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Adjudicating Climate Change

The Role of Human Rights Litigation in Climate Change Mitigation

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Contents

Summary

Over the last few decades, states have made a series of attempts to mitigate climate change through international agreements. Greenhouse gas emissions have kept rising, however, and are currently at record levels. This indicates that the international climate change regime has so far proven ineffective. With this in mind, litigants around the world have increasingly made use of human rights arguments as a way of compelling states to increase their mitigation efforts.

This study assesses the potential impact of this trend by analysing how human rights litigation has contributed to climate change mitigation to date. First, the study evaluates the effectiveness of the international climate change regime. Secondly, the study presents an overview and analysis of international, regional, and domestic cases as of May 2021 wherein human rights arguments have been made to compel states to undertake more mitigation action. Finally, the study identifies and analyses a number of key substantive and procedural factors that affect the justiciability of these claims.

The conclusion of this study is that human rights litigation has played an important role in terms of its contribution to climate change mitigation, but that there are several challenges to overcome before rights-based litigation can be employed in a broader context and establish clear obligations to mitigate climate change. Human rights litigation has so far resulted in direct regulatory changes to mitigation policies, increased public awareness on the issue, and an improved judicial understanding of key concepts relevant to this type of litigation. The study's findings reveal that the substantive provisions contained within the core human rights treaties can be applied to the issue of climate change, meaning that the protective scope of human rights law extends to harm caused by climate change. Some domestic courts have, in addition, confirmed the existence of a human rights obligation to mitigate climate change. While the substantive human rights framework thus offers the potential to hold states accountable for a lack of mitigation action, many procedural hurdles remain. These include questions relating to standing, extraterritorial jurisdiction, attribution and causation, and the separation of powers. The existence of said procedural issues is evidence that, in its current form, the human rights system is insufficient in protecting against violations caused by climate change. Since it is widely accepted that climate change is the greatest threat to human rights globally, this study calls for judicial adaption and adjustment to account for the special conditions inherent to climate change and to properly deal with the existential threat that it represents.

Sammanfattning

Under de senaste decennierna har stater gjort flera försök att begränsa klimatförändringar genom internationella avtal. Trots detta har utsläppsnivåerna fortsatt öka och är idag rekordhöga, vilket tyder på att de internationella klimatavtalen hitintills varit ineffektiva. Som en följd av detta har individer och grupper i allt större utsträckning väckt talan och använt argument baserade på mänskliga rättigheter för att förmå stater att begränsa sina utsläpp.

Denna studie undersöker den potentiella effekten av denna trend genom att analysera i vilken utsträckning rättighetsbaserade tvister har bidragit till att begränsa klimatförändringar. Först utvärderas effekten av de befintliga internationella klimatavtalen. Därefter presenteras en översikt och analys av internationella, regionala och nationella rättsfall fram till maj 2021 där argument med utgångspunkt i mänskliga rättigheter har framförts för att förmå stater att begränsa sina utsläpp. Slutligen identifieras och analyseras ett antal betydelsefulla materiella och processuella faktorer som påverkar möjligheten till rättslig prövning av dessa yrkanden.

Studien drar slutsatsen att rättighetsbaserade tvister har spelat en viktig roll när det kommer till att begränsa klimatförändringarna, men att många utmaningar kvarstår innan dessa tvister framgångsrikt kan användas i ett större sammanhang för att fastställa staters skyldigheter att minska sina utsläpp. Rättighetsbaserade tvister har än så länge resulterat i direkta lagändringar av klimatåtaganden, en ökad medvetenhet hos allmänheten kring frågan och en ökad förståelse för rättsliga begrepp som är relevanta för dessa tvister. Studiens resultat visar att de materiella bestämmelserna i de centrala rättighetsfördragen kan tillämpas på klimatfrågan, vilket betyder att tillämpningsområdet för rättighetsfördragen sträcker sig till skada orsakat av klimatförändringar. Några nationella domstolar har dessutom bekräftat att vissa bestämmelser i fördragen innefattar en skyldighet för stater att begränsa klimatförändringar. Även om det materiella ramverket därmed har potential för att hålla stater ansvariga för bristande klimatåtgärder, återstår många processuella utmaningar. Dessa inkluderar frågor om talerätt, extraterritoriell jurisdiktion, ansvar och orsakssamband, samt maktdelning. Förekomsten av nämnda utmaningar visar att människorättssystemet i sin nuvarande form är otillräckligt för att skydda människor mot kränkningar orsakade av klimatförändringar. Eftersom det är allmänt accepterat att klimatförändringar utgör det största hotet mot mänskliga rättigheter globalt, efterlyser denna studie rättslig förändring och anpassning för att ta hänsyn till klimatförändringarnas speciella omständigheter och för att hantera det existentiella hot som de utgör.

