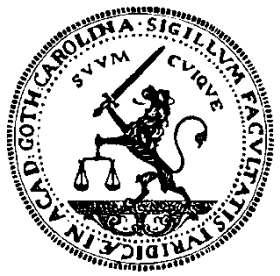

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A paradigm shift from voluntary to court-ordered climate change mitigation? The potentials and challenges of a human rights-based approach

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List of contents

Summary

> "We cannot solve our problems with the same thinking we used when we created them."
>
> - Albert Einstein

This citation is exceptionally relevant for the issue to be discussed in this thesis, namely anthropogenic climate change. It cannot be ignored that we are all the creators and that we will all be the victims of the risks of dangerous and irreversible climate change if we don't change our attitudes urgently. And that urgent need for a new attitude, for governments to create a more inclusive response mechanism that includes the interests of the most vulnerable groups of the international community and not merely represents those of the strongest among us, that is exactly what this thesis discusses. The central issue is governments' lack of mitigation action, action that could prevent reaching a state of dangerous and irreversible global warming. States have bound themselves eagerly to a large framework of climate change agreements in which the commitment to mitigate greenhouse gas emissions as soon as possible is codified. However, practice shows the opposite. Greenhouse gas emissions levels have continued to increase drastically and the effects on humanity are starting to show.

As a result, groups of citizens are starting to increasingly lose trust in their respective executive and legislative branches and by means of protest, climate advocates have now turned to invoking State responsibility for a failure to mitigate polluting activities before courts. Often-times representing the public interest. This choice of adjudicatory dispute settlement has grown out to be a popular trend throughout the past few years and the number of cases on courts' dockets continue to grow quickly.

Furthermore, when taking note of high-profile strategic climate change litigation, over the past five years a clear shift is visible from tort claims, public nuisance claims and public trust claims towards human rights claims. Noteworthy there is the far-reaching success of the Dutch landmark *Urgenda* climate case, in which a human rights-based approach was adopted, justiciability issues dismissed and in which, based on the obligations under the UNFCCC regime and climate science, an order to mitigate greenhouse gas emissions by 25 per cent by end-2020 compared to 1990 was given. This human rights-based approach has been an inspiration for many litigants in different jurisdictions since. A few of those human rights-based cases have already been concluded, others are pending in appeal and the majority have only recently been submitted and are awaiting an admissibility decision in first instance.

The central question of this thesis is whether this rise in human rights-based mitigation-related climate change litigation reflects a shift from voluntary targets to mitigate greenhouse gas emissions through global climate governance, to court-ordered mitigation obligations. This thesis has furthermore researched what the potentials and challenges are regarding the application of the human rights-based approach. Considered in this thesis' research is the undeniably important connection between science, governance and law in the context of climate change. Governance is almost solely dependent on the guidance of scientific reports. Furthermore, of interest is the global level of recognition that climate change affects the enjoyment of human rights and may invoke State responsibility.

The answer to the research question is modestly positive. On the one hand governments are failing their duties to protect the public interest of a clean and healthy environment. It is furthermore increasingly apparent that the failure to do so will most probably infringe human rights when taking note of climate

science. When assessing current standards set by regional human rights regimes, it has also become apparent that the substantive aspect of human rights law seems to be consistent with climate change law.

However, the problem is that the human rights courts have not yet answered to climate matters. This means that these human rights obligations derived from the regional human rights frameworks are prone to a lack of coherence in domestic judicial interpretation. Clarification from these courts is thus necessary for States to have guidance as to how to deal with human rights law in climate change matters.

Besides the novelty of the matter, legal-dogmatic research has presented several reoccurring justiciability issues. In particular the issue of standing before respective courts and the principle of separation of powers stand in breach of effective access to justice. The human rights-based approach has the unique potential to overcome issues regarding the separation of powers principle as it allows courts, by means of guarding democracy and the rule of law, to substantively review a respective matter if constitutional or human rights are impaired. That is where the strength of human rights law lays; in the fact that its main aim is to create an inclusive society where equality and fundamental freedoms are guarded and where minorities are protected against the despotism of the majoritarian elective that is in control of law- and policymaking and -implementation. Through the invocation of human rights law, these minority groups can thus form a contra-democracy in which said groups keep the electoral process in balance.

Even though mitigation-related litigation may not be the final solution in the long run, it does offer potential to coerce States that are lagging the necessary action to mitigate to act now, and given the fact that this fundamental right to a healthy environment is increasingly considered to be a constitutional or fundamental rights issue, it may even be considered the judiciary's duty to do so. This trend of invoking a human rights-based approach to counter the lack of mitigation action by States will therefore most certainly not end soon. In fact, it has just started and within now and ten years, there will most probably be a well-established set of jurisprudence that supports this vision and has hopefully contributed to an accelerated majoritarian State-awareness of the urgent need to mitigate pollution now, evoking action over words.

Preface

My interest to write about the subject of climate change in general, and mitigation-related climate change litigation in particular, was awoken by closely following the Dutch *Urgenda* proceedings. I was fascinated by the creative, progressive way in which the Dutch Court of Appeal and Supreme Court applied the European Convention on Human Rights in an unprecedented way on one of the most abstract and complicated issues of our time; climate change.

When I started to read more about this case, I noticed that many advocates in different countries were inspired by these proceedings and took an example of the strategy administered by Urgenda, especially the human rights-based approach. This made me wonder what was happening in the ivory towers of different domestic judiciaries, as well as what led to this unrest amongst non-State actors.

As a result, I present this thesis. It was a humbling process, as I started with a clear vision about what the outcome of my process would be, which was subsequently blurred by a large grey area, formed by the domestic political, economic, financial and cultural differences and democratic principles, which in their turn form the basis on which courts can or cannot review the climate change problem. This forced me to approach the matter with modesty, as the balance between the majority's interests should not overrule the minority, but the other way around, the minority cannot blindly overrule majoritarian counter-interests. It has, however, also given me the confirmation I was looking for regarding the power of human rights as a fundamental criterion for a functioning democratic State, as it allows, if breached, for substantive court-interference, regardless of what the majoritarian elective may find.

This process has been lonely and lovely at the same time. It required a lot of work, even though I could have covered so much more. I am certain that this project, if done again, will look very different in about five to ten years. And hopefully, some solutions will have been found either by litigants or by governments to overcome the concluded justiciability issues that bar effective access to justice. I am sure that the trend of invoking human rights to combat States' failure to mitigate, through the support of authoritative, ever developing, climate science, will most definitely continue to evolve. Many cases are currently pending, and monthly, if not weekly, new cases appear on the docket in different jurisdictions globally.

I want to give my thesis supervisor, Dr M. Scott, my endless gratitude for supporting me throughout this process, for motivating me to continue and for taking the time to have clarifying and inspiring brainstorm sessions on the issue. As he is an expert in the field, I could not have been luckier to have his supervision throughout this process. I would furthermore like to thank my dear friends and fellow-classmates Ms A. Möller Andréewitch, Mr N. Arevadze and Ms E.A.S. Hammarström for making my time in Sweden, and my studies at Lund University, a lovely and memorable experience. I hope to meet them again, wherever we all end up. And to you, as my reader, I hope you will enjoy this thesis and that you can find yourself in the visions I have shared.

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission on Human and Peoples' Rights
ACtHPR	American Court of Human and Peoples' Rights
AR	Assessment Report of the IPCC
ARSIWA	International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts
CBDR-principle	Common-but-differentiated-responsibilities principle
CIL	Customary International Law
CJEU	Court of Justice of the European Union
CO_2	Carbon-dioxide
COP	Conference of the Parties to the UNFCCC
CRC	UN Committee on the Rights of the Child
DCC	Dutch Civil Code
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPA	United States Environmental Protection Agency
EU	European Union
EU ETS	European Union Emissions Trading Scheme
GHG	Greenhouse gas
HRBA	Human rights-based approach
IAComHR	Inter-American Commission on Human rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
IEL	International Environmental Law
INDC	Internationally Determined Contributions
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
NDC	Nationally Determined Contributions
NGO	Non-governmental organisation
^{O}C	Degrees Celsius
OECD	Organisation for Economic Co-Operation and Development
San Salvador Protocol	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
SYR	IPCC Synthesis Report
TFEU	Treaty on the Functioning of the European Union
UNEP	United Nations Environment Programme

UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNICEF	UN Children's Fund
US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	UN World Health Committee
WMO	World Meteorological Organization
WTO	World Trade Organization

1. Research introduction

1.1. At issue: Anthropogenic climate change and a lack of mitigation action

One of the most hotly debated and complex social issues of our time, causing much uproar in both domestic and international law, politics, economics and science, is climate change. With weather conditions starting to noticeably change in all regions of the world, heat waves becoming more common, sea levels rising, winters becoming less cold, wildfires becoming more intense in unprecedented ways, and frightening prospects presented in climate science reports, people are increasingly becoming aware of the frailty of our human existence and the need to preserve the climate and sustain our livelihoods. Following climate science, it cannot be ignored that the rapid speed in which the climate is currently changing is the result of anthropogenic pollution through the emission of, amongst others, greenhouse gases (GHGs).[1] It can likewise not be ignored that all of us who read this thesis are contributors to this pollution, just by driving a car, taking an airplane, or ordering imported products. At the same time, not all of us will feel the consequences thereof in the same way. Climate change is a highly complex problem to solve with a massive scope that will affect the most vulnerable groups of people in the world the most.[2]

In an effort to raise more public and political awareness about the dangers of climate change and the urgent need to make the combat against anthropogenic climate change a priority on States' political agendas, environmental activists, young and old, are collectively speaking up and multiple movements have been created in the past few years. To stress this urgent need for action, American economist and Nobel prize laureate Joseph E. Stiglitz made an interesting analogy to our last world war, claiming the climate crisis to be our Third World War, and arguing that

> [w]hen the US was attacked during the second world war no one asked, "Can we afford to fight the war?" It was an existential matter. We could not afford *not* to fight it. The same goes for the climate crisis. [W]e are already experiencing the direct costs of ignoring the issue […] It's a cliché, but it's true: an ounce of prevention is worth a pound of cure.[3]

Indeed, 'time is not costless', and as presented by a few Justices from the Asia Pacific Region during a Judicial Colloquium on climate change in 2019, "the more time passes without finding a solution, the harder it will become to do so."[4]

States' awareness of the risks of climate change and the need to act upon it is, however, not a novel development. Global climate governance has been around for decades. In 1972, at the UN Conference on the Human Environment, States adopted the Stockholm Declaration, presenting 26 Guiding

[1] 'Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC 2007) <https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf> accessed 6 March 2020.
[2] Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 4 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5616350&site=eds-live&scope=site>.
[3] 'Joseph E. Stiglitz - The Climate Crisis Is Our Third World War. It Needs a Bold Response' (*CU Global Thought*, 4 June 2019) <https://cgt.columbia.edu> accessed 18 February 2020.
[4] Helen Winkelmann, Susan Glazebrook and Ellen France, 'Climate Change and the Law' (2019) para 4.

Principles for the preservation and enhancement of the human environment.[5] The Preamble of this Declaration stated that:

> Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform this environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights, the right to life itself.
>
> A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend.

Then, in 1992 the first international treaty between States on the need to take climate action was adopted, to know the United Nations Framework Convention on Climate Change (UNFCCC), which today enjoys universal recognition.[6] With this document, States acknowledge that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions."[7]

The adoption of the UNFCCC marked the start of an era in which States, to a growing extent, recognize the dangers of climate change. With the supplementary Kyoto Protocol, adopted in 1997, States even managed to bind themselves to specific emissions reduction targets for the Annex I countries. And more recently, in 2015, another universal legally binding document with much potential,[8] the Paris Agreement, was adopted under the UNFCCC regime.[9] With this Agreement, States have bound themselves "to prepare, communicate and maintain successive nationally determined contributions that it intends to achieve" and "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".[10] The Paris Agreement has set a target to remain well below a global average temperature increase of 2.0ºC and to aim to limit the increase to 1.5ºC compared to the pre-industrial era.[11] Thus, mitigation efforts should comply with this target.

Interestingly, the Paris Agreement is also the first document of climate change law to recognize climate change to affect human rights and to invoke human rights obligations on States. [12] The Preamble states that,

> [a]cknowledging 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, the right to health, the rights of indigenous peoples, local communities, migrants,

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[5] Robert V Percival, 'International Responsibility and Liability for Environmental Harm', *Routledge Handbook of International Environmental Law* (Routledge 2015) 682–683.
[6] United Nations Framework Convention on Climate Change (May 9, 1992) 1994 (UN Treaty Series Vol 1771).
[7] ibid Preamble.
[8] 'What Is the Paris Agreement? | UNFCCC' <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> accessed 6 May 2020.
[9] 'Report of the Conference of the Parties on Its Twenty-First Session, held in Paris from 30 November to 13 December 2015: Adoption of the Paris Agreement' (UNFCCC 2016) Decision FCCC/CP/2015/10/Add.1. 1/CP.21.
[10] Paris Agreement (Dec. 13, 2015) 2016 (FCCC/CP/2015/10/Add1) Article 4(2) and (3).
[11] ibid Article 2(1)(a).
[12] ibid Preamble.

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.

These inter-State agreements under the UNFCCC regime go together with international climate science. Standards are set, and agreements are made, to a large extent as a result of scientific reports from the Intergovernmental Panel on Climate Change (IPCC), which is designed to "provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impacts of climate change and realistic response strategies"[13] and which publishes highly authoritative periodical assessment reports on climate change. As a result of the IPCC's septennial assessment reports, national and international law and policy are adapted to changing circumstances. The most recent reports have consistently held on to the conviction that in order to remain within a 'safe' zone of global warming, global temperature increases should not surpass 2.0ºC by 2100 relative to the pre-industrial era and should preferably remain below an average of 1.5ºC. As mentioned above, this target has been implemented in the Paris Agreement and has thus been made binding.[14]

Such positive developments aside, up until today, it has been difficult for States to implement adequate policies that are expected to fulfil the 1.5 or even 2.0ºC commitments. Reasons therefor are besides necessary political will and conflicting interests that come with adaptation and mitigation efforts, even more so the comprehensive, multi-faceted scope of climate change. An obvious issue is the financial commitment which is required for proper action and the possible economic and human rights implications this might entail.[15]

The ensuing issue then is, can States be held responsible for such lack of action to mitigate and adapt? To refer back to Stiglitz's argument, can we come to the agreement that, regardless of conflicting interests and costs involved, we need to understand the urgency of taking action now, because failing to do so will cost us–the international community and humankind–a lot more?

There are some issues when attempting to answer these questions. First, there is the issue of international dispute settlement. The UNFCCC is an important public international law document, which, together with its supplementary protocols and subsequent agreements, binds a large part of the world's nation States. But those obligations are only binding between States, thus creating horizontal obligations that merely allow for possible disputes to be settled between States. The UNFCCC mandates States Parties to submit a dispute to the International Court of Justice (ICJ) or start an arbitration procedure.[16] However, when taking note of inter-State judicial dispute settlement, it is an unpopular decision for one State to invoke State responsibility towards another State as there are alternative, more friendly settlement mechanisms to solve inter-State issues. This mandate has thus not yet been used and current disputes are characterized by quasi-diplomatic or facilitative inter-state dispute settlement methods.[17]

The second issue is closely connected to the first one and concerns the horizontally binding character of UNFCCC obligations. Because it is merely binding between States, non-State actors, meaning *inter alia* non-governmental organisations, foundations, individuals and corporations, are largely excluded from

[13] General Assembly Resolution on the Protection of Global Climate for Present and Future Generations of Mankind (70th Plenary Meeting) 1988 1988 (A/RES/43/53).
[14] Paris Agreement (Dec. 13, 2015) Article 2, paragraph 1, under (a).
[15] Randall Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources* (Cambridge University Press 2020) 10 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.6326997&site=eds-live&scope=site>.
[16] UNFCCC Article 14, paragraph 2.
[17] Tim Stephens, 'The Settlement of Disputes in International Environmental Law', *Routledge Handbook of International Environmental Law* (Routledge 2015) 186.

holding States accountable for alleged non-compliance with UNFCCC obligations. But these actors are key players in advocating *for* the protection of our environment, and *against* endangering humanity's existence as a result of climate change. So what do these actors do instead?

Instead of patiently waiting for their respective authorities to take the necessary action, alternative ways to coerce governments to take action are initiated by these actors. Indeed, there is a large corpus of case law regarding mitigation-related climate change litigation which dates back to the 1990s, but is undergoing a considerable shift towards strategic mitigation-related litigation only now. Some scholars even label this shift as an 'explosion' in climate change litigation.[18] International and regional courts have not yet answered to disputes in the context of climate change.41[19] However, domestic courts have and do. Public interest litigation is thus currently initiated before domestic courts. These cases have been collected by the Sabin Center for Climate Change Law and have been put in a climate change chart.[20] Cases concern, amongst others, domestic tort claims, public nuisance claims, public trust claims and interestingly, more recently, a trend of invoking a human rights-based approach (HRBA) in mitigation-related litigation is an outstanding development.

This latter trend cannot be left unnoticed. In the past five years, litigants have started to collectively apply a HRBA, and not without success. In the recently concluded *Urgenda* climate judgments from the Netherlands, the Dutch judiciary dismissed standing- and separation of powers-arguments by the Dutch State. The Court concluded that the rights to life and the right to respect for private and family life, pursuant to Articles 2 and 8 of the European Convention of Human Rights (ECHR), applied to the matter at hand and, by taking the IPCC reports into account, ordered the State to lower its GHG emissions by at least 25% by the end of 2020. The main ratio behind this order was that an assessment report of the IPCC predicts that, in order to remain within the 2.0ºC target at the lowest cost, a global decrease in GHG emissions of 25 to 40% should be reached by the end of 2020.[21]

This judgment is ground-breaking for two reasons. Firstly, because the Court found a substantive violation of human rights, and in particular a violation of the rights to life and the right to respect for private and family life, which is–to say it bluntly–not a well-established given, when taking into account the complexity, reach and uncertainty of consequences of climate change, as well as the fact that human rights courts have not yet answered to these matters, leaving domestic courts without precedents. A second reason for its ground-breaking character is that the court managed to overcome common procedural hurdles regarding justiciability, in particular standing and issues concerning the principle of separation of powers.

When taking note of other cases, it will become apparent that the approach taken by the Dutch courts does not necessarily provide a "holy grail" for mitigation related climate change litigation. Indeed, the Dutch courts' approach is unique to the Dutch jurisdiction and does not enjoy an extraterritorial precedential status. However, it has inspired–and does inspire–litigants from all over the world, but in particular the European continent, to apply this same approach in their respective jurisdictions in order to find State responsibility for States' lack of action towards the prevention of dangerous climate change. Consequently, given the novelty of this strategy, it causes much uproar in domestic jurisdictions and

[18] Laura Burgers, 'Should Judges Make Climate Change Law?' [2020] Transnational Environmental Law 1, 2.
[19] Roda Verheyen and Cathrin Zengerling, 'International Dispute Settlement', *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 418.
[20] 'Search Non-US Cases - Climate Change Litigation' (n 18); 'Search US Cases - Climate Change Litigation' (n 18).
[21] 'Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (n 1).

domestic courts take close note of judicial approaches taken in other countries. This novelty, these changes in societal beliefs, are worth to be further researched.

1.2. Research question: A shifting legal paradigm from voluntary to obligatory mitigation targets via a new human rights-based approach?

To briefly recap, it is apparent that the international community is dealing with a conflict. Namely, anthropogenic climate change, the prospect of these changes to negatively affect humanity as a whole and potentially becoming a danger to humanity's existence, the uncertainties that come with that, and the issue that States are failing to take proper action to mitigate climate change which shelters the danger of inflicting the enjoyment of human rights. States have been eagerly binding themselves to take mitigation efforts with the aim to stabilize GHG emissions levels through international law agreements for the past few decades, but regardless of that, these levels continue to rise, together with the global temperature, and extreme weather events are already clear signs of its consequences on our livelihoods. Thus, voluntary inter-State governance strategies have proved not to be effective.

A solution needs to be found. And if not through global governance, then perhaps through the indirect application of these binding agreements by means of human rights obligations, as has been done in *Urgenda*? Taking note of current trends in climate change litigation, this approach is clearly gaining popularity. But does this approach have the potential to create an overall effective basis to enforce mitigation efforts? Has the approach taken in *Urgenda,* with its far-reaching popularity, potential to introduce an era in which the human rights-based approach can be considered common legal doctrine? Does this trend reflect societal change–a revolution even–in which a shift is apparent from voluntary mitigation targets by States through climate change governance to enforceable court-ordered mitigation obligations? And does the human rights-based approach have potential to create an effective strategy therein?

In short, the main question that this thesis aims to answer is, does the recent increase in human rights-based mitigation-related climate change litigation reflect a paradigm shift from voluntary to obligatory mitigation-targets to combat climate change and is does this rights-based approach provide an effective, enforceable strategy for courts to work with?

In order to answer this question, several sub-questions will have to be answered: How does the current climate change governance regime take shape? To what extent does the regime recognise climate change to be a human rights issue? To what extent does international human rights law provide a platform for a human rights-based approach in climate change matters? What workable precedents have been set by regional human rights courts? What is the current state of affairs in strategic mitigation-related climate change litigation in domestic jurisdictions? Which developments are noteworthy? What is the practical outcome of different litigation strategies? And lastly, what is the potential and what are the challenges of a human rights-based approach as an effective litigation strategy?

1.3. Research methods: Kuhnian paradigmatic theory and legal-dogmatic research

This thesis will approach these questions through the lens of the Kuhnian theory of paradigms, which was presented in Thomas Kuhn's 1962 book "The Structure of Scientific Revolutions".[22]

According to Kuhn's paradigmatic theory, a paradigm can be defined as "an entire constellation of beliefs, values and techniques, and so on, shared by members of a given community;"[23] a common conviction of the state of affairs in a specific research niche. This thus entails, as described by De Vries, "the tools of observation, analysis, argumentation and interpretation in respect of a particular body of knowledge vis-à-vis its domain of analysis."[24] Such paradigm may change if 'anomalies' in the current environment or *status quo* can be identified, which in their turn result in a "crisis where new competing theories emerge, resulting in a plethora of ideas, leading to the loss of status of the paradigm."[25] In that case, a situation or standard which was until now a 'given' becomes object of critique to such an extent that it can no longer be upheld that such standard is a 'given'. If that occurs, current views and approaches need to be adapted.

This theory was initially designed merely to be applicable in natural sciences. Kuhn believed that social sciences could not have a paradigm as they "engage in the construction of 'unverifiable theories.'[26] After all, such theories are merely the consequence of a social construct, made up by humanity, being the result of a common belief of society rather than a theory which can be scientifically verified as fact.

However, De Vries argues that this theory of paradigm shifts through 'anomalies' can be described in legal research as "providing a means to make sense of social events and developments to which law responds".[27] De Vries describes, that a paradigmatic sketch "would allow the analysis of a particular legal ordering of social interaction on the basis of certain beliefs, values and techniques and as the type of social interaction differs in time and place, so does the ordering."[28] He thus creates a link between the *status quo* in legal regulations and judicial precedents, and structural changes in society as a result of evolving problems within the current legal framework. If the current legal framework and its practical workability can no longer properly answer to such changes, an 'anomaly' is present, and a legal paradigm shift is bound to happen.[29]

Consequently, if such a shift occurs, a "revolution" will take place, in which "well-established assumptions about the law and how it regulates the issue at hand" need to be let go.[30] This can be a very sensitive and daring development and often requires "out of the box" thinking. As De Vries underlines, such paradigmatic view on legal research "revolves around the interplay between law and society in terms of uncertainty" and needs to be approached in a cross-disciplinary way.[31]

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[22] Thomas S Kuhn, *The Structure of Scientific Revolutions.* (Univ of Chicago Pr 1962) <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.1438314&site=eds-live&scope=site>.
[23] Ubaldus de Vries, 'Kuhn and Legal Research: A Reflexive Paradigmatic View on Legal Review' (2013) 1 Law and Method 7, 8.
[24] ibid 9.
[25] ibid 10.
[26] ibid 7.
[27] ibid 10.
[28] ibid 12.
[29] ibid 21–22.
[30] ibid 7.
[31] ibid 20.

To apply this theory to this thesis, it is important to identify if such "structural societal and legal changes" are happening. The hypothesis of this thesis is that this is, indeed, the case. The point of departure is that that the current paradigm until now has been that a certain degree of trust in governments to take the lead in protecting society against the dangers of climate change existed. That States could be trusted to voluntarily implement and enforce mitigation targets through climate governance. However, the problem is that this enforcement is unsuccessful, that increasing numbers of people are starting to lose confidence in inter-State agreements and that parties from all over the world are thus aiming to enforce these obligations in an alternative manner before the judiciary. This has led to an unprecedented mitigation-related climate change litigation trend in which the human rights-based approach is taking a lead. This approach has been proved successful and appears to have potential. Thus, we are currently amid an 'anomaly' which is changing through a human rights-based litigation 'revolution'.

This study will be done through the legal-dogmatic research method. To give a clear definition of this type of research, a citation of Vranken is appropriate, in which he states that this method entails "researching current positive law as laid down in written and unwritten European or (inter)national rules, principles, concepts, doctrines, case law and annotations in the literature."[32] Thus, legal-dogmatic research concerns a thorough analysis of current positive law.[33]

By paying close attention to developments within the dominant climate change law and governance regime under the UNFCCC and by taking into account its close connection with authoritative standards set in climate change science; by researching current attitudes taken by authoritative human rights bodies and regional human rights courts; and by paying attention to domestic legal precedents in different jurisdictions, a final assessment will be conducted in which these developments, attitudes and approaches will prove to account for a changing society, which demands a new doctrine: A new legal paradigm which embraces court-ordered mitigation enforcement through a human rights-based approach.

The following chapter, chapter 2, will set out the current climate change law and governance regime, which is based in large on climate science. This regime reflects the long-term paradigm, one of voluntary State-based, majoritarian agreements that aim to solve the problem of anthropogenic climate change. This chapter will assess current standards within the UNFCCC regime, as well as central environmental principles in that regard, and climate science.

Chapter 3 will address developments regarding the international recognition of the interdependence and indivisibility of anthropogenic climate change and the enjoyment of human rights. Attitudes in international human rights law towards climate change and human rights will be discussed applying the legal-dogmatic research method, particularly focusing on judicial precedents. The focus will particularly be on the potential of a substantive application of human rights in climate change matters. Attention will furthermore be paid to procedural barriers before these courts, even though such matters merely apply to the regional courts and do not apply *per se* in domestic jurisdictions when applying the regional human rights standards. The aim of this chapter is to identify whether current standards lend themselves for a human rights-based approach in mitigation-related climate change litigation, or if certain gaps remain to exist and thus require new attitudes. This chapter will conclude that, indeed, current regional human rights standards do provide a potential basis for a human rights-based approach in climate change matters, but that three issues remain a barrier, either because the regional judicial bodies have not yet

[32] Jan Vranken, 'Exciting Times for Legal Scholarship' [2012] Law and Method 43–44.
[33] ibid 43.

clarified this, or because these bodies have dismissed these issues. These concern matters of standing, in particular for an *actio popularis*, extraterritoriality and finding causation.

Chapter 4 will critically assess several high-profile, domestic mitigation-related climate change cases, in order to identify what common reoccurring issues lead to the failure of this type of litigation. This study will show that there is a growing conviction within the international community that the invocation of human rights obligations is a suitable approach to find State responsibility in climate change matters, but that courts lack uniformity and guidance when interpreting and applying these standards. Reoccurring issues and successes before domestic courts will be discussed. The main issues being, as already mentioned before, procedural, regarding standing and the principle of separation of powers. As Tava clearly describes it, "to be granted standing before a court, a prospective party to legal proceedings must be able to demonstrate that they have some legal right or interest in the matter beyond simply that of concern for the environment."[34] At issue with the separation of powers principle is that courts have relatively limited review options due to States' wide discretion in fulfilling climate targets.[35] This enlightenment principle, first initiated by Montesquieu, entails that the three government branches–the Judiciary, the Legislative and the Executive–have to remain distinct and aim to create a balance of powers to secure democracy and the rule of law.[36] The last part of this chapter aims to identify whether the human rights-based approach offers potential to overcome these issues. The hypothesis is that standing issues remain to be within the liberty of the respective courts and legal frameworks, but that the invocation of human rights law does offer a strong basis to overcome issues regarding limited review possibilities as a result of the separation of powers principle.

Chapter 5 will lastly draw all findings together in order to analyse whether the hypothesis, that we are currently amid a paradigm shift from voluntary to obligatory mitigation efforts through a litigation explosion, and whether human rights-based litigation offers potential for effective enforcement, is correct.

[34] Vernon I Tava, 'The Role of Non-Governmental Organisations, Peoples and Courts in Implementing International Environmental Laws', *Routledge Handbook of International Environmental Law* (Routledge 2015) 132.
[35] ibid.
[36] Lukas van den Berge, 'Montesquieu and Judicial Review of Proportionality in Administrative Law: Rethinking the Separation of Powers in the Neoliberal Era' (2017) 10 European Journal of Legal Studies 203, 204–205.

2. The current global climate governance regime: the interplay between climate science, governance and law

This chapter aims to provide an overview of the current, global climate governance regime, its interplay with climate science, and developments that have led to current climate change law. This has been, and still is, the inter-State cooperative system representing majoritarian democracy with the aim to create a solution to the climate change problem. This regime thus reflects the current legal paradigm regarding the solution of the climate change problem. A paradigm which is based on voluntary inter-State agreements.

The main regime to be discussed is that of the UNFCCC. This regime's decision- and law-making processes are to a large extent, if not solely, based on international climate science. Some scholars even argue that "climate change represents the prime example of how global knowledge-making is co-constitutive of global decision-making,"[37] which is brightly visible in the interplay between the UNFCCC regime and the IPCC expert reports. As a result of clear and approachable scientific risk assessments presented by the IPCC in its septennial Assessment Reports (ARs), States acting within the UNFCCC regime have scientific guidance as to how to set targets to prevent such risks from materialising. This regime is furthermore built around several central principles, namely, amongst others, the principle of sustainable development, the principle of intergenerational equity and the precautionary principle.

As will become apparent in chapter 4, this governance regime is also a predominant basis on which non-State litigants attempt to claim State responsibility for attributably failing to fulfil their mitigation-obligations. Therefore, it is important to understand what exactly States have bound themselves to and which principles of international law are central in that matter. Therefore, this chapter will set out findings of authoritative climate science, as well global governance agreements, international principles of environmental or climate change law, and lastly attention will be given to the lack of international climate change dispute settlement.

2.1. International climate science: The Intergovernmental Panel on Climate Change

In order to find a proper response to the problem of climate change, appropriate scientific research is necessary. For example, in order to make international decisions to take mitigation action, it is important for States to have a handle on how, how much and when this action is necessary.[38] This is where the IPCC comes into play, which has made the highly complex issue of climate change approachable through the creation of insightful, usable reports for international climate law- and policy-makers.

The IPCC, an organ of the United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO), is, fairly uncontestably, one of the most authoritative providers of scientific

[37] Jasmine E Livingston, Eva Lövbrand and Johanna Alkan Olsson, 'From Climates Multiple to Climate Singular: Maintaining Policy-Relevance in the IPCC Synthesis Report' (2018) 90 Environmental Science and Policy 83, 83.
[38] Thomas Meyer, 'Institutions and Expertise: The Role of Science in Climate Change Making', *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 447.

climate change reports.[39] Today, the IPCC has 195 members and is open to all member States of the UN and the WMO.[40] Functioning as an independent, intergovernmental scientific organ, the IPCC is designed to "provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies".[41] Its scientific credibility and authoritative reputation is a result of the IPCC's strict requirements with regard to the reputation of experts, democratic status and its global inclusivity.[42]

With regard to its expert opinions, only experts with recognised competence based on information supplied by governments, national and international organisations–for example the United Nations, the World Bank, the Third World Academy of Sciences and the Organisation for Economic Cooperation and Development–are regarded as potential candidates to work with the IPCC.[43] Furthermore, with regard to inclusivity, the IPCC invests in creating an inclusive panel in which experts from the Global South are also actively represented and invested in. Therefore, it can be said that the IPCC has created a "new international democracy of knowledge-making."[44]

Since its establishment in 1988, the IPCC has published five assessment reports on climate change. Assessment Report 5 of 2014 (AR5) is the latest report, preceded by Assessment Report 4 in 2007 (AR4). AR6 is expected to be published in 2021. These ARs are created by expert working groups and often-times cover thousands of pages that are highly scientific. In order to create more approachability to these data, the IPCC always presents a summary of its findings in an additional Synthesis Report (SYR). A SYR "distils, synthesizes and integrates the key findings of the three Working Group contributions […] in a concise document for the benefit of decision makers in the government, the private sector as well as the public at large."[45] Thus, this excerpt is an important document for States to base their policy on. In AR5, the scope of the SYR was described as follows:

> [T]o ensure coherent and comprehensive information on various aspects related to climate change. This SYR includes a consistent evaluation and assessment of uncertainties and risks; integrated costing and economic analysis; regional aspects; changes, impacts and responses related to water and earth systems, the carbon cycle including ocean acidification, cryosphere and sea level rise; as well as treatment of mitigation and adaptation options within the framework of sustainable development. Through the entire length of the SYR, information is also provided relevant to Article 2, the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC).[46]

With its reference to the UNFCCC, even though both the Panel and the UNFCCC work independently of one another, the important interplay is undisputed. The referred Article 2 of the UNFCCC states as follows:

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[39] General Assembly Resolution on the Protection of Global Climate for Present and Future Generations of Mankind (70th Plenary Meeting) 1988.
[40] 'About | IPCC' <https://www.ipcc.ch/about/> accessed 6 April 2020.
[41] General Assembly Resolution on the Protection of Global Climate for Present and Future Generations of Mankind (70th Plenary Meeting) 1988.
[42] Sheila Jasanoff, 'A World of Experts: Science and Global Environmental Constitutionalism' (2013) 40 Boston College Environmental Affairs Law Review 439, 448–449.
[43] ibid 449.
[44] ibid.
[45] 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (IPCC 2015) <https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf> accessed 6 March 2020 preface vii.
[46] ibid preface vii.

> […] to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Some of the main findings and developments of the last reports will be presented below. Important to note is that the IPCC evaluates its findings based on evidence and agreement. It thus presents its outcomes with an additional note of the likelihood of a predicted outcome or result.[47]

One of the most general findings of the IPCC is that that the climate system is affected by anthropogenic influence and that anthropogenic GHG emissions have reached a record height.[48] It was furthermore concluded that these emissions have led to "atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years" and that there is a likeliness of 95 to 100% that their effects are and have been the dominant cause of the observed warming since the mid-20th century.[49] The report furthermore presents that the continued emission of GHGs "will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe pervasive and irreversible impacts for people and ecosystems" and that, in order to limit such risks, "substantial and sustained reductions in [GHG] emissions, together with adaptation" are necessary.[50] The "substantial and sustained reductions in GHG emissions" are so-called "mitigation efforts".[51] Mitigation and adaptation are thus complementary strategies that are necessary to limit the risks of irreversible climate change.