Preface

Nu är det min tur att äntligen ta juristexamen! Jag är så glad över de senaste fem åren och allt de har gett mig.

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Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
AComHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
CJEU	Court of Justice of the European Union
COP	Conference of the Parties
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
GC	General Court
GHG	Greenhouse gas
HRC	Human Rights Committee
HR Council	Human Rights Council
IAComHR	Inter-American Commission on Human rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social, and Cultural Rights
IDP	Internally displaced person
IPCC	Intergovernmental Panel on Climate Change
NDC	Nationally Determined Contributions
NGO	Non-governmental organisation
NOAA	National Oceanic and Atmospheric Administration
OHCHR	The Office of the United Nations High Commissioner for Human Rights
Ppm	Parts per million
Protocol of San Salvador	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
SIDS	Small Island Developing States
UN	United Nations
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

1 Introduction

Human activity is causing unprecedented atmospheric concentrations of greenhouse gas (GHG) emissions. These atmospheric changes are resulting in increasing global average temperatures, causing the climate to change.[1] Over the last 30 years, the international community has made a series of attempts to mitigate climate change through international agreements and policies.[2] The latest such attempt, the 2015 Paris Agreement, sets out a goal of limiting the global temperature rise by 2100 to well below 2 °C, preferably 1.5 °C, compared to pre-industrial levels.[3] It is estimated that with the policies currently in place, however, global temperatures will have risen by 3 °C warming in this same timeframe, meaning that states will need to increase their efforts more than fivefold in order to achieve the stated goal.[4] This indicates that the international climate change regime has so far proven ineffective in mitigating climate change to levels that will prevent irreversible harm.[5]

A new discourse linking climate change and international human rights law has been emerging, with its origins in a petition made by Inuit peoples from Alaska and Canada to the Inter-American Commission on Human Rights (IAComHR) in 2005.[6] Today, numerous international bodies recognize the link between climate change and human rights.[7] This field is founded on the

[1] IPCC, 'Climate Change 2014: Synthesis Report' (Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Core Writing Team R K Pachauri and L A Meyer (eds) 2014) 2–26.
[2] See for example United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 31 March 1994) 1771 UNTS 107 [hereinafter UNFCCC]; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 [hereinafter Kyoto Protocol]; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) [hereinafter Paris Agreement].
[3] Art 2 Paris Agreement.
[4] Climate Action Tracker 'Global Temperatures, 2100 Warming projections' (4 May 2021) <https://climateactiontracker.org/global/temperatures/> accessed 21 May 2021; UNEP, 'The Emissions Gap Report 2019' (2019) XIV, XX.
[5] See also Randall S Abate, *Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources* (Cambridge University Press 2019) 10.
[6] 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, IAComHR (7 December 2005); Edward Cameron, 'Development, climate change and human rights – From the Margins to the Mainstream?' (2011) Social Development Paper No. 123 I, IV.
[7] See for example HR Council Resolution 7/23, 'Human rights and climate change' (28 March 2008) UN Doc A/HRC/RES/7/23. See also Sébastien Duyck, 'Integrating Human Rights in Global Climate Governance: An Introduction' in Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 3; Annalisa Savaresi, 'Climate change and human rights – Fragmentation, interplay, and institutional linkages' in Sébastien Duyck, Sébastien Jodoin, and

presumption that human rights law is relevant to climate change since its various impacts, as well as the measures to combat it, affect the realization and enjoyment of human rights.[8] These developments have contributed to a sharp increase in recent years of international, regional, and domestic litigation in which human rights arguments are made with the aim of mitigating climate change.[9] As Peel and Osofsky succinctly put it, "[c]ourtrooms have become a key battleground in the public debate over climate change around the world."[10] While the number of cases worldwide remains fairly low, the trend is gathering pace and already producing some groundbreaking results. Perhaps the clearest example of this is *Urgenda Foundation v. the Netherlands* from 2019, wherein the Dutch Supreme Court ordered the Dutch state to reduce its GHG emissions by at least 25 % compared to 1990 by the end of 2020, on the basis of the rights under articles 2 and 8 of the European Convention of Human Rights (ECHR).[11] There have been a number of similar cases with varying degrees of success, while several are currently pending before international, regional, and domestic fora. As of this writing, rights-based litigation aimed at mitigating climate change is pending before the Human Rights Committee (HRC), the Committee of the Rights of the Child (CRC), the IAComHR, and the European Court of Human Rights (ECtHR) respectively.[12]

Alyssa (eds), *Routledge Handbook of Human Rights and Climate Governance, Routledge* (Routledge 2018) 31.

[8] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 January 2009) UN Doc A/HRC/10/61, 7–15.

[9] UNEP, 'The Status of Climate Change Litigation – A Global Review' (2017) 31–32; Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2020) 1, 3, 14–16.

[10] Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 1.

[11] *Urgenda Foundation v. State of the Netherlands*, ECLI:NL:HR:2019:2007 (Supreme Court of The Netherlands, 12 December 2019) [Unofficial English Translation from the Court]; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953, Protocols entered into force 11 May 1994 and 1 June 2010 respectively) ETS 5, 213 UNTS 222 [hereinafter ECHR].

[12] ClientEarth, 'Torres Strait FAQ' (Sabin Center for Climate Change Law, information from group representing plaintiffs since the petition is not publicly available at this time) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release.pdf > accessed 5 May 2021; Communication to the Committee on the Rights of the Child in the case of *Sacchi and others v. Argentina and others* (CRC, 13 September 2019); Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, IAComHR (23 April 2013); ECtHR Communication in *Duarte Agostinho and others v. Portugal and 32 other States*, Communication no. 39371/20 (ECtHR,13 November 2020); ECtHR Communication in *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, Communication no. 53600/20 (ECtHR, 17 March 2021).

These types of cases raise a number of as yet unanswered questions and form part of a new global trend, the effects of which are still not yet clear. Undoubtedly, there exist several challenges for such litigation to succeed. However, in terms of contributing to climate change mitigation, this litigation may come with unprecedented potential. This study will explore just how great that potential is.

1.1 Purpose and research question

This study is founded on the conviction that climate change is the most pressing issue of our time and that more efforts need to be taken to combat it as a threat. Recent developments illustrate that one way of approaching this is to reframe the issue of climate change as ultimately one of protecting individuals. By enforcing the notion that insufficient mitigation action risks interfering with binding international human rights law, states may be inclined to intensify their efforts. This approach has been adopted by litigants throughout the world who increasingly make use of human rights arguments in climate change litigation against states. This thesis welcomes these developments but is at the same time mindful of existing challenges and limitations. Given the recent rise in rights-based litigation aimed at mitigating climate change, it is worthwhile to reflect on its effectiveness. Consequently, the purpose of this thesis is to gain a greater understanding of the potential impact of rights-based litigation in the fight against climate change. This is achieved by a critical examination of the growing number of cases in which litigants invoke human rights law to compel states to increase their mitigation efforts. The presented cases provide an empirical basis for an understanding of when and how human rights law can be successfully employed in mitigation-related litigation, plus the challenges courts face when confronted with such claims. To fulfil the stated purpose, the following research question will be answered:

> *How has human rights litigation contributed to climate change mitigation?*

The following three sub-questions help guide the research:

1. How effective has the international climate change regime been in mitigating climate change? (Chapter 2)

2. How have rights-based claims aimed at mitigating climate change been adjudicated in international, regional, and domestic fora? (Chapter 3)

3. What are the main factors that affect the justiciability of rights-based claims aimed at mitigating climate change? (Chapter 4)

1.2 Method and material

This thesis employs the legal doctrinal research method to answer the research question. This method aims to provide a systematic exposition of the rules and principles governing a certain legal area, and to solve unclarities and gaps therein.[13] Accordingly, this paper identifies and critically examines legal sources with the aim of establishing a correct and complete conclusion of the law.[14]