In order to remain below this point of 'dangerous and irreversible climate change', the 'point of no return', the international community has set a limit of 1.5-2ºC global warming by 2100 relative to pre-industrial levels.[52] In order to reach this, international climate governance has set a target to stay around 450 ppm of carbon dioxide-equivalent concentrations by 2100 and rather even a target of 430 ppm. AR4 predicted it to be more likely than not, meaning a 50 to 66% probability rate, that the 450 ppm-scenario would result in a global temperature rise of no more than 1.5-2.0ºC. The report stated that, in order to stay within reach of the 450-scenario, a 25 to 40% reduction of CO_2 by end-2020 compared to 1990 would be necessary for industrialized countries ("Annex I-countries").[53] This prospect was slightly more positive in AR5, in which it was predicted to be likely, meaning a 66 to 100% probability rate, that temperature rises will not exceed 1.5-2.0ºC. AR5 furthermore presented there to be multiple pathways to remain within the 450 ppm-scenario, instead of strictly prescribing a 25 to 40% reduction target by 2020 as in AR4.[54] However, 87% of those alternative pathways included assumptions of "negative emissions", which means that new technologies would have to be applied to extract CO_2 from the

[47] ibid 2.
[48] ibid.
[49] ibid 4.
[50] ibid 8.
[51] ibid 125.
[52] Paris Agreement (Dec. 13, 2015) Article 2(1); 'Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (n 1); 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (n 45).
[53] 'Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (n 1) 4.
[54] 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (n 45) 81.

atmosphere in upcoming years in order to remain below the 450 ppm limit by 2100.[55] Besides that, the report underlines that regardless of many adaptation and mitigation pathways, "no single option is sufficient by itself. Effective implementation depends on policies and cooperation at all scales and can be enhanced through integrated responses that link adaptation and mitigation with other societal objectives."[56]

The IPCC furthermore stresses in its reports that delaying additional mitigation will increase the challenges associated with limiting global warming over the 21st century to below 2°C. The reports conclude that delaying mitigation action to 2030 "will require substantially higher rates of emissions reductions from 2030 to 2050; a much more rapid scale-up of low-carbon energy over this period; a larger reliance on [carbon dioxide removal] in the long term; and higher transitional and long-term economic impacts."[57] The report then continues that it will be costly to take mitigation efforts, that the costs depend on methodologies and assumptions, that global consumption will have to be reduced, and that the effectiveness of adaptation and mitigation efforts depends on international, regional, national and sub-national cooperation to create effective measures and policies.[58]

Mitigation can thus prevent, to a certain extent, the realization of dangerous climate change. Co-benefits to come with such efforts are "improved air quality", "enhanced energy security", "reduced energy and water consumption in urban areas through greening cities and recycling water", "sustainable agriculture and forestry", and "protection of ecosystems for carbon storage and other ecosystem services".[59] However, mitigation can also have negative side-effects, sheltering risks of environmental, social and societal costs, for example by the indirect removal of resources from other development priorities. Vulnerable communities, often indigenous or poor communities are the groups most likely to be negatively affected by such side-effects.[60] Thus a balance needs to be found between positive and negative outcomes.

As will become apparent in the discussion of the next paragraph, these findings of the IPCC, through the translation of these highly complex issues into "a unitary global problem", have made international arrangements such as the UNFCCC, the Kyoto Protocol and the recent Paris Agreement more practical and concrete policy and legislative guidelines .[61]

2.2. Climate change governance: The UNFCCC regime

As presented in the former paragraph, the scientific findings of the IPCC form an important basis for the international community to build international climate regulation and policy on. Its authoritative status is the result of the independency, accessibility and democratic reputation of the platform in which reputable experts from all over the world provide highly useful and credible information for international

[55] 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (n 45); *State of the Netherlands v Urgenda Foundation* [2018] The Hague Court of Appeal 200.178.245/01 (English translation) [12].
[56] 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (n 45) 26.
[57] ibid 24.
[58] ibid 23–30.
[59] ibid 90.
[60] ibid.
[61] Livingston, Lövbrand and Alkan Olsson (n 37) 89.

policy- and lawmakers. As will become apparent in this paragraph, these data thus form the basis of many UNFCCC framework negotiations.

A unique multilateral document of international law regarding climate change, enjoying a universal scope, is the UNFCCC, which was adopted in New York on 9 May 1992 and entered into force in 1994.[62] Today, the UNFCCC has 197 parties, meaning all UN-recognised States as well as the two UN observer States–to know Vatican City and the State of Palestine.[63] As already mentioned above, the main objective of this document, as laid down in Article 2 UNFCCC, is to stabilise GHG concentrations in the atmosphere in order to prevent "dangerous anthropogenic interference" with the climate system. This objective "to prevent" thus entails a central precautionary approach, its main concern being mitigation, rather than adaptation.[64] Besides this precautionary principle,[65] Article 3 UNFCCC includes the principle of intergenerational equity[66] and the principle of sustainable development.[67] Article 4(1) furthermore presents the common-but-differentiated responsibilities principle (CBDR principle). This principle entails that developing countries, so-called Annex II-countries, are given more leeway to fulfil their obligations under the UNFCCC than the industrialized countries; Annex I-countries. Article 4(2) UNFCCC binds the latter group of countries to adopt (national) policies and take measures to mitigate greenhouse gases in such a manner that they take the lead in modifying longer-term trends in anthropogenic GHG emissions.

Noteworthy is that Article 4(7) UNFCCC stresses that developing countries can only be held responsible to the extent that these States are supported financially and with proper technology by the Annex I-countries, stressing that "economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties." [68] Thus, international cooperation and sustainable development are there quite radically underlined.[69]

Also noteworthy is Article 14 UNFCCC, which provides for a 'settlement of disputes' clause. Paragraph 1 of this provision states that "[i]n the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice." Parties may submit a dispute to the ICJ or start an arbitration procedure to be agreed by the Conference of the Parties 'as soon as practicable' in an annex on arbitration.[70] This annex has, however, not been created, nor have any disputes under the UNFCCC been brought before the ICJ.[71]

Lastly, Article 7 of the UNFCCC establishes a Conference of the Parties (COP). This body is considered the "supreme body of this Convention", which "shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt."[72] Such

[62] UNFCCC.
[63] 'Status of ratification | UNFCCC' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en#1> accessed 5 April 2020.
[64] David Freestone, 'The United Nations Framework Convention on Climate Change - The Basis for the Climate Change Regime', *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 101.
[65] UNFCCC Article 3(3).
[66] ibid Article 3(1).
[67] ibid Article 3(4).
[68] ibid Article 4(7).
[69] Freestone (n 64) 102.
[70] UNFCCC Article 14(2)(b); Freestone (n 64) 104.
[71] Freestone (n 64) 104; Verheyen and Zengerling (n 19) 420.
[72] UNFCCC Article 7(2).

meetings have since the entry into force of the UNFCCC been organised on an annual basis and has led to several international agreements, so-called COP-Agreements.

At the third COP-meeting in 1997, with the purpose of operationalising and concretising the commitments of Article 4 UNFCCC, in particular its second paragraph, the Kyoto Protocol was adopted. This Protocol offered several binding emission reduction targets for the Annex-I countries. With these targets, States committed to reduce their average GHG emissions by 5.2% in 2012 compared to the 1990 base year.[73] The Protocol furthermore introduced a number of mechanisms, namely the mechanism of joint implementation,[74] the clean development mechanism,[75] and the emissions trading scheme.[76] The latter scheme allowed for certain States to "participate in emissions trading for the purpose of fulfilling their commitments under Article 3", but underlined that such trading is "supplemental to domestic actions."[77] This provision furthermore marked the birth of a "carbon market", which is consistently invoked by the United States and which has been implemented in the European Union legal framework with the EU Emissions Trading System (EU ETS).[78]

The mandate of the Kyoto Protocol ran until 2012. During the 13th COP-meeting in Bali, in a response to the "findings of the Fourth Assessment Report of the [IPCC] that warming of the climate system is unequivocal and that delay in reducing emissions significantly constrains opportunities to achieve lower stabilization levels and increases the risk of more severe climate change impacts",[79] Member States set up the Bali Action Plan in order to "enable the full, effective and sustained implementation of the Convention through long-term cooperation action, now, up to and beyond 2012".[80] Two Ad Hoc Working Groups were established. On would research the future of the Kyoto Protocol after 2012, the other group would work on long-term cooperative action.[81] Both were to report back during the fifteenth COP-meeting in Copenhagen in 2009.

The year of 2009 arrived and the Copenhagen Accord was concluded during the fifteenth COP-meeting.[82] In this Accord, in line with the conclusions of AR4, Member States recognised the need for deep cuts in global emissions in order to hold the global temperature increase below 2°C.[83] In order to do so, Member States belonging to the Annex I group were allowed to list unilateral non-binding mitigation targets in which they presented targets for 2020 compared to the 1990 base-year.[84] However, due to organisational and administrative issues, the final COP Plenary Meeting refused to adopt the Accord into the UNFCCC framework, excluding it from enjoying any legal status.[85] In an attempt to

[73] Freestone (n 64) 105.
[74] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Dec 11, 1997) 2005 Article 6.
[75] ibid Article 12.
[76] ibid Article 17.
[77] ibid Article 17.
[78] Freestone (n 64) 108.
[79] 'Report of the Conference of the Parties on Its Thirteenth Session, held in Bali from 3 to 15 December 2007: Bali Action Plan.' (UNFCCC 2007) Decision FCCC/CP/2007/6/Add.1. 1/CP.13 Preamble.
[80] ibid 1.
[81] Freestone (n 65); 'Report of the Conference of the Parties on Its Thirteenth Session, held in Bali from 3 to 15 December 2007: Bali Action Plan.' (n 80) para 2.
[82] 'Report of the Conference of the Parties on Its Fifteenth Session, held in Copenhagen from 7 to 19 December 2009: Copenhagen Accord' (UNFCCC 2009) Decision FCCC/CP/2009/11/Add.1. 2/CP.15.
[83] ibid 2.
[84] Freestone (n 64) 113.
[85] Kevin R Gray, Cinnamon Piñon Carlarne and Richard Tarasofsky, *The Oxford Handbook of International Climate Change Law.* (Oxford University Press 2016) 114 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5740913&site=eds-live&scope=site>.

correct these issues, during the sixteenth COP-meeting in Cancún in 2010, the statements of the Copenhagen Accord were confirmed in the Cancún Agreements. States recognised the need to remain below a global 2ºC temperature rise, "that Parties should take urgent action to meet this long-term goal, consistent with science and on the basis of equity" and underlined the need to consider strengthening this goal to 1.5ºC "on the basis of the best available scientific knowledge".[86] The Cancún Agreement furthermore made reference to the UN Human Rights Council's Resolution 10/4 regarding the adverse effects of climate change for the effective enjoyment of human rights and on the most vulnerable groups, "owing to geography, gender, age, indigenous or minority status, or disability."[87]

During the 17th COP-meeting in Durban, States Parties decided it to be time for the Ad Hoc Working Groups that were established during the 13th COP-meeting in Bali to be terminated, and that, instead, a new Ad Hoc Working Group should be established to create a proper replacement of the Kyoto Protocol; the Ad Hoc Working Group on the Durban Platform for Enhanced Action.[88] This project was set to be presented no later than 2015 at COP-21 to come into effect and be implemented in 2020.[89] In 2012, with the prospect of the end of the Kyoto Protocol mandate, the Doha Amendments to the Kyoto Protocol were introduced during the 18th COP-meeting in Doha. These amendments aimed to create a second commitment period for the Kyoto Protocol by setting new targets for Annex I countries for the coming period between 2012 and 2020. However, due to a lack of majority acceptance – 144 instruments of acceptance were needed and up until today only 137 Parties have deposited such instrument – the Doha Amendments never entered into force.[90]

However, during that period the Ad Hoc Working Group on the Durban Platform for Enhanced Action continued its work on a new Protocol, which was presented in 2015 during the 21st COP-meeting in Paris: The Paris Agreement.[91] The Paris Agreement's main objectives are laid down in Article 2, aiming to (a) hold the global average temperature increase below 2ºC compared to pre-industrial levels "to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases"[92] and to "pursue to limit the temperature increase to 1.5ºC" in order to reduce the risks and impacts of climate change; (b) to increase adaptation capabilities to climate impacts; and (c) to make "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."[93] The Paris Agreement is furthermore the first agreement of international law to recognise climate change to be a human rights concern.[94] This development of recognizing human rights

[86] 'Report of the Conference of the Parties on Its Sixteenth Session, held in Cancún from 29 November to 10 December 2010: The Cancún Agreements.' (UNFCCC 2010) Decision FCCC/CP/2010/7/Add.1. 1/CP.16 paras 4, 138–139.
[87] 'Report of the Conference of the Parties on Its Sixteenth Session, held in Cancún from 29 November to 10 December 2010: The Cancún Agreements.' (n 64) Preamble.
[88] 'Report of the Conference of the Parties on Its Seventeenth Session, held in Durban from 28 November to 11 December 2011: Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' (UNFCCC 2011) Decision FCCC/CP/2011/9/Add.1. 1/CP.17 paras 1–2.
[89] ibid 4.
[90] 'Doha Amendment | UNFCCC' <https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment> accessed 6 April 2020.
[91] 'Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015: Adoption of the Paris Agreement' (n 9).
[92] Paris Agreement (Dec. 13, 2015) Article 4(1).
[93] ibid Article 2(1).
[94] ibid Preamble.

offers potential to serve as a unique anchorage for lawsuits regarding mitigation and adaptation measures.[95] This will be discussed in detail in the next chapter.

In short, the current global climate change governance regime is based on the UNFCCC and its subsequent additional agreements, which is based in large on climate change science of the IPCC. The recently entered into force Paris Agreement is one of the leading documents in that aspect. The main objective laid down in the UNFCCC is to stabilize GHG concentrations in the atmosphere in order to prevent dangerous anthropogenic climate change from materialising. This objective has furthermore been specified in the Paris Agreement as to hold "the increase in global average temperature well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change",[96] with the aim "to reach global peaking of greenhouse gas emissions *as soon as possible*".[97]

There are several central principles States aim to comply with, within this regime. These principles concern the principle of sustainable development, inter-generational equity, the precautionary principle and the CBDR principle. These principles will be discussed in more detail in the following paragraph. Also, important to discuss is the closely linked field of international environmental law to the climate governance regime, which, in its turn, is closely intertwined with other fields of (inter)national law.

2.3. Principles of international environmental law

The UNFCCC and its subsequent legally binding documents are part of the field of international environmental law (IEL). This field can indisputably be considered a branch of public international law.[98] However, it is not a distinctive regime, as it can virtually touch upon and be extracted from every other field of law; both international, regional and transnational law. To give some examples, environmental law concerns have been raised in international trade law,[99] land use law, administrative law,[100] EU-law,[101] corporate liability law,[102] human rights law[103] and even domestic criminal law.[104]

As already presented to some extent in the two previous paragraphs, IEL is furthermore a highly interdisciplinary branch of international law, which is largely influenced by and based on non-legal factors like science, economic relationships and politics and which has a strong focus on sustainable development.[105] As described by Sands and Peel, IEL should therefore be defined as "those substantive,

[95] United Nations Environment Programme and Sabin Center for Climate Change Law, *Status of Climate Change Litigation, a Global Review* (2017) 17 <http://wedocs.unep.org/handle/20.500.11822/20767> accessed 22 February 2020.
[96] UNFCCC Article 2(1)(a).
[97] Paris Agreement (Dec. 13, 2015) Article 4(1).
[98] Lakshman D Guruswamy and Mariah Zebrowski Leach, *International Environmental Law in a Nutshell.* (4. ed., Thomson West 2012) 1.
[99] *European Communities - Measures affecting asbestos and asbestos-containing products (Case brought by Canada)* [2001] WTO No. 135.
[100] *Anti-Aircraft Noise Society and Others v Vienna Airport AG* (Constitutional Court of Austria).
[101] *ExxonMobil Production Deutschland GmbH v Bundesrepublik Deutschland* [2019] CJEU C-682/17.
[102] *Guevara Baioja, José Luis v Petroecuador* [2002] Corte Suprema de Justicia Juicio ordinario No. 31-2002.
[103] *State of the Netherlands v Urgenda Foundation* [2019] Supreme Court of the Kingdom of the Netherlands 19/00135 (English translation).
[104] Burgers (n 19) 2. Footn. 10. Cit.: "The late Polly Higgings called for making ecocide (genocide on the ecosystem) an international crime".
[105] Patricia W Birnie, Alan E Boyle and Catherine Redgwell, *International Law and the Environment.* (3. ed., Oxford University Press 2009) 2–3.

procedural and institutional rules of international law that have as their primary objective the protection of the environment. These rules form a set of related legal developments and treaties rather than a coherent 'regime'."[106]

Characteristic about environmental law today is that, even though it is described to aim to protect the environment, its final objective is almost always to protect the environment for humanity to be left unharmed by environmental changes, and thus for humanity to thrive. IEL can therefore be described as anthropocentric, rather than ecocentric, which is noticeable in most environmental documents. An example can be given by reference to one of the earliest IEL documents tracing back to 1972; the Stockholm Declaration on the Human Environment. This Declaration explicitly embraced a link between humanity, the enjoyment of human rights and the environment. Principle 1 of this Declaration, for example, states that

> [m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

This Declaration was adopted as an answer to "the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment".[107] This document was furthermore the first to embrace the principle of inter-generational equity,[108] and the obligation to prevent pollution.[109]

Another noteworthy IEL document, often-times referred to as a successor of the Stockholm Declaration for it specified many of the principles of the 1972 Declaration, is the Rio Declaration on Environment and Development which was adopted in the same year as the UNFCCC, and which comprises of 27 Guiding Principles. The main aim of this document was to work towards "international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system" and recognise "the integral and interdependent nature of the Earth, our home".[110] The Rio Declaration does not have a legally binding status, but regardless of that, the Declaration represents authoritative principles, some of which today are considered to be customary rules of international (environmental) law. Examples are the principle of sustainable development,[111] the CBDR principle,[112] the precautionary approach,[113] and the polluter pays-principle.[114]

The Rio Declaration furthermore confirmed the anthropocentric approach to the environment in its first principle, which stated that "[h]uman being are at the centre of concerns for sustainable development.

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[106] Philippe Sands and others, *Principles of International Environmental Law.* (Fourth edition, Cambridge University Press 2018) 14.
[107] 'Report of the United Nations Conference on the Human Environment: Stockholm Declaration on the Human Environment' (United Nations General Assembly 1972) UNGA Declaration UN Doc.A/CONF.48/14.
[108] ibid Principle 2 states: The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.
[109] ibid Principle 7.
[110] 'Report of the United Nations Conference on Environment and Development (Annex I): Rio Declaration on Environment and Development' (United Nations General Assembly 1992) UNGA Declaration A/CONF.151/26 (Vol.I).
[111] ibid Principles 1, 3 and 4.
[112] ibid Principles 7 and 11.
[113] ibid Principle 15.
[114] ibid Principle 16.

They are entitled to a healthy and productive life in harmony with nature."[115] Since its creation, this Declaration has served as an important guide for the development of national and international law- and decision-making, and these principles are today reflected in many more documents, among them the UNFCCC.

Regardless of the diverse, and multi-sourced nature of IEL, a few principles occur consistently in treaties, declarations, state practice and judicial decisions. As a result, they potentially apply to all members of the international community.[116]

It is worth taking a closer look at these principles, especially at their role in a climate change context, and in particular within the UNFCCC regime. General principles mentioned consistently within this regime are the principle of sustainable development, the principle of intergenerational equity and the principle of precaution.[117] These will therefore be discussed in more detail hereafter.[118]

A central element within the UNFCCC regime, is the principle of sustainable development. This principle is closely linked to the above-mentioned CBDR principle and forms part of the main objective of the UNFCCC, namely to "enable economic development to proceed in a sustainable manner."[119] Even though an express definition seems to be lacking in many documents, including in the UNFCCC itself, an often-cited definition can be found in the Brundtland Report of 1987, in which sustainable development has been defined as a means "to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."[120] This overarching principle has a number of central elements, which are intra- and intergenerational equity, sustainable use and the principle of integration.[121] This principle is furthermore considered to enjoy a customary international law (CIL) status.[122]

The principle of intergenerational equity forms an important element of sustainable development as well as a unique principle of climate change law. This principle was first recognised in the non-binding Stockholm and Rio Declarations,[123] as well as in the legally binding UNFCCC. Article 3, paragraph 1, UNFCCC thus binds States to "protect the climate system for the benefit of present and future generations of humankind."[124] In the Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, the ICJ furthermore recognised the applicability of this principle in an environmental context by stating that "the use of nuclear weapons could constitute a catastrophe for the environment" and "that

[115] ibid Principle 1.
[116] Sands and others (n 106) 197–198.
[117] UNFCCC Articles 3 and 4.
[118] Sands and others (n 106) 197–198 The authors describe the generally accepted principles of IEL to be: (1) the principle of sovereignty and responsibility, (2) the principle of preventive action, (3) the principle of cooperation, (4) the principle of sustainable development, (5) the precautionary principle, (6) the polluter pays principle and (7) the CBDR principle.
[119] UNFCCC Article 2.
[120] 'Our Common Future: Report of the World Commission on Environment and Development (Brundtland Report)' (United Nations 1987) UN. Doc. A/42/427 para 27.
[121] Sands and others (n 106) 218–219.
[122] ibid 219.
[123] 'Report of the United Nations Conference on the Human Environment: Stockholm Declaration on the Human Environment' (n 107) Principle 1; 'Report of the United Nations Conference on Environment and Development (Annex I): Rio Declaration on Environment and Development' (n 110) Principle 4.
[124] UNFCCC Article 3(1).

the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, *including generations unborn*."[125]

The principle of intergenerational equity does, however, not explicitly provide a 'right' to the protection of future generations as such, nor has it been awarded CIL status, which seemingly makes this principle non-justiciable.[126] However, some scholars are of the view that the recognition of a State's duty to comply with the principle of intergenerational equity does offer potential to enhance standing before courts in claims where current standing-requirements do not yet seem to be fulfilled due to climate change's future harm character.[127] This principle has not yet formed the legal basis for successful dispute resolution.[128] It has however been brought up, but dismissed, in some domestic cases.

Another, widely recognized, IEL principle is the precautionary principle. This principle is codified in Article 3, paragraph 3, of the UNFCCC and prescribes that

> Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.

This principle is also laid down in the Rio Declaration,[129] and entails that, regardless of a lack of full scientific certainty, States are supposed to take action to prevent harm if there is a risk that such harm will materialise. This principle has furthermore been codified in Article 191, paragraph 2, of the Treaty on the Functioning of the European Union (TFEU), also known as the Treaty of Maastricht. The European Commission later interpreted this principle to entail that "precaution must be based on risk assessment, must consider costs and benefits, 'must not aim at zero risk,' and must be 'provisional' to be revised over time as understanding improves."[130] This codification in the Maastricht Treaty as well as its mention in the Rio Declaration was furthermore quoted and applied by the European Court of Human Rights (ECtHR) in the case of *Tātar c. Roumanie*.[131]

What makes the precautionary approach unique to the issue of climate change is that the consequences of not acting, regardless of scientific uncertainty, may be catastrophic because climate change reversal is no practical option. However, taking a leap of faith and investing in precaution may be costly and not have the longed effects in the long term, which generally makes governments hesitant to take precautionary action. After all, "the cure may be worse than the disease".[132] This balancing of costs versus benefits remains a sensitive political issue in climate governance. This is where the strength of

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[125] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] International Court of Justice General List No. 95 [29] ; Sands and others (n 107) 221–222.
[126] Catherine Redgwell, 'Principles and Emerging Norms in International Law: Intra- and Inter-Generational Equity', *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 196.
[127] Sands and others (n 106) 222.
[128] Redgwell (n 126) 198–199.
[129] 'Report of the United Nations Conference on Environment and Development (Annex I): Rio Declaration on Environment and Development' (n 110) Principle 15.
[130] Jonathan B Wiener, 'Precaution and Climate Change', *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 167.
[131] *Tatar c Roumanie* [2009] ECtHR 67021/01 [69].
[132] Wiener (n 130) 72.

the precautionary principle lies; it may offer a basis to coerce States to fight the 'climate change disease', regardless of uncertainties. This principle has been implemented widely and is consistently referred to by domestic and regional courts in environmental disputes.

The above-mentioned authoritative environmental principles, relevant in a climate change context, are closely intertwined with one another. This has also been stressed in the Preamble of the Paris Agreement, in which the States Parties "emphas[e] the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty."[133] Thus, equity, precaution and sustainability of efforts are intrinsic principles of State compliance.

2.4. International climate change dispute-settlement

As already mentioned before, IEL potentially touches upon every field of law and, as a result thereof, is characterised by a large corpus of legal sources, covering some thousands of documents. Its corpus is formed by many multilateral environmental agreements, bilateral and multilateral treaties, national and transnational law documents and a large majority of soft law instruments, creating mostly inter-State obligations.[134] As has previously become apparent, the UNFCCC regime is the main IEL framework focusing on climate change.

Over the years, international environmental law has grown out to be, besides large in quantity, also an increasingly complex and multi-faceted field of law, mainly because many environmental concerns have now been incorporated into, and thus co-exist with, trade, development banks, foreign investments, the private sector, and, as will be discussed in more detail in chapter 3, human rights law.[135] This is also the case for climate change law. But, how are climate change disputes settled? There is no general international climate change- or environmental court to go to when dissenting parties need a judicial intermediator.[136]

As already briefly mentioned before, the UNFCCC regime provides under Articles 13 and 14 UNFCCC for a dispute settlement clause, in which cases can be brought before the ICJ or where an arbitration procedure can be started.[137] This clause has also been included in consequent UNFCCC documents, among which the Kyoto Protocol and the Paris Agreement.[138] Besides that, States have the opportunity to go to the International Tribunal for the Law of the Sea (ITLOS) in sea-related matters, or to file a complaint under the dispute settlement system of the World Trade Organization (WTO).[139] There are furthermore opportunities for States to complain before other tribunals, for example, the International Centre for the Settlement of Investment Disputes, the Permanent Court of Arbitration, the World

[133] Paris Agreement (Dec. 13, 2015) Preamble; Sands and others (n 106) 219.
[134] Tava (n 34) 134.
[135] Mónica Feria-Tinta and Simon C. Milnes, 'International Environmental Law for the 21st Century: The Constitutionalization of the Right to a Healthy Environment in the Inter-American Court of Human Rights Advisory Opinion No. 23' [2019] ACDI: Anuario Colombiano de Derecho Internacional 59 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=edsdoj&AN=edsdoj.b2835b0ae842488a4bb6f7eff794c7&site=eds-live&scope=site>.
[136] Stephens (n 17) 182–183.
[137] UNFCCC Article 14(2)(b); Freestone (n 64) 104.
[138] Verheyen and Zengerling (n 19) 418.
[139] ibid 426–438.

Heritage Committee of UNESCO, or before the Organisation for Economic Co-operation and Development (OECD).[140]

However, there are very few–near to none–climate change-cases that have been dealt with before these fora and to date no cases have been initiated under the UNFCCC's dispute settlement clauses. The reason thereof is that international environmental law documents in general, and international climate change law in particular, predominantly concern obligations binding between States, thus affording only access to such courts for States. Logically, States generally do not have an incentive to deal with inter-State disputes in environmental matters before courts, which in practice means that environmental or climate change disputes are generally dealt with through managerial or quasi-diplomatic settlement, in which mediation is predominant over adjudication.[141] And because most IEL documents are generally merely binding between States, its dispute settlement mechanisms do not allow standing to non-State actors.[142]

This lack of adjudication is problematic for three reasons: Firstly, because non-State actors are highly important players in the climate change debate, especially when holding their respective governments or the international community to account for a failure to fulfil their international legal obligations. This will be discussed in more detail in chapter 4 and 5. Secondly, because the creation of international case-law is important for the clarification of certain international legal principles and obligations, both under treaty and customary law. And thirdly, because if States do not voluntarily comply and inter-State mediation fails due to conflicting State interests, it is unlikely that environmental obligations will be met.[143] The lack of dispute mechanisms can furthermore be explained by the fact that IEL has a preventive nature, rather than a responsive one, which in its turn has resulted in a lack of "sophisticated remedial machinery".[144]

Non-State actors do have, however, two alternative options. The first option is to start a procedure before international human rights courts as those mechanisms do provide standing to individuals under human rights law. However, as will be discussed in chapter 3, these courts have not yet dealt with climate change disputes either, which results in several uncertainties regarding access to justice and interpretation. The second option is to start a lawsuit before domestic courts, either based on tort claims, public nuisance claims, constitutional claims or other claims. This latter option is predominant now, as non-State actors initiate climate change procedures, often public interest litigation, before their respective domestic jurisdictions. A case study of domestic litigation in different jurisdictions will be carried out in chapter 4.

2.5. Concluding remarks

This chapter has set out the current 'paradigm', namely that of voluntary inter-State mitigation and adaptation targets under the UNFCCC regime, with the aim to stabilize GHG concentrations in the atmosphere in order to prevent dangerous anthropogenic climate change from materialising.

[140] ibid 421.
[141] Tava (n 34) 134; Stephens (n 17) 182–183.
[142] Elisabeth Lambert, 'The Environment and Human Rights: Introductory Report to the High-Level Conference "Environmental Protection and Human Rights" (Strasbourg, 27 Feb, 2020)' (2020) 5–7.
[143] Andrew W Samaan, 'Enforcement of International Environmental Treaties: At Analysis' (2011) 5 Fordham Environmental Law Review 273.
[144] Sumudu A Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016) 267.

This regime, forming the predominant climate change response mechanism, is multi-disciplinary and highly dependent on input from climate science. The IPCC is an important, and probably the most authoritative provider of scientific information in that regard as it provides important guidelines for global, regional, national and even sub-national governance. An important example of the unequivocal role of climate science can be given with reference to the Paris Agreement, in which States have adopted, in line with findings from the IPCC, a target not to exceed a 1.5 to 2.0°C global temperature rise by 2100 compared to the pre-industrial era, which is generally considered to be in line with GHG emissions levels not exceeding 430 to 450 ppm in 2100. The Paris Agreement has furthermore underlined that the need to act is urgent and that delaying such action will only result in more mitigation costs and efforts and adaptation needs. Indeed, States have bound themselves "to reach global peaking of greenhouse gas emissions *as soon as possible*".[145]

Several central principles relating to the matter of climate change which have been implemented in international, regional and domestic frameworks, have furthermore been discussed. Authoritative principles are the principle of sustainable development, the principle of common but differentiated responsibilities, the principles of inter-generational equity and the widely recognised precautionary principle.

It can be concluded that global climate change governance inherently reflects the right intentions to combat anthropogenic climate change and to prevent harm as a result thereof. The UNFCCC regime takes interdisciplinary expertise into account to base its law and governance decisions on, it takes into account important principles to protect the vulnerable and to act even without complete certainty and it has a clear objective, namely to stabilise GHG emissions and remain below a global temperature rise of 2.0°C in order to prevent dangerous climate change.

However, as good as these intentions may be, States have proved it to be harder to achieve in practice than on paper. Indeed, since 1992, emissions levels have continued to rise drastically and the effects thereof are starting to show.[146] Sea levels continue to rise rapidly, droughts and floods are an increasing issue, heat waves are becoming more common and air pollution is negatively affecting unprecedented amounts of people.[147] Besides that, the most vulnerable populations are hit the hardest by these developments. In particular people living smaller states, for example small-island States, women, the elderly, the poor, and the indigenous are significantly more affected than majority groups.[148] And from an intergenerational equity perspective, the generations unborn will probably be hit even harder if States continue to fail to comply with their voluntary mitigation and adaptation targets. Besides that, it is mostly the Global South that feels the consequences of climate change, whereas the Global North is generally spared even though this latter part of the world is the main cause of global GHG emissions. Together with the fact that vulnerable minorities are hit the hardest and have the least means to counter the problem as they are generally underrepresented by their governments–the majoritarian elective, it can be concluded that the existing framework in which voluntary inter-State mitigation targets are central, are lacking proper implementation.

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[145] Paris Agreement (Dec. 13, 2015) Article 4(1).
[146] 'Global CO_2 emissions chart | Worldbank' <https://blogs.worldbank.org/opendata/chart-global-co2-emissions-rose-60-between-1990-and-2013> accessed 15 May 2020.
[147] David R Boyd, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (UN OHCHR 2019) HRC Report A/HRC/40/55 paras 23–30 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/002/54/PDF/G1900254.pdf?OpenElement>.
[148] ibid 31–36.

As a result thereof, as will become apparent in the upcoming discussion, in particular in chapter 4, increasing numbers of people are starting to lose confidence in this voluntary inter-State compliance regime and are searching for alternative methods. The problem then is, how can these groups enforce State responsibility? As discussed above, the majority of IEL documents, the UNFCCC included, concern inter-State agreements that exclude non-State actors to directly confer rights from and, thus, exclude standing before the international adjudicatory mechanisms. Thus, direct access to climate justice for individuals, in particular minority groups, is barred.

This lack of 'direct' access to climate justice has not withheld public interest groups to stand up against the lack of mitigation by their respective governments. Instead, non-State actors are increasingly, proactively initiating strategic procedures to coerce their governments to comply with these binding international agreements before their respective domestic courts. And a recent trend is visible towards the indirect invocation of State responsibility through human rights law. Prior to a legal-dogmatic research on domestic mitigation-related climate change litigation in several jurisdictions, in order to create a full-fledged understanding of these domestic developments, in particular the human rights-based approach, the following chapter will therefore discuss the current connection between climate change and human rights in the international community, as well as the level of recognition of a 'human right to a healthy environment' by the regional human rights courts.

3. The road to recognizing and interpreting climate change to be a human rights issue

This chapter aims to identify the current state of recognition of the interdependence and indivisibility of (anthropogenic) climate change with the enjoyment of human rights. This will be done by considering developments within the UNFCCC regime regarding human rights, other diplomatic developments and, very importantly, the attitudes taken by human rights courts.

As already briefly mentioned before, international courts have not yet answered to climate change matters. This also means that none of the international human rights courts and commissions, to know the Inter-American Court and Commission of Human Rights (IACtHR and IAcomHR), the African Court and Commission of Human and Peoples' Rights (ACtHPR and AComHPR) and the European Court of Human Rights (ECtHR), have explicitly provided guidance as to how to apply the human rights treaties in a climate change context.

That fact aside, these human rights courts and commissions have answered to matters involving environmental deterioration and human rights violations, which might be considered to offer guidance by analogy to climate change litigation too. Indeed, as will become apparent in the chapter 4, with an assessment of the *Urgenda* case, the Dutch Court of Appeal and Supreme Court have applied the ECHR as a basis to find a preventive violation of the Dutch government, based on the duty of care, if the State would fail to mitigate its emissions by 25-40% by 2020 compared to 1990 in line with the IPCC's AR4. As a result of this success, this approach has been taken over by multiple other litigants in quite a few other jurisdictions but leading to different successes.

Before entering into a legal-dogmatic discussion of a diverse selection of domestic cases, it is therefore important to create a clear overview of current attitudes of the human rights courts and commissions in that niche, to identify to what extent the human rights standards give room to perceive a connection between climate change and human rights violations, and to eventually assess what links between human rights and climate change are generally accepted in the international community, by domestic courts, as well as in international governance.

3.1. Intergovernmental recognition of the interdependence and indivisibility of climate change and human rights

States have long been hesitant to formally recognize climate change to be a human rights issue. Only recently, in the last decade or so, did climate change diplomacy take a slow turn towards the recognition of human rights in a climate change-context. Initially, during the negotiations of the UNFCCC, efforts to include human rights remained unsuccessful.[149] Many advocacy efforts to change this were made since. Key efforts were the petition of the Inuit Circumpolar Conference of 2005, in which the petitioners pursued to hold the United States of America (US) responsible for failing to protect their livelihoods against the dangers of anthropogenic climate change due to domestic regulatory issues.[150] Even though

[149] Sébastien Duyck, 'Integrating Human Rights in Global Climate Governance: An Introduction', *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 4–5.
[150] Abate (n 15) 31–32.

the IAComHR declared the case to be inadmissible, it did manage to raise awareness of the human rights dimensions of climate change.[151] Another important milestone was the adoption of the Male' Declaration on the Human Dimension of Global Climate Change, by Small Island Developing States in 2007.[152] As described by the John Knox, former UN Special Rapporteur on Human Rights and the Environment, in his independent Report on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment of 2016, this Declaration "was the first intergovernmental statement to explicitly recognize that climate change has "clear and immediate implications for the full enjoyment of human rights", including the rights to life, to an adequate standard of living and to the highest attainable standard of health."[153]

Then, within the UNFCCC regime, the first human rights-related statement was made in 2010 by the Conference of Parties during COP-16 in Cancún, Mexico, with the adoption of the soft law Cancún Agreements. In these agreements, States recognized that "the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status or disability", concluding that "Parties should, in all climate change related actions, fully respect human rights."[154]

After the Cancún Agreements, attention for climate change and human rights continued to grow and the Human Rights Council as well as respective mandate holders stressed the need for a new climate agreement in which parties bound themselves to, "in all climate change related actions, respect, protect, promote and fulfil human rights for all."[155] These efforts finally bore fruit in 2015, with the adoption of the Paris Agreement, which is the first legally binding international climate agreement in which a formal mention was made of human rights obligations.[156] Up until today, this is still the sole binding international law document to recognize climate change to affect human rights. The Preamble of the Paris Agreement states as follows:

> 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, 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.[157]

This formal recognition of a human rights dimension within a climate change context, be it only in a Preamble of a very recent text, has provided a slightly stronger position for human rights institutions, experts and actors to take a stance against the risks of climate change and its impacts on human rights.[158]

In its 2016 report, Knox stressed that climate change will continue to create issues with regard to availability of safe drinking water and food, growing inequality, forced migration, the existence of small

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[151] Duyck (n 149) 4–5.
[152] John H Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment.' (2016) HRC Report A/HRC/31/52 para 7.
[153] ibid.
[154] 'Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancún from 29 November to 10 December 2010: The Cancún Agreements.' (n 86) para 8.
[155] Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment.' (n 152) para 15.
[156] 'Paris Agreement status | European Commissions' <https://ec.europa.eu/clima/policies/international/negotiations/paris_en> accessed 21 May 2020.
[157] Paris Agreement (Dec. 13, 2015) Preamble.
[158] Stephens (n 17) 5–6.

island States and non-human species.[159] He argued that these "foreseeable adverse effects of climate change on the enjoyment of human rights give rise to duties of States to take actions to protect against those effects" and that these obligations do "not only apply to decisions about how much climate protection to pursue, but also to the mitigation and adaptation measures through which the protection is achieved."[160]

In the same report, Knox furthermore remained realistic and underlined that the scale and complexity of the problem is so large that it is hard to establish to what extent this can lead to human rights violations in a strict legal sense.[161] To hold states responsible for general, global environmental threats is complicated for a number of reasons: Issues with causality, territorial sovereignty and jurisdictional limitations of human rights treaties, and States' capacities and subsequent level of accountability, continue to block the effective legal accountability of States to take appropriate measures.[162]

Indeed, human rights law may have barriers, for example due to its responsive nature rather than a preventive one which characterizes environmental law.[163] Environmental law has furthermore not developed at the same time, with the same initial purpose and in the same way as human rights law. This is in fact quite an important issue. The major human rights documents were negotiated and adopted in a time when the awareness of the pace and impact of climate change was lacking in the international community.[164] As stated by Boyd, "it is [therefore] not surprising that the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the international Covenant on Economic, Social and Cultural Rights make no mention of the right to a healthy environment", where he continues with a citation of Kennedy Cuomo, stating that "the drafters of these documents could not be expected to "foresee the enormity of ecological degradation and the consequent necessity for human rights norms to encompass environmental considerations."[165] The same goes for the oldest regional human rights framework, the European Convention on Human Rights (ECHR), the adoption of which dates back to 1950, as w gell as the American Convention on Human Rights from 1969 (ACHR). It was not until the much later adopted San Salvador Protocol from 1988 that the right to a healthy environment was codified as a procedural right. The same goes for the adoption of the African Charter on Human and Peoples' Rights (ACHPR), which is still very young and dates to 1998; an entirely different era than the post-war period in which the Bill of Rights and the ECtHR were adopted.

That evolutionary fact aside, climate change law and governance and human rights law do intend to protect the same subject: humanity. Taking note of the above-discussed climate change legal framework, it inherently intends to protect the environment in order to protect human lives and livelihoods.[166] The protection of human rights law, however, goes further in the sense that it binds States vertically towards

[159] Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment.' (n 152) paras 23–30.
[160] ibid 33.
[161] ibid 35.
[162] Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages', *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 31–33.
[163] Atapattu (n 144) 267–268.
[164] David R Boyd, 'Catalyst for Change', *The Human Right to a Healthy Environment (edited by John H. Knox and Ramin Pejan)* (Cambridge University Press 2018) 38.
[165] ibid.
[166] John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 1 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5277094&site=eds-live&scope=site>.

its citizens, thus providing individuals with the opportunity to adjudicate human rights violations before their respective courts as well as before sophisticated international human rights courts.

This is where the potential of human rights law lays, it offers access to non-State actors to hold their respective governments and possibly the larger international community of States responsible for endangering their lives. Some scholars even claim the protection of human rights to be "the closest international law comes to protecting fundamental rights to the environment."[167] Thus, and this has already become clear in some instances in domestic litigation, fighting climate change through a human rights lens is not left without potential. Especially not, now that climate change is increasingly accepted to be a human rights issue in the international community. The following paragraphs will thus present standards set by human rights courts that might provide handles in support of a HRBA to climate change litigation.

3.2. Current standards of regional human rights courts regarding climate change and human rights

Climate change litigation in general, and human rights litigation in particular, is still very much developing. Currently, none of the three regional human rights courts, have declared cases, in which a human rights issue was posed considering the risks or consequences of global climate change, admissible.[168] In fact, no international court to date has decided on general climate change disputes. However, as will be discussed hereafter, almost all courts have recognized, either explicitly or implicitly, a rights-based approach regarding the environment in their case-law. This recognition of a "human right to a healthy environment" by the Inter-American, African and European human rights regimes will be discussed below, where attention will be given to the differences and resemblances in the approaches of the courts towards this right. The standards set by these regimes have the potential to provide significant contributions to the development of environmental rights in international law. They furthermore have the potential to serve as important guidelines in possible human rights-based climate change litigation.

This paragraph will be structured as follows: First, general considerations regarding States' obligations under human rights law will be briefly presented. Attention will be given to the duty to respect, to protect and to fulfil. Second, the substantive aspects of relevant human rights will be considered. Rights to take into account are the right to a healthy environment under the African and Inter-American regime, rights of indigenous peoples and the indirect protection against environmental degradation pursuant to the rights to life and personal dignity and respect for private and family life, which form a central part of the discussion of the European framework. Lastly, a critical analysis of the current general attitude by the three regimes will be presented.

[167] James R May and J Patrick Kelly, 'The Environment and International Society (Issues, Concepts and Context)', *Routledge Handbook of International Environmental Law* (2015) 22.
[168] Heta Heiskanen, 'Climate Change and the European Court of Human Rights', *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 322.

3.2.1. General considerations regarding States' human rights obligations in a climate change context

International human rights law is characterized by three levels of obligations. The first level concerns the obligation to *respect*, which in a climate change context entails that States have to refrain from activities that may harm the climate and may therewith contribute to climate change.[169] The second level concerns States' obligation to *protect*, which entails that States have to protect individuals within their jurisdiction against the harmful consequences of climate change.[170] And lastly, the third level concerns the obligation to *fulfil* human rights. This entails that States must "take positive steps to ensure that all people, at least those within the State's territory or jurisdiction, are able to enjoy the full range of rights."[171]

Lewis clearly explains what these types of obligations entail in practice. The obligation to respect has a preventive character and entails an obligation to take mitigation efforts to reduce GHG emissions and therewith to prevent interference with the enjoyment of human rights.[172] With this thesis' focus on mitigation obligations, this level of obligations is thus highly relevant for the discussion at hand. This obligation includes an obligation for States not to facilitate harmful activities by private actors, to implement proper policy which aims to minimise GHG emissions and the obligation "not to avoid, distort or deny scientific information on the causes and effects of climate change, especially where such behaviour is intended to facilitate ongoing or increased emissions."[173]

Regarding the obligation to take mitigation action, the obligation to protect is closely connected to the obligation to respect. This level of protection, however, obliges States to take positive steps to prevent and protect against the dangers of GHG emissions by taking mitigation action, rather than to refrain from emitting activities.[174]

Lastly, the obligation to fulfil is rather vague in a climate change context, for it requires States to take "complementary mitigation" action as Lewis describes it.[175] This entails that States must promote, support and facilitate mitigation action by States. The commitments under the UNFCCC characteristically fall within this type of obligations. For example, the wording in Article 4, paragraph 1, of the UNFCCC, states that Parties shall "[p]romote and cooperate in the development, application and diffusion, including transfer of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases […]", that Parties shall "[p]romote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol", and Parties shall "[p]romote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies."[176]

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[169] Bridget Lewis, *Environmental Human Rights and Climate Change. [Elektronisk Resurs] : Current Status and Future Prospects.* (1st ed. 2018., Springer Singapore 2018) 175 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5156359&site=eds-live&scope=site>.
[170] ibid 177.
[171] ibid 179.
[172] ibid 175.
[173] ibid 175–176.
[174] ibid 178.
[175] ibid 179.
[176] UNFCCC paras 1 under (c), (d) and (h). See also the other sub-paragraphs of Article 4(1).

As laid down in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001, in order for a State to then be held accountable under international law, conduct needs to consist of an action or omission which "(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[177] In the given matter, non-compliance with substantive obligations under the human rights conventions needs to be established and this needs to be attributable to a State through the establishment of a causal link between this violation and the State conduct. The substantive standards set by the regional courts will be set out below. Then, an analysis of procedural provisions will be discussed which deals with access to the human rights courts.

3.2.2. Substantive provisions: The human right to a healthy environment?

3.2.2.1. The Inter-American human right regime

Interestingly, both the Inter-American and African human rights regime explicitly recognize a right to a healthy environment. The Inter-American regime explicitly recognizes a freestanding right to a healthy environment under Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (the San Salvador Protocol).[178] This provision states as follows:

> 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.

The codification of such right is an important recognition of the need to protect the environment for people to live healthily. However, the character of the Protocol, it being a socio-economic rights document, stands in the way of direct invocability and enforceability of this right. Article 1 of the San Salvador underlines this by stating that

> [t]he States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

This Protocol thus requires States to take measures with a view on the *progressive realization* of those rights. This makes the rights enshrined in this Protocol less enforceable than the strict obligations to respect and protect as laid down in the civil-political Convention rights. The Protocol furthermore does not provide standing for individuals or individual petitions before the Inter-American Commission or

[177] 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (International Law Commission 2001) Supplement No. 10 (A/56/19), chp.IV.E.1 Article 2.
[178] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' 1999 (OAS Treaty Series, No 69).

Court.[179] Therefore direct invocability of this provision in environmental or climate change litigation is not possible.

However, in its commendable and progressive "Advisory Opinion concerning State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity, Recognized in Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights", of November 2017,[180] the IACtHR has managed to provide clarification with regard to its understanding of the obligation to protect the environment.

In its request for this Advisory Opinion, Colombia sought clarification about the relationship between environmental harm and human rights obligations, in particular the right to a healthy environment and the rights to life and personal dignity and integrity.[181] In the Advisory Opinion, the Court reconfirmed, amongst other things, its recognition of "the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights."[182] It thus confirmed that environmental degradation or other undesirable effects on the environment may constitute an interference with the obligation to respect, protect and fulfil human rights.[183]

The Court furthermore interpreted Article 11 of the San Salvador Protocol to "constitute an indivisible whole based on the recognition of the dignity of the human being",[184] both in its individual and collective dimensions.[185] The latter dimension was explained by the Court as follows:

> In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. [186]

This individual dimension is an important clarification of the practical invocability of Article 11 of the San Salvador Protocol. After all, in and of itself, this provision does not provide standing for individuals or individual petitions before the Inter-American Commission or Court.[187] Therefore direct invocability of this provision in environmental or climate change litigation is not possible, but its violation can be invoked if a violation thereof interferes with the rights recognized in the ACHR. In such case, Article 44 ACHR provides for broad accessibility to file a petition at IAComHR. This provision states that "[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more

[179] Riccardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights', *Environmental Law Dimensions of Human Rights* (1st edn, Oxford University Press 2015) 70. See Article 19, paragraph 6, of the San Salvador Protocol.
[180] *Advisory Opinion requested by the Republic of Colombia on the Environment and Human Rights* [2017] Inter-American Court of Human Rights OC-23/17.
[181] Ricardo Abello-Galvis and Walter Arevalo-Ramirez, 'Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection.' (2019) 28 Review of European Comparative & International Environmental Law 217, 217.
[182] *A/O on the Environment and Human Rights* (n 180) para 47.
[183] Abello-Galvis and Arevalo-Ramirez (n 181) 220.
[184] *A/O on the Environment and Human Rights* (n 180) para 47.
[185] *ibid 59.*
[186] *ibid.*
[187] Pavoni (n 179) 70. See Article 19, paragraph 6, of the San Salvador Protocol.

member states of the Organization, may lodge petitions with the Commission containing denunciations of complaints of violations of this Convention by a State Party."

When focusing on substantive rights, the Court underlined that, "in addition to the right to a healthy environment, damage to the environment may affect all human rights, in the sense that the full enjoyment of all human rights depends on a suitable environment."[188] The Court explicitly recognized the rights to life and liberty to be specifically vulnerable to environmental harm.[189]

The right to life is laid down in Article 4, paragraph 1, of the ACHR and states as follows: "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. No one shall be arbitrarily deprived of his life." As explained by the Court, this right entails both an obligation to respect, meaning that no person may be deprived of his of her life arbitrarily (negative obligation), but, in conjunction with Article 1(1) ACHR,[190] entails also an obligation to protect the right to life (positive obligation) by taking appropriate measures to protect and preserve this right.[191] The Court specified these obligations to be as follows:

> States must take necessary measures to create an appropriate legal framework to deter any threat to the right to life; establish an effective system of justice capable of investigating, punishing and providing redress for any deprivation of life by State agents or private individuals, and safeguard the right of access to the conditions that ensure a decent life.

Regarding the latter, the Court importantly underlined that the right to a 'decent life' also consists of access to and proper quality of water, food and health and that pollution may limit the access to such basic needs for a decent life.[192]

The right to personal integrity is laid down in Article 5 ACHR and states in paragraph 1 that "[e]very person has the right to have his physical, mental, and moral integrity respected" and in paragraph 2 that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." In environmental matters this right is relevant mainly for indigenous peoples, whose "ancestral territories", as the Court underlines, should be protected "owing to the relationship that such lands have with their cultural identity, a fundamental human right of a collective nature that must be respected in a multicultural, pluralist and democratic society."[193]

The rights to life and personal integrity are closely connected, for they both require a decent or dignified life, which both touches upon human health.[194] The Court therefore discussed the specific obligations to be derived from these rights jointly and concluded with regard to the *obligation to respect*, that the right to life and personal dignity require the State to refrain from "(i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life, such as adequate food and water, and (ii) unlawfully polluting the environment in a way that has negative impact on the conditions that permit a dignified life for the individual; for example by dumping waste from State-owned facilities in ways that affect access to or the quality of potable water and/or sources of food."[195] With regard to the *obligation to ensure* the right to life and personal dignity, the Court underlined that "States must take

[188] *A/O on the Environment and Human Rights* (n 180) para 64.
[189] ibid 64,69, 108.
[190] Article 1, paragraph 1, of the American Convention on Human Rights provides that States Parties have an obligation "*to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights […]".
[191] *A/O on the Environment and Human Rights* (n 180) para 108.
[192] ibid.
[193] *A/O on the Environment and Human Rights* (n 180) paras 112–113.
[194] ibid 114.
[195] ibid 117.

all appropriate steps to protect and preserve the rights to life and to integrity." This can be done, *inter alia*, through adopting proper legal, political, administrative and cultural measures. It furthermore also includes the obligation to prevent third parties from violating the protected rights in the private sphere.[196]

The Court furthermore underlined that the obligation to prevent environmental harm is closely connected to the above-discussed precautionary principle which entails that "States must act diligently to prevent harm to these rights" and that "States must act in keeping with the precautionary principle in order to protect the rights to life and to personal integrity in cases where there are plausible indications that an activity could result in severe and irreversible damage to the environment."[197] By invoking an obligation to prevent environmental harm, the Court thus steps away from the classic responsive attitude of human rights courts in environmental matters. Measures may therefore also need to be taken to protect the right to life and personal integrity, if there is no full scientific certainty about the impact that an activity could have on the environment.[198] Furthermore noteworthy is, that, in coming to these conclusions, the Court consistently referred to the–in the previous chapter discussed–Stockholm and Rio Declarations and the World Charter for Nature.[199]

With regard to the severity threshold regarding the due diligence obligation *to prevent* harm, the Court concluded, in line with earlier conclusions of the ICJ and the International Law Commission, that the harm needs to be at least "significant", meaning more than "detectable" but not as much as "serious" or "substantial"[200] and "that States are bound to use all the means at their disposal to avoid activities under their jurisdiction causing harm to the environment."[201]

A last noteworthy point about the Advisory Opinion is the fact that indigenous and tribal populations are important players in environmental claims within the Inter-American human rights regime. Given the fact that their existence often, if not always, highly depends on the natural environment, the Court's recognition of their individual right to a healthy environment is an important development.[202] The IACtHR also underlined that in the case of *Mayagna Awas Tingni Indigenous Community v. Nicaragua*,[203] which was the first case in which a court recognized the collective property rights of indigenous communities.[204]

The case involved a claim from the Awas Tingni indigenous community, regarding the fact that Nicaragua had failed to demarcate "the communal lands of this community to its ancestral lands and natural resources, and also because it granted a concession on community lands without the assent of the Community," as well as to "ensure an effective remedy in response to the Community's protests regarding its property rights."[205] The Court agreed with these claims finding that, amongst other things, "[i]ndigenous peoples live off the land; in other words, the possibility of maintaining social unity, of cultural preservation and reproduction, and of surviving physically and culturally, depends on the

[196] ibid 118.
[197] ibid 179–180.
[198] ibid 175.
[199] 'Report of the United Nations Conference on the Human Environment: Stockholm Declaration on the Human Environment' (n 107); 'Report of the United Nations Conference on Environment and Development (Annex I): Rio Declaration on Environment and Development' (n 110).
[200] *A/O on the Environment and Human Rights* (n 180) para 136.
[201] ibid 135–136, 140, 142.
[202] Mónica Feria-Tinta and Simon C. Milnes (n 135) 53.
[203] *Mayagna Awas Tingni Indigenous Community v Nicaragua* [2001] Inter-American Court on Human Rights 23/01.
[204] Sumudu Anopama Atapattu, 'Climate Change under Regional Human Rights Systems', *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 132.
[205] *Mayagna Awas Tingni Indigenous Community v. Nicaragua* (n 203) para 2.

collective, communitarian existence of maintenance of the land. […] [Not] adopting special measures to ensure stability of the indigenous people on the land – measures which must respect their culture and avoid environmental damage – causes catastrophic damage."[206] This statement was furthermore taken over by the petitioners in the *Inuit Petition* of 2006[207] on human rights of indigenous peoples in a climate change context before the Inter-American Commission.[208]

In short, the IACtHR thus reconfirmed the indivisibility between the right to a healthy environment and the enjoyment of the rights laid down in the ACHR. The Court particularly underlined that the rights to life and personal integrity pursuant to Articles 4 and 5 ACHR may be affected by environmental harm and that States Parties have both negative and positive obligations. Negative obligations entail the duty to refrain from activities that denies or limits access to clean food, air, water and health and to refrain from polluting activities that may negatively interfere with the rights to life and personal dignity and integrity of individuals. The Court furthermore underlined that these rights entail a positive obligation for States Parties to take appropriate measures to ensure the enjoyment of these rights, for example through the adoption of legal, political, administrative and cultural measures. This obligation furthermore entails that the State must take measures to protect individuals from third Party interference, thus, to prevent polluting activities by private parties for example. Lastly, regarding substantive protection, it is noteworthy that the Court reconfirmed the close relationship between the existence of indigenous and tribal communities with a healthy environment.

3.2.2.2. The African human rights regime

The African human rights regime, though being a significantly younger and less prominent human rights system, will also be discussed. As already briefly mentioned in the discussion of substantive rights in the Inter-American regime, the African regime also recognizes a right to a healthy environment. Indeed, for the Member States to the African Union, Article 24 of the ACHPR provides for a right to a healthy environment. This provision states as follows: "All peoples shall have the right to a general satisfactory environment favourable to their development." What distinguishes the ACHPR from other regional human rights frameworks, is its strong emphasis on *peoples'* rights, instead of individual rights. This definition of peoples in Article 24 of the Charter has furthermore been considered by the African Court to possibly concern a collective of individuals that would otherwise not necessarily be recognized to fall within the strict legal definition of "a people", but that collectively suffer from the deprivation of such rights.[209] This can even be an entire national population.

Interestingly, this right is, contrary to the Inter-American right to a healthy environment under Article 11 of the San Salvador Protocol, besides subject to procedural review also subjectable to substantive review by the African Court and Commission on Human and Peoples' Rights.[210] A substantive

[206] ibid 79 See expert opinion by Roque de Jesús Roldán Ortega, attorney.
[207] *Decision on the 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* [2006] Inter-American Commission on Human Rights P-1413-05.
[208] Daniel Magraw and Kristina Wienhöfer, 'The Malé Formulation of the Overarching Environmental Human Right', *The Human Right to a Healthy Environment* (2018) 219–220.
[209] Lilian Chenwi, 'The Right to a Satisfactory, Healthy and Sustainable Environment in the African Regional Human Rights System', *The Human Right to a Healthy Environment (edited by john H. Knox and Remin Pejan)* (Cambridge University Press 2018) 65 this understanding is drawn from the interpretation of Articles 19 to 24 of the African Charter.
[210] Knox and Pejan (n 166) 8.

understanding of what the right entails was first given by the African Commission, a quasi-judicial supervisory body of the ACHPR that has standing to refer cases to the African Court when it so deems necessary,[211] in the case of *SERAC and CESR v. Nigeria*, also known as the *Ogoniland* case.[212]

In the *Ogoniland* case, two Nigerian NGOs alleged that Nigeria's direct involvement in oil production through the State-owned oil company NNPC, a majority shareholder in a Shell consortium, resulted in a violation of Article 24 of the ACHPR. The NGOs alleged that Nigeria should be held responsible pursuant to this provision on three grounds: Firstly, for its direct participation "in the contamination of air, water and soil," thus "harming the health of the Ogoni population"; secondly, for its failure "to protect the Ogoni population from the harm caused by the NNPC Shell consortium, but instead using its security forces to facilitate damage"; and thirdly, for its failure "to provide or permit studies of potential or actual environmental and health risks caused by the oil operations."[213]

In answering to these allegations, the African Commission first set out the substantive obligations to be drawn from the otherwise rather vague and open provision of Article 24 of the Charter. The Commission held that Article 24 of the ACHPR involved three main obligations, namely the obligation to respect, protect and fulfil. The obligation to respect entails a duty to *prevent* pollution and ecological degradation; the obligation to *protect* entails a duty to secure ecologically sustainable development of natural resources and the obligation to *fulfil* entails a duty to promote conservation.[214]

In order to achieve that, States have to undertake to order or permit independent scientific monitoring of threatened environments; to prepare and publicise environmental and social impact studies prior to major industrial developments; to monitor and provide information to communities that are exposed to hazardous materials and to participate in decision-making affecting their communities.[215] In *Ogoniland*, the AComHPR eventually concluded that Nigeria failed to fulfil these obligations and thus violated Article 24 of the Charter.

Important to note is that the right to a healthy environment, pursuant to Article 24 of the Charter cannot be dealt with in isolation from other fundamental rights of the ACHPR.[216] This was made clear in the case of the *African Commission on Human and Peoples' Rights v. the Republic of Kenya* before the African Court on Human and Peoples' Rights, otherwise known as the *Ogiek* case of 2017.[217] This is furthermore the only judgment the African Court has given with regard to the right to a healthy environment. Reasons for such a low number of cases before the Court are threefold. Firstly, the African Court was only established in 2005, thus it is the by far the youngest regional human rights court.[218] A second reason is the fact that individuals and NGOs have limited standing before the African Court because States are required to explicitly recognise the competence of the Court to receive cases submitted by NGOs and individuals.[219] To date, only eight out of the total thirty Member States have done so. Given the fact that NGOs and individuals are the biggest players in environmental rights and

[211] Lilian Chenwi, 'Provisional Measures in Rights Protection in Africa: A Comparative Analysis' [2014] African Yearbook of International Law 224, 226.
[212] 'Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (Ogoniland Case)' (African Commission on Human and Peoples' Rights 2001) Decision Communication 155/96.
[213] ibid 1, 50.
[214] ibid 52.
[215] ibid 53.
[216] Chenwi (n 209) 85.
[217] *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek case)* [2017] African Court of Human and Peoples' Rights 006/2012.
[218] Anopama Atapattu (n 204) 133.
[219] Chenwi (n 209) 77.

climate litigation, this is a significant barrier.[220] A third and last reason is the fact that the African Commission does not make effective use of its competence to submit cases to the African Court in relation to the right to a healthy environment.[221] Together with the limited standing issues of individuals and NGOs, this forms a barrier to effective enforcement of this right.

The Commission did, however, refer the *Ogiek* case to the Court. In this case, the Ogieks–an indigenous community living in the Kenyan Mau Forest–were threatened to be evicted from the forest by the Kenyan government, because the forest allegedly constituted a reserved water catchment zone which was part of government land.[222] The Court eventually concluded, after having ordered provisional measures "to immediately stop land transaction in the Mau Forest and to refrain from actions that would irreparably prejudice the case",[223] that Kenya had violated the rights to land, non-discrimination, the right to life, freedom of religion, culture, development and the right to freely dispose of wealth and natural resources of the Ogieks as an indigenous community. The Court concluded that the Ogieks' occupation of the land was not the result of environmental degradation, but instead that the government itself could be held responsible therefor. The Court there stated:

> In the instant case, the [government's] public interest justification for evicting the Ogieks from the Mau Forest has been the preservation of the natural ecosystem. Nevertheless, it has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area. Different reports prepared by or in collaboration with the [government] on the situation of the Mau Forest also reveal that the main *causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions*.[224]

Therewith the Court made an important link between the important role of indigenous peoples in Africa with the conservation and protection of land, natural resources and the environment.[225] The fact that the Court ordered provisional measures to prevent, instead of redress, environmental harm was also groundbreaking, as the African Court is only allowed to order provisional measures in cases of "extreme gravity and urgency". This was the first case in which Court recognised the situation of extradition of the indigenous community and consequent environmental harm to fall within that definition.[226]

Thus, despite the rather limited body of jurisprudence to work with, the African human rights regime does offer direct environmental protection and the AComHPR has set some clear requirements to be derived from Article 24 of the Charter. States are obliged to prevent degradation, to promote conservation and to secure ecologically sustainable development. It is furthermore interesting to note that the African regime weighs heavily on the importance of indigenous communities to protect the natural environment. However, some issues arise about the effectiveness of the African regime.

Firstly, the obligations set by the African Commission in the *Ogoniland* decision concern procedural rather than substantive State obligations.[227] That is understandable given the fact that the AComHPR had to answer to procedural rights-related questions, but because this is the only case in which the AComHPR or Court has articulated the definition to be given to Article 24 of the ACHPR, a clear

[220] ibid.
[221] ibid 76.
[222] *ACHPR v. Kenya (Ogiek case)* (n 217) paras 6–8.
[223] Chenwi (n 209) 78.
[224] *ACHPR v. Kenya (Ogiek case)* (n 217) para 130.
[225] Chenwi (n 209) 78, 85.
[226] ibid 78.
[227] Lewis (n 169) 72.

substantive definition is lacking.[228] A second issue is that the AComHPR has limited authority due to its status as a quasi-judicial body. This results in a tendency of States to not comply with the decisions of the AComHPR as well as with possible requests for provisional measures in cases where the prevention of irreparable harm is vital.[229] In its turn, this non-compliance stands in the way of the AComHPR to act as a proper enforcement body. Another important issue, with regard to the Court, is the fact that NGOs and individuals have very limited standing in environmental matters. Given the fact that these are important actors in environmental proceedings, this bars effective access to justice. However, what makes the African regime unique compared to its European and Inter-American sister frameworks, is its explicit and directly invocable human right to a healthy environment.

3.2.2.3. The European human rights regime

The ECHR, under auspices of the European Court of Human Rights, has undoubtedly created one of the most sophisticated, extensive bodies of jurisprudence regarding the relationship between the enjoyment of human rights and environmental harm. Ironically, however, and contrary to the Inter-American and African regimes, it has not explicitly codified a "human right to a healthy environment" in its Convention or additional Protocols.[230] In the case of *Kyrtatos v. Greece,* which concerned a complaint concerning the loss of a swamp due to urban development allegedly leading to loss of scenic beauty and a subsequent violation of Article 8 ECHR, the Court even stated that "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 the particular aspect."[231] Thus, the Court underlined the individual scope of the Convention rights, rather than "general aspirations or needs of the community taken as a whole".[232]

A relevant document of international law for the European continent which is often cited by the ECtHR is the United Nations Economic Commission for Europe's *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* of the United Nations of 1998 (Aarhus Convention). Article 1 of the Aarhus Convention provides that:

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this convention.

Thus, the Aarhus Convention does provide for a right to a healthy environment, but comparable to the Inter-American human rights regime, this provision provides merely for a procedural, and no substantive right. It therefore does not provide for an individual, independent right to a healthy environment.[233]

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[228] ibid 72–73.
[229] Chenwi (n 211) 233.
[230] 'Factsheet - Environment and the ECHR' 1 <https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 21 February 2020.
[231] *Kyrtatos v Greece* [2003] ECtHR 41666/98 [52]; Lewis (n 169) 23.
[232] *Manual on Human Rights and the Environment* (2nd edn, Council of Europe Publishing 2012) 46 <http://site.ebrary.com/id/10930825> accessed 22 February 2020.
[233] Lewis (n 169) 75.

The Council of Europe's Committee of Ministers has consistently declined efforts to include a 'human right to a healthy environment' to the Convention framework, because "the convention system already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights."[234] Even though both the Aarhus Convention and the ECHR do not offer direct protection against environmental harm, the ECtHR has thus afforded indirect individual protection; for example through the application of the right to life (Article 2), the right to respect for private and family life (Article 8), the right to a fair trial and access to a court (Article 6), the right to receive and impart information and ideas (Article 10), the right to an effective remedy (Article 13) and the right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1).[235]

The right to respect for private and family life under Article 8 ECHR is the most commonly invoked right in environmental matters. Especially acts of physical pollution that have fulfilled the minimum severity threshold, may trigger this right "to the extent that there is an actual interference with the applicant's private sphere."[236] The right to life pursuant to Article 2 ECHR is furthermore considered to be quite commonly implicated in such instances. In fact, as described by Pedersen, "although the substantive scopes of these two provisions are materially different, the Court has held that "in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8."[237] As these rights are also central in the claims by applicants in domestic litigation, as will be discussed in chapter 4, it is worth to take a closer look at the standards set by the ECtHR pursuant to Articles 2 and 8 ECHR.

As briefly mentioned before, the most commonly invoked right in environmental contexts is Article 8 ECHR. This provision states as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

With regard to the first paragraph, the Court has concluded that Article 8 is applicable in cases of severe environmental pollution which "may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life, even where the pollution did not seriously affect their health."[238] The Court has however also stressed that situations of negligible detriment "in comparison to the environmental hazards inherent in life in every modern city" does not lead to a violation of Article 8 ECHR.[239] Thus, the *minimum level of severity* required by the Court for

[234] Committee of Ministers, 'Joint Reply to Recommendations 1883 (2009) and 1885 (2009), Adopted at the 1088th Meeting of the Ministers' Deputies (16 June 2010).' (Parliamentary Assembly of the Council of Europe (PACE) 2010) 12298 para 9 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24830&lang=en>; Lewis (n 170) 76.
[235] *Manual on Human Rights and the Environment* (n 232) 8.
[236] Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law', *The Human Right to a Healthy Environment (edited by John H. Knox and Ramin Pejan)* (Cambridge University Press 2018) 88.
[237] ibid; *Budayeva et al v Russia* [2008] ECtHR 15339/02,21166/02, 20058/02, 11673/02 and 15343/02 [133].
[238] *Lopez Ostra v Spain* [1994] ECtHR 16798/90 [54]; *Guerra and Others v Italy [GC]* [1998] ECtHR 116/1996/735/932 [60].
[239] *Dubetska and Others v Ukraine* [2011] ECtHR 30499/03 [105].

an applicant to have an arguable claim under Article 8 is that "the environmental hazard [results] in significant impairment of the applicant's ability to enjoy his [or her] home, private or family life, which is dependable on the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life.[240] In the case of *Grimkovskaya v. Ukraine* the Court furthermore concluded that the cumulative effect of environmental nuisance, for example due to the effects of noise, vibrations and pollution, might all add up to a violation of Article 8 ECHR.[241] In the case of *Fadeyeva v. Russia*, the Court furthermore concluded that a causal link needs to be established between the activity and the negative impact on the individual.[242]

Examples of cases in which a violation of Article 8 ECHR has been found in environmental matters caused directly by State activities are excessive noise levels generated by an airport,[243] fumes and noise from a waste treatment plant located close to the applicant's home,[244] toxic fumes from a steel plant,[245] and pollution from a gold ore extraction plant.[246] Besides that, the Court has also recognized an indirect obligation for States *to protect* the right enshrined in Article 8 ECHR.[247] This entails that a State can also have a positive obligation to protect individuals within its jurisdiction against environmental harm caused by private parties through, for example, properly regulating the private industry in order to prevent environmental nuisance,[248] prevention of toxic emissions from a factory by taking proper risk-assessments,[249] and the proper resettlement or compensation of individuals whose health and well-being may be affected due to the instalment of a steel plant.[250]

Article 8, paragraph 2, ECHR sets out requirements that need to be fulfilled for a justifiable interference with Article 8(1) ECHR. Required is that the interference is in accordance with the law and that the law is "accessible and its effects foreseeable".[251] Also required is that the interference serves a legitimate aim and that the measures leading to the interference are proportionate, which in its turn means that a fair balance has to have been struck.[252]

As already briefly mentioned before, the Court leaves a wide margin of appreciation to the State in such situations. The Court has set out two main aspects to take in consideration when assessing whether the State acted within its margin of appreciation: Firstly, the Court "may assess the substantive merits of the government's decision, to ensure that it is compatible with Article 8".[253] This process has to be "fair and show due regard for the interests of the individual protected by Article 8".[254] In such situations, unnecessary or disproportionate delays and inconsistent enforcement can be grounds for the interference

[240] ibid; *Fadeyeva v Russia* [2005] ECtHR 55723/00 [68–69].
[241] *Grimkovskaya v Ukraine* [2011] ECtHR 38182/03 [62].
[242] *Fadeyeva v. Russia* (n 240) para 69; *Manual on Human Rights and the Environment* (n 232) 45–46.
[243] *Hatton et al v the United Kingdom* [2003] ECtHR 36022/97.
[244] *Lopez Ostra v. Spain* (n 238).
[245] *Fadeyeva v. Russia* (n 240).
[246] *Tatar c. Roumanie* (n 131).
[247] *Manual on Human Rights and the Environment* (n 232) 51.
[248] *Hatton v. UK* (n 243) para 98; *Fadeyeva v. Russia* (n 240) para 89.
[249] *Guerra and Others v. Italy [GC]* (n 238) paras 58–60.
[250] *Ledyayeva et al v Russia* [2006] ECtHR 53157/99, 53247/99, 53695/00 and 56850/00 [98].
[251] *Manual on Human Rights and the Environment* (n 232) 55.
[252] ibid 56.
[253] *Giacomelli v Italy* [2008] ECtHR 59909/00 [79].
[254] ibid.

to become unjustified.[255] Secondly, the Court "may scrutinise the decision-making process to ensure that due weight has been accorded to the interests of the individual."[256]

The practice of the Court to uphold a wide margin of appreciation under Article 8, paragraph 2, ECHR, does, however, shelter the risk of overemphasising States' economic well-being. This results in the Court posing high severity thresholds as preconditions for violations of Article 8 ECHR. And in its turn, this results in the Court's acceptance of violations only in the "worst possible situations".[257] This issue is closely connected with the Court's awareness of possibly overstretching the meaning of the Convention; its having a predominantly civil-political nature. These issues will be discussed in more detail later.