As the paper analyses the contribution of human rights litigation in mitigating climate change, the legal doctrinal method is applied in the specific context of *international human rights law*. As held by Article 38 of the Statue of the International Court of Justice, the primary sources of international human rights law are international conventions, international customary law, and general principles. The same provision identifies judicial decisions and scholarly literature as secondary sources for determining the law.[15] The primary sources in this study consist mainly of the international human rights treaties that have been employed in the studied litigation, namely, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the American Convention on Human Rights (ACHR), the African Charter on Human and Peoples' Rights (ACHPR), and the ECHR[16]. Moreover, when assessing the international climate change regime, primary sources such as the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agreement are presented.[17] As the subject matter of this study is largely un-dealt with under the primary sources of law, secondary sources are heavily relied on. These include documents from international bodies such

[13] Jan M Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research', in Rob Van Gestel, Hans-W Micklitz, and Edward L Rubin (eds), *Rethinking Legal Scholarship – A Transatlantic Dialogue* (Cambridge University Press 2017) 210.
[14] Terry Hutchinson, 'Doctrinal research – Researching the jury', in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9–10.
[15] Art 38 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1055, TS 993, 3 Bevans 1179.
[16] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 [hereinafter ICESCR]; American Convention on Human Rights "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123 [hereinafter ACHR]; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 [hereinafter ACHPR]; ECHR (n 11).
[17] UNFCCC (n 2); Kyoto Protocol (n 2); Paris Agreement (n 2).

as the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Human Rights Council (HR Council). In addition, contributions from legal scholars are used extensively to help inform the understanding of international human rights law and to contribute to the analysis.

Since this thesis examines case law on three distinct levels of adjudication – internationally, regionally, and domestically – it is necessary to account for how the presented cases were chosen. In short, the cases in this study were selected specifically in order to answer the research question. Although the exact number of cases that pertain to climate change worldwide is likely impossible to attain, the database provided by the Sabin Center for Climate Change Law counts 1794 cases as of May 19, 2021, including pending cases.[18] This database contains a comprehensive collection of all climate change-related litigation worldwide, originating from both judicial and quasi-judicial bodies. The cases analysed in this thesis center squarely on claims of human rights violations and principally concern the relationship between individuals and the state. From these 1794 cases, more than 85 make some reference to human rights either as their sole argument or alongside other claims.[19]

In terms of the subject matter of the cases presented, "climate change litigation" is a broad concept and includes various types of cases with differing structures and aims. Setzer and Byrnes describe two types of climate change litigation, wherein the first includes civil and administrative procedures for private interests and the second consists of "strategic litigation" with the aim of advancing policies, changing behaviours, and creating public awareness.[20] The cases selected for this thesis belongs to the second category. Moreover, since this study investigates the possibility of *mitigating* climate change through human rights litigation, all selected cases relate specifically to mitigation action. From the more than 85 cases relating to human rights law in the Sabin Center's database, approximately 62 of them can be said to relate specifically to human rights and climate change mitigation.[21] These cases form the basis of the analysis in this study, although not all of them will be presented. This is because many of them are still pending and also share very similar traits. For the purpose of the research question, it is not necessary to

[18] Sabin Center for Climate Change Law, 'About' <http://climatecasechart.com/about/> accessed 19 May 2021.
[19] Sabin Center for Climate Change Law, 'Non-U.S. Climate Change Litigation, Suits Against Governments, Human Rights' <http://climatecasechart.com/non-us-case-category/human-rights/> accessed 19 May 2021; Annalisa Savaresi and Joana Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (2021) SSRN Electronic Journal 1, 1, 3.
[20] Setzer and Byrnes (n 9) 4.
[21] See also Savaresi and Setzer (n 19) 6.

present all pending cases or cases almost identical to others. Meanwhile, since no mitigation-related case has been declared admissible in any international or regional human rights fora at the time of writing, other cases not relating to mitigation per se will also be discussed. These cases have been chosen for their contribution to the analysis on the connection between climate change and human rights. To be specific, they help demonstrate how the international and regional human rights fora have dealt with matters concerning environmental protection previously, including the use of the autonomous right to a healthy environment. The value of including such cases stems from the possibility of drawing analogies between them and future mitigation-related litigation.