The second substantive right to come into play in situations of environmental deterioration is the right to life which is laid down in Article 2 ECHR. This provision states as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    (a) in defence of any person from unlawful violence;
    (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Important to note is that, similarly to Article 8 ECHR, the Court has recognized this right not only to entail a State's obligation "to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction."[258] Article 2 ECHR therewith puts both negative and positive obligations upon States Parties. A determining factor then is "whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk."[259]

In order to conclude that a State has such positive obligations under Article 2, several factors need to be assessed. First and foremost, a causal link needs to exist between the interference with the right to life and the State's acts or omissions.[260] A second factor is the question whether the State "knew or ought to have known" that there was a real and immediate risk to the loss of life.[261] If those factors are present, the respective State has the positive obligation under Article 2 ECHR to take preventive operational measures as are necessary and sufficient to protect individuals against the realisation of this risk.[262]

Elements to take into account are the existence of "a legislative and administrative framework designed to provide effective deterrence against the threats to the right to life";[263] the authorities' fulfilment of the obligation to adequately inform the public about any life-threatening emergency;[264] and lastly, the State's obligation to ensure that any occasion of deaths will be followed by an independent and impartial

[255] *Dubetska and Others v. Ukraine* (n 239) paras 143–145, 150–152, 155; *Manual on Human Rights and the Environment* (n 232) 59.
[256] *Giacomelli v. Italy* (n 253) para 79.
[257] Lambert (n 142) 13.
[258] *LCB v the United Kingdom* [1998] ECtHR 14/1997/787/1001 [36].
[259] ibid.
[260] ibid 39.
[261] *Öneryildiz v Turkey [GC]* [2004] ECtHR 48949/99 [101].
[262] ibid.
[263] ibid 89.
[264] ibid 108.

official investigation procedure that satisfies certain minimum standards so that effectiveness is provided.[265] The latter element is the so-called "procedural aspect" of Article 2 ECHR, because it imposes investigative obligations on States after loss of life has occurred. [266]

Interestingly, such positive obligations may also apply in the event of a natural disaster, regardless of it being initially beyond human control.[267] In the case of *Budayeva and Others v. Russia*, numerous lives were lost because of a mudslide which happened as a result of heavy rain falls. The Court there concluded that Russia had violated Article 2 ECHR because it *knew* of the dangers in the given circumstances, *failed* to warn the population of such dangerous situation, *failed* to implement evacuation and emergency relief policies and *failed* to carry out a judicial enquiry afterwards.[268]

In that same case, the Court stressed that the State has, similarly to Article 8 ECHR, a wide margin of appreciation in its choice of measures and that no "impossible or disproportionate burden must be imposed on the authorities without consideration being given, in particular to the operational choices which they must take in terms of priorities and resources.[269] In the case of *Osman v. the United Kingdom*, the Court defined this disproportionate burden-principle as follows:

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to operational measures to prevent that risk from materialising.[270]

One the one hand, the case-law of the ECtHR shows an evolutionary process of adaptability to changing circumstances, which confirms the Court's attitude of interpreting the Convention as a "living instrument". As has become apparent throughout the discussion of some selected cases concerning Articles 2 and 8 ECHR above, the ECtHR has built an impressive, sophisticated body of jurisprudence in environment-related matters. However, the Court's case-law also remains to be filled with a lot of open ends, especially regarding future harm and the general risks of climate change. Current case-law is characterised either by reactive responses to human rights violations as a result of environmental harm that has already occurred or by preventive cases in which a real and immediate risk of materialisation of individual harm was present, but which concerned a situation within a clear delimited sector or region.

3.2.3. Extraterritorial State obligations and jurisdiction

An important matter to be discussed is the extent to which States can be held responsible for harm in- and outside the "jurisdictional parameters" of the human rights treaties.[271] The above-discussed substantive provisions provide good potential to be applied in climate change cases, even though this does require certain interpretation by analogy since precedents on climate change are lacking. An issue,

[265] ibid 94; *Budayeva et al. v. Russia* (n 237) para 131.
[266] *Manual on Human Rights and the Environment* (n 232) 40.
[267] *ibid 37.*
[268] ibid.
[269] *Budayeva et al. v. Russia* (n 237) paras 134–135; *Osman v the United Kingdom* [1998] ECtHR 23452/94 [116]; *Öneryildiz v. Turkey [GC]* (n 261) para 107.
[270] *Osman v UK* (n 269) para 116.
[271] Lewis (n 169) 180.

however, is that the character of climate change and its potential harms are different from the discussed environmental cases. In the cases discussed above, the Courts answer to environmental harm that has either already occurred or will very probably occur within a delimited area within a State's territorial jurisdiction. Anthropogenic climate change, on the other hand, is often both caused and effectuated on an international level, with its effects materialising very slowly. As described by Lewis, "it is […] difficult to demonstrate with respect to global greenhouse gas emissions where the consequences are the cumulative effect of the actions of many State and non-State actors across a multitude of jurisdictions."[272] Thus, in order to understand States jurisdictional obligations under the regional frameworks, it is important to set out the standards set in the jurisdictions. This will, again, be discussed in the following order: firstly, requirements in the Inter-American system will briefly be discussed, then the African system and lastly, the European system.

Article 1, paragraph 1, of the ACHR prescribes that States Parties are obliged to "undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without discrimination […]". The definition of 'jurisdiction' in environmental matters has been clarified in the recent, and above-discussed, Advisory Opinion of the IACtHR.[273]

In its Advisory Opinion, the Court made some ground-breaking statements concerning States' obligations in cases of extraterritorial harm.[274] Indeed, with regard to State *jurisdiction* under the ACHR, the Court concluded that this is in fact not limited to the concept of national territory, but, in line with the requirements of Article 31 of the Vienna Convention on the Law of Treaties (VCLT), "contemplates circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction."[275] Whether extraterritorial conduct falls within the State's jurisdiction under the ACHR is then dependent on the circumstances of each case.[276] Having considered that, the Court concluded that

> the obligation to prevent transboundary environmental damage or harm is an obligation recognized by international environmental law, under which States may be held responsible for any significant damage caused to persons outside their borders by activities originating in their territory or under their effective control or authority. […] That said, there must always be a causal link between the damage caused and the act or omission of the State of origin in relation to activities in its territory or under its jurisdiction or control.[277]

This statement is an important development, given that the Court explicitly recognizes cross-border human rights obligations, also in environmental matters, thus giving the "possibility for human rights claims to be brought by individuals not under the territorial jurisdiction of the state whose international responsibility for environmental harm is invoked."[278] With this development, the Court thus dared to step away from the classic territorial understanding of State responsibility where the harm occurs and instead recognizes a definition of responsibility for the State where environmental harm is conducted, embracing extraterritorial State responsibility.[279]

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[272] ibid.
[273] *A/O on the Environment and Human Rights* (n 180).
[274] *ibid 217.*
[275] ibid 76, 78.
[276] ibid 82.
[277] ibid 103.
[278] Mónica Feria-Tinta and Simon C. Milnes (n 135) 54.
[279] ibid.

The ACHPR appears to exercise an "open door approach" regarding jurisdictional matters, but its judiciary bodies have not answered to this matter in an environmental sphere. Article 1 of the ACHPR states that Member States "shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them." The Charter, however, fails to mention the territorial or jurisdictional reach of these obligations. Taking note of practice at the African Commission, the AComHPR has recognized extraterritorial State responsibility on a few occasions.[280] In the *Burundi Embargo case*, for example, the AComHPR found human rights violations for a number of Member States, to know Kenya, Tanzania, Rwanda, Uganda, Zaire and Zambia, for placing an embargo on imported goods and services in Burundi after a *coup d'état*.[281] According to the AComHPR, this embargo placed disproportionate and excessive restrictions on the rights to life and education of Burundi residents, which led to an extraterritorial application of human rights obligations.[282] The Commission furthermore found extraterritorial human rights violations in the *DRC Invasion case* as a result of forced military occupation of the Democratic Republic of the Congo.[283] However, in the small selection of environmental case-law, neither the AComHPR nor the Court have responded to the matter of extraterritorial human rights obligations. This thus remains to be open to interpretation by the respective (quasi-)judicial bodies.

The ECtHR has also not decided on cases involving transboundary or extraterritorial harm in environmental matters. Article 1 ECHR provides that Member States "shall secure to everyone within their *jurisdiction* the rights and freedoms defined in Section I of this Convention." Jurisdiction under Article 1 ECHR is understood to be primarily territorial.[284] In the case of *Banković and Others v. Belgium and Others* of 2001, the Court concluded that "[w]hile international law does not exclude a State's exercise of jurisdiction extraterritorially, the suggested bases of such jurisdiction are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States."[285]

The Court has accepted extraterritorial application in exceptional cases, for example where a State has effective control over an area or over persons who are in the territory of another state,[286] or in cases where "a State hosts the headquarters of an international organisation against which the applicant's complaints are directed".[287] Other grounds for extraterritorial exercise of jurisdiction that have been accepted by the Court include activities of diplomatic or consular staff abroad as well as activities in

[280] Takele Soboka Bulto, 'Patching the "Legal Black Hole": The Extraterritorial Reach of States' Human Rights Duties in the African Human Rights System' (2011) 27 South African Journal on Human Rights 259–261; 'Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda (DRC Invasion Case)' (African Commission on Human and Peoples' Rights 2006) Communication 227/1999; 'Association Pour La Sauvegarde de La Paix Au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia (Burundi Embargo Case)' (African Commission on Human and Peoples' Rights) Communication 157/96.
[281] Soboka Bulto (n 280) 261; 'Association Pour La Sauvegarde de La Paix Au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia (Burundi Embargo Case)' (n 280).
[282] Soboka Bulto (n 280) 262; 'Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda (DRC Invasion Case)' (n 280) para 71.
[283] 'Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda (DRC Invasion Case)' (n 280).
[284] *Banković and others v Belgium and others (dec) [GC]* [2001] ECtHR 52207/99 [59].
[285] ibid.
[286] *Al-Skeini and others v the United Kingdom [GC]* [2011] ECtHR 55721/07 [138–140].
[287] Directorate of the Jurisconsult of the Council of Europe, 'Practical Guide on Admissibility Criteria' para 201 <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> Important to note is that the mere fact that an international criminal tribunal has its seat and premises in the Netherlands is not a sufficient ground for attributing to that State any alleged acts or omissions on the part of the international tribunal in connection with the applicant's conviction.

aircrafts and ships registered in or flying the flag of, the State in question.[288] The Court has, however, not yet decided on cases relating to transboundary or extraterritorial environmental harm.[289]

Nonetheless, the Court has made reference to IEL standards in its jurisprudence, which by their very nature do have transboundary characteristics.[290] Core IEL principles the Court has referred to are mainly the precautionary principle,[291] the no-harm principle,[292] the polluter pays-principle, and (other) principles laid down in the above-mentioned Aarhus Convention. This may offer potential for environmental cases, but the exact standards remain to be unanswered.

3.2.4. Procedural provisions: Standing before the regional courts

A last, important matter to discuss is the procedural matter of standing. Standing refers to the competence of a court to hear and review a case, which generally concerns the presence of (potential) harm and the character of the petitioners. The three regional judicial bodies have different requirements regarding standing. An interesting issue to address in this regard is the issue of allowing an *actio popularis*. Why is this interesting?

As described by Aceves, an *actio popularis* can be considered the "class action in international law".[293] In Roman law, an *actio popularis* "was an action that could be brought by an individual on behalf of the public interest".[294] Lambert furthermore defines an *actio popularis* as "the capacity of an individual to act in the collective interest, which cannot be reduced to the sum of individual interests."[295] An *actio popularis* is furthermore characterised by its preventive nature, namely to prevent damage in order to protect the public interest.

As has already briefly been mentioned before and as will become even more apparent in the next chapter, the key players in international climate change mitigation are often groups standing up for the public interest. After all, anthropogenic climate change is not a targeted violation of human rights towards a specific (group of) individual(s) *per se*, but instead forms potential far-reaching dangers to humanity as a whole. Indeed, a healthy environment is a collective right belonging to us all. In strategic mitigation-related climate change litigation filing a class action, or *actio popularis,* furthermore has the advantage of making a stronger statement and to be more efficient whereas "individual plaintiffs are unlikely to bring their own claims".[296] Taking into consideration the people that are and will be most negatively affected by the dangers of climate change, for example indigenous peoples, these are also the most vulnerable, impoverished groups of individuals that often lack the necessary means to start an individual procedure.[297]

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[288] ibid 204.
[289] *Manual on Human Rights and the Environment* (n 232) para 114.
[290] ibid 115.
[291] *Taşkın and Others v Turkey* [2004] ECtHR 46117/99 [99, 119]; *Demir and Baykara v Turkey [GC]* [2008] ECtHR 34503/97.
[292] *Manual on Human Rights and the Environment* (n 232) 149 Appendix III: Reference to other instruments relevant to the environment in ECHR case-law.
[293] William J Aceves, 'Actio Popularis - The Class Action in International Law' (2003) 2003 University of Chicago Legal Forum 353, 353.
[294] ibid 356.
[295] Lambert (n 142) 21.
[296] Aceves (n 293) 354.
[297] ibid.

This paragraph will thus create an overview of standing requirements of the regional human rights systems. In line with the previous order of discussion, first the Inter-American system will be discussed, then the African system and lastly the European system. As will become apparent, the African system has the most lenient standing requirements and the European system is found on the other side of the spectrum with the strictest ones.

Article 44 of the ACHR allows for any individual or group of persons or NGOs to lodge a petition before the IAComHR in which a violation of a *human* right is addressed. There thus needs to be a human victim, even though the petitioners do not have to be a direct or indirect victim themselves.[298] The victim requirement has four elements, namely "(1) a human person suffers an injury in fact to a protected right; (2) the injury is proximately caused by an illegal act; (3) the act is imputable to the State; and (4) the act breaches an international obligation."[299] Thus, a class action, an *actio popularis* is generally not permitted.[300] The Commission clarified this in the case of *Metropolitan Nature Reserve v. Panama*,[301] where it concluded Article 44 ACHR to have the following meaning:

> It is worth recalling that, unlike other systems designed to protect human rights, the Inter-American System allows various categories of petitioners to submit petitions on behalf of victims […] There is no requirement that petitioners themselves have a direct or indirect personal interest in the adjudication of a petition.[302] [But] for a petition to be considered admissible, interpretation of Article 44 of the Convention must be construed to mean that there do exist specific, individual and identifiable victims. Petitions filed in the abstract and divorced from the human rights of specific human beings shall not be admissible.[303]

The Commission therewith concluded that petitioners can be others than victims, but that they only have standing if they succeed in identifying "specific, individual and identifiable victims." The victim requirement is thus upheld in a rather strict manner in this case.

However, the IAComHR has proven to be more lenient in cases regarding indigenous peoples.[304] In the case of *Yanomami Indians of Brazil* from 1985, for example, petitioners filed a petition against Brazil in which the petitioners claimed that the Brazilian government, by permitting "the exploitation of the natural resources of the Amazon and the development of territories occupied by the Yanomami", violated the indigenous group's rights to life, equality before the law, preservation of health and well-being and the right to property.[305] Even though the petitioners filed complaints representing NGOs and not "human victims", the Commission did declare the case admissible and found that Brazil had violated the group's human rights.[306]

This flexibility in the victim-requirements for standing offers potential for climate change matters. As argued by Pavoni:

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[298] ibid 387.
[299] ibid 384–385.
[300] Pavoni (n 179) 94.
[301] 'Metropolitan Nature Reserve v. Panama (Petition 11.533)' (Inter-American Commission of Human Rights 2003) Decision 88/03.
[302] ibid 27.
[303] ibid 28.
[304] Pavoni (n 179) 96–97.
[305] *Yanomami Indians of Brazil v Government of Brazil* [1985] Inter-American Commission on Human Rights 7615.
[306] ibid; Aceves (n 293) 389.

> Crucially, the Inter-American practice on group and collective rights is replete with egregious examples of environmental destruction or mismanagement occurring in the territories inhabited by entire communities of people. The environmentally related findings of the Inter-American indigenous peoples' jurisprudence cannot be regarded as a merely incidental aspect thereof. Most importantly, the collective perspective firmly embraced by the Inter-American organs in this context indirectly benefits environmentally related claims. The upshot of this is that, to a considerable extent, the adjudication of such claims may be viewed as a matter of general interest."[307]

Besides this potential of less strict *actio popularis* requirements, the recognition of the precautionary principle and the obligation to take *preventive* measures to respect, protect and fulfil human rights under the Convention by the IACtHR in the above-discussed Advisory Opinion also shelter potential of a shift towards looser standing requirements in climate change matters. On the other hand, if petitioners are able to present the presence of a victim of alleged violations, the Inter-American regime allows petitions, so in that sense the standing requirements are rather flexible in comparison to other regimes, for example the European human rights regime, but it is significantly less flexible compared to the African regime.

Interestingly, the African human rights regime also takes an "open-door approach" to standing. Article 56 of the ACHPR allows standing if petitions are, for example, not based exclusively on news disseminated through the mass media, as laid down in Article 56, paragraph 4, but it does not set specific requirements with regard to the character of the petitioners. In fact, the African Commission explicitly embraces an *actio popularis*. In the case of *Law Society of Zimbabwe et al v. Zimbabwe*, the Commission underlined that:

> Although the provisions of Article 55 of the African Charter do not explicitly state those who are eligible to file complaints under this Article, the Commission has adopted the *actio popularis* approach, a flexible approach, that allows everyone including non-victim individuals, NGOs and pressure groups with interest to file a Communication, for its consideration. All that is required is for the Complainants to allege the violation of a recognized Charter right. They need not show that they personally have any specific rights that have been violated.[308]

The last, and strictest, regime regarding standing is the European human rights regime. In order to have standing before the European Court, the requirements set in Article 34 ECHR need to be fulfilled. This provision requires that "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." This means that in order to have standing, petitioners needs to fulfil two conditions: Firstly, the petitioner needs to fall within one of the categories of Article 34 ECHR and secondly, the petitioner needs to allege to be a victim.[309] This victim-requirement entails that a petitioner needs "to be able to show that he or she was 'directly affected' by the measure complained of."[310]

The Court has furthermore accepted standing for "potential victims", but merely when the applicant managed to present "reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur".[311] A complaint about a violation of Convention rights without being able

[307] Pavoni (n 179) 97.
[308] 'Law Society of Zimbabwe et al. v. Zimbabwe' (African Commission on Human and Peoples' Rights 2013) Communication 321/2006 paras 58–59.
[309] Directorate of the Jurisconsult of the Council of Europe (n 287) 9.
[310] ibid 11.
[311] ibid 31.

to demonstrate to have been directly affected by it–a complaint *in abstracto*–is not allowed.[312] Thus, an *actio popularis* is inadmissible.[313]

Compared to its African and Inter-American sister frameworks, the European human rights regime therefore has the strictest standing requirements. In particular the non-acceptance of *actio popularis* is a large barrier to environmental protection and the possible negative effects on human rights as a result of climate change.[314] As described by Lambert, "since ecological damage is not the sum of injury to individual interests but the injury to a common interest consisting of various human and non-human interests considered collectively […] the connection between the interests injured and the representative of this interest is specific."[315] With this, Lambert refers to the distinct character of climate change, namely that it negatively affects us all, thus making it a highly broad, yet specific issue.

In that sense, it can either be said that the *actio popularis* rules should not apply for climate change litigation before the human rights courts, or that there would not be an *actio popularis*, given that we are all victims of the negative impacts of climate change.

These strict standing requirements under Article 34 ECHR thus form an important barrier to access to the justice for public interest litigation. However, this does not leave future admissibility for public interest litigation without potential. This potential can be referred back to in the case of *Louizidou v. Turkey,* in which the Court underlined that the Convention should be interpreted in light of present-day conditions, and that this way of interpretation does not only apply to substantive provisions, but also to procedural ones.[316] The Court stated that

> the Convention is a living instrument [which] is not confined to the substantive provisions of the Convention, but also applies to those provisions […] which govern the operation of the Convention's enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.[317]

Thus, the fact that the Court interpretation of the Convention, this recognition of a possibly new interpretation of procedural provisions considering changing circumstances, does offer potential for Article 34 ECHR to be loosened up or adapted in climate change matters. However, given that no cases have been heard regarding climate change litigation, there is no definite answer to this potential yet.

3.3. The road ahead

Looking at recent developments in international law and governance, it is apparent that there is a growing acceptance of the interconnectivity and indivisibility of human rights on the one hand and a healthy environment on the other. Indeed, without a healthy environment, our livelihoods as we know it will be at stake, meaning that our human rights may and will be negatively affected by environmental deterioration if States don't take measures to stay on track with the recommendations of the IPCC's ARs, to know the 450 ppm-scenario, which, according to AR4, entails the target to stay below 1.5 – 2.0°C global warming by 2100 compared to pre-industrial levels, and in its turn requiring at least 25%

[312] *Aksu v Turkey* [2012] ECtHR 4149/04; 41029/04 [50].
[313] Directorate of the Jurisconsult of the Council of Europe (n 287) paras 33–34.
[314] Lambert (n 142) 21.
[315] ibid 22.
[316] *Louizidou v Turkey (Preliminary Objections) [GC]* [1995] ECtHR 15318/89 [71].
[317] ibid.

reduction by 2020, or alternative pathways that include negative emissions. The adoption of the Paris Agreement is an important step towards creating an international legal framework around this and providing a target in support of this. The Paris Agreement is furthermore the first environmental, universally accepted, document of international law to explicitly recognise the connection between climate change and the enjoyment of human rights.

The main guiding bodies regarding the application of human rights obligations are the regional human rights courts. These court have, however, not yet explicitly recognised anthropogenic climate change to interfere with human rights obligations and to invoke State responsibility. Nonetheless, the regional courts have to a certain extent recognized a right to a healthy environment either directly through a substantive codification of this right, or indirectly as a result of, for example, a violation of the right to life, the right to dignity, and the right to private and family life. John Knox, during his mandate as Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, described this development as indirect "greening" of existing human rights and concluded it to be successful.[318] In his independent report to the Human Rights Council in 2018, Knox furthermore concluded that "[e]nvironmental harm interferes with the full enjoyment of a wide spectrum of human rights, and the obligations of States to respect human rights, to protect human rights from interference and to fulfil human rights apply in the environmental context no less than in any other."[319] Thus, a substantive assessment of these rights will be discussed hereafter.

3.3.1. The substantive assessment of rights offers potential for climate change litigation

As has been presented in this chapter, States can be held responsible for human rights violations on the basis of three levels of obligations. These obligations concern the duty to respect, to protect and to fulfil. These obligations can be translated into obligations to take mitigation efforts to reduce GHG emissions. The obligation to *respect* entails the obligation to refrain from polluting activities, which includes an obligation to mitigate emissions levels. The obligation to *protect* entails an obligation to take positive steps to protect against the dangers of GHG emissions. The obligation to *fulfil* in its turn requires States to promote, support and facilitate mitigation efforts. The latter obligation has a political dimension, rather than a legally enforceable one and can be put in line with efforts within the objectives of the UNFCCC scheme for example.

Then, in order to find State responsibility for a failure to comply with these obligations, two requirements need to be fulfilled: (1) a breach of (international) law needs to be constituted and (2) this breach has to be attributable to a respective State, meaning that a causal link between State conduct and harm needs to be effectuated.

With regard to the first requirement, this chapter has set out to which substantive human rights standards States are bound in environmental matters. Even though the regional human rights bodies have not yet answered to these issues, current environmental human rights standards have the potential to apply, by analogy, to climate change litigation too.

The Inter-American human rights regime recognizes an explicit right to a healthy environment under Article 11 of the San Salvador Protocol. Contrary to the Convention rights, this right cannot directly be

[318] John H Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2018) HRC Report A/HRC/37/59 para 12.
[319] ibid.

invoked. However, the IACtHR has concluded in a recent Advisory Opinion that this right is undeniably related to the enjoyment of the rights laid down in the ACHR. The Court held that the rights to life and personal integrity under Articles 4 and 5 of the ACHR can be interfered with as a result of environmental degradation and that these rights are closely interconnected as they both require a dignified, healthy life.

With that conclusion, the Court set out a number of specific State obligations. First and foremost, States have an obligation to *respect*, States shall refrain from "(i) any practice or activity that denies or restricts access, in equal conditions, to the requisites of a dignified life, such as adequate food and water, and (ii) unlawfully polluting the environment in a way that has negative impact on the conditions that permit a dignified life for the individual; for example by dumping waste from State-owned facilities in ways that affect access to or the quality of potable water and/or sources of food."[320] Under the obligation to *protect*, the Court furthermore underlined that States must take "all appropriate steps to protect to protect and preserve the rights to life and to integrity", for example by adopting proper legal, political, administrative and cultural measures. The Court furthermore stressed that States are required to act in accordance with the precautionary principle and referred to the Rio and Stockholm Declarations.

The African human rights regime is the least outspoken on matters of human rights and the environment. This has to do in part with limited access to the African Commission, States' non-compliance with decisions of the African Commission and the limited use of the Commission's standing to refer cases to the African Court. Regardless of that, the ACHPR has recognized the right to a healthy environment in Article 24 of this Charter, which is unique in the sense that it provides petitioners with the possibility to directly invoke this right. Neither the Inter-American nor the European Conventions explicitly embrace such possibility.

The specific human rights obligations to come with this right have been clarified by the Commission in the *Ogoniland* case. The Commission there underlined a duty to *prevent* pollution and ecological degradation; the obligation to *protect* ecologically sustainable development of natural resources and lastly, an obligation to *fulfil*, which entails that States are obliged to promote conservation. In order to achieve that, States have (1) to undertake to order or permit independent scientific monitoring of threatened environments; (2) to prepare and publicise environmental and social impact studies prior to major industrial developments; (3) to monitor and provide information to communities that are exposed to hazardous materials and to participate in decision-making affecting their communities.[321]

The last framework is that of the ECtHR, which has without a doubt created the largest and most sophisticated body of case-law in the field of human rights and environmental deterioration. This is ironic, given that the ECHR is the only regional human rights convention not to have recognised a human right to a healthy environment. Neither in its main Convention, nor in additional Protocols. Rather, the Court has recognised an anthropocentric approach in which the environment is merely a means to ensure the enjoyment of human rights. Thus, the Court has recognised many of the Convention rights to be possibly violated by State acts or, more often, omissions to protect individuals from being harmed by environmental deterioration.

Having taken note of the rights enshrined in the Convention, the most commonly invoked rights in environmental matters are the right to life and the right to respect for private and family life, pursuant

[320] *A/O on the Environment and Human Rights* (n 180) para 117.
[321] 'Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (Ogoniland Case)' (n 212) para 53.

to Articles 2 and 8 ECHR. The standards set by the Court within the meaning of these Articles will be discussed below.

Article 8 ECHR may be applicable in cases of severe environmental pollution which, as described in the case of *Lopez Ostra v Spain*, "may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life, even where the pollution did not seriously affect their health." Thus, a minimum severity threshold needs to be met in order to find a violation of Article 8 ECHR in environmental matters. The Court has underlined that the cumulative effects of environmental hazards or degradation may also meet this threshold.

Article 8 ECHR requires firstly the negative obligation to *respect* the right to respect for private and family life, meaning that the State needs to refrain from excessive environmental pollution. Besides that, the Court has recognized positive obligations to *protect* the right enshrined in Article 8 ECHR. This can for example entail an obligation to protect individuals within the State's jurisdiction from environmentally harmful activities by private actors and by properly regulating environmental nuisance.

Article 2 ECHR includes, firstly, a negative obligation to *respect* the right to life, which entails a State obligation to refrain from the intentional and unlawful taking of life. It furthermore includes a positive obligation to *protect* the right to life, which means that States must take appropriate steps to safeguard the lives of those within its jurisdiction. In practice, this entails that States have a positive obligation to provide a proper legislative and administrative framework, as well as to take preventive operational measures, for example in industrial activities.[322] Furthermore important to note is that the Court upholds a wide margin of appreciation, meaning that States may not be imposed to an impossible or disproportionate burden in their efforts towards the protection of the right to life. Important thresholds to find State responsibility under Article 2 ECHR are thus (1) a (real and imminent risk of) loss of life, (2) a causal link between the interference and (3) the State knew or ought to have known that there was a real and immediate risk to the loss of life and that this provision does not place a disproportionate burden on States.

The ECtHR affords a wide margin of appreciation to State authorities in the fulfilment of their human rights obligations. States are generally free to find a fair balance between competing interests. As described by Lewis, "international courts and tribunals will generally not want to micromanage domestic environmental law."[323] The above-discussed positive obligations generally have a procedural nature, which has led the Court to consistently conclude a wide margin of appreciation on States. The Court underlined this in the case of *Budayeva v. Russia,* where it concluded that "where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its duty by other means."[324] The Court furthermore stressed this margin of appreciation to be particularly wide in difficult social and technical spheres.[325] With regard to the matter of climate change, it being inherently complicated, the actions required preventive, and consisting of scientific complexities and uncertainties, this wide margin of appreciation may stand in the way of effective enforcement of human rights obligations pursuant to the ECtHR.

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[322] *Öneryildiz v. Turkey [GC]* (n 261) para 90; *Budayeva et al. v. Russia* (n 237) para 132.
[323] Lewis (n 169) 185.
[324] *Budayeva et al. v. Russia* (n 237) paras 134–135.
[325] *Hatton v. UK* (n 243) paras 100–101; *Öneryildiz v. Turkey [GC]* (n 261) para 107; *Budayeva et al. v. Russia* (n 237) para 135.

Regardless of that, all three regional human rights frameworks recognize, to some extent, substantive standards that oblige States, by means of negative obligations, to refrain from excessive pollution that endangers the enjoyment of people's health, lives, or livelihoods, and, by means of positive obligations, to take proper efforts to protect human rights against the dangers of climate change, for example through procedural measures such as the implementation of proper policy and regulations that minimize the risks of environmental harm and thus of interferences with human rights and by taking preventive measures.

To interpret these rights by analogy, this thus offers strong grounds to conclude that, on a substantive level, States' lack of proper mitigation efforts in order to prevent high levels of GHG emissions and consequently to prevent dangerous and irreversible global warming may too lead to violations of human rights obligations. After all, the concluded human rights obligations under the regional human rights frameworks are consistent with the, in the previous chapter discussed, objectives of the UNFCCC. The question is whether the Courts have the competence to limit States discretion or margin of appreciation in their choice of means. Other practical issues to be identified, which may form a barrier to successful human rights-based climate change litigation, are firstly the extraterritorial nature of climate change and jurisdictional limitations in human rights documents; secondly the issue of proving that a causal link exists between (potential) harm and State conduct; and thirdly, the procedural issue of standing.

3.3.2. Barriers to justiciability: extraterritoriality, causation and standing

As already discussed above, anthropogenic climate change is generally caused by pollution, the emissions of GHGs, which is transmitted through air. Given that 'air' cannot be confined within State-borders, it is thus effectuated on an international level, created by virtually every State, and it is hard to trace back which State can then be held responsible for subsequent harm. To put it simply, harm and conduct are caused by us all and we are all victims thereof. Thus, regarding the practical enforcement of human rights obligations, jurisdictional limitations may be a barrier, especially the practice of strict territorial jurisdiction, as is the case under the European human rights framework, as well as finding a causal link.

The IACtHR has made a highly progressive conclusion on its definition of jurisdiction in matters of environmental harm. It concluded a conduct-based State responsibility, rather than focusing on the territoriality of where the harm takes place. This thus offers potential to find State responsibility for cross-border harm too, provided that a causal link can be established.

The African regime lacks a jurisdictional or territorial clause in the ACHPR, but taking note of the attitude of the Commission, extra-territorial State responsibility has been accepted on several occasions. This provides potential to conclude State responsibility in matters of harm as a result of a lack of climate change mitigation efforts.

The European human rights regime is the most restrictive regarding jurisdiction and State responsibility. The Court generally upholds a strict territorial definition of jurisdiction and has only accepted extraterritorial jurisdiction in exceptional matters of diplomatic relations or in cases where a State has effective control over an area or over persons. The Court has not yet decided on cases relating to transboundary harm or extraterritorial environmental harm. A problematic aspect of this territorial definition to jurisdiction is that, as described by Lewis, "countries causing most of the damage are not the worst affected by those actions, and restricting human rights duties to States' own people would leave many who suffer serious consequences unable to enforce their rights against the chief perpetrators

of that harm."[326] To leave the most vulnerable without redress thus enlarges inequality and leaves violating States uncorrected.

This issue is closely linked to the challenge of proving a causal link between violations of human rights and the conduct of States. After all, the effects of climate change are inherently international and are multi-dimensional, meaning that multiple actors can be held responsible. In fact, virtually every State can be held responsible. Another issue is the fact that climate change is a slow process and that GHG emissions have a cumulative effect, which makes it complicated to trace back which State can be held responsible for the harm caused. An alternative to finding causation has been proposed by John Knox in 2009 in which he stated that:

> It is not necessary to link the emissions of a particular state to a particular harm in order to assign responsibility for the harm; since all greenhouse gases contribute to climate change, wherever they are released, responsibility could be allocated according to States' shares of global emissions of greenhouse gases. While precise allocations of responsibility would be controversial, it is clear that most States contribute well under one percent of total emissions, and that relatively few are responsible for the lion's share. […] On this basis, it would be possible, at least in principle, to conclude that even if all States contribute to climate change and are therefore joint violators of the human rights affected by it, some States are far more culpable than others, and to allocate responsibility accordingly.[327]

Knox thus claims that joint causation leads to joint responsibility. However, Lewis makes a fair point to counterargue this claim, concluding that if virtually every State can be held responsible, there is firstly the above-discussed issue of jurisdictional or territorial barriers; secondly the issue that the share of responsibility of the majority of States is very small compared to the highest emitting countries–this will be discussed in more detail in the next chapter–which thus leads to no practically benefits; and lastly, if allocation of the cause of harm is no longer the biggest barrier, the slow materialisation of the harmful effects of climate change mitigation may form an additional barrier to find shared causation.[328]

The Dutch Supreme Court in the *Urgenda* climate case has found another alternative. Instead of finding causation in the narrow sense, or finding responsibility as a result for the by Knox proposed shared responsibility, the Court concluded that, based on IPCC predictions and UNFCCC obligations, the Dutch State has to reduce its GHG emissions with at least 25% by 2020 in order to remain within the 1.5 to 2.0°C target. Thus, instead of concluding for which part the Dutch State is responsible for harm, the court concluded that in order to prevent harm–in the given matter an interference with the rights to life and respect for private and family life–the State has to increase its efforts to mitigate and 'do its part' in that way. This approach will be discussed in more detail in the chapters to follow.

A last matter to be discussed is the matter of standing, which is a strictly procedural requirement that is merely applicable before the regional human rights courts themselves. Interesting about mitigation-related climate change litigation is the phenomenon of an *actio popularis*. An *actio popularis* can be considered a class action in international law and concerns a case that is brought by a party that acts on behalf of the public interest. Climate change clearly falls within this definition of 'public interest', for it has a preventive nature, it affects us all and is better suited to be dealt with in a collective manner.

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[326] Lewis (n 169) 180.
[327] John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477, 489.
[328] Lewis (n 169) 187–188.

The Inter-American regime has a mixed attitude towards an *actio popularis*. On the one hand the IAComHR has stated that a 'specific, individual and identifiable victim' needs to be exist. However, on the other hand, in cases regarding indigenous peoples, the IAComHR has proven to be more lenient and has not spent attention on the victim-requirement, thus allowing an *actio popularis*. The African regime is unique, firstly in that the Charter lacks information on standing and secondly that the African Commission explicitly allows for an *actio popularis* if a violation of Charter rights can be identified. The European regime, it being characterized as the regime with the most sophisticated, but also strictest requirements for applicability of the Convention and Court access, unsurprisingly does not allow for *actio popularis*. However, given that the Convention needs to be interpreted as a 'living instrument', both its substantive and procedural provisions, there may be room for an alternative interpretation in climate change matters.

3.3.3. Concluding remarks

All in all, substantive human rights standards seem to offer potential to be consistently applied with the UNFCCC objectives in climate change matters and therewith in mitigation-related climate change litigation. However, a few issues remain to exist, namely that of jurisdiction and territoriality, causation and standing. The latter issue is unique to the regional courts, but, as will become clear in the next chapter, this is also an issue in domestic litigation and can be traced back to the unique nature of the climate change problem. The Dutch Court of Appeal and Supreme Court have, however, found solutions to these issues in the *Urgenda* case. This case, together with high-profile mitigation-related climate change cases from different jurisdictions in- and outside of Europe, will be discussed in the next chapter. The objective of the following chapter is to identify which strategies are successful and which strategies are not. It will be concluded that the now identified barriers of jurisdiction, territoriality and causation are not the main issue. Instead, rather procedural standing requirements and the principle of separation of powers stand in the way of justiciability. The next chapter will furthermore present that separation of powers issues may in fact be overcome with a 'smart' HRBA.

4. Current State of Affairs of Domestic Climate Change Litigation

The previous chapters have presented current climate change governance, the close cooperation of global governance with climate science, and the mitigation targets set as a result thereof in authoritative climate change agreements. It has furthermore become apparent that there is a growing acceptance of the interdependence and indivisibility of climate change and the enjoyment of human rights in the international community. The conclusion to be drawn from that, is that there is an urgent need to mitigate the emissions of GHGs as soon as possible in order to prevent humankind from being harmed as a result thereof and to prevent people's human rights to be infringed.

Regardless of the fact that the regional human rights frameworks have not yet explicitly answered to the matter, the frameworks do appear to have set standards that are in coherence with the UNFCCC regime targets and, thus, have the potential to be invoked in climate change-related matters. Several issues remain to be answered, however, namely procedural standing-issues and issues of jurisdiction.

What has furthermore become clear, is that, regardless of the good intentions of global governance to combat dangerous climate change, the practical outcomes currently do not comply with the set targets. This has resulted in a growing degree of distrust of concerned citizens globally, often the groups that are underrepresented in the majoritarian elective branches of government, which in its turn has led to a significant increase of public interest court-cases against governments for failing to take the necessary mitigation action. And as international and regional courts either do not provide a suitable platform for such complaints, or have not answered to these issues, domestic courts are the main players. Indeed, as described by Peel and Osofsky, a 'climate change explosion' has occurred in the past few years,[329] in which, as described by Burgers, "an established movement which is unlikely to stop in the near future" has been established.[330]

In order to create a better understanding of the current state of affairs of litigation, this chapter will attempt to create a digest of current mitigation-related climate litigation against governments, using the legal-dogmatic research method, in which current trends will be discussed as well as the way in which these cases have been argued. Taking note of different types of approaches taken by litigants in different places and periods of time, and their respective responses by different courts, this discussion will lead up to developments today and conclude that, besides a shift to a more collective and proactive turn to courts, a shift towards a HRBA is also starting to make a grand entrance in the matter. Considering the successful *Urgenda* climate case, this approach shelters much potential for future litigation.

However, as will also become apparent throughout this research, a few consistent and reoccurring issues will be identified. These are justiciability issues, concerning standing and the principle of separation of powers. The *Urgenda* case answers positively to that with its HRBA, but considering other European cases, some issues remain to be disputed. In its turn, in the chapter to come, these grounds for failure will be subjected to a theoretical assessment of the possible value of a human rights approach to combat that.

First, a brief overall introduction will be given on climate change litigation. Second, several high-profile cases will be discussed in highly litigated jurisdictions outside of Europe. Then, taking note of current

[329] Peel and Osofsky (n 2) xi.
[330] Burgers (n 18) 2.

European trends, European domestic case-law will be discussed as well as a strategic transnational case before the Court of Justice of the European Union; its predominant strategic litigation being based on the HRBA. And lastly, a conclusion of common reoccurring issues will be given with reference to the current legal dogma in the discussed jurisdictions.

4.1. What is "mitigation-related climate change litigation" and where does it occur?

As already briefly mentioned in the introduction of this thesis, climate change touches upon virtually every field of law. We are all contributors to climate change, and we feel the consequences of climate change in every corner of our society. Broadly speaking, as Peel and Osofsky argue, "virtually all litigation could [therefore] be conceived of as climate litigation […]."[331] However, this chapter, and this thesis in general, discusses climate change litigation in the narrow sense, in line with the definition given by the UN Environment Programme: "It counts as "climate change litigation" [if it concerns] cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts."[332] It thus excludes cases where mention of "climate change is incidental to holding and immaterial to the future of climate change law."[333] Furthermore, focus will be put on public interest lawsuits against governmental bodies, thus generally excluding private tort claims.

The battle against climate change is, besides being dealt with in the political sphere in international climate governance, currently being fought by litigants against their governments on a domestic level. As discussed in the former chapter, international courts have generally not yet dealt with this issue. Thus, domestic courts play an important role in climate change litigation, both in the enforcement of law but more interestingly in law-making and international legal development.[334] Saiger explains this cleverly by stating that "[w]hile the role of domestic courts in international law has been characterized by the ability to 'bring international law home', the current climate change regime illustrates how complex this role may be."[335] These difficulties lie largely with the fact that international law does not yet provide a well-established answer to dealing with climate change disputes yet. Therefore, taking an example of how domestic courts approach the matter, an oversight can be created of how the issue is conceived, what is living in the international society and what justiciability barriers remain to exist.

Climate change litigation has without a doubt 'exploded' in the past few years. To give an example; whereas the UNEP in May 2017 reported a total count of climate cases since the 1990s to be 654 in the US and 230 in all other countries combined,[336] this count has almost doubled in early 2020 with a total of 1,486 cases in 33 different countries. Most of those cases are or have been litigated in the US, covering 78% of the total number of cases,[337] and the other 22% of cases cover litigation outside the US. Besides the US, Australia is the second most litigated jurisdiction with 96 cases, followed by the United

[331] Peel and Osofsky (n 2) 4.
[332] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 10.
[333] ibid.
[334] Anna-Julia Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach (Symposium Article)' (2020) 9 Transnational Environmental Law 38.
[335] ibid.
[336] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 10–11.
[337] 'Climate Change Litigation Databases - Sabin Center for Climate Change Law' <http://climatecasechart.com/> accessed 23 February 2020.

Kingdom (U.K.) with 57 cases and in the fourth place are cases regarding EU-law and policy brought before the Court of Justice of the European Union (CJEU) with 48 cases.[338]

The large majority of all those cases, covering 80% of all litigation, are brought against governments by citizens, corporations and/or NGOs.[339] And in turn, most of those cases involve mitigation-related climate change cases.[340] In their report "Global Trends in Climate Change Litigation: A Snapshot" of May 2019, Setzer and Byrnes distinguish two main categories of climate change litigation. On the one hand, they identify "strategic cases" and on the other they identify "routine cases". The latter category concerns cases "dealing with, for example, planning applications or allocation of emissions allowances under schemes like the EU Emissions Trading System" and generally do not receive as much publicity as the former category.[341] Strategic litigation, on the other hand, is very interesting, for they aim to use legal strategies in order to coerce public (and private) liability for climate change-related matters. These cases are characteristic for public interest litigation, are often high-profile and evoke public and policy debates as well as "revolutionary" legal reform.[342] The main aim of this type of cases is to *prevent* the materialisation of harm as a result of a lack of mitigation efforts by States.

A number of high-publicity cases to fall within this litigation niche and which will be discussed in the following paragraphs, originate from the United States with the 2007 case of *Massachusetts v. the Environmental Protection Agency*[343] and the in 2020 concluded *Juliana v. the US* [344] case; less-strategic–yet high-profile–cases from Australia with the cases of *Hodgson v. Macquarie Generation*[345] which was concluded in 2011 and *Gray v. Minister for Planning and Others*[346] of 2006; from New Zealand with its recent case of *Thomson v. Minister for Climate Change issues*[347] of 2017; from Canada with the cases of *Friends of the Earth v. Canada*[348] of 2008 and other, currently pending strategic human rights-based climate cases;[349] from the Global South with the globally ground-breaking *Leghari v. the Federation of Pakistan*[350] case of 2015, which was the first court to embrace the HRBA in the climate change debate; from the European continent, to know the case of *Urgenda Foundation v. the State of the Netherlands*[351] which was favourably concluded by the Supreme Court in December 2019, as well

[338] 'Search Non-US Cases - Climate Change Litigation' (n 18).
[339] Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot' (CCCEP, Grantham Research Institute on Climate Chnage and the Environment, The Sabin Center for Climate Change Law at Columbia Law School 2019) 4 <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf> accessed 27 February 2020.
[340] ibid 5.
[341] ibid 2.
[342] ibid.
[343] *Massachusetts v Environmental Protection Agency et al* [2007] United States Supreme Court 05–1120.
[344] *Juliana v the United States (opinion and order)* [2016] US District Court of Oregon 6:15-cv-01517-TC; *Juliana v the United States* [2020] US Court of Appeal for the Ninth Circuit 18-36082 6:15-cv-01517-AA.
[345] *Macquarie Generation v Hodgson* [2011] New South Wales Court of Appeal [2011] NSWCA 424.
[346] *Gray v Minister for Planning and Others* [2006] NSW Land and Environment Court [2006] NSWLEC 720.
[347] *Thomson v the Minister for Climate Change* [2017] High Court of New Zealand CIV 2015-485-919 [2017] NZHC 733.
[348] *Friends of the Earth v Canada (Governor in Council) (FC)* [2008] Federal Court 2008 FC 1183, [2009] 3 F.C.R. 201.
[349] *Saskatchewan v Canada re Greenhouse Pollution Pricing Act; Bill C-74, Part 5* [2019] Court of Appeal for Saskatchewan CACV3239, 2019 SKCA 40; *ENvironnement JEUnesse v Canada* [2019] Superior Court (class action) Quebec, Canada 500-06-000955–183; *Alberta v Canada re Greenhouse Gas Pollution Pricing Act* [2020] Court of Appeal of Alberta 1903-0157-AC, 2020 ABCA 74.
[350] *Ashgar Leghari v Federation of Pakistan* [2015] Lahore High Court 25501/2015.
[351] *State of the Netherlands v. Urgenda Foundation* (n 55); *State of the Netherlands v. Urgenda Foundation* (n 103).

as *Urgenda*-inspired cases from Norway, Switzerland, Belgium, Ireland and Sweden;[352] and lastly a transnational case before the EU Court of Justice (CJEU), which is currently pending in appeal, the *People's Climate Case.*[353]

There are a few noteworthy points that need to be considered regarding strategic litigation. First, strategic mitigation-related climate change litigation is a novel trend, meaning that many cases are currently pending before their respective courts. This, in its turn, entails that the mapping and assessment of current arguments and outcomes for many cases is subject to large change in the upcoming years. Furthermore, the cases discussed, besides a transnational case, are litigated on a domestic level and originate from highly diverse domestic legal systems. States may have bound themselves to different sources of international or regional law. Differences in the role of judges in common law- and civil law-systems and the fact that some States have monist and others dualist or mixed frameworks, also result in different domestic interpretations. Besides that, it needs to be stressed that States' divided political views regarding the necessity of mitigation action do influence domestic courts' stances on the matter.[354]

That said, to counter-argue these points, it is important to note that petitioners or claimants in strategic litigation cases often follow preceding examples of (potentially) successful litigation, thus to a certain extent copying each other's strategies. For example, plaintiffs in the cases of *Klimaatzaak v. Belgium* and *Verein KlimaSeniorinnen v. Switzerland*, Norway, Ireland, as well as Canadian cases, largely copied the strategy used in the successful Dutch *Urgenda* case.[355] And in *Urgenda,* the Dutch court took an example of the rather poorly formulated, yet successful *Leghari* case, originating from Pakistan, to stress the growing awareness of the implications of climate change on the enjoyment of human rights. And although the domestic legal frameworks are different, the main idea objective of litigants the same: to coerce States to comply with mitigation targets in order to prevent further harm as a result of anthropogenic climate change.

As anthropogenic climate change is recognized to be an international issue regarding the public good, the purpose is to find a way in which society can find common ground on how to address that issue. Litigation can be a powerful instrument to achieve that.

[352] *Natur og Undgom and Föreningen Greenpeace Norden v the Government of Norway* [2020] Borgarting Court of Appeal 18-060499ASD-BORG/03; *Verein KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications (DETEC)* [2018] Federal Administrative Court of Switzerland A-2992/2017; *Summons Magnolia v Government of Sweden (Sept 15, 2016)* (Stockholm District Court); *Friends of the Irish Environment v Ireland (judicial review)* [2019] The High Court [2019] IEHC 747 [2017 No. 793 JR].
[353] *Armando Carvalho and Others v the European Parliament and the Council of the EU* [2019] CJEU, General Court (Second Chamber) T-330/18.
[354] Peel and Osofsky (n 2) 56.
[355] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 16–17.

4.2. Non-European examples of mitigation-related climate change litigation

4.2.1. The United States: Standing and separation of powers barriers

When discussing climate change litigation, by far the most litigated jurisdiction in the world is the United States of America with a total of 1,161 cases filed since 1990.[356] This number can be explained in part due to the fact that the US is the second-largest emitter in the world with a global share of 13.9% of all emissions.[357] The US 's per capita CO_2 emissions measured in 2018 exceeded 16 tons.[358] To put this into perspective, the average global per-capita CO_2-emissions were measured to be around 5 tons in 2018.[359] And where China is the biggest emitter making for a global share of emissions of 29.7%, it made for a "mere" per-capita emission of around 6 tons in 2018.[360]

Besides that, there is the issue of the US having remained outside the Kyoto Protocol regime.[361] Furthermore, more recently, the Trump Administration has subjected the US to drastic deregulation of environmental laws. Whereas the Obama Administration encouraged the US Environmental Protection Agency (EPA) to take action to implement environmental protection statutes, the Trump Administration did the opposite.[362] By implementing large budget-cuts to environmental justice programs of the EPA – targeting mainly indigenous communities in the Alaskan regions and communities in the US border region – reviving the coal sector, rejecting climate science,[363] abrogating the Paris Agreement, and reversing domestic policy regarding climate change mitigation, developments in the field of environmental protection have been more or less reversed.[364] For example, whereas the Obama Administration introduced the Clean Power Plan in 2015, which aimed to structure state-by-state emissions reduction from the electrical power sector, the Trump Administration almost immediately reversed this upon Trump's inauguration.[365]

Given the fact that the US is such a big global emitter, this recent political shift in the US has a large impact on climate change efforts. And, because greenhouse gases are not bothered by State borders, this impact is too felt in an international climate context. These developments have introduced significant challenges for mitigation-related litigation and ask for aggressive litigation strategies in return. To identify issues within US litigation, some high-profile cases will be discussed below.

Considering statistics, there are two major federal statutes that litigants classically focus on. And the main type of claim litigants generally submit is a tort claim. Firstly, forming the largest category with 238 cases, is a group of claims under the National Environmental Policy Act (NEPA).[366] This statute regards governmental obligations to make environmental impact statements for activities that could have

[356] 'Search US Cases - Climate Change Litigation' (n 20).
[357] 'EDGAR - Fossil CO2 and GHG Emissions of All World Countries, 2019 Report - European Commission' 12 <https://edgar.jrc.ec.europa.eu/overview.php?v=booklet2019> accessed 4 March 2020.
[358] Peel and Osofsky (n 2) 57.
[359] 'EDGAR - Fossil CO2 and GHG Emissions of All World Countries, 2019 Report - European Commission' (n 357) 11.
[360] ibid 11–12.
[361] Peel and Osofsky (n 2) 61.
[362] Uma Outka and Elizabeth Kronk Warner, 'Reversing Course on Environmental Justice Under the Trump Administration.' (2019) 54 Wake Forest Law Review 393, 395.
[363] ibid 401–402.
[364] ibid 395–397.
[365] ibid 403–404.
[366] 'Search US Cases - Climate Change Litigation' (n 20).

a significantly negative effect on the environment.[367] The second group of claims is made under the Clean Air Act with a total of 196 cases.[368] This is one of the most publicized litigated laws in the US and is interesting because it can be invoked to coerce the government to regulate GHG emissions.[369] A landmark case under this Act is the case of *Massachusetts v. the US Environmental Protection Agency* of 2007.[370] It was the first successful administrative mitigation-related climate change judgment decided by the Supreme Court and is still considered by many to be one of the most important examples of successful mitigation climate change cases in the US to date.[371]

The case involved a complaint filed by twelve US states and thirteen NGOs challenging the EPA's dismissal of a petition requesting the EPA to regulate GHG emissions from new motor vehicles.[372] Massachusetts claimed that the EPA's failure to regulate would result in injury based on "the loss of coastal land in its state from sea level rise caused by climate change."[373] The Supreme Court concluded the plaintiffs to have *standing* in the matter, thus allowing judicial access on a climate change claim, and eventually ruled in favour of Massachusetts, concluding that the EPA had misread the Clean Air Act when it denied the rulemaking petition.[374] With regard to standing, the Supreme Court concluded the case to be justiciable under Article III of the US Constitution, because the "proper construction of a congressional statute is an eminently suitable question for federal-court resolution, and Congress has authorized precisely this type of challenge to EPA action."[375] The Supreme Court argued that, in order to have *locus standi*, a plaintiff has to provide that:

> [I]t has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that a favourable decision will likely redress that injury. However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests […] can assert that right without meeting all the normal standards for redressability and immediacy". Only one petitioner needs to have standing to authorize review.[376]

Thus, the Supreme Court underlined the requirements of standing to be threefold: damage, causality and redressability under Article III of the US Constitution. The Court found Massachusetts to be harmed by the failure to regulate GHGs and stressed the seriousness of the harms associated with climate change.[377] The Supreme Court concluded that, even though "regulating motor-vehicle emissions may not by itself reverse global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. […] Because of the enormous potential consequences, the fact that a remedy's effectiveness might be delayed during the time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant."[378]

This case has served as an inspiration for litigation within the US and has offered an important precedent for federal courts in climate change litigation. The judgment furthermore marked the initiation and

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[367] Michael Gerrard, 'Overview of Climate Change Litigation.' (2019) 113 American Society of International Law: Proceedings of the Annual Meeting 194, 194.
[368] 'Search US Cases - Climate Change Litigation' (n 20).
[369] Gerrard (n 367) 194.
[370] *Massachusetts v. EPA* (n 343).
[371] Peel and Osofsky (n 2) 2.
[372] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 28.
[373] Abate (n 15) 19.
[374] Peel and Osofsky (n 2) 64.
[375] *Massachusetts v. EPA* (n 343) 2.
[376] ibid.
[377] *ibid 3.*
[378] ibid 4 under (d).

development of the public trust-doctrine and a more human rights-based movement.[379] A highly publicised case to fall within both the public trust doctrine and the human rights-based doctrine is the recent case of *Juliana v. the US* which will be discussed later throughout this paragraph.[380] Noteworthy now is the fact that the judgment of *Massachusetts v. EPA*, though considered a victory in US climate change litigation, was also very peculiar in the sense that the Supreme Court found that Massachusetts had standing because of its "special sovereign nature" as a *parens patriae*.[381] This status exempted Massachusetts from having to have fulfilled the requirements of redressability and immediacy. Thus, the Supreme Court did not explicitly offer a precedent for non-state or non-governmental entities in litigation.[382] In the Supreme Court climate change case of *Connecticut v. American Electric Power Co.* of 2011 (*Connecticut v. AEP*),[383] the Supreme Court did not clarify the issue either, but merely leaned on the approach taken in the case of *Massachusetts v. EPA*.[384]

In *Connecticut v. AEP,* a complaint was made by the state of Connecticut together with six other states, the city of New York and the Open Space Institute Inc., while representing the interests of their 77 million citizens and residents. The states brought a suit against the American Electric Power Company Inc. and other large power plants on the basis of the public nuisance of global warming.[385] The plaintiffs argued that "global warming will cause irreparable harm to property in New York State and New York City and that it threatens the health, safety and well-being of New York's citizens, residents and environment", and argued that the defendant parties were "the five largest emitters of carbon dioxide in the US and that their emissions constitute approximately one quarter of the US electrical power sector's carbon dioxide emissions".[386] Thus, taking into account that the US is a top global emitter, this would make them responsible for a large part of the global GHG emissions, and for significantly contributing to global warming. The District court, however, concluded that it did not have jurisdiction because the case involved non-justiciable political questions, thus implicitly involved an issue with the separation of powers principle.[387] The District court defined this type of question as one that is impossible to answer "without an initial policy determination of a kind clearly for non-judicial discretion".[388]

This decision was later reversed by the Court of Appeal, which concluded that the claims did not present a non-justiciable political question; that the plaintiffs instead had standing; and that federal common law of nuisance governed their claims.[389] The Court stressed that the bar to find non-justiciability under the political question-doctrine was set high in the case of *Baker v. Carr* of 1962 that initially set the standard for this doctrine. In this case it was concluded that "the political question doctrine must be cautiously invoked" and that "simply because an issue may have political implications does not make it non-justiciable".[390] Thus, the court underlined that the doctrine "is one of 'political questions', not one of 'political cases".[391] Eventually the Court concluded that "the political implications of any decision

[379] Abate (n 15) 20.
[380] *Juliana v. US* (n 344); Abate (n 15) 20.
[381] Peel and Osofsky (n 2) 65; Abate (n 15) 19.
[382] Peel and Osofsky (n 2) 272.
[383] *American Electric Power Co, Inc, et al v Connecticut et al* [2011] Supreme Court of the United States 10–174.
[384] Peel and Osofsky (n 2) 272–273.
[385] *Connecticut et al v American Electric Power Company, Inc et al* [2005] US District Court Southern District of New York 04 Civ. 5669, 04 Civ. 5670 2–3.
[386] ibid 3–4.
[387] ibid 11.
[388] ibid 14.
[389] *Connecticut et al v American Electric Power Co, Inc et al* [2009] US Court of Appeals for the 2nd Circuit 05-5104–cv, 05-5119–cv 4.
[390] ibid 19.
[391] ibid.

involving possible limits on carbon emissions are important in the context of global warming, but not every case with political overtones is non-justiciable. It is error to equate a political question with a political case", thus concluding that the district court erred when it dismissed the complaints on the political question doctrine.[392] The Supreme Court eventually concluded that federal common law was not applicable in the given matter, since "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants" and that this delegation displaced federal common law.[393]

In later cases before lower-instance courts, views on the matter of standing of non-governmental plaintiffs in climate change matters have been divided.[394] This was, once again, confirmed in the high-profile Appeals judgment of *Juliana v. the US* of January 2020.[395] The *Juliana v. US* case was posed by a non-profit organisation called Our Children's Trust and founded on the public trust-doctrine as well as fundamental rights.[396] In first instance, the District Court concluded the litigants to have standing before the court, thus concluding in favour of the plaintiffs and stating that "[e]ven when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."[397] Thus, the court took a similar stance as in the case of *Connecticut v. AEP*.

However, this same case was rejected in appeal proceedings on 17 January 2020 on standing barriers under Article III. The Court of Appeal concluded there to be a lack of *redressability* of the claim as a result of the principle of separation of powers. The plaintiffs argued to have suffered climate change-related injuries caused by the federal government by continuing to "permit authorize and subsidize" fossil fuel.

The US Court of Appeal agreed with the plaintiffs about the risks of climate change and stated that:

> The plaintiffs have compiled an extensive record, which at this state in the litigation we take in the light most favourable to their claims […] The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace. It documents that since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. For hundreds of thousands of years, average carbon concentration fluctuated between 180 and 280 ppm. Today, it is over 410 ppm and climbing. Although carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase.
>
> Copious experts evidence establishes that his unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures have already risen 0.9 degrees Celsius above pre-industrial levels and may rise more than 6 degrees Celsius by the end of the century.[398]

The court concluded the harm-requirement under Article III of the US Constitution to be fulfilled given that "at least some plaintiffs claim concrete and particularized injuries.[399] The court dismissed the government's argument that the plaintiffs alleged injuries that are "not particularized because climate

[392] ibid 35.
[393] *American Electric Power Co., Inc., et al. v. Connecticut et al.* (n 383) 3.
[394] Peel and Osofsky (n 2) 273.
[395] *Juliana v. US* (n 344).
[396] *Juliana v. US* (n 123).
[397] *Juliana v. the United States (opinion and order)* (n 344) 54.
[398] *Juliana v. US* (n 344) 14.
[399] ibid 18.

change affects everyone", by stating that "it does not matter how many persons have been injured if the plaintiffs' injuries are concrete and personal".[400]

The court furthermore concluded the requirement of causation to be fulfilled by concluding that "causation can be established "even if there are multiple links in the chain, as long as the chain is not hypothetical or tenuous".[401] The court concluded that the United States has accounted for a large part of global emissions and that, regardless of these emissions stemming from private emitters, the government has actively contributed to this by offering federal subsidies and leases.[402] Thus, the court concluded that there "is at least a genuine factual dispute as to whether those policies were a 'substantial factor' in causing the plaintiffs' injuries."[403]

However, the court did find issues regarding redressability and its interconnectivity with the separation of powers-doctrine. The court noted that the plaintiffs did not claim that the government had violated a statute or regulation, nor that procedural rights were denied.[404] It furthermore noted that the plaintiffs were also not seeking damages under Federal Tort Claims, but that they instead merely claimed that the government deprived them of a substantive constitutional right, a human right to a "climate capable of sustaining human life" and were therefore seeking remedial declaratory and injunctive relief.[405] However, according to the court, such declaration would not mitigate plaintiff's injuries. The court here underlined that:

> The crux of the plaintiff's requested remedy is an injunction requiring the government not only to cease permitting, authorizing and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress, but also to enjoin Congress from exercising power expressly granted by Article IV of the US Constitution.[406]

Whereas the district court relied on *Massachusetts v. EPA,* in finding the redressability requirement to be satisfied "because the requested relief would likely slow or reduce emissions", the Court of Appeal disagreed with the district court and concluded that *Massachusetts v. EPA* "involved a procedural right that the State of Massachusetts was allowed to assert without meeting all the normal standards for redressability, whereas this case does not concern procedural rights, but rather a substantive due process claim."[407] It thus referred back to Massachusetts' special *parens patriae* status.

With reference to the case of *Rucho v. Common Cause,*[408] the Court noted with regard to the separation of powers principle that "federal courts have no commission to allocate political power and influence without standards to guide in the exercise of such authority" and that "in the absence of those standards judicial power could be unlimited in scope and duration and would inject the unelected and politically unaccountable branch of the Federal Government into assuming such an extraordinary and unprecedented role."[409] Thus, the court eventually concluded that the principle of separation of powers did not allow the court to have standing in the matter with the following statement:

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[400] ibid 19.
[401] ibid 19–20.
[402] ibid 20.
[403] ibid.
[404] ibid 21.
[405] ibid 22.
[406] ibid.
[407] ibid 24.
[408] *Rucho v Common Cause* [2019] US Supreme Court 139 S. Ct. 2484, 2508.
[409] *Juliana v. US* (n 344) 28.

> We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. We *reluctantly* conclude, however, that the plaintiff's case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III [US Constitution] court, no matter how well-intentioned, the ability to step into their shoes.[410]

Eventually, this case thus failed due to issues of standing and separation of powers barriers. Interestingly, the court concluded 'reluctantly' not to be competent to order the US to cease permitting, authorizing and subsidizing fossil fuel use and prepare a plan to draw down harmful emissions, and reversed the district court's orders.[411] However, it did recognise the need to take action, the fact that harm could be identified and that this harm did not have to be highly specific.

What can be concluded is that the main issues for the US in climate change litigation are issues of justiciability regarding *standing* under Article III of the US Constitution in the first place and the *separation of powers* doctrine in the second place. With regard to standing, main barriers concern, to put it in simple terms and as identified under Article III of the US Constitution, issues of identification of causation and redressability,[412] the interpretation of which depends highly on the place and time the judge or bench needs to make the decision. This furthermore closely links to separation of powers barriers, where courts are often reluctant to rule on climate change issues because of the political sensitivity of the matter and the fact that doing so would contradict the democratically elected majoritarian decision-maker, the Executive and Legislative branch, which cannot be done indiscriminately. Both these barriers are, as will become clear throughout this chapter, non-exclusive for the US

4.2.2. Australia and New Zealand: Lack of political will and separation of powers barriers

Australia's distant second place concerning climate change litigation counts, with a total number of 96 cases, has to do with, as is also the case in the US, its strong economic dependence on fossil fuel production and export. Coal is Australia's largest energy export product, which too makes for high GHG emissions.[413] Even though Australia's global share of CO_2 emissions "only" forms a total of 1.1%,[414] the average per-capita CO_2 emissions measured in 2018 were more or less the same as the US with almost 17 tons.[415] Both Australia and the US thus deal with similar challenges in mitigation efforts.[416] Australia can furthermore be compared to the US with regard to its common law system, strong decentralized governments and similar court structures.[417]

However, whereas the US is getting more and more familiar with strategic climate change suits holding the State responsible for a failure to take proper mitigation efforts to reduce GHG emissions, this trend

[410] ibid 32.
[411] ibid.
[412] Peel and Osofsky (n 2) 271.
[413] ibid 58.
[414] 'EDGAR - Fossil CO2 and GHG Emissions of All World Countries, 2019 Report - European Commission' (n 357) 12.
[415] 'EDGAR - Fossil CO2 and GHG Emissions of All World Countries, 2019 Report - European Commission' (n 357).
[416] Peel and Osofsky (n 2) 104.
[417] ibid 83–84.

is only now starting to reach Australian courts. Until today, about 80 per cent of Australian climate change cases concern environmental assessment and permitting claims.[418] In many instances these concern procedural claims with regard to the environmental impact of mining processes, often routine cases, and many of those cases have been unsuccessful.[419] An important reason for this is, amongst others, the aforementioned fact that the coal industry is an inherent part of Australian politics and economy, thus leaving courts reluctant to substantively challenge this "orthodoxy" without overstepping their competence and contradicting democratic decision- and policy-making processes.[420]

It can therefore not be said that Australian courts have been a large player in strategic mitigation-related climate change litigation. On the contrary.[421] Following climate change statistics, only two cases directly concerned complaints regarding GHG emissions reductions and both these cases have been summarily dismissed.[422] In one of these cases, the case of *Hodgson v. Macquarie Generation*, plaintiffs argued under the Pollution of the Environment Operations Act of 1997 that the State-owned Bayswater Power Station's "waste" in the form of CO_2 emissions resulted in a violation of the duty of reasonable care for the environment under common law, thus creating a *public nuisance* with regard to the environment.[423] The plaintiffs were inspired by the above-discussed US *Massachusetts v. EPA* case.[424] In first instance, the Land and Environment Court decided partly in favour of the applicants and concluded "that there was an implied limit to the emitting authority granted by the licence" to be drawn from Australian common law's public nuisance-principle.[425] However, the Court of Appeal abruptly reversed this judgment without substantive assessment of the possible harms from CO_2, and considered common law rights to be irrelevant in the given matter. The Court stated that "the so-called common law principles protect private rights" and that "there is no common law tort for causing harm to the environment."[426] Thus, the public nuisance claim was found not to be applicable in environmental matters. This precedent has not been amended by subsequent judgments.

Besides such unsuccessful attempts at direct mitigation-related claims, the majority of Australian claims regarding the need for mitigation measures are filed indirectly and are implied in procedural claims challenging the assessment and permitting of emissions sources; in most instances large fossil fuel projects. Most of these cases are routine cases, also concerning merely procedural claims. However, when taking note of more strategic approaches, litigants tend to lean towards ecologically sustainable development principles, so-called "ESD principles", as for example intergenerational equity and the precautionary principle.[427] In the case of *Gray v. Minister for Planning and Others* of 2006, the New South Wales Land and Environment Court argued these principles to be relevant in the environmental assessment of a fossil fuel project and stated the following:

> The approach to environmental assessment required by the application of the precautionary principle required knowledge of impacts which were cumulative, on-going and long term. In the context of climate change/global warming there was considerable overlap between the environmental assessment requirements to enable these two principles of ESD to be adequately dealt with. […] The

[418] 'Search Non US Cases - Climate Change Litigation' (n 20).
[419] Peel and Osofsky (n 2) 101.
[420] ibid 102.
[421] ibid 55.
[422] *Macquarie Generation v. Hodgson* (n 345); *Spencer v Commonwealth of Australia* [2010] High Court of Australia [2010] HCA 28.
[423] *Macquarie Generation v. Hodgson* (n 345) under headnote.
[424] Peel and Osofsky (n 2) 97.
[425] ibid.
[426] *Macquarie Generation v. Hodgson* (n 345) para 47.
[427] Peel and Osofsky (n 2) 98.

> Director-General failed to take into account the precautionary principle when he decided that the environmental assessment […] was adequate.[428]

The Court thus rejected the government's environmental impact assessment to be properly conducted. In other words, the court exercised its jurisdiction of procedural review. However, another decentralized court, the Queensland Land Court, took a different stance and concluded these grounds not to be necessary to consider.[429] Furthermore, no Australian court has succeeded in actually halting (fossil fuel) projects on climate change-related grounds, due to the broader extraterritorial "off-shore" impacts.[430]

The absence of strategic mitigation-related climate change litigation in Australia seems surprising given the fact that Australia deals with similar issues than the US. This can possibly be explained due to an important difference between the jurisdictions regarding access to justice. In particular with regard to legal costs.[431] Even though standing is less of a barrier in Australia than in the U.S, given that Australian environmental courts have less stringent standing-provisions,[432] Australia's climate change litigation is often initiated by "poorly resourced environmental NGOs and community groups" that could, due to the free discretion of Australian courts to decide parties' legal fees, face major negative financial consequences.[433] Some exceptions aside, the general rule in Australia is that the losing party will be held liable for the costs made by both parties to the proceedings, whereas in the US the general rule is that both parties cover their own costs.[434] Given the fact that plaintiffs often deal with powerful parties, to know corporations and the government, these costs can become disproportionally large and stand in the way of choosing risky, novel climate change litigation strategies.

Interestingly, on May 13, 2020 an environmental group called "Youth Verdict" announced to have submitted a complaint before the Queensland Land Court in which they argued that the Australian government's approval of a coal mine project in Queensland–a mine that will be one of the biggest in Australia–violates their fundamental rights under the recently entered into force Queensland Human Rights Act.[435] The applicants complain that their rights to life, the protection of children and the right to culture will be endangered by the realization of this highly polluting coal mine project, with reference to the principle of intergenerational equity. Senator Matt Canavan, however, expressed his doubts about the case, stating that "I just don't think our court systems are set up to handle such a disputed political issue. That's not their role and purpose and [to] try to retrofit them to this will just cause more division and angst in our community."[436] This comment seems to fit the current reputation of Australian courts and political institutions, but the fact that a first human rights-based strategic mitigation-related climate case has been filed in Australia is a positive development and fits the hypothesis that human rights are indeed considered by citizens from all over the world to be impaired by climate change and to provide suitable grounds for climate change claims.

In short, it can thus be concluded that Australia and the US, though both deal with similar challenges, experience very different mitigation-related climate change litigation strategies. Whereas the US has

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[428] *Gray v Minister for Planning and Others* (n 346) See "Held: Operation of Pt 3A" under (22) and (23).
[429] Meredith Wilensky, 'Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation' (2015) 26 Duke Environmental Law & Policy Forum 131, 155.
[430] Peel and Lin (n 127) 105.
[431] Peel and Osofsky (n 2) 281–282.
[432] ibid 269.
[433] ibid 279.
[434] ibid 279–283.
[435] 'Youth Activists challenge Waratah Coal Mine' <https://www.abc.net.au/news/2020-05-13/youth-activists-challenge-clive-palmers-waratah-coal-mine/12239570> accessed 14 May 2020.
[436] ibid.

dealt with several high-profile examples of cases within this niche, Australia has not, which has to do with, amongst others, financial barriers to access to justice. This, together with the political sensitivity of climate change mitigation claims in a fossil fuel-run country like Australia, stands in the way of starting such suits.

Australia's eastern neighbour New Zealand has a comparable record when it comes to climate change litigation, though smaller scale, with a total of 18 cases.[437] And here too, most litigation concerns environmental assessment and permitting.[438] However, contrary to Australia, New Zealand's courts have been confronted with high-profile mitigation-related climate change suits against the government. An example is the case of *Thomson v. Minister for Climate Change Issues*.[439] The case concerned a claim by Sarah Thomson, a young law-student, who argued that the government had failed to set proper GHG emissions reduction targets required by New Zealand's Climate Change Response Act of 2002. The purpose of this act was "to enable New Zealand to meet its international obligations under the UNFCCC", thus ratifying the UNFCCC responsibilities for Annex I countries.[440] Thomson argued that the emissions reduction target, the so-called Nationally Determined Contributions (NDC), under the Paris Agreement of 11% by 2030 compared to 1990 "will not, if adopted by other developed countries in combination with appropriate targets set by developing countries, stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[441] She thus sought an order for a new emission reduction target that would more appropriately contribute to the ultimate UNFCCC objective, namely the stabilisation of GHG levels in the atmosphere.[442]

The defending government counter-argued that the set target of 11% involved socio-economic and financial policy questions, requiring the balancing of many factors, which falls within the jurisdiction of the Executive branch only, and not the judiciary.[443] The State thus argued that the separation of powers-principle stood in the way of the court having jurisdiction. However, with reference to domestic climate change litigation from other jurisdictions, the New Zealand High Court partly disagreed.