Lastly, parts of this thesis will examine scientific projections regarding climate change. In these sections, data from various research agencies such as the Intergovernmental Panel on Climate Change (IPCC), the National Oceanic and Atmospheric Administration (NOAA), Climate Action Tracker, and Our World in Data is presented.

1.3 Delimitations

The thesis looks only at litigation concerning claims of human rights violations. While most of the cases included in the study are founded on multiple claims covering different areas of law – wherein human rights law is but one among many – the focus will be squarely on the human rights claims.

The chosen cases relate specifically to climate change mitigation in the sense that the alleged injury is caused by the state's inadequate mitigation action and the remedy sought is a reduction in GHG emissions. There do exist mitigation-related cases in which the principal goal is not to limit GHG emissions. Some such cases include claims against the legality of an airport expansion,[22] the state's promotion of fossil fuels at the expense of renewables,[23] state-provided tax credits on air travel,[24] as well as coronavirus bailout packages to airlines.[25] If successful, these cases would most likely contribute to a reduction in GHG emissions, but, as it is not their primary goal, they are consequently excluded from the study.

[22] *Plan B Earth and others v. Secretary of State for Transport*, [2020] UKSC 52 (The United Kingdom Supreme Court, 16 December 2020).
[23] *Greenpeace Mexico v. Ministry of Energy and others* (on the Energy Sector Program), Amparo No. 372/2020 (Mexico City District Court, 21 September 2020).
[24] *Greenpeace et al. v. Austria*, G 144-145/2020-13, V 332/2020-13 (Constitutional Court of Austria, 30 September 2020).
[25] *Greenpeace Netherlands v. State of the Netherlands*, C/09/600364 / KG ZA 20-933 (Hague District Court, 9 December 2020).

Furthermore, while acknowledging the significance of the field of business and human rights and the importance of regulating the conduct of non-state actors in connection to climate change, this is outside the focus of this study. The cases presented only concern litigation in which the state is the defendant, and not corporations or other non-state actors.

The study will also refrain from discussing the specificities of the different legal systems in detail, including any domestic legal frameworks. It is important to acknowledge that some legal systems may be better equipped than others to facilitate the kind of litigation that concern this thesis, whether it be their procedural rules or applicable laws. Yet the aim of the thesis is not to give an all-encompassing account of how human rights litigation has and can contribute to climate change mitigation, but rather to understand its potential and limitations as illustrated by case law. Accordingly, some sections of the thesis may require a comparison of certain specificities among the different legal systems, but these will only be discussed briefly.

Finally, when examining adjudication regionally, this study only looks at the American, European, and African human rights systems. While in Asia there exists two regional human rights bodies – the Asian Human Rights Commission and the ASEAN Intergovernmental Commission on Human Rights – there is no possibility to file individual complaints within these bodies. The same goes for the Arab Human Rights Committee under the Arab Charter on Human Rights.[26] Moreover, when discussing adjudication in Europe, some European Union (EU) case law will be included since the Court of Justice of the European Union (CJEU) very recently decided on a rights-based mitigation case.[27]

1.4 Literature review

The area of "climate change litigation" has caught the attention of scholars for at least three decades.[28] The first known case relating to climate change dates back to 1990.[29] Since then, scholars have analysed examples of litigation either as a means of advancing or preventing climate change action.[30] In

[26] Margaretha Wewerinke-Singh, *State responsibility, climate change and human rights under international law* (Hart 2019) 151.
[27] Case C-565/19 P, *Armando Carvalho and others v. European Parliament and Council of the European Union* [2021] ECLI:EU:C:2021:252.
[28] Setzer and Byrnes (n 9) 1.
[29] *City of Los Angeles v. National Highway Traffic Safety Administration*, no. 912 F 3d 478 (US Court of Appeals for the District of Columbia Circuit, 24 August 1990).
[30] See for example Dinah Shelton, 'Human Rights, Health & Environmental Protection: Linkages in Law & Practice', (2002) A Background Paper for the WHO, Health and Human Rights Working Paper Series No 1.