By considering cases from other jurisdictions in which courts dealt with matters of justiciability, for example *Massachusetts v. EPA*, the first judgment of *Juliana v. US* of 2016, and *Friends of the Earth v. Canada* and *Urgenda Foundation v. The Netherlands*, the latter two will be discussed later throughout this chapter, the court dismissed the justiciability-arguments of the government and stated that:

> The various domestic courts have held that they have a proper role to play in Government decision making on this topic, while emphasising that there are constitutional limits in how far that role may extend. The IPCC reports provide a factual basis on which decisions can be made. Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body.
>
> This approach is consistent with the view that justiciability concerns depend on the ground for review rather than the subject matter. The subject matter may make a review ground more difficult to establish, but it should not rule out any review by the Court. The importance of the matter for all and

[437] 'Search Non-US Cases - Climate Change Litigation' (n 18).
[438] Wilensky (n 429) 159.
[439] *Thomson v. New Zealand* (n 347).
[440] 'Thomson v. Minister for Climate Change Issues - Climate Change Litigation' <http://climatecasechart.com/non-us-case/thomson-v-minister-for-climate-change-issues/> accessed 23 February 2020; United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 38.
[441] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 16–17.
[442] *Thomson v. New Zealand* (n 347) para 100.
[443] ibid 102.

> each of us warrants some scrutiny of the public power in addition to accountability through Parliament and the General Elections. If a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to defer to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing.[444]

By taking this into account, the court then concluded that the Minister, with its NDC did not breach the requirements under the UNFCCC. The court concluded that "neither the Convention nor the Paris Agreement stipulate any *specific* criteria or process for how a country is to set its INDC and NDC, nor how it is to assess the costs of the measures it intends to take."[445] It furthermore underlined that the fact that New Zealand is a party to the UNFCCC, the Kyoto Protocol and the Paris Agreement is because it accepts the dangerous consequences of inaction and furthermore concluded that no reviewable error of the Minister in this regard could be identified.[446] The court therefore concluded not to have jurisdiction to intervene in the Minister's decision concerning the State's set NDC and dismissed Thomson's claim.[447] In that sense, the court concluded it was only competent to perform limited procedural review as a result of the principle of separation of powers.

Another mitigation-related climate case, which has recently been declared admissible by the High Court of New Zealand on March 6, 2020, is the case of *Smith v. Fonterra Co-Operative Group Limited*.[448] Even though this case concerns claims against corporations, the reasoning of the High Court is interesting in the given matter. The plaintiff in this case, Mr Smith, being of indigenous *Ngāpuhi and Ngāti Kahu* descent, claims that the emissions originating from seven of the largest emitting corporations in New Zealand lead to public nuisance, negligence and a breach of the "duty, cognisable at law to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system and adverse effects of climate change through their emission of greenhouse gases".[449] Smith's main claim was that the existence of his community depends on the low-tides and that the activities of the polluting corporations would endanger this, for they contribute to global warming.

Even though the Court dismissed the complaints based on public nuisance and negligence, it did declare the case to be admissible under the "cognisable at law"-doctrine, concluding that, even though the Court is "reluctant to conclude that the recognition of a new tortious duty which makes corporates responsible to the public for their emissions, […] [i]t may, for example, be that the special damage rule in public nuisance could be modified; it may be that climate science [with reference to the IPCC reports] will lead to an increased ability to model the possible effects of emissions."[450] Therefore, the case should be further investigated at trial. This reasoning, though reluctant, is living proof of the fact that courts are noticeably amid a judicial revolution in which courts can no longer ignore the issues related to climate change. It furthermore presents that climate science plays a highly authoritative role in the justiciability of climate cases. The case is currently pending trial.

[444] ibid 133–134.
[445] ibid 140.
[446] ibid 141, 179.
[447] ibid 179–180.
[448] *Smith v Fonterra Co-Operative Group Limited* [2020] New Zealand High Court [2020] NZHC 419.
[449] ibid 12–16.
[450] ibid 103.

4.2.3. Canada: Potential of embracing a human rights-based approach

Another non-European, high-income jurisdiction that will briefly be discussed is Canada. Current statistics show that 19 climate change cases have been filed against the Canadian government, twelve of which concern GHG emissions reductions claims.[451] Two main categories can be distinguished in this type of litigation: on the one hand complaints of carbon pricing legislation under the Greenhouse Gas Polluting Pricing Act, with three cases,[452] and on the other hand claims regarding inadequate government response to climate change. These two categories somewhat contradict one another in the sense that the former category regards complaints of provinces about the constitutionality of carbon taxes of their polluting activities, while the latter concerns claims of citizens, NGOs and others regarding the failure of the Canadian central government to put proper effort in the protection of the environment. That point aside, for the matter of this discussion, focus will be on cases regarding inadequate government responses to climate change.

An early case belonging to the latter category is the case of *Friends of the Earth v. Canada* of 2008.[453] In this case, a non-profit organisation called Friends of the Earth sought judicial review of a climate change plan and its compatibility with the requirements of the Canadian "Kyoto Protocol Implementation Act". Section 5 of this Act required the Minister to prepare a climate change plan that included "a description of the measures to be taken to ensure that Canada meets its obligations under Article 3, paragraph 1 of the Kyoto Protocol" and Section 7 required the Governor in Council to "ensure that Canada fully meets is obligations under Article 3, paragraph 1 of the Kyoto Protocol by making, amending or repealing the necessary regulations". The court concluded that the justiciability of the issues was a matter of "statutory interpretation". And following the wording "shall", the failure of the Minister to prepare a climate change plan would be justiciable given that the wording implied a strict obligation. However, the court concluded that the wording of an obligation "to ensure" entailed that the evaluation of the content of the plan is non-justiciable since such considerations are policy-laden and therefore not the proper subject-matter for judicial review.[454] This judgment created a clear limitation with regard to the court's jurisdiction and the wide discretion of the executive branch.

Important to note, however, is the fact that this case originates from 2008 and that times have very much changed since then. Following scientific reports about the consequences of global warming on the Canadian territory, it seems that the Canadian government as well as the public increasingly realizes that action needs to be taken. Interestingly, in June 2019, the Canadian House of Commons even declared a "national climate emergency" in Canada. Consequence was that Canada explicitly committed itself "to meeting its national emissions target under the Paris Agreement and to making deeper reductions in line with the agreement's objective of holding global warming below two degrees Celsius and pursuing efforts to keep global warming below 1.5 degrees Celsius."[455]

Strategic litigation procedures have also reached Canada by now. Recently, four public interest litigation procedures were initiated in order to evoke the Canadian government to increase its efforts to mitigate GHG emissions in order to battle climate change. These cases are inspired by constitutional and human

[451] 'Search Non-US Cases - Climate Change Litigation' (n 18).
[452] *Saskatchewan v. Canada re Greenhouse Pollution Pricing Act; Bill C-74, Part 5* (n 349); *Ontario v Canada re Greenhouse Gas Polluting Pricing Act, Part 5* [2019] Court of Appeal for Ontario 28-06–2019; *Alberta v. Canada re Greenhouse Gas Pollution Pricing Act* (n 349).
[453] *Friends of the Earth v. Canada (Governor in Council) (F.C)* (n 348).
[454] ibid 33–34.
[455] 'House of Commons Publication Climate Emergency' <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-435/hansard> accessed 14 May 2020.

rights-based approaches taken in other jurisdictions, in particular in the above-discussed *Juliana v. US* case and the *Urgenda Foundation v. the Netherlands* case. In line with those cases, the Canadian cases concern human rights claims regarding the obligation to protect indigenous peoples in the case of *Lho'Imggin et al v. Canada*, which was filed in February 2020, and three youth climate action lawsuits arguing that the fundamental rights of current and future generations (intergenerational equity principle) will be violated if the government continues to fail to set proper GHG emissions reduction targets and take proper action to reduce emissions.[456]

In the case of *Lho'Imggin*, plaintiffs seek a court order declaring statutory provisions that permit high-emission fossil-fuel export projects unconstitutional. The plaintiffs argue that "the peace, order and good government power imposes a positive obligation on the defendant to pass laws that ensure that Canada's GHG emissions are now, and will be into the foreseeable future, consistent with its constitutional duty to the plaintiffs and with its international commitments to keep global warming to well below 2ºC."[457] They argued that if the government fails to take these efforts, it will violate the fundamental right to life, liberty and security as well as the right to non-discrimination on the basis of age and ethnicity pursuant to the Canadian Charter of Fundamental Rights.[458] The case is pending trial.

Three other cases, filed in 2018 and 2019, are the cases of *ENvironnement JEUnesse v. Canada (ENJEU v. Canada)*, the case of *Mathur et al v. Her Majesty the Queen* and the case of *La Rose v. Her Majesty the Queen*. These cases argue that the government's failure to adopt greenhouse gas emissions targets, breach the fundamental rights to life and liberty of current and future generations under the Canadian Charter of Rights and Freedoms. The case of *La Rose* furthermore argues that the failure to do so will violate the *public trust* principle.

In 2019, the case of *ENJEU v. Canada* was surprisingly *not* dismissed on jurisdictional or remedial grounds, because of the constitutional status of the Canadian Charter. The Superior Court did, however, dismiss the case on other justiciability grounds. Contrary to the dismissal in *Friends of the Earth v. Canada* of 2008, where the application of federal law would raise non-justiciable issues that are immune from judicial review, the court now underlined that "in the context of the Canadian Charter, which is an integral part of the Constitution of Canada, the courts must decide upon the limits of justiciability of the issues. It is in this context that the adoption of the Canadian Charter has, to a large extent, brought the Canadian system of government "*from parliamentary supremacy to one of constitutional supremacy"*.[459] Thus, the Canadian Charter has a direct effect on the analysis of the question of justiciability."[460] Instead, the ground that did lead to a dismissal of the complaint was the fact that ENvironnement JEUnesse included all minors in Quebec into the complaint and claimed a one hundred Canadian dollar punitive damage reward per person, while it is only at the age of eighteen that a person "has the full exercise of all his civil rights" and can thus independently make such a claim.[461] The court therefore concluded that:

> Although the mission and objectives of Jeunesse are admirable on the socio-political level, they are too subjective and limiting in their nature to form the basis of an appropriate group for the purpose

[456] *Complaint La Rose v Her Majesty the Queen in Right of Canada [Oct 25, 2019]* Federal Court T-1750-19; *Complaint of Mathur et al v Her Majesty the Queen in Right of Ontario [Nov 25, 2019]* Superior Court of Justice of Canada CV-19–00631627; *ENvironnement JEUnesse v. Canada* (n 349).
[457] *Complaint Lho'Imggin v Her Majesty the Queen in the Right of Canada* (Federal Court) [85].
[458] ibid 86.
[459] *ENvironnement JEUnesse v. Canada* (n 349) para 51.
[460] *ibid.*
[461] ibid 125–126.

> of exercising a class action. Jeunesse can give a "voice" to young people, but it does not have the authority to change the legal status and powers of minors.[462]
>
> The fact that it is impossible for the Tribunal to reasonably identify, in this case, a group that could reconcile effectiveness and fairness objectively and rationally confirms that a class action is not the appropriate procedural vehicle in this case and, therefore, that the class action proposed by Jeunesse should not be authorized.[463]

Thus, the court found the complaint to be inadmissible due to the character of the group in this class action. The court however implicitly encouraged the substantive aspect of the complaint and the HRBA, stating that "[t]he *erga omnes* effect of a judgment regarding the legal debate raised by Jeunesse is beyond doubt, even if the proceedings are brought by only one person, without the needs to proceed as a class action."[464] The strength of this latter note of the Superior Court is not to be underestimated, for it recognises the potential of the claim, had it not been put forward on behalf of such a large group of unidentifiable applicants.

ENvironnement JEUnesse has appealed to the judgment. If the character of the group is adapted, the case seems to have potential, as does the HRBA. The same goes for the above-mentioned suits that are currently pending before Canadian courts.

4.2.4. Pakistan*: The Leghari case* a predecessor of *Urgenda*

Pakistan may seem slightly out of place in the context of the just discussed large greenhouse gas emitters from the Global North, but one of its judgments has proved to provide a powerful example for strategic climate change litigation in other parts of the world. It is the case of *Ashgar Leghari v. Pakistan*, which was decided in favour of the plaintiff by the Lahore High Court in 2015.[465]

Ashgar Leghari, an agriculturist and citizen of Pakistan, started a public interest case in which he "challenged the inaction, delay and lack of seriousness of the Government of the Punjab to address the challenges and to meet the vulnerabilities associated with climate change."[466] He argued that, in spite of the fact that Pakistan's National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2013) were adopted, practical progress failed to be made.[467] As a result of that, he claimed that the government's inaction regarding measures to protect its citizens against the risks of climate change, in particular risks regarding access to water, food and energy security, in its turn endangered the applicant's fundamental right to life under Article 9 of the Constitution of Pakistan.[468]

On September 4, 2015, the Lahore High Court of Pakistan agreed with Leghari, thus adopting a HRBA. The Court concluded that:

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[462] ibid 136.
[463] ibid 140.
[464] ibid 143.
[465] *Ashgar Leghari v. Federation of Pakistan* (n 350).
[466] ibid under 'climate change order'.
[467] ibid under 'climate change order'.
[468] ibid.

> Climate Change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is a clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.[469]
>
> [The] right to life, right to human dignity, right to property and right to information under Articles 9, 14, 23 and 19A of the Constitution read with the constitutional values of political, economic and social justice provide the necessary judicial toolkit to address and monitor the Government's response to climate change.[470]
>
> In the present case, the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded.[471]

As a result of these findings, the Court ordered the State to (1) nominate a climate change focal person, (2) to present a list of adaptation points before the end of 2015 and (3) to constitute a climate change commission that comprises of representatives of the key ministries/departments, NGOs and technical experts.[472]

This judgment was the first case in which a human rights approach was acknowledged by a judge in a strategic mitigation-related climate change suit.[473] It represents that human rights can be affected through the recourse of international environmental law principles. This is thus a clear and pioneering example of how a court can be a strong actor in an order to coerce State action against climate change.[474] Even though Pakistan is not a large contributor to global warming, this judgment furthermore presents that a State may have to do its part, no matter how small the effects may be on the global climate, to mitigate or adapt its GHG emissions.[475]

A last noteworthy point to be drawn from this judgment is that the Court, as Barritt and Sediti describe in a clear way, "takes very seriously the need for effective judicial enforcement in environmental law. This directive and supervisory approach holds the government strongly to account for their stated commitments in the Framework, Policy and Constitution. Admittedly in doing this, he does thread a thin line along the separation of powers."[476] The Lahore High Court did however, not pay explicit attention to procedural barriers, as for example the separation of powers doctrine, which is highly exceptional, and which also makes the legal reasoning significantly less strong, albeit correct, than the hereafter to be discussed *Urgenda* case.

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[469] ibid 6.
[470] ibid 7.
[471] ibid 8.
[472] ibid 7–8.
[473] Emily Barritt and Boitumelo Sediti, 'The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South.' (2019) 30 King's Law Journal 203, 206.
[474] Abby Rubinson Vollmer, 'Mobilizing Human Rights to Combat Climate Change through Litigation', *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 363.
[475] Barritt and Sediti (n 473) 205.
[476] ibid 206–207.

4.3. A growing trend of human rights-based litigation in Europe

When assessing mitigation-related climate change litigation in Europe, an unprecedently growing trend towards the invocation of the HRBA is occurring in different jurisdictions throughout Europe. One ground-breaking, landmark example to be discussed in the following paragraph is the Dutch case of *Urgenda Foundation v. the State of the Netherlands*, which has inspired litigants from multiple other European jurisdictions to start a similar procedure, for example from Belgium, Switzerland, Ireland, Sweden and Norway. These cases will be discussed below.

It is furthermore noteworthy that one of the key players in mitigation-related litigation is the Court of Justice of the European Union (CJEU). With a total number of 48 cases, the CJEU deals almost exclusively with procedural claims regarding the EU Emissions Trading System. Them often being "routine cases" concerning national courts' requests for preliminary rulings in domestic lawsuits regarding the validity of the allocation of emissions allowances to corporations.[477] Since these cases do not fall within the strategic litigation-category, they will not be discussed further throughout this chapter. One transnational case concerning EU-law before the CJEU that is interesting for this discussion, however, is the case of *Armando Ferrão Carvalho and Others v. the European Parliament and the Council*,[478] in which plaintiffs argued that the EU needs to set more stringent GHG emissions reduction targets. This case will be discussed below in paragraph 4.3.5. In an indirect way, this complaint also resonates with the assessment and conclusion of the landmark *Urgenda* case.

4.3.1. The Netherlands: The *Urgenda climate case* progressively embracing a human rights-based approach

The Dutch *Urgenda* case, though concluded only very recently, has been hailed by many scholars as one of the brightest shining stars of climate change litigation. Reasons thereof are firstly, the fact that the Court substantively applied ECHR rights in a climate change case by finding a preventive violation, which is, as has become apparent in the former chapter, unprecedented, and secondly because the court extensively overruled government arguments regarding standing, including harm, causation and redressability, and the separation of powers doctrine on the basis of international human rights law. Therewith, this case is one of the first and undoubtedly most-sophisticated judgments to answer favourably to plaintiffs in the highly politically sensitive subject of State responsibility for a failure to mitigate climate change.

Given that this case is considered a breakthrough, a landmark case, in climate change litigation and is considered to introduce a new era of this type of litigation, both the substantive and procedural aspects of this case will be discussed in detail below.

[477] 'Search Non-US Cases - Climate Change Litigation' (n 18) under 'EU - GHG emissions reduction and trading'.
[478] *Armando Carvalho and Others v. the European Parliament and the Council of the EU* (n 353).

4.3.1.1. The situation

Urgenda, a foundation established as an initiative of the Dutch Research Institute for Transitions at Erasmus University Rotterdam, with the main objective to stimulate and progress transition processes to a more sustainable society, started a litigation procedure in 2013 against the Dutch government on behalf of 886 citizens. Based on authoritative climate reports of the IPCC and international and regional governance and law, Urgenda claimed that the State should commit to a 25 to 40% GHG emissions reduction by end-2020 compared to 1990 in order to prevent a violation of the right to life and the right to respect for private and family life pursuant to Articles 2 and 8 ECHR.[479] Following prospects reported by the IPCC, the applicants claimed that the lives and livelihoods of both current and future generations would be endangered if the government would not start acting in line with those emissions targets.

The Dutch State lowered its initial emissions reduction target from 30% to a 20% target in 2011, based on adapted EU climate law and policy. Central in that context are Articles 191 and 193 of the Treaty of the Functioning of the EU (TFEU). Based on those provisions, the European Parliament and the Council have created several directives. An important Directive is the Union Emission Trading System Directive of 2003 (ETS Directive 2003/87/EC), which creates certain guidelines for GHG emissions of large, energy-intensive corporations, e.g. power plants and refineries (ETS sectors). This Directive was amended in 2009 and set a specific target for an overall GHG emissions reduction of at least 20% by 2020 for both ETS- and non-ETS sectors compared to 2005, as well as a reduction target of 40% in 2030 and an 80-95% target for 2050. These targets are all relative to the 1990 base-year in which initial emissions levels were reported.[480]

As a result of this EU-policy, the Dutch State argued that the 25% reduction order was unjustified, that the State acted in line with EU-directives and that the State is not allowed to do more than the set 20%-target. The State furthermore argued that the requested decision falls outside the jurisdiction of the court, and instead would fall solely within the political domain, which is best suited to make a proper assessment of conflicting interests.[481] The State argued that

> [t]here is no absolute need to reduce emissions by 25 to 40% by end-2020. The State's scope for policymaking includes, after considering all interests involved, such as those of the industry, finances, energy-provision, healthcare, education and defence, to choose the most appropriate reduction path. This is a political question, the *trias politica* prohibits judges from making such decisions.[482]

The State furthermore argued that the ECHR does not oblige States to offer protection from the genuine threat of dangerous climate change, because this threat "is not specific enough to fall within the scope of protection afforded by Articles 1, 2 and 8 ECHR", given that this threat "is global in both cause and scope, and […] relates to the environment, which […] is not protected as such by the ECHR."[483]

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[479] *Urgenda Foundation v State of the Netherlands* [2015] The Hague District Court C/09/456689 / HA ZA 13-1396.
[480] ibid 2.58-2.59.
[481] *State of the Netherlands v. Urgenda Foundation* (n 55) para 30.
[482] ibid.
[483] *State of the Netherlands v. Urgenda Foundation* (n 103) para 5.1.

4.3.1.2. The substantive reasoning: Articles 2 and 8 ECHR and the common ground method

The Dutch Court of Appeal and Supreme Court dismissed all arguments of the State and ruled in favour of Urgenda. Very interesting in this regard, is that the Court of Appeal and Supreme Court based this decision on Articles 2 and 8 ECHR, through the application of the 'common ground method'.[484] As discussed in chapter 3, none of the regional human rights courts and commissions have yet decided explicitly on the global climate change problem, but these same institutions have set certain standards with regard to other environmental issues which are closely linked to climate change and can thus lead as a source of inspiration for the case at hand. The Dutch court used these standards by analogy and interweaved this with international obligations under the UNFCCC and closely interconnected climate science.

The Court concluded that "the provisions of the ECHR must be interpreted and applied so as to make its safeguards practical and effective" and that, in line with ECtHR practice, "this 'effectiveness principle' ensures "the object and purpose of the Convention as an instrument for the protection of individual human beings", which is in line with the rules of interpretation of treaties of Article 31, paragraph 1, VCLT.[485] In line with Article 31(3)(c) VCLT, this entails that account should be taken of "any relevant rules of international law applicable in the relations between the parties", and in particular the relevant rules concerning the international protection of human rights (…)."[486]

The common ground method, as interpreted by the ECtHR, thus entails that the Convention will be interpreted in light of present-day conditions, by taking note of elements of international law other than the Convention as long as this interpretation reflects common values among European States.[487] As cited by the ECtHR in *Demir and Baykara v. Turkey*, "[i]t will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is a common ground in modern societies […]."[488] The Court thus applied the standards set by the ECtHR on the basis of the UNFCCC regime, a universally applicable climate change governance and law regime, as well as climate science.

With regard to climate science, the Court took into account the in chapter 2 discussed authoritative IPCC reports, in particular the IPCC's AR4 and AR5, in which it was found to be *likely* that a global temperature rise of more than 2ºC compared to pre-industrial levels will create a risk of dangerous and irreversible climate change. It was furthermore found to be *very likely* that everyone in the world will be negatively affected by global temperature rises of 2 to 3ºC.[489] The Court furthermore took note of the AR4 report, in which it was concluded that in order to stay below that 2ºC global temperature increase, the volumes of CO_2 in the atmosphere should not exceed 450 ppm, which in practice would require a global emissions reduction of 25 to 40% CO_2 emissions by 2020 compared to 1990 (at least for Annex I countries).[490]

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[484] ibid 5.4.1.-5.4.3.
[485] ibid 5.4.1.
[486] ibid.
[487] ibid 5.4.2.; *Demir and Baykara v. Turkey [GC]* (n 291) paras 85–86.
[488] *State of the Netherlands v. Urgenda Foundation* (n 103) para 5.4.2.; *Demir and Baykara v. Turkey [GC]* (n 291) para 86.
[489] 'Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' (n 1).
[490] *Urgenda Foundation v. State of the Netherlands* (n 479) paras 4.20-4.21.

With regard to climate change law and governance, the Court concluded, by taking into account the UNFCCC, the Kyoto Protocol, the large collection of COP-Agreements and the binding Paris Agreement in which the 2°C target is explicitly laid down in Article 4, that there is "a high degree of international consensus on the urgent need for the Annex-I countries to reduce greenhouse gas emissions by at least 25 to 40% by 2020 compared to 1990 levels,[491] in order to achieve at least the two-degree target."[492] In short, it is generally accepted that, would the State fail to comply with this minimum requirement of a 25% emissions reduction by end-2020, there would be a real risk of not remaining under the 2°C global temperature rise without excessive costs or measures needed.

As stated by the Court "[t]he need to reduce greenhouse gas emissions is becoming ever more urgent. Every emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere and thus contributes to reaching the critical limits of 450 ppm and 430 ppm."[493] Therefore, the Court concluded that, if we continue to fail to take mitigation action, there is a "real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with the loss of life and/or a disruption of family life", and that it is "clearly plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced."[494]

To apply these findings to Articles 2 and 8 ECHR, the Court applied the in chapter 3 discussed ECtHR standards set in environmental cases. It focused, in particular, on the positive obligations to be derived from these provisions. Regarding Article 2 ECHR, the Court concluded that

> [t]he ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster. It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved.[495]

In line with that reasoning, the Court continued that Article 8 ECHR also entails a positive obligation to take "reasonable and appropriate measures to protect individuals against possible serious damage to their environment", where the minimum threshold requirement entails that "serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely."[496] Because, according to the Court and this has also been discussed in chapter 3, Article 2 and 8 ECHR largely overlap in environmental matters, the State "is expected to take the same measures pursuant to Article 8 ECHR that it would have to take pursuant to Article 2 ECHR."[497]

In line with the *precautionary principle*, this entails a positive obligation under both provisions "to take preventive measures to counter the danger even if the materialisation of that danger is uncertain."[498]

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[491] *State of the Netherlands v. Urgenda Foundation* (n 103) paras 7.2.6-7.2.10.
[492] *ibid 7.2.11.*
[493] ibid 4.3.
[494] ibid 4.7; *State of the Netherlands v. Urgenda Foundation* (n 55) para 37.
[495] *State of the Netherlands v. Urgenda Foundation* (n 103) para 5.2.2.
[496] ibid 5.2.3.
[497] ibid 5.3.1.
[498] ibid.

Following the conclusions from scientific reports, this real and imminent risk of materialisation can be concluded to be present, therefore "States are obliged to take appropriate steps without having a margin of appreciation. […] States do have discretion in choosing the steps to be taken", as long as the action will counter the imminent threat appropriately.[499] Whether the measures are thus appropriate may be reviewed by the Court. And when reviewing this, the Court must consider that no disproportionate burden will be placed on the State.

The argument of the State that the issue is global and can thus not lead to applicability of the ECHR in the given case, was dismissed by the Supreme Court. The Court stated that "in the opinion of the Supreme Court […] the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem." The Court based this conclusion on the objectives of the UNFCCC, and even more so the recent Paris Agreement, in which States have agreed to take precautionary measures to mitigate the causes of climate change and to create appropriate policy in that regard, to all do the necessary to prevent dangerous climate change.[500] The Court furthermore based its shared responsibility conclusion on Article 47, paragraph 1, ARSIWA, which states that "[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."[501] Thus, the argument of the State that it cannot be held accountable for a lack of mitigation action because other States also fail to take action cannot succeed. Indeed, States are obliged to "do their part to counter that danger", leading to "individual responsibility of the contracting states", which too is in accordance with ECtHR standards.[502]

Thus, when concluding the current state of affairs in climate governance, law and climate science and by setting out the positive obligations to be derived from Articles 2 and 8 ECHR, it can be considered that a real and imminent risk of loss of life or a disruption of family life in the foreseeable future is present, which leads to applicability of the rights to life and the right to private life, family life, home and correspondence pursuant to Articles 2 and 8 ECHR, and thus to a positive obligation to take appropriate measures to counter these risks.[503]

Taking note of current policy in the Netherlands, the Supreme Court concluded that there was no proper reason for the Netherlands to deviate from the collective 25-40% target, and that the Dutch State failed to substantiate its decision to lower its target in 2011 from 30% to 20% in line with EU policy, and furthermore failed to inform about its intended measures to combat dangerous climate change in an alternative way.[504]

With regard to the State's knowledge of the risks and the disproportionate burden-principle, the Court concluded that the Netherlands is an active party within the UNFCCC regime, meaning that State could be considered to have knowledge of these risks and the need to mitigate, at least since the publication of AR4 in 2007. It furthermore concluded that there was no proper reason for the Netherlands to deviate from the collective target of 25-40%, since the primary order was already given in 2015 with the judgment of the district court, thus having given the government an appropriate amount of time to mitigate.[505] Besides that the court argued that there is no discussion about the fact that active measures

[499] ibid 5.3.2.
[500] ibid 5.7.3-5.7.5; UNFCCC Articles 3 and 4; Paris Agreement (Dec. 13, 2015) Articles 2, 3 and 4.
[501] 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (n 177) Article 47(1).
[502] *State of the Netherlands v. Urgenda Foundation* (n 103) para 5.8.
[503] *State of the Netherlands v. Urgenda Foundation* (n 55) para 40.
[504] *State of the Netherlands v. Urgenda Foundation* (n 103) para 7.4.6.
[505] *ibid.*

need to be taken to protect Dutch citizens against the dangers of climate change and that a delay is unjustifiable.[506] In that regard, the Court stated that

> [d]elaying the reduction will lead to greater risks for the environment. A delay would, after all, allow greenhouse gas emissions to continue in the meantime; GHGs which linger in the atmosphere for a very long time and further contribute to global warming […] An even distribution of reduction efforts over the period up to 2030 would mean that the State should achieve a substantially higher reduction in 2020 than 20%. An even distribution is also the starting point of the State for its reduction target of 49% by 2030, which has been derived in a linear fashion from the 95% target for 2050. If extrapolated to the present, this would result in a 28% reduction by 2020 as confirmed by the State in answering the Court's questions.[507]

The Supreme Court thus confirmed the 25% reduction order for 2020 on penalty of finding a preventive violation of the State's duty of care to protect the right to life and the right to private and family life pursuant to Articles 2 and 8 of the ECHR.[508]

4.3.1.3. The reasoning overcoming procedural barriers

The State argued that Article 34 ECHR would prevent standing of the applicants regarding the applicability of the ECHR, because the applicants could not present to be a direct or indirect victim in the given matter, thus it would concern an *actio popularis*. In first instance, the court agreed with this and concluded that, indeed, "Urgenda cannot be designated as a direct or indirect victim, within the meaning of Article 34 ECHR."[509] The Court of First Instance, eventually based the reduction order on Article 6:162 DCC, thus concluding responsibility on the basis of tort law.

The Court of Appeal decided differently, and this conclusion was later confirmed by the Supreme Court. Contrary to the State's argument, the Court concluded that Article 34 ECHR would form no limitation to admissibility of claims regarding the ECHR before domestic courts as this provision is relevant only regarding access to the ECtHR. Indeed, Dutch domestic law provides for Article 3:305a DCC, which provides standing in class actions–an *actio popularis*–in a public interest procedure.[510]

Another argument by the government regarded the principle of separation of powers. This, too, was dismissed by the Court, on the basis that it involved the infringement and possible violation of fundamental rights. Even though the Supreme Court partially agreed that it is the principal power of the government and parliament to make decisions regarding GHG emissions and that, generally speaking these institutions have a large degree of discretion, it concluded that it is up to the judiciary to decide whether these institutions *remain within the limits of the law*.[511] Those limits include the obligations arising from the ECHR, as the Netherlands has a monist legal system, and international treaties have direct applicability.[512]

Thus, the Supreme Court eventually, very strongly, concluded in favour of a HRBA by stating that "[t]he protection of human rights it provides is an essential component of a democratic state under the rule of

[506] *State of the Netherlands v. Urgenda Foundation* (n 55) para 47.
[507] ibid 47.
[508] *State of the Netherlands v. Urgenda Foundation* (n 103).
[509] *Urgenda Foundation v. State of the Netherlands* (n 479) para 4.45.
[510] *State of the Netherlands v. Urgenda Foundation* (n 55) para 36.
[511] *State of the Netherlands v. Urgenda Foundation* (n 103) paras 8.3.2.-8.3.3.
[512] ibid 8.3.3.

law."[513] It therewith underlined the fact that, with regard to fundamental rights, in line with the reasoning of the Canadian Superior Court in the *ENJEU* case, parliamentary supremacy is overruled by constitutional supremacy.

The *Leghari* case was the first judicial recognition of a HRBA in climate change litigation, but the explicitly detailed, legal approach adopted by the Dutch Supreme Court has led to a real revolution for climate change litigation, especially in Europe. As described by the UNEP, this "decision was pathbreaking in separation of powers jurisprudence because it grounded its instruction to the government to tighten emissions limits on a rights-based analysis rather than through reference to statutory requirements."[514] This is also a reason why this case serves as an important model of climate change litigation in other countries. Two examples are the case of *KlimaSeniorinnen Schweiz v. DETEC Switzerland,*[515] which is pending in appeal, and the case of *Klimaatzaak v. the Kingdom of Belgium,*[516] which is still awaiting judicial review. Other cases that have been inspired by *Urgenda* are the Swedish *Magnolia* case,[517] the Norwegian case of *Greenpeace Nordic Association & Natur og Ungdom v. Norway* [518] and the Irish case of *FEI v. Ireland.*[519] The latter cases, as will be presented hereafter, also show that the success of Urgenda does not necessarily provide a "holy grail" in climate change litigation for every other jurisdiction. After all, the ECtHR has not yet answered to climate change cases itself and the interpretation of the Dutch Court can only be said to be a form of creative interpretation, which is, as stressed by Leijten, not a simple formula of one plus one is two.[520] These Norwegian, Swedish and Irish cases will be discussed below.

4.3.2. Norway: Dismissal of a human rights-based approach to extraterritorial harm

The case of *Greenpeace Nordic Association and Natur og Ungdom v. the Government of Norway*, also known as *People v. Arctic Oil,* was based too on the HRBA. The was posed by Greenpeace and Nature and Youth–two environmental organisations–and was rejected by the Court of Appeal in January 2020.[521] The reason thereof was not that the Court did not agree with the Urgenda approach, but that the case was based on different claims and circumstances.

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[513] ibid.
[514] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 15.
[515] *KlimaSeniorinnen Schweiz v. DETEC Switzerland* (n 352); Verein KlimaSeniorinnen Schweiz, 'Appeal in Matters of Public Law against Judgment A-2992/2017 in the Case of Verein KlimaSeniorinnen Schweiz et al. V. Federal Department of the Environment, Transport, Energy and Communications (DETEC)' <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190121_No.-A-29922017_appeal-1.pdf> accessed 23 February 2020.
[516] 'Climate Case, the Lawsuit in Which Everyone Wins | Climate Case' <https://affaire-climat.be/en> accessed 23 February 2020.
[517] Future Roundtable Org, 'Magnolia Case - Youth NGOs and Individuals v. the Government of Sweden' <http://futureroundtable.org/documents/2238847/0/Magnolia-Final+17.05.17.pdf/5dc06e88-f831-60de-3ba5-06c8147e8fde>.
[518] *Natur og Undgom and Föreningen Greenpeace Norden v. the Government of Norway* (n 352).
[519] *FEI v. Ireland* (n 352); *Friends of the Irish Environment CLG v The Government of Ireland and the Attorney General (determination leave for appeal)* [2020] Supreme Court [2020] IESCDET 13.
[520] AEM Leijten, 'De Urgenda-zaak als mensenrechtelijk proeftuin?' (2019) 2019 AV&S 6.
[521] *Natur og Ungdom and Föreningen Greenpeace Norden v the government of Norway* [2018] Oslo District Court 16-166674TVI-OTIR/06; *Natur og Undgom and Föreningen Greenpeace Norden v. the Government of Norway* (n 352).

The case at hand was filed in 2016, shortly after the adoption of the Paris Agreement, and concerned complaints against the Norwegian government for the issuance of licenses allowing for oil and gas exploitation and extraction by corporations in the arctic Barents Sea. The plaintiffs asserted that the Norwegian government, by doing so, violated its commitments under Article 112 of the Norwegian Constitution, as well as domestically implemented human rights obligations under the ECHR and binding obligations flowing from the Paris Agreement. The plaintiffs argued that Norway, by opening the Barents Sea to more production of petroleum, would continue to actively contribute to major GHG emissions and consequently to global warming, which would violate the government's duty of care to protect current and future generations against climate harm.[522]

The central provision in the applicants' claim, Article 112 of the Norwegian Constitution, provides for the right to a healthy environment and reads as follows:

> 1. Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.
> 2. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
> 3. The authorities of the state shall take measures for the implementation of these principles.

The invocation of Article 112 of the Constitution in this case was in a sense a premier, given that it was the first time to be invoked in a high-profile court case.[523] And even though the Oslo district court recognized the provision to be a *rights* provision, it also stressed that the applicability of the provision entails a high threshold and can only be invoked when the third paragraph has not been fulfilled.[524] Taking this into account, and arguing that, under the Kyoto Protocol and the Paris Agreement, each country is responsible for GHG emission from its own territory, the court thus concluded the provision not to apply for possible emissions outside the Norwegian territory as a result of the export of the extracted petroleum.[525]

In appeals proceedings, the plaintiffs argued that this reading of Article 112 of the Constitution was too restrictive and that the principle of solidarity would require the Norwegian government to take significant emissions abroad, as a result of extractions in Norway, into account too. The Court of Appeal agreed with the plaintiffs in the sense that emissions abroad cannot be left out of consideration, but then came to the conclusion that the separation of powers principle stood in the way of an extensive substantive review of the consequences of the government's decision to approve the licenses. It eventually held that the threshold to find a violation under this provision was high and in the given case could not be met, by stating the following:

> The Court of Appeals wishes to emphasize that it is particularly when emissions are also included from the combustion that the climate-related consequences come to the fore. However, the threshold for finding a violation of Article 112 of the Norwegian Constitution is high, and the matter involves socio-economic and political balancing on which positions are continuously being taken in the *Sorting* and which is in the core area for what the courts should be constrained in reviewing. It is also an element in the assessment of such emissions under Article 112 that the Paris Agreement is

[522] *Petition The People v Arctic Oil [Oct 18, 2016]* (Oslo District Court).
[523] Abate (n 15) 30.
[524] *Natur og Ungdom and Föreningen Greenpeace Norden v. the government of Norway* (n 521) 18.
[525] *ibid 6.*

> based on each country taking measures against its own national emissions. On the basis of an overall assessment of the elements that have been reviewed, the Court of Appeal cannot see that the threshold under Article 112 has been exceeded.[526]

Thus, Article 112 could in this case, due to the separation of powers principle, only be subjected to restricted review and was thus declared inadmissible.

Inspired by the Urgenda case, applicants furthermore made complaints under Articles 2 and 8 ECHR, but this was dismissed by the Court of Appeal. The court concluded that the government's argument that no standing should be afforded on the basis of Article 34 ECHR, should be left undiscussed because the Norwegian Dispute Act affords standing to collective lawsuits, but only if "a party's connection to the claim in order to bring a legal action" can be identified.[527] Therewith, Norwegian law provides for a class action, but the victim-requirement still needs to be fulfilled as is the case with Article 34 ECHR, meaning that the Norwegian Dispute Act does not provide standing for a pure *actio popularis*.[528] Without reviewing this victim-requirement, the Court concluded that it found "no reason to go further into whether there is a basis for dismissing this part of the lawsuit, as it finds it clear in any event that the Government must also be held not liable as regards this basis".[529] In its assessment, the Court of Appeal did pay brief attention to the substantive requirements of Articles 2 and 8 ECHR before concluding these provisions not to be breached by awarding the production licenses.[530]

The Court concluded that the minimum severity thresholds in Articles 2 and 8 ECHR could not be considered fulfilled as "a direct and immediate connection [cannot] be shown regarding emissions that might result from the decision when seen in connection with other greenhouse gas emissions." The Court continued by stating that

> [t]he Environmental Organisations 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 [therefore] no conflict between the result the Court of Appeal has arrived at in this case and the result in the Urgenda case.[531]

Therefore, whereas the Dutch court concluded Article 34 ECHR merely to be a procedural requirement for direct litigation before the ECtHR, also by taking into account that the Dutch Civil Code provided for another procedural standard for *standing* in class actions, the Norwegian court interpreted this differently because its domestic law does not allow *actio popularis* either.[532] Regardless of that, the Norwegian Court of Appeal still entered into a brief discussion of the substance of Articles 2 and 8 ECHR, and after recognising the ground-breaking nature of the Urgenda case for a human rights approach in climate litigation, concluded this case to be different and the claims not to fulfil the substantive requirements of Articles 2 and 8 ECHR.

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[526] *Natur og Undgom and Föreningen Greenpeace Norden v. the Government of Norway* (n 352) para 3.3.
[527] *ibid 4.1.*
[528] *ibid.*
[529] ibid.
[530] ibid 4.2.
[531] ibid 4.2.
[532] *State of the Netherlands v. Urgenda Foundation* (n 55) para 36.

However, would Articles 2 and 8 ECHR have been fulfilled in a claim more like Urgenda, it would probably have been considered inadmissible based on a lack of standing for *actio popularis* lawsuits.

4.3.3. Sweden: Dismissal of finding 'a real risk' of a violation of human rights and climate change

Another case which was inspired by the *Urgenda* case and like the Norwegian *People v. Artic Oil* case was the case of *Push Sweden and Fältbiologerna v. Government of Sweden*, also known as the *Magnolia* case. The case regarded the sale of German lignite assets by the Swedish State-owned Vattenfall to a Czech company.[533]

Plaintiffs argued that by doing this, the Swedish State failed to fulfil its *duty of care* to protect applicants against a "major and immediate risk of greatly increased greenhouse gas emissions compared to the emissions that would occur if the operations were continued under the conditions that apply to Vattenfall's ownership", and would thus violate international environmental agreements, national policy, but most importantly applicants' fundamental rights under the Swedish Constitution and the ECHR to a non-harmful climate.[534] With regard to the latter, the applicants underlined that, "[a]lthough the right to protection against environmental degradation and climate change is not explicitly stated in the statutes, a growing body of European and international case law demonstrates that these provisions can be invoked as grounds for claims."[535] Therewith, they argued in line with was has been done in the *Urgenda* case, namely a common ground method and application of the ECHR standards by analogy to the global climate change problem.

Unfortunately, this case was dismissed by Stockholm's district court as well as by the Court of Appeal because the actual realisation of harm could not be determined. The Court of Appeal concluded that "the plaintiffs' claim for financial damage is based on a hypothetical risk assessment of future environmental health effect, and not on any actual economic damage", thus leading to a lack of standing.

4.3.4. Ireland: Separation of powers barriers with higher instance potential

A case that is currently pending before the Supreme Court of Ireland is the case of *Friends of the Irish Environment CLG v. The Government of Ireland, Ireland and the Attorney General* (*FEI v. Ireland*).[536] This lawsuit was, again, strongly inspired by the *Urgenda* case and involved a claim by the environmental NGO Friends of the Irish Environment (FEI). In their complaint against the Irish government, they claimed that the Irish National Mitigation Plan, was unconstitutional, violated the ECHR and was *ultra vires* the powers of the Minister.[537] The applicants sought a declaration that the approval of this Plan was inconsistent with international human rights obligations and contrary to the objectives of the UNFCCC, the Kyoto Protocol and the Paris Agreement.

[533] *Summons Magnolia v. Government of Sweden (Sept 15, 2016)* (n 352) para 125.
[534] ibid 87–89.
[535] ibid 89.
[536] *FEI v. Ireland* (n 352); *FEI v. Ireland (determination leave for appeal)* (n 519).
[537] *FEI v. Ireland* (n 352) para 12.

The High Court, by looking closely at the climate science conclusions drawn in *Urgenda*, concluded that "there is now limited room, or budget, known as a carbon budget, for greenhouse gas emissions. While the court in Urgenda observed the acknowledgement by the worldwide community that action is required to reduce the emission of such greenhouse gases, it also noted that urgency is differently assessed within the global community."[538] With regard to the separation of powers principle the court then stressed that it "should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference, the alter being identifiable by the fact that they are not capable of being impugned by objective criteria that a court could apply",[539] and that, even if the court would conclude the matter to be justiciable, it should take into account the wide margin of discretion afforded by the Executive."[540] Having considered that, the court eventually concluded that it would to be too difficult to "conclude that it has been established by the applicant that the State has acted in a disproportionate manner in the creation and adoption of the Plan, when the Plan, as I have found, is not *ultra vires*."[541] Thus the complaint failed due to the separation of powers principle.

As a result of this dismissal of the relief sought before the High Court, the FEI decided to apply for immediate appeal before the Supreme Court in November 2019. This application was accepted by the Supreme Court in February 2020 with the following statement:

> The applicant and the respondents accept that there exists a degree of urgency in respect of the adoption of remedial environmental measures. There is no dispute between the parties as to the science underpinning the Plan and the likely increase in greenhouse emissions over the lifetime of the Plan. Further, the parties accept the gravity of the likely effects of climate change.
>
> The availability of judicial challenge to the legality of the Plan by the Government, the standard of such review if adoption of the Plan is justiciable as matter of law, and the broader environmental rights, asserted by the applicant to arise under the Constitution, from the European Convention on Human Rights and/or from Ireland's international obligations are issues of general public and legal importance.[542]

This recognition of the Supreme Court, of the public and legal importance of the climate change matter, the constitutional and human rights involved, has potential for an interesting turn of events before the Irish Supreme Court. However, the fact that the Irish court concluded that the common understanding of an urgent need to mitigate at least 25% by end-2020 as understood in Urgenda, is differently assessed in different countries. Thus, whether the Irish judiciary will convert to the Urgenda approach has to remain to be seen.

4.3.5. The European Union as a collective transnational jurisdiction: Standing barriers

A last case to be discussed is the case of *Armando Ferrão Carvalho and Others v. the European Parliament and the Council of the European Union*, also known as the *Peoples' Climate case,* which was decided in first instance before the General Court of the CJEU in May 2019. In this case, ten families from different countries in the EU as well as individuals from Kenya and Fiji, and the Saami people,

[538] ibid 76.
[539] ibid 92.
[540] ibid 94–95.
[541] ibid 145.
[542] *FEI v. Ireland (determination leave for appeal)* (n 519) para 8,10.

claimed that current EU measures that deal with reduction targets of GHG emissions, to know Directive 2018/410, Regulation 2018/842 and Regulation 2018/841, all implemented on the basis of Article 192 (1) TFEU, should be annulled.[543] Plaintiffs argued that the current EU target of 40% reductions by 2030 compared to 1990 would, following climate science, be insufficient to protect plaintiffs against the dangers of climate change and would therewith too be insufficient to protect plaintiffs' fundamental rights to life, health, occupation and property under the Charter of Fundamental Rights of the European Union.[544]

In order to have standing before the Court, claimants have a burden of proof with regard to their individual and direct concern for the adjudication of this case, both of which are cumulative.[545] Claimants argued to be individually concerned because they based their claim on fundamental rights, and "although all persons may in principle each enjoy the same right (such as the right to life or the right to work), the effects of climate change and, by extension, the infringement of fundamental rights is unique to and different for each individual."[546]

The General Court of the European Union dismissed this argument and concluded that the claimants failed to prove to have fulfilled the requirement for admissibility under Article 263 TFEU to be individually, directly and sufficiently affected by the contended measures. The court argued that:

> [A]lthough it is true that, when adopting an act of general application, the institutions of the Union are required to respect higher-ranking rules of law, including fundamental rights, the claim that such an act infringes those rules or rights is not sufficient in itself to establish that the action brought by an individual is admissible, without running the risk of rendering the requirements of the fourth paragraph of Article 23 TFEU meaningless, as long as that alleged infringement does not distinguish the applicant individually just as in the case of the addressee. […] It is true that every individual is likely to be affected one way or another by climate change […] However, 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 […] A different approach would have the result of rendering the requirements of the fourth paragraph of Article 263 TFEU meaningless and of creating *locus standi* for all […].[547]

Plaintiffs have filed an appeal in July 2019, claiming that the General Court of the EU erred in interpreting the requirements for individual concern, which would then result in issues with access to justice before the European courts. This appeal is currently pending before the CJEU.

4.4. Lessons to be drawn from domestic litigation developments

Following the above-discussed selection of several high-profile mitigation-related climate change cases originating from different jurisdictions across the world, several takeaways are to be identified. First and foremost, as already mentioned in the introductory remarks of this chapter, it has become clear that there are significant differences in the tools that courts have and apply in order to answer and interpret such climate claims. This has to do in large with the plurality of international and domestic law and

[543] *Armando Carvalho and Others v. the European Parliament and the Council of the EU* (n 353) para 18.
[544] ibid 30.
[545] ibid 45.
[546] ibid 46.
[547] ibid 48, 50.

policy and the fact that litigation to coerce States to increase mitigation efforts to combat and prevent dangerous climate change is a rather novel trend, meaning that there are not that many consistent pathways created yet.

Plaintiffs have made a large variety of claims. These claims were based either on general tort,[548] public nuisance,[549] the public trust doctrine,[550] and constitutional or human rights,[551] but all served a common purpose; to receive a judicial declaration that orders the mitigation of polluting activities that contribute to anthropogenic climate change.

There are two main conclusions to be drawn. First, a clear trend is noticeable towards invoking human rights in this type of litigation in the past five years. Litigants from different jurisdictions are under the collective impression that the lack of proper action to mitigate climate change is in breach with States' positive human rights obligations. It was only in the *Urgenda* case that the Dutch court came to a clear substantive review of the applicability of the rights pursuant to Articles 2 and 8 of the ECHR. This interpretation is an important development towards the full embrace of a HRBA. In the case of *People v. Arctic Oil*, the Norwegian court also payed brief attention to that matter, but quickly dismissed the arguments due to the transboundary effect of its export of extracted petroleum–the harmful product–outside Norwegian territory.[552] Besides that, the Norwegian court concluded that, if the case were not dismissed on substantive grounds under Articles 2 and 8 ECHR, it would be dismissed on procedural grounds as neither Article 34 ECHR, nor the Norwegian Dispute Act allow for a pure *actio popularis*.

A second conclusion regards the outcomes of those cases by judgments. Cases are predominantly dismissed due to justiciability barriers, thus procedural barriers, which stands in the way of substantive review of such alleged human rights violations. The main procedural barriers can be traced back to issues of standing and issues regarding the principle of separation of powers.

There is good reason for this, especially with regard to the latter. As already mentioned before, climate change is a highly complex phenomenon and acting against it requires a lot of interests to be weighed against one another. It is not only a legally complex issue, but scientific foreseeability and uncertainties, cultural differences, political sensitivity, financial counter-interests, and economic consequences are all factors to be considered. There is not one right answer as to how to solve the climate crisis.

As has been stressed by judges in most of the above-discussed cases; the Executive is democratically elected and generally best-suited to use its margin of appreciation in finding a balance in interests. It is not until a clear violation of procedural and substantive obligations, or constitutional or fundamental rights have been identified that courts will have jurisdiction to step in and use their power as the third

[548] *Urgenda Foundation v. State of the Netherlands* (n 479).
[549] *American Electric Power Co., Inc., et al. v. Connecticut et al.* (n 383); *Macquarie Generation v. Hodgson* (n 345).
[550] *Juliana v. US* (n 344); *Complaint La Rose v. Her Majesty the Queen in Right of Canada [Oct 25, 2019]* (n 456).
[551] *Juliana v. US* (n 344); *Complaint Lho'Imggin v. Her Majesty the Queen in the Right of Canada* (n 457); *Complaint of Mathur et al v. Her Majesty the Queen in Right of Ontario [Nov 25, 2019]* (n 456); *Complaint La Rose v. Her Majesty the Queen in Right of Canada [Oct 25, 2019]* (n 456); *Ashgar Leghari v. Federation of Pakistan* (n 350); *State of the Netherlands v. Urgenda Foundation* (n 55); *Natur og Undgom and Föreningen Greenpeace Norden v. the Government of Norway* (n 352); *Summons Magnolia v. Government of Sweden (Sept 15, 2016)* (n 352); *FEI v. Ireland* (n 352); *Armando Carvalho and Others v. the European Parliament and the Council of the EU* (n 353).
[552] *Natur og Ungdom and Föreningen Greenpeace Norden v. the government of Norway* (n 521) 6.

branch of government to correct the faults of others. Thus, the inflexibility of those procedural requirements seems to stand in the way of effective public interest litigation in environmental matters.[553]

In order to create a clear overview of these issues, this paragraph will present create a justiciability digest. To give a definition of the term justiciability, UNEP describes this as "a person's ability to claim a remedy before a judicial body when a violation of a right has either occurred or is likely to occur."[554] The exact interpretation and implementation of this concept differs per jurisdiction and is thus largely a matter of domestic law. However, two main requirements are considered to form a central part of justiciability: The first one is standing and the second one is the court's ability to act without violating the principle of separation of powers.[555] These will be discussed in the same order in the following paragraphs.

4.4.1. Barriers to justiciability: Standing

Standing of parties before a respective court in climate change disputes entails that these parties "must be able to demonstrate that they have some legal right or interest in the matter beyond simply that of concern for the environment."[556] In general, this means that a claimant needs to be able to proof to a certain extent the presence of harm, a causal link between the alleged conduct and the harm, also known as causation, and that this harm is redressable or that a remedy can be provided by the court, meaning that the harm can either be repaired, prevented or restored. These three sub-requirements for standing are closely interconnected and are thus generally dealt with collectively. Regardless of that, the following paragraphs will attempt to identify and discuss these issues separately. The overarching requirement is thus that the claimant may not merely air generalized grievances shared by all or by a large class of citizens but is instead capable of proving its claim to be of sufficient direct interest.[557]

4.4.1.1. Harm and causation

The requirement of harm, or the "victim requirement" seems to exclude general interest or collective interest claims in general, because often-times it is required to include a specific, particular injury or serious risk thereof. Thus, domestic courts, but also–and this has been discussed in chapter 3–regional and international courts generally require the specific identification of such harm as well as a causal link between the harm and alleged State conduct.

As has become clear, the US handles a rather strict standard of standing under Article III of the US Constitution. What is noteworthy is that Article III Courts have often-times managed to avoid questions of harm and causation. For example, in the landmark case of *Massachusetts v. EPA* standing was found for Massachusetts, but only because of its special *parents patriae* status, which allowed the court to virtually skip the "regular" requirements of harm and causation. If Massachusetts would not have had that status, the respective state would have had to prove that the issue brought before the Supreme Court

[553] Jeffrey T Hammons, 'Public Interest Standing and Judicial Review of Environmental Matters: A Comparative Approach.' (2016) 41 Columbia Journal of Environmental Law 515, 516.
[554] United Nations Environment Programme and Sabin Center for Climate Change Law (n 95) 27.
[555] ibid 27–28.
[556] Tava (n 34) 132.
[557] Hammons (n 553) 516.

was both redressable and that the risks of the emissions to create global warming, and thus shrink the coastal area, were immediate. It is very likely that, without that status, Massachusetts would not have been able to present proper supportive proof in accordance with those statements. Then, in the case of *Connecticut v. AEP*, the district court jumped to concluding the matter to fall within the political domain, without answering to the plaintiffs' claim that "global warming will cause irreparable harm to property in New York State and New York City and that it threatens the health, safety and well-being of New York's citizens, residents and the environment".[558] The same was the matter in the Canadian case of *ENJEU v. Canada*, in which the court concluded, without answering to the substantive harm- and causation-related claims, that the character of the group was not suitable for the given claim.[559] Also in the Norwegian case of *People v. Arctic Oil*, the Court of Appeal did not extensively answer to the harm- and causation-claims before concluding the case non-justiciable due to separation of powers issues.[560]

In the Swedish *Magnolia* case, the Swedish courts did answer to harm and causation. It dismissed the case due the failure to determine the realisation of harm. The Court of Appeal there concluded that "the plaintiffs' claim for financial damages is based on a hypothetical risk assessment of the future environmental health effect, and not on any actual economic damage", leading to the conclusion that the claimants could not be provided standing.[561]

In the case of *Juliana v. US,* the US courts also answered to the questions of harm and causation, and concluded these requirements to be fulfilled. The court concluded that the plaintiffs managed to present a record of proof which "leaves little basis for denying that climate change is occurring at an increasingly rapid pace" as a result of anthropogenic GHG emissions and that "at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked."[562] Indeed, the court dismissed the government's argument that the alleged injuries were not particular enough "because climate change affects everyone" by stating that, regardless of the amount of people harmed, "if the plaintiffs' injuries are 'concrete and personal' the harm requirement is fulfilled.[563] The causation requirement was also found to be fulfilled because of the United States' large contribution to global emissions and the government's active contribution to this by facilitating large emitters–often private companies–with subsidies and leases.[564] With this approach, the Court of Appeal has set an interesting precedent for future mitigation-related climate litigation in the United States.

In the case of *Leghari v. Pakistan*, it being the first case in the world to declare a HRBA in mitigation-related climate change litigation admissible, the Lahore High Court concluded the harm and causation requirements to be fulfilled by stating that "climate change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system", and given that Pakistan is particularly vulnerable for such changes, think of floods and droughts, the government's failure to properly implement the adaptation framework, regardless of its being a small emitter on a global scale, would violate the fundamental rights to life and dignity of Pakistan's citizens.[565] Upon coming to this conclusion, the Court did not pay further attention to further procedural obligations.

[558] *American Electric Power Co., Inc., et al. v. Connecticut et al.* (n 383) 3–4.
[559] *ENvironnement JEUnesse v. Canada* (n 349) para 110.*ENvironnement JEUnesse v. Canada* (n 350) para 110.
[560] *Natur og Undgom and Föreningen Greenpeace Norden v. the Government of Norway* (n 352) 18–20.
[561] Future Roundtable Org (n 517).
[562] *Juliana v. US* (n 344) 18–19.
[563] ibid 19.
[564] ibid 20.
[565] *Ashgar Leghari v. Federation of Pakistan* (n 350) para 6.

In the case of *Urgenda v. the State of the Netherlands*, the Supreme Court also concluded the harm and causation requirements to be fulfilled under the ECHR-scheme. The court concluded that current authoritative climate science presents a genuine threat of dangerous and irreversible climate change in the foreseeable future, and that, in order to prevent that, global warming should not exceed 1.5-2ºC relative to the pre-industrial era. The court furthermore underlined that, regardless of the fact that climate change is a global issue, after all, GHGs are emitted by every State, following the UNFCCC framework objectives, every State is responsible for its own share and thus to do 'their part'.[566] The court dismissed the argument of the government that "a state does not have to take responsibility because other countries do not comply with their partial responsibility" or 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", stating that "each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change" and thus "no reduction is negligible".[567] The Dutch Court, by concluding Articles 2 and 8 of the ECHR to be applicable in the given case, then concluded the rights to life and respect for private and family life to be affected due to the dangers of climate change and the government's inaction to lower emissions originating from Dutch territories.

The Urgenda interpretation is unique in the sense that it goes a step further than the ECtHR. The ECtHR has not yet dealt with a climate change case, nor have other human rights courts, and it is therefore not crystal clear whether this interpretation would fall within the meaning of the ECHR. That fact aside, the ECtHR often leaves a wide margin of appreciation to the domestic authorities, to the Executive, in how to deal with human rights obligations, and if the ECtHR would have accepted Articles 2 and 8 ECHR to be applicable in the given case, it would almost certainly not have given a specific 25% reduction order, but it would merely have ordered 'to take more stringent measures' to counter the risk at hand.[568] On the other hand it is important to note that the ECtHR has a different role than a domestic court, the latter which is generally considered to be better suited to deal with domestic affairs and thus to give specific orders.

4.4.1.2. The direct, concrete and sufficient interest requirement

In the cases discussed above, harm and causation do not seem to be a large barrier. Except for the Swedish case, it has either been accepted to be present or it has not been discussed due to the identification of other justiciability complications. The legal status of the claimant(s), however, seems to be a bigger barrier. In the Canadian *ENJEU* case, the court concluded the case to be inadmissible due to the legal status of the involved claimants. Because all minors in Quebec were listed as claimants, the court concluded purely on procedural grounds that it did not meet the character-requirements for a justiciable claimant due to the unspecific, subjective character of the group and the inclusion of minors.[569] However, the case was based on the Canadian charter and thus rights-based, and the court did stress its encouragement of such HRBA and the "*erga omnes effect*" it would have.[570] With that conclusion, the Court implicitly offers an opportunity for the litigants to change this group's character in higher instance.

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[566] *State of the Netherlands v. Urgenda Foundation* (n 103) paras 4.1-4.8, 5.6.1-5.8 See also 'Summary of the Decision'.
[567] ibid 5.7.6-5.7.8.
[568] Leijten (n 520) 5.
[569] *ENvironnement JEUnesse v. Canada* (n 349) paras 125–126.
[570] ibid 143.

Another issue is the *actio popularis* principle. This was an implicit ground for inadmissibility in the EU *People's Climate Case* in which claimants argued that they were individually concerned because they based their claim on fundamental rights and that the effects of climate change and the infringement of such rights is unique to and different for each individual.[571] The General Court of the EU dismissed this and concluded that every individual is likely to be affected by climate change, the claim nonetheless needs to include a specific interest, in that it reflects why the case is of particular importance for this (group of) claimant(s).[572] Thus, the specific and identifiable victim-requirement was considered not to be fulfilled.

In the Dutch *Urgenda* case, the character of the claimants was also brought up by the government regarding the applicability of the ECHR. The government argued that, because Article 34 ECHR excludes public interest actions, the claimants' complaints regarding Articles 2 and 8 ECHR would not have standing.[573] The Dutch Supreme Court dismissed this argument by stating that Article 34 ECHR is only applicable with regard to access to the ECtHR and not to Dutch courts. Standing before Dutch Courts for class actions is regulated in Article 3:305a DCC.[574]

This issue was also dealt with in the Norwegian *People v. Artic Oil* case, in which claimants argued that Articles 2 and 8 ECHR should be applicable to case at hand. The Norwegian government, too, argued that Article 34 ECHR should stand in the way of discussing these complaints.[575] The Norwegian court did not explicitly dismiss the government's argument, but instead concluded that the Norwegian Dispute Act affords standing to collective claims as long as the claimants have a sufficient interest, meaning that a connection between the claimant and the allegedly breached human rights violation is required and that it doesn't entail a sheer *actio popularis*. Without answering to the matter, the Court then concluded that it found "no reason to go further into whether there is a basis for dismissing this part of the lawsuit, as it finds it clear in any event that the Government must also be held not liable as regards this basis".[576] In its assessment, the Court of Appeal did pay brief attention to the substantive requirements of Articles 2 and 8 ECHR before concluding these provisions not to be breached by awarding production licenses.[577]

This standing-issue is probably the most disputed one. Indeed, applicants need to have a specific interest in making a claim, often because a victim-requirement needs to be fulfilled, unless an *actio popularis* is explicitly allowed. As discussed before, the only regional human rights framework to allow this indiscriminately is the African framework. Besides that, American framework has ignored the specific interest- or victim-requirement, but only in indigenous cases and the European framework is strictly against this type of claim. For now, it is thus a matter of domestic law whether this is allowed. The Dutch legal framework allows for such claims, as does the Canadian framework, but the Norwegian and EU frameworks do not, which stands in the way of effective protection of fundamental rights in class actions.

For the European framework, however, it could be an option to loosen up the standing requirements. Some scholars have argued in favour of a new approach in climate change matters, and Lambert proposes a "limited *actio popularis* for people in the vicinity of the environmental damage".[578] This has, for example, been introduced in the French legal system since 2016, in Article 1246 of the French Civil

[571] *Armando Carvalho and Others v. the European Parliament and the Council of the EU* (n 353) para 46.
[572] ibid 48, 50.
[573] *State of the Netherlands v. Urgenda Foundation* (n 55) paras 34–38.
[574] ibid 36; *State of the Netherlands v. Urgenda Foundation* (n 103) para 2.3.2.
[575] *Natur og Undgom and Föreningen Greenpeace Norden v. the Government of Norway* (n 352) para 4.1.
[576] ibid.
[577] ibid 4.2.
[578] Lambert (n 142) 21.

Code, wherein a non-exhaustive list of bodies with standing has been laid down in Article 1248 of the Civil Code.[579]

4.4.1.3. Redress or remedy

A last issue of standing, which is closely related to the principle of separation of powers and seems to be a specific issue within the US domestic system is the issue of redressability. As has become clear in the US case-studies, the possibility to provide proper remedy or redress is an important standing-requirement under Article III of the US Constitution.[580] The requirement was a central consideration in the very recent *Juliana v. US* case, where the Court of Appeal concluded, contrary to *Massachusetts v. EPA,* that even though the harm-requirement was considered to be met and the seriousness of climate change was recognised, the issue of redressability together with the separation of powers doctrine stood in the way of the plaintiffs having standing. The Court of Appeal concluded that the plaintiffs neither made a claim that the government had violated a statute or regulation, nor that procedural rights were denied and that plaintiffs were also not seeking claims under the Federal Tort Claims, but instead merely claimed that the government deprived them of a substantive constitutional right to a "climate capable of sustaining human life" and that they, thus, merely asked for redress in the form of declaratory or injunctive relief.[581] Because of that, the Court of Appeal had to conclude that the requested remedy would require the government to cease permitting, authorizing and subsidizing fossil fuel use, and to prepare a plan subject to judicial approval to draw down harmful emissions. All in all, that would mean that the Court would overstep its competence by entering the political domain. The character of the remedial request thus stood in the way of the court answering to it.[582]

Redress and remedy also formed one of the central matters of controversy in the Urgenda case. There, by means of offering redress to the conclusion of a preventive violation of Articles 2 and 8 ECHR, the Court ordered the State to undertake a 25-40% GHG emissions reduction by end-2020 compared to 1990 levels. The Court based this order on the IPCC's AR4 in which it was concluded that in order to remain well below 2ºC, GHG emissions should not exceed 450 ppm by 2100, which would be equal to a 25 to 40% reduction by end-2020. The government counter-argued this by stating that firstly, multiple alternative pathways are presented in AR5, and that, secondly, it is not a binding rule or agreement in and of itself, thus that it does not bind the State.[583] With reference to the Cancún Agreements, the Durban Agreement, the Doha Amendments to the Kyoto Protocol–all to which the Netherlands agreed–which confirmed the need for a 25-40% reduction, and the fact that the large majority of proposed alternative pathways in AR5 included so-called negative emissions, to which no technology has been shared that would be of sufficient scale, that there is a high degree of consensus in international climate science and in the international community that a 25 to 40% reduction target is necessary.[584]

The State furthermore argued that the 25 to 40% target merely applies for the UNFCCC member States as a collective, but that this target does not apply individually.[585] The court dismissed this argument by stating that, even though it is true that the target was set for the Annex I countries as a collective, "the

[579] ibid 21–22.
[580] *Massachusetts v. EPA* (n 343) 2; *Juliana v. US* (n 344) 14.
[581] *Juliana v. US* (n 344) 22.
[582] ibid.
[583] *State of the Netherlands v. Urgenda Foundation* (n 103) para 7.1.
[584] ibid 7.2.1-7.2.7.
[585] ibid 7.3.1.

UNFCCC and the Paris Agreement are both based on the individual responsibility of states. Therefore, in principle, the target from AR4 also applies to the individual states within the group of Annex I countries."[586] The Court continued that the Netherlands furthermore expressly committed itself to such target until 2011 when it adjusted its target downwards to 20% in line with EU-policy, meaning that the Netherlands was clearly aware of the need to lower emissions by at least 25%.[587]

Lastly, the court dismissed the government's disproportionate burden-argument, by stating that the order has been in force since the first instance judgment of 2015, "that the State has moreover been aware of the seriousness of the climate problem for some time and initially pursued a policy aimed at a 20% reduction by 2020", and "that other EU countries pursue much stricter climate policies and that the State has not explained its argument in more detail."[588]

All in all, the Supreme court concluded that the State failed to prove that a 25% emissions reduction target would not be necessary and thus concluded that the State has to adhere to the reduction order.[589] As already briefly mentioned above, this is a form of creative interpretation and it is questionable whether this type of order is in line with the standards and precedents of the ECtHR. On the other hand, the Court underlined that it did not force the State to create new legislation, but merely that it should take more action to fulfil the 25% requirement in order to prevent dangerous climate change from materialising in line with current climate science prospects and the precautionary principle. Now, how the State will do that, indeed falls within the domain of the Executive.

There is a fine line between what is acceptable to offer as redress and what is not and that this is highly dependable on domestic interpretation. In the *Juliana* case, the Court concluded that it would not be acceptable to order the Executive to cease the facilitation of fossil fuel use, and to take positive action to draw down harmful emissions, because this would lead the judiciary to challenge the powers of the Executive. The Dutch court then stated that it would not overstep its competence, stating "the courts are not prevented to issue a declaratory decision to the effect that the omission of legislation is lawful. They may also order the public body in question to take measures in order to achieve a certain goal, as long as that order does not amount to an order to create legislation, with a particular content."[590]

4.4.2. Barriers to justiciability: The principle of separation of powers

Following the above-discussed standing issues, it has become clear that standing and the principle of separation of powers are closely connected. In a sense, it can be said that this separation of powers principle restricts standing requirements even more and has the potential to block public interest litigation.[591] The main connecting point between the two requirements is that, if a claimant in proceedings does not have a sufficient interest, for example because no specific harm can be identified, then it is not for judges to deal with that. Hammons explains this issue very clearly, by stating the following:

[586] ibid 7.3.2.
[587] ibid 7.4.2.
[588] ibid 7.5.3.
[589] ibid 7.5.1-7.5.3.
[590] ibid 8.2.6-8.2.7.
[591] Hammons (n 553) 545.

> Allowing a citizen with no injury to question executive action in courts would effectively transfer the discretion of administering the laws from the executive branch to the judiciary. In other words, it would enable courts 'to assume a position of authority over the governmental acts of another and co-equal department, and to become 'virtually continuing monitors of wisdom and soundness of Executive action'."[592]

In many jurisdictions public interest litigation in the form of an *actio popularis* is, as has been discussed in the previous paragraph, thus, not explicitly recognized.[593] However, when taking note of the above-discussed cases, it is clear that key players in climate change litigation are NGOs and that the main aim is to fulfil public interests, to act for the greater good, thus the claimant itself is not necessarily "the object of challenged government action or inaction", or maybe it is, but not exclusively.[594] This limitation leads to consistent, reoccurring justiciability barriers.

In the US case of *Connecticut v. AEP* for example, the Court of First Instance first concluded the case to be non-justiciable due to the political weight of the claims put forward by the plaintiff-states, which is impossible to answer without an initial policy determination of a kind clearly for non-justiciable discretion.[595] This was later reversed by the Court of Appeal with reference to an old US Supreme Court case which stated that "the political question doctrine must be cautiously invoked" and that "simply because an issue may have political implications does not make it non-justiciable", leading to the Court of Appeal's conclusion that "it is error to equate a political question with a political case" and that the threshold for non-justiciability on the basis of the political question doctrine is high.[596] The Supreme Court eventually reversed the case, not in the sense that it disagreed with the conclusions of the Court of Appeal regarding the political question doctrine, but rather with regard to the eventual outcome; it concluded the case to fall within the discretionary powers of the EPA.[597]

In the US *Juliana* case, the Court of First Instance first concluded, in line with *Connecticut v. AEP*, that the "judiciary must not shrink from its role as a coequal branch of government" and thus concluded that the plaintiffs did have standing before the court. However, this was reversed by the Court of Appeal which, as already mentioned above, concluded that the character of the request for redress conflicted with the separation of powers principle, thus leading to non-justiciability.[598] In its conclusion the court stated that it had to "reluctantly conclude […] that the plaintiffs' case must be made to the political branches" and that, even though the political branches "may have abdicated their responsibility to remediate the problem does not confer on Article III court, no matter how well-intentioned, the ability to step into their shoes."[599]

In the case of *Thomson v. New Zealand* too, the New Zealand Court underlined that the separation of powers principle is an important threshold for justiciability. By taking into account the practice of justiciability of other domestic jurisdictions in climate change litigation, the court concluded that "if a ground of review requires the Court to weigh public policies that are more appropriately weighed by those elected by the community it may be necessary for the Court to the elected officials on constitutional grounds, and because the Court may not be well placed to undertake that weighing."[600]

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[592] ibid 546.
[593] ibid 516–517.
[594] ibid 545.
[595] *Connecticut v. AEP* (n 385) 11.
[596] *Connecticut v. AEP* (n 389) 35.
[597] *American Electric Power Co., Inc., et al. v. Connecticut et al.* (n 383) 3.
[598] *Juliana v. US* (n 344) 22.
[599] *ibid 32.*
[600] *Thomson v. New Zealand* (n 347) paras 133–134.