2017, the United Nations Environment Programme (UNEP) published *The Status of Climate Change Litigation – A Global Review*, consisting of an overview of global trends and issues in climate change litigation.[31] The same entity publish a report annually containing new developments in climate change litigation from the previous year, the latest one being *Global Climate Litigation Report 2020: Status Review*.[32] Similarly, Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy publish a yearly report since 2017, the latest one being *Global Trends in Climate Change Litigation: 2020 Snapshot*, containing key global developments in climate change litigation from the previous year.[33]

While climate change litigation dates back three decades, the use of human rights arguments in climate change litigation first began in 2005 with the *Inuit Petition* to the IAComHR.[34] From this point onwards, scholars began to engage in discussions on the relationship between climate change and human rights in earnest.[35] However, while the connection between climate change and human rights has gained increased recognition by the world community in the years since 2005, the sharp rise in human rights litigation is a more recent development. In fact, up until 2015, human rights arguments had been employed only in five climate change cases.[36] Consequently, the scholarly attention placed on the intersection of climate change and human rights litigation is a relatively new phenomenon. Yet since 2015 – and in particular following the judgement in *Urgenda Foundation v. the Netherlands* in 2019 – the literature on this topic has proliferated significantly. Notable authors who have contributed to this area and whose work this study relies upon include Jacqueline Peel, Hari M Osofsky, Annalisa Savaresi, Margaretha Wewerinke-Singh, Joana Setzer, Rebecca Byrnes, Jonas Ebbesson, Ole W Pedersen, John H Knox, and Stephen Humphreys.

This is an area of law that is changing quickly, making it difficult to keep up to date with new developments. While writing this thesis in the spring of 2021, for instance, there were several developments in case law taking place contemporaneously, necessitating some changes to the content of the thesis. This study builds on previous scholarship and contributes to the literature in the area of rights-based climate change litigation by compiling and analysing the existing case law as of May 2021. Most of the cases that concern climate

[31] UNEP, 'The Status of Climate Change Litigation' (n 9).
[32] UNEP, 'Global Climate Litigation Report 2020: Status Review' (2020).
[33] Setzer and Byrnes (n 9).
[34] *Inuit Petition* (n 6).
[35] See for example Hari M Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 Washington University Law Review 1789.
[36] Setzer and Byrnes (n 9) 14.

change mitigation and human rights are very recent, many of them still pending. It follows that scholarly contributions covering these new developments are still lacking. This study aims to help in filling that gap.

1.5 Outline

The thesis consists of 5 chapters, including this introductory chapter.

The second chapter contains a brief account of climate change and an overview and assessment of the international climate change regime. It moves on to depict how climate change is, and came to be, a human rights issue. The chapter ends with a reflection on whether the human rights framework is applicable to the issue of climate change and if it provides for an obligation to mitigate against it.

The third chapter presents an overview and analysis of cases as of May 2021 wherein human rights arguments have been made to compel states to undertake more mitigation action. The chapter is divided into sections based on the level at which the cases were adjudicated and the region in which they originated.

The fourth chapter draws on the findings in the previous chapter and identifies and analyses main factors that affect the justiciability of rights-based claims aimed at mitigating climate change. The chapter divides these factors into two sections: the substantive legal framework and procedural issues.

The fifth chapter summarises the findings, offers conclusions on the research question, and discusses some potential future developments.

2 Climate change and human rights

The following chapter contains a brief account of climate change and an assessment of the international climate change regime. Only through an appreciation of the current regime can the potential contribution of human rights litigation be fully understood. The chapter moves on to discuss the links between climate change and human rights and ends with a reflection on whether the human rights framework is applicable to the issue of climate change and if it provides for an obligation to mitigate against it.

2.1 Climate change today and tomorrow

Climate change is defined as "a change in the state of the climate that can be identified […] by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer".[37] The most common understanding is that climate change can be caused by natural internal processes, external forcings, and anthropogenic changes in the atmosphere or land use.[38] However, article 1 UNFCCC distinguishes between *climate change* and *climate variability*, where climate change solely refers to changes in climate attributable to human activity.[39]

The IPCC, the leading scientific body on climate change, has issued five assessment reports since its establishment in 1988. The latest, Assessment Report 5 of 2014, contains the most comprehensive analysis of climate change as of today.[40] In these reports, the IPCC provides detailed information on the impacts and risks of climate change and how mitigation and adaptation