Because the complaints concerned NDCs and neither the UNFCCC nor the Paris Agreement provide for a specific criterion on how these targets are to be set, the court concluded that this falls within the discretion of the Executive branch.[601] This was also an issue in the Canadian *Friends of the Earth* case of 2008, in which claims were made with regard to the alleged failure to properly implement the Kyoto Protocol Implementation Act. There, the court concluded that it could not mingle in the wording of 'to ensure' given that this is an "open" policy-laden provision and therefore not a proper subject for the judiciary to decide on.[602] Thus, the court concluded this too to fall within the discretionary power of the Executive branch.

However, inspired by litigation in European jurisdictions, the Canadian Court took a different stance regarding claims under the Canadian Charter, which is a fundamental rights charter and thus concerns a HRBA. In the case of *ENJEU v. Canada*, the court concluded that "in the context of the Canadian Charter, which is an integral part of the Constitution of Canada, the courts must decide upon the limits of justiciability of the issues. It is in this context that the adoption of the Canadian Charter has, to a large extent brought the Canadian system of government from parliamentary supremacy to one of constitutional supremacy."[603] This is very interesting, because it affords the court to restrict the Executive branch's power due to the constitutionality of the issues raised.

The same was the matter in the *Urgenda* case, in which the government argued that "it is not for the courts to make the political considerations necessary for a decision on the reduction of greenhouse gases."[604] The Supreme Court answered to these arguments by stating that, yes, government and parliament do have a certain degree of discretion to make the necessary political considerations, but "it is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound."[605] The Supreme Court then concluded these limits to include the obligations derived from the ECHR, especially given that the court is obliged under Articles 93 and 94 of the Dutch Constitution–codifying the direct effect of binding international law in domestic law–to apply its provisions in accordance with the interpretation of the ECtHR.[606] It furthermore underlined, and this is probably the most important part, that "[t]he protection of the human rights it provides is an essential component of a democratic state under the rule of law".[607] Again the HRBA seems to invoke a certain degree of constitutionalism, which affords courts, in light of the rule of law, to review this to a larger extent than regular statutory or federal law.

These interpretations, as exemplified by the Canadian and Dutch domestic cases, implies an increasing acceptance of climate change as a constitutional issue, a human rights issue, which is thus considered to fall within the merits of existing law.[608] These cases can be considered to go against, as Burgers describes it, "the majoritarian decisions taken in the democratic process", made by the democratically elected Executive and legislative branch, "which makes their democratic legitimacy questionable".[609] A court can only then oppose this democratic majority if it is, as also underlined by the Supreme Court in Urgenda, to protect democracy itself as secured in the system of fundamental rights. Burgers continues by stating that "[i]f a judicial decision defends environmental interests against majority decisions, this is legitimate only if constitutional value is attached to the environment", meaning that the protection of

[601] ibid 179–180.
[602] *Friends of the Earth v. Canada (Governor in Council) (F.C)* (n 348) 33–34.
[603] *ENvironnement JEUnesse v. Canada* (n 349) para 51.
[604] *State of the Netherlands v. Urgenda Foundation* (n 103) para 8.3.1.
[605] ibid 8.3.2.
[606] ibid 8.3.3.
[607] ibid.
[608] Burgers (n 18) 14–15.
[609] ibid 16.

fundamental rights has a superior role over majority decisions.[610] After all, fundamental rights are the key protectors of democracy and the rule of law.

This development thus shows that, even though we are in the midst of a large global 'revolution' with regard to the understanding of countering climate change through the successful invocation of human rights obligations, we are currently undergoing a rather quick turn towards the acceptance of climate change as a constitutional, fundamental rights issue. Burgers describes this as a new "global environmental constitutionalism".

A last case to be discussed, which, though based on *Urgenda* and human rights, took a different stance on the matter in first instance is the case of *FEI v. Ireland*. The separation of powers principle there was ground for non-justiciability of the case. The court concluded that the scientific information and the urgency to act, which was considered to enjoy a large degree of consensus in the international community by the Dutch Supreme Court, is differently assessed within the global community. Because of this lack of universal consensus, according to the Irish court, the court concluded that it should thus "be reluctant to review decisions involving utilitarian calculations of social economic and political preference, the alter being identifiable by the fact that they are not capable of being impugned by objective criteria that a court could apply".[611] Thus, the court concluded it to be too difficult to conclude that the Executive branch had acted disproportionately and that therefore it could not review the matter further without overstepping the principle of separation of powers.[612] This is the "other side of the medal". The fact that one jurisdiction concludes in favour of environmental constitutionalism does not force another jurisdiction to do the same. Local or national political, cultural and economic interests remain to be an important basis to either embrace or deny that.

Interestingly, however, the claimants requested immediate appeal before the Supreme Court, which was granted given that "there exists a degree of urgency in respect of the adoption of remedial environmental measures."[613] The fact that the Supreme Court states the 'urgency' of the situation, seems already to imply disagreement with reasoning of the court of first instance.

It can thus be concluded that the HRBA shelters much potential, provided that a domestic jurisdiction is ready to embrace the constitutional status of climate change, compared to other strategies. As courts have underlined that the judiciary is an equal branch of government, the judiciary can counter the majority opinion reflected in the conduct of the Executive if this conduct is concluded to contradict fundamental rights in order to protect democracy and the rule of law. This development, though jurisdictions differ, is proof that climate change does not necessarily solely belong to the political domain but may also be a constitutional matter which provides space for courts to act without overstepping the principle of separation of powers.

4.5. Concluding remarks

Following this chapter's legal-dogmatic research of several highly diverse cases from different jurisdictions, this chapter aimed to identify what developments are currently happening with regard to climate change litigation. Noteworthy is that a significant shift is occurring towards the invocation of a

[610] ibid.
[611] *FEI v. Ireland* (n 352) paras 94–95.
[612] ibid 145.
[613] *FEI v. Ireland (determination leave for appeal)* (n 519) para 8.

HRBA in mitigation-related climate change litigation for approximately five years now and that the global community is still amid that shift. Although those human rights-based cases have not all been successful, it does present a growing awareness of the consequences of a lack of mitigation action by States' governments on our existence and the enjoyment of our rights.

A number of reoccurring issues have furthermore been identified in all cases and mainly refer to justiciability issues, where the court is either not in a position to declare a case admissible due to a lack of standing or where a court is not in a position to question the majoritarian elective's conduct from the perspective of the principle of separation of powers. The main standing issue regards the specific, identifiable interests of the claimants. Climate change litigation is generally characterized by class actions, in the form of an *actio popularis*. This has to do with the broad scope and multi-faceted, slowly developing character of climate change. The future aspect is another hurdle standing in the way effective protection. Besides that, it is primarily the most vulnerable groups of people that are hit the hardest. These groups generally form the minority of the population and are therewith underrepresented in climate change governance. For these groups to claim to be an individual victim is hard, either due to the future aspect of climate harm or due to limited financial or other means to support such claim. And given the fact that we are all the cause and the victim of anthropogenic climate change, making this a matter of common interests that belong to everyone, public interest litigation by means of an *actio popularis* is a reasonable way to bring a claim to court.

The problem with this justiciability barrier is that this cannot be solved unless the legislator has explicitly allowed this or decides to adapt legislation and allow for such claim. On the other hand, if a domestic jurisdiction does not provide *actio popularis* standing, litigants can strategically anticipate on these matters and point out what exact harm has been done to them. The recent petition of *Sacchi et al. v. Argentina et al.* to the UN Committee on the Rights of the Child (CRC) is a good example of that.[614]

In that case, sixteen child-petitioners filed a complaint against Argentina, Brazil, France, Germany and Turkey requesting that the CRC adopt precautionary, declaratory and remedial relief, by finding "that climate change is a children's rights crisis"; that "each respondent, along with other states, has caused and is perpetuating the climate crisis by knowingly acting in disregard of the available scientific evidence regarding the measures needed to prevent and mitigate climate change"; and that the respondent States should "amend their laws and policies to ensure that mitigation and adaptation efforts are being accelerated to the maximum extent of available resources and on the basis of the best available scientific evidence to (i) protect the petitioners' rights and (ii) make the best interests of the child a primary consideration, particularly in allocating the costs and burdens of climate change mitigation and adaptation."[615]

As a petition of this nature requires, under Article 5 of the Third Optional Protocol to the Convention on the Rights of the Child, that the petitioners can be considered victims "of a violation by that State party of any rights set forth in any of the following instruments to which that State is a party",[616] the applicants all, individually set out how they have allegedly been harmed by the consequences of the

[614] 'Communication to the Committee on the Rights of the Child in the Case of [16 Youth] Petitioners v. Argentina, Brazil, France, Germany and Turkey. Submitted under Article 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child'.
[615] ibid 33.
[616] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure 2014 Article 5(1).

otherwise abstract problem of anthropogenic climate change and the lack of mitigation action.[617] To name a few examples, petitioners have alleged to have been "hospitalized for asthma as hotter temperatures worsen the air quality",[618] to have been bedridden after inhaling smoke from wildfires as a consequence of hotter and drier conditions,[619] to have been forced to flee their homes as a result of violent storms,[620] and to be increasingly exposed to the risk of infectious diseases as a result of floods and rising sea levels.[621] This petition has been expressly supported by UNICEF as well as by the CRC, which welcomed "the active and meaningful participation of children, as human rights defenders, in relation to issues of concern to them along with everyone else."[622] The petition is currently pending an admissibility decision, but the individualisation of the problem is undoubtedly helpful in that regard.

Surprisingly, the harm and causation issue is not the biggest hurdle, a more common issue is that of the court's competence in light of the principle of separation of powers. And the HRBA does offer much potential in that regard. As mentioned before, if litigants go to court with a mitigation-related claim, thus with a claim that goes against current policy made by the Executive branch, this claim implicitly questions the majoritarian decision-making process. This is something that generally does not fall within the discretion of the court. The court is not allowed from a separation of powers perspective to interfere in the political domain. However, this discretion of the Executive goes only so far as it stays within the parameters of constitutional and fundamental rights. And if a matter is a fundamental rights issue, the court can limit this discretion in order to protect democracy and the rule of law.

This is what is happening now: A constitutionalisation of the environment is starting to occur. Courts are increasingly starting to recognise environmental rights to be a fundamental rights issue. The Urgenda case being the first, revolutionary, example of that. Through the indirect interpretation of the protection of the environment as part of the protection of the rights to life and the right to private and family life pursuant to Articles 2 and 8 ECHR, the Dutch Supreme Court could review government conduct in that regard and concluded the conduct to impair these rights.

The interpretative relativity thereof, is however, highly dependent on domestic affairs and the "holy grail" formula for one jurisdiction, as for the Netherlands with the Urgenda case, is not necessarily the same formula that works for other jurisdictions, as has become clear with, for example, the Irish *FEI* case. However, the fact that such changes are occurring, that courts are shook by the amount of cases coming in and that courts are increasingly declaring human rights-based cases admissible is a development leaning towards a constitutionalisation of fundamental rights; a development that cannot be ignored.

Besides the human rights-based cases, the fact that in the past three years the amount of climate change lawsuits in general has almost doubled, shows a clear shift towards growing unrest considering the climate emergency. Will climate change lawsuits change the world? Most probably not, but it does present a shift from public trust in majoritarian government action to counter the dangers of climate change, to individuals, NGOs and other activist 'minority' parties taking matters into their own hands and claiming to have legal rights that protect them against these climate dangers. After all, the aim to

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[617] 'Communication to the Committee on the Rights of the Child in the Case of [16 Youth] Petitioners v. Argentina, Brazil, France, Germany and Turkey. Submitted under Article 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child' (n 614) paras 5–11.
[618] ibid 5.
[619] ibid 6.
[620] ibid 8.
[621] ibid 9.
[622] 'UN child rights committee voices support for children campaigning on climate change' <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25068> accessed 17 May 2020.

provide inclusive protection by the democratically elected majoritarian Executive branches has proved to fail.

5. A Kuhnian paradigm shift? Potentials and challenges of a human rights-based approach

What future is ahead of us in light of the climate change crisis? Are we starting to realise that the current state of affairs with all the prospects of dangerous and irreversible climate change needs more enforceable compliance mechanisms? Can States be held responsible through courts based on human rights obligations? And, to arrive at the main question of this thesis, are we currently amid what can be called a Kuhnian paradigm shift from voluntary mitigation targets through international governance to obligatory court-based mitigation targets on the basis of human rights law?

Following the research outcomes from the former chapters, this chapter will answer this question. Two main conclusions, though closely connected with one another, will have to be distinguished. The first conclusion regards the question whether the international community is currently undergoing a paradigm shift from voluntary governance-centralised mitigation to obligatory court-ordered enforcement of mitigation targets. The second conclusion regards to what extent courts can effectively provide relief in climate change-related claims. In particular, in line with the human rights-based trend, the potentials of a HRBA in mitigation-related climate change litigation are of interest. The answer to these questions will not be black and white as a lot of factors play a role in the eventual concluding remarks.

5.1. A shift from voluntary mitigation targets through governance to obligatory court-ordered enforcement

For decades now, awareness of the need to act upon the dangers of anthropogenic climate change has been present. Starting with the adoption of the Stockholm Declaration in 1972 until the recent adoption of the Paris Agreement in 2015, governments have eagerly bound themselves to address climate change mitigation and adaptation targets through international legislative and policy commitments and continue to do so with annual COP-meetings and a large framework of subsequent climate change laws and policies, basing these obligations on authoritative climate science.

These processes have not been entirely unsuccessful. For example, with the adoption of the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987, which is a noteworthy success of international climate governance. As reported by the UN in 2017 on the thirtieth anniversary of the adoption of this Protocol and following scientific reports "parts of the ozone layer have recovered at a rate of 1-3% per decade since 2000. At projected rates, Northern Hemisphere and mid-latitude ozone will heal completely by the 2030s. The Southern Hemisphere will follow in the 2050s and the Polar Regions by 2060. Ozone layer protection efforts have also contributed to the fight against climate change by averting an estimated 135 billion tonnes of carbon dioxide equivalent emissions, from 1990 to 2010."[623]

With the adoption of the UNFCCC in 1992, the same good intentions were present when States committed themselves universally to ultimately achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate

[623] 'UN Ozone Day statement' <https://www.un.org/en/events/ozoneday/> accessed 16 May 2020.

system",[624] as well as to take "precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects",[625] through the CBDR principle, and by promoting sustainable development and international cooperation.[626]

These commitments, supported by the reports of, amongst others–but predominantly–the IPCC, have been specified throughout the years with the additional Kyoto Protocol of 1997, with the Paris Agreement which was adopted during the twenty-first COP-meeting in 2015, and hundreds of other subsequent unilateral, bilateral and multilateral agreements. With the adoption of the Paris Agreement, States have even committed themselves to hold "the increase in global average temperature well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change",[627] with the aim "to reach global peaking of greenhouse gas emissions *as soon as possible*".[628]

However, current statistics show that these aims have been much harder to achieve in practice than on paper. Following a report of the World Bank from 2013, GHG emissions levels have risen from 22.4 billion metric tons in 1990 to 35.8 billion metric tons in 2013, meaning emissions levels have risen with 60% in 23 years' time.[629] The effects thereof are already starting to show. To name a few examples, sea levels are rising rapidly, floods and droughts are an increasing issue, forest and bush fires are becoming more extreme and destructive, heat waves are becoming more common, and exposure to polluted air causes more damage to human health than ever before.[630] Indeed, as reported by the UN Human Rights Council, "[m]ore than 90 per cent of the world's population lives in regions that exceed WHO guidelines for healthy ambient air quality", meaning that "over 6 billion people – including 2 billion children – are breathing air that has adverse consequences for their health and well-being."[631] And the most vulnerable populations are hit the hardest by these developments. Women, children, the elderly, the poor, and indigenous peoples are most vulnerable and therewith most negatively affected in the enjoyment of their human rights.[632] These most vulnerable groups are also the minority groups, which leads to underrepresentation in international, supranational and national governance.

It cannot be ignored that democratic processes have proved to be too slow in their domestic and international implementation of the targets set in climate change law and governance agreements. Whereas climate science predictions present a clear framework of risks and proposed measures that need to be taken to remain below the 1.5 to 2°C mark, the main remedy being the prevention of further global warming through mitigation of GHG emissions, counter-interests–economic, financial and political–continue to stand in breach with the democratically elected majoritarian institutions effectively answering to the urgent need to take action 'as soon as possible'.

As a result of this lack of success and the materialisation of the consequences of climate change, activist counter-movements have started to grow exponentially in the past few years, questioning international governance processes and claiming more action to protect individuals' fundamental rights against climate change. This noticeable establishment of activist movements reflects a loss of public trust in

[624] UNFCCC Article 2.
[625] ibid Article 3(3).
[626] ibid Articles 3(4) and 4(1).
[627] ibid Article 2(1)(a).
[628] Paris Agreement (Dec. 13, 2015) Article 4(1).
[629] 'Global CO_2 emissions chart | Worldbank' <https://blogs.worldbank.org/opendata/chart-global-co2-emissions-rose-60-between-1990-and-2013> accessed 15 May 2020.
[630] Boyd (n 147) paras 23–30.
[631] ibid 25.
[632] ibid 31–36.

voluntary compliance methods by governments as well as the search for alternative methods to coerce States to fulfil their commitments. And interestingly, besides coercing public debate through protests and marches, courts have recently become a "natural place of resort".[633]

This resort to the judiciary has several issues in the field of climate change. A first issue is that the UNFCCC regime does not offer a direct platform for dispute settlement, but merely allows for settlement of disputes through inter-State applications either before the ICJ or via an arbitration procedure.[634] Given that States have no incentive to start such procedure, but that its rather NGOs, individuals and other non-State actors arguing for the public interest, this platform does not offer effective relief. A second issue is the fact that international courts have been hesitant to say the least, and unwilling to say the most, to answer to these highly complicated issues for reasons of political sensitivity and that no international courts to date, the human rights courts being the main institutions in this discussion for they afford standing to non-State actors in claims against States, have answered specifically to climate change disputes.

This has not withheld public interest advocates to act. Indeed, in the past few years there has been a 'climate change litigation explosion' on a domestic level as some scholars name it, where the amount of climate change disputes has almost doubled between 2017 and 2020 in jurisdictions from all over the world–with mixed success.

But can this shift from voluntary State compliance in which public trust and representation by the majoritarian elective to court-ordered mitigation targets be considered a Kuhnian paradigm shift? Are we currently in the midst of what can be called an 'anomaly', a "crisis where new competing theories emerge, resulting in a plethora of ideas, leading to the loss of the paradigm"?[635] Do these social events, these protests against government inaction to mitigate, represent a practically unworkable legal framework that is in dire need of a changing view?[636]

First and foremost, it is important to realize that these 'protests' contradict democratically elected institutions, meaning institutions that represent the majority of populations through electoral processes. And from a separation of powers perspective, it does not fall within the principal competence of the judicial branch to indiscriminately interfere with the electorate. However, the fact that governments represent the democratically elected majority, does not exclude the fact that institutionalised distrust is part of democracy too. After all, democracy also entails that minorities are protected against "majoritarian parliamentary tyranny" through contra-democracy.[637] In other words, in order for a functioning democratic rule of law system, it is important to uphold a system of checks and balances in which said counter-movements keep the electoral process in balance.[638]

As stressed by James May and Erin Daly in the introduction of the UNEP *Global Judicial Handbook on Environmental Constitutionalism*, "[c]ourts matter. They are essential to the rule of law. Without courts, law can be disregarded, executive officials left unchecked, and people left without recourse. And the environment and the human connection to it can suffer. Judges stand in the breach."[639] The fact alone

[633] Winkelmann, Glazebrook and France (n 4) para 130.
[634] UNFCCC Articles 13 and 14.
[635] de Vries (n 23) 10.
[636] ibid 21–22.
[637] RA Koole, 'Is de "Akkoorden-Democratie" wel een Democratie?' (2019) 34 RegelMaat 96–97.
[638] ibid 98.
[639] James R May and Erin Daly, 'Global Judicial Handbook on Environmental Constitutionalism (3rd Edn)' (UNEP 2019) 7

that judges are focusing on environmental issues and climate change will awaken societal consciousness of the climate emergency the world is currently enduring.[640] It is therefore of the highest importance that courts form an efficient and accessible branch of government in those situations where the executive and legislative branch fail to fulfil public interests.

So, to answer the question whether we–society–are currently enduring an 'anomaly' in the current paradigm in which voluntary compliance through elected governance is the predominant method of settling the climate change crisis: The answer is yes. Current methods are unsuccessful, as implementation of the 'good intentions' laid down within the climate change governance regime is not in keeping with the materialisation of the known risks of not mitigating GHG emissions. Society is starting to step up against that, in particular youth movements basing their claims on the principles of inter- and intra-generational equity, indigenous groups basing their claims on their dependence on the lands and current environment, groups of elderly and disabled people and many others, all forming the most vulnerable 'minority' groups in the climate change debate. And besides the fact that these groups start (peaceful) protests, these litigants have now come to a point where they invoke their fundamental rights to a healthy environment before respective courts.

This tension between law and politics in the climate change debate is currently amid a revolution. And the fact that litigation is not exclusively unsuccessful reflects a shift towards the constitutionalisation of a right to a healthy environment. This will be discussed in the following paragraph, in which the current trend of a HRBA in mitigation-related climate change litigation, as well as its potentials and challenges to effective enforcement, will be assessed.

5.2. The potentials of a human rights-based approach in mitigation-related climate change litigation

To return to the, in the previous paragraph discussed, interference of courts in these 'protest'-cases–the cases of contra-democracy–a shift is noticeable towards the recognition of climate change as a human rights issue. This shift makes sense, not only because the materialisation of dangerous climate change almost certainly forms an existential threat to the enjoyment of our fundamental rights, but also because the judiciary can only then interfere with the electoral majority if the conduct unjustifiably interferes with constitutional or fundamental rights.

As presented in chapter 3, global governance is increasingly recognizing this human rights aspect, for example through the explicit recognition thereof in the Preamble of the Paris Agreement and through the fact that the UN Human Rights Council is active in that aspect, as the Special Rapporteurs on the Environment and Human Rights continue to stress the importance of recognizing a human right to a healthy environment, either independently or implicitly.[641] The above-mentioned petition of *Sacchi et al. v. Argentina et al.*, which has been applauded by UNICEF and the CRC, as well as multiple other fora, is furthermore a good example of this governance shift. Such petition may nourish social action, growing awareness of the problem and may eventually lead to change. However, the downside of such petitions is also that it takes a considerable amount of time before action is factually taken and in light

<https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/JEN/2019_JEN/UNEP_Handbook_on_Environmental_Constitutionalism__3d_ed.pdf> accessed 29 February 2020.

[640] ibid.

[641] Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (n 318) paras 12–13.

of the climate change crisis there is not that much time to spare.[642] Thus, court enforcement is more effective in the short run, as it has the coercive power of direct action. But, to what extent are courts an effective platform to enforce such change?

Following the legal-dogmatic research conducted in chapter 4 of this thesis, it has become apparent that present-day global convictions amongst litigants are changing. This research has shown that an unprecedented global shift from classic tort-based claims to human rights-based claims is occurring, which clearly represents a growing awareness of the consequences of the lack of mitigation action by governments on our existence and the enjoyment of our rights.

The Urgenda case is ground-breaking in that context. In this case, the Dutch Supreme Court upheld the Court of Appeal's judgment in which a HRBA pursuant to Articles 2 and 8 ECHR was adopted to counter the lack of action by the Dutch State to properly mitigate GHG emissions. The Court furthermore ordered the State to redress this by lowering its emissions by at least 25% by end-2020 in line with reported prospects of the IPCC. Besides that, the Court dismissed the State's arguments that the matter was too abstract to be dealt with through applicability of the ECHR, and, with reference to the widely-accepted precautionary principle, concluded the rights to life and to respect for private and family life, home and correspondence to also entail a positive obligation to take measures to prevent the 'real and immediate risk' of an unjustifiable interference thereof, as long as this obligation does not result in a disproportionate burden upon the responsible State.

Furthermore interesting–and this is a matter that has proved to be a serious issue before virtually all other courts in the climate change debate–is that the Dutch Supreme Court dismissed the State's arguments that the matter belonged to the political domain; thus, that the Court would not have competence to consider the matter due to the principle of separation of powers. The Court concluded differently, and argued that, self-evidently the executive and legislative branch do have a certain degree of discretion in the implementation of policy commitments, *as long as* these branches remain within the limits of the law. And given that the protection of human rights is an essential component of a democratic State under the rule of law, the court is allowed to substantively review the matter. [643] This consideration was also stressed by the Canadian Superior Court in the *ENJEU* case, where the Court concluded that in situations where human rights are infringed, general parliamentary supremacy is overruled by constitutional supremacy.[644] This is a large advantage as compared to invoking statutory or regulatory rights, as it allows courts to oppose the democratic majority to protect an inclusive democracy through the security of the fundamental rights system. After all, as said before, fundamental rights are the key protectors of democracy and the rule of law.

This development thus shows that, although there are still uncertainties about how to counter climate change, the international community is currently increasingly accepting climate change as a constitutional, fundamental rights issue. Burgers describes this as a new "global environmental constitutionalism".[645] To cite Burgers once more, "once the judiciary does stipulate that an undisrupted climate is a constitutional matter this usually implies regulatory duties for the other branches of government: the judiciary lays the foundation for the executive branches to build upon" and is allowed to do so if this is based on fundamental rights.[646]

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[642] Jasanoff (n 42) 443.
[643] *State of the Netherlands v. Urgenda Foundation* (n 103) para 8.3.3.
[644] *ENvironnement JEUnesse v. Canada* (n 349) para 51.
[645] Burgers (n 18) 18–20.
[646] ibid 19.

Jasanoff also makes reference to this concept of 'environmental constitutionalism'.[647] By highlighting the current climate change debate, she argues that "we can ask whether the problem of global order today is an absence of constitutionalism or in some respects its opposite: a premature constitutionalism that already exists, partly through the influence of science and expertise, but whose scope and limitations are not perceived as such or consented by most citizens of the world."[648]

In her attempt to answer to this hypothesis, she makes an analogous reference to the US case *Brown v. Board of Education of Topeka*, a case from the 1950s, an era in which the "equal, but separate" doctrine– one of racial segregation–between the coloured and the white American population was still considered acceptable.[649] The Supreme Court then managed to break through this doctrine, by "helping to translate widely held moral intuitions [that racial segregation is unacceptable] into robust principles of constitutional governance".[650] Today, even though we are still battling the issue of racism, we can no longer imagine that coloured student would have to study separately from white students in Western civilised universities, but in the 1950s a Supreme Court order was necessary to create awareness of the unjustifiability of this practice.

The same is the case for the climate change debate, where an implied understanding of the urgent need to take action as it will otherwise negatively affect human rights globally is already present, but the current majority of people have not yet perceived this urgency as such; mainly because change is costly and as the future is insecure it is enticing not to invest prematurely. This implied understanding can be reflected in other fields too, as for example widely accepted climate science, governance, law and regulations. The ECtHR describes this in its jurisprudence as the 'common ground' method, in which it stresses that "[i]t will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is a common ground in modern societies […]."[651] If such environmental constitutionalism is considered present, because they find wide support in litigation, than courts can counter-act to that majority and therewith add to global awareness of these 'moral intuitions' of the dangers of climate change.

The conducted case-study has, however, also presented the limitations of court-based mitigation-claims, both on a domestic level and on a regional level before the human rights courts, and in particular regarding justiciability on the ground of standing. These issues have proved that "[t]he problems of climate change do not easily conform to existing forms of action."[652] For example, the issue that *actio popularis* claims are not provided standing in many jurisdictions is an issue the judiciary cannot overcome as it is dependent on the existing domestic legal framework dealing with access to courts. The same issue is present before the regional human rights courts, fact aside that the African human rights regime does allow for this, but this regime has other, previously discussed, restrictions that stand in the way of effective legal protection.

The regional human rights frameworks seem to provide the right substantive foundation to base a human rights-claim in climate change matters on, but the lack of standing in cases of *actio popularis* and the rather strict victim-requirements forming the basis of admissibility before these courts bar access to

[647] Jasanoff (n 42).
[648] ibid 440.
[649] *Brown v Board of Education of Topeka* [1954] US Supreme Court 347 U.S. 483.
[650] Jasanoff (n 42) 452.
[651] *State of the Netherlands v. Urgenda Foundation* (n 103) para 5.4.2.; *Demir and Baykara v. Turkey [GC]* (n 291) para 86.
[652] Winkelmann, Glazebrook and France (n 4) para 131.

justice. This issue, both domestically and regionally can only be solved through procedural adaptation that answers to the unique nature of the climate change problem. This is for example what the IACtHR has done in indigenous cases, in which the Court overlooked the standing-requirements and more than once allowed an *actio popularis*. Such approach also forms a solution in climate change cases, but until then, there is merely limited access to the IACtHR and the ECtHR.

Besides that, there is the issue of territorial jurisdiction before the regional human rights courts. The IACtHR has given some ground-breaking clarifications in that regard with its 2017 Advisory Opinion,[653] allowing for responsibility based on conduct, rather than responsibility based on the territory in which the harm materialises. The ECtHR, on the other hand, holds on to strict territorial jurisdictional standards. The Urgenda case has provided an interesting take to combat this problem, concluding that, instead of basing responsibility on the exact effects this has on individuals, looking back to harm already done and offering redress for those effects, the Netherlands has 'to do its part' in preventing further pollution through the emissions of GHGs as continuing to do so clearly creates risks to the health and well-being of everyone, the citizens of the Netherlands included. Thus, the Supreme Court dismissed the State's arguments that it is only responsible for a negligible part of the global emissions and underlined the State's individual responsibility regarding its own sovereign conduct that contributes to climate change, which is in breach with international human rights law.

To come back to the ECtHR, it is becoming increasingly apparent that European countries are in dire need of clarifications within the niche of human rights and climate change. Human rights-based litigation is undoubtedly trending in different jurisdictions throughout Europe and the Urgenda approach, though commendable on many levels, has set creative standards pursuant to the ECHR without expressive support thereof by the ECtHR itself. This need for clarifications has also become apparent in the interpretation of the ECHR in the Norwegian *People v. Artic Oil* case, in which the Court of Appeal, though it did not disagree with the argumentation of the Urgenda case, struggled with the applicability of the ECHR, for example with regard to Article 34 ECHR, in the situation of export of polluting products.

The ECtHR is, thus, currently lagging a pioneering role in this regard, whereas in the past it did fulfil this role. As stressed by Lambert, "[t]he moment has come for the Council of Europe to provide new impetus here, at the same time as acting as a leader of fundamental rights protection. If it fails to do so, piecemeal initiatives will be taken at national level, and the legitimacy of the Council of Europe will be seriously affected as a result."[654] Thus, if not on the Council of Europe's own initiative, maybe it is time for one of the Council of Europe Member States' highest national courts to request an advisory opinion in that regard under Additional Protocol No. 16 to the ECHR.[655]

Another issue is that of scientific credibility. In the Urgenda case, the Dutch court based its conclusions on IPCC reports and concluded the scientific findings of these reports to enjoy global support. As has become apparent in chapter 4, multiple courts have explicitly agreed with that. The US Court of Appeal, for example, accepted climate science as a basis to conclude harm and causation to be present in the *Juliana* case. Another example is the New Zealand court, which, when declaring the case of *Smith v. Fonterra* admissible, explicitly took into account that "it may be that climate science [with reference to the IPCC reports] will lead to an increased ability to model the possible effects of emissions."[656] On the

[653] *A/O on the Environment and Human Rights* (n 180).
[654] Lambert (n 142) 29.
[655] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms 2013 (Council of Europe Treaty Series) Article 1.
[656] *Smith v. Fonterra Co-Operative Group Limited* (n 448) para 103.

other hand, however, expert reports do still enjoy to some extent different levels of credibility within different jurisdictions. For example, in the Irish *FEI* case, the court of first instance stressed that "[w]hile the court in Urgenda observed the acknowledgement by the worldwide community that action is required to reduce the emission of such greenhouse gases, it also notes that urgency is differently assessed within the global community."[657]

These different understandings regarding the authority of climate science form an issue. As Jasanoff underlines, as long as nations "do not produce shared understandings about the state of the world […] they will remain unable to develop common normative principles on the basis of which their citizens will claim stewardship for the planet and future generations."[658] And the recognition of this 'state of the world' remains to be highly dependent on the political and economic interests that are at stake in nation States. On the other hand, in the Urgenda case, the Supreme Court did not claim current scientific statistics to be sacrosanct, but instead based its conclusions on the precautionary principle, stating that regardless of the fact that there continue to be uncertainties in climate science, there is still a need to act, to try our best to prevent harm. There is much power in this principle of international environmental law, which has been recognised in the UNFCCC, as well as by the regional human rights courts, in many other documents and through widespread practice. This should not be overlooked by the judiciary.

So, to come to the question whether the HRBA has the potential to create an overall effective basis to enforce mitigation efforts: the answer is unclear, leaning towards a yes. There is a clear shift present with regard to the international recognition that climate change affects human rights and courts are also increasingly starting to express recognition thereof. The substantive human rights law framework seems consistent with the climate change law and governance framework, but it is now up to the human rights courts to guide domestic litigation and possibly adapt their admissibility criteria in order for (potential) climate change victims to enjoy effective protection there too. A barrier that cannot be overcome without procedural change, however, is the justiciability barrier, especially the barrier of standing, which continues to create an issue the judiciary struggles to satisfy.[659]

5.3. Concluding remarks

To refer back to Stiglitz's argument, can we come to the agreement that, regardless of conflicting interests and costs involved, we need to understand the urgency of taking action now, because failing to do so will cost us–the international community and humankind–a lot more?

The answer is yes. Climate change science presents clear risks for humanity if States fail to take mitigation action. In particular for the most vulnerable groups of people. Those groups are also, often, an underrepresented minority, and the only way in which these groups can counter the lack of climate change action by the majoritarian elective is through protest. Interestingly, this protest has recently taken shape through a high influx of court cases. And these cases that have not been without success. These successes have even led to court-ordered mitigation targets, as the Dutch judiciary concluded the State not to comply with its commitments under the climate change law and governance regime.[660]

[657] *FEI v. Ireland* (n 352) para 76.
[658] Jasanoff (n 42) 447.
[659] Winkelmann, Glazebrook and France (n 4) para 137.
[660] *State of the Netherlands v. Urgenda Foundation* (n 103).

These cases are, furthermore, very recently taking a sharp turn from classic tort-based cases to fundamental rights cases, which offers potential for courts to review State conduct substantively without acting in breach with the separation of powers principle. It furthermore reflects the recognition that human rights are, indeed, affected by the risks and effects of anthropogenic climate change.

There remain to be a few issues that possibly stand in the way of effective judicial protection. That fact aside, what is important to keep in mind is that the human rights of one group of individuals should never fall victim to the interests of others. That idea is, after all, why human rights law has once been codified in the first place, to create a system of equality in which minorities are protected against the despotism of the majority of the population. It can therefore be concluded that, even though mitigation-related litigation may not be the final solution in the long run, it does offer potential to coerce States that are lagging the necessary action to mitigate to act now, and given the fact that this fundamental right to a healthy environment is increasingly constitutionalising, it may even be considered the judiciary's duty to do so.

This trend of invoking a HRBA to counter the lack of mitigation action by States will therefore most certainly not end soon. In fact, it has just started and within now and ten years, there will most probably be a well-established set of jurisprudence that supports this vision and has hopefully contributed to an accelerated majoritarian State-awareness of the urgent need to mitigate pollution now, evoking action over words.

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