[37] IPCC, 'Global Warming of 1.5 °C' (An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, V Masson-Delmotte and others (eds) 2018) Annex I: Glossary.
[38] ibid, Annex I: Glossary.
[39] Art 1 UNFCCC.
[40] IPCC, 'Climate Change 2014: Synthesis Report' (n 1); Cinnamon Piñon Carlarne, Kevin R Gray, and Richard Tarasofsky, 'Ch.1 International Climate Change Law: Mapping the Field' in Cinnamon Piñon Carlarne, Kevin R Gray, and Richard Tarasofsky (eds), *The Oxford handbook of international climate change law* (Oxford University Press 2016) 5.

measures can reduce those risks.[41] The latest report clearly confirms that human activity influences the climate system and that anthropogenic GHG emissions are at a record high.[42] During earlier periods of significant climate change, including ice ages and warmer interglacial periods, the atmospheric concentration of carbon dioxide has remained within a range of 180 parts per million (ppm) to 300 ppm. In May 2021, the concentration amounts to 418 ppm, the highest it has been in 3 million years.[43] As a result of the already existing stocks of GHG emissions in our atmosphere, many associated impacts of climate change will continue for centuries even if all emissions were cut entirely as of today.[44]

The unprecedented atmospheric concentration of GHG emissions is resulting in an increase in global average temperature which causes the climate to change. Changes in climate lead to wide-ranging consequences for natural and human systems. Rising temperatures is resulting in, among many things, frequent and severe heat waves, melting glaciers and ice caps, extreme precipitation events, ocean acidification, and a rise in global sea levels. A continuation of GHG emissions will only increase the likelihood of irreversible and acute damage to the natural and human systems.[45]

2.2 The international climate change regime

General Assembly resolution 43/53 (1988) recognized that climate change is a common concern of mankind and determined that action should be taken to deal with the problem within a global framework.[46] Shortly after this, in 1992, the UNFCCC was adopted. This framework has since then been the focal point of the development of international climate change law.[47] The objective of the UNFCCC is to stabilize GHG emissions in the atmosphere to levels

[41] IPCC, 'About the IPCC' <www.ipcc.ch/about/#:~:text=The%20IPCC%20is%20an%20organization,the%20work%20of%20the%20IPCC.&text=The%20IPCC%20does%20not%20conduct%20its%20own%20research.> accessed 15 February 2021.
[42] IPCC, 'Climate Change 2014: Synthesis Report' (n 1) 2–26.
[43] Global Monitoring Laboratory of the NOAA, 'Trends in Atmospheric Carbon Dioxide, Recent Daily Average Mauna Loa CO2' <https://gml.noaa.gov/ccgg/trends/monthly.html > accessed 12 May 2021; Rebecca Lindsey, 'Climate Change: Atmospheric Carbon Dioxide' (NOAA Climate.gov, 14 August 2020) <www.climate.gov/news-features/understanding-climate/climate-change-atmospheric-carbon-dioxide#:~:text=The%20global%20average%20atmospheric%20carbon,least%20the%20past%20800%2C000%20years> accessed 12 May 2021.
[44] IPCC, 'Climate Change 2014: Synthesis Report' (n 1) 2–26.
[45] ibid 2–26; IPCC, 'Global Warming of 1.5 °C' (n 37) 7–11.
[46] UNGA, Resolution 43/53 'Protection of global climate for present and future generations of mankind' (6 December 1988) UN Doc A/RES/43/53.
[47] Carlarne, Gray, and Tarasofsky (n 40) 4.

that would prevent dangerous anthropogenic interference with the climate system.[48] The UNFCCC is complex in nature, partly due to its inclusion of a wide range of topics, but also due to a lack of clarity and precision around state obligations.[49] The UNFCCC also avoids providing a timeframe or deadline by which to achieve the objectives it sets out, and fails to define what stable levels of GHG emissions would look like.[50] Moreover, the actual realisation and implementation of the adopted norms has been greatly impeded by national interests and realpolitik.[51]

Article 7 UNFCCC establishes a Conference of the Parties (COP) with the purpose of reviewing the implementation of the UNFCCC. At the third COP in 1997, the Kyoto Protocol was adopted. This Protocol subjects 37 developed states (Annex 1 states) to individual and legally binding emissions reduction targets: an average total reduction of at least 5.2% from levels recorded in 1990 during the commitment period of 2008–2012.[52] While having states agree on legally binding reduction targets has been seen as an impressive achievement, the Kyoto Protocol has been criticized by both developing and developed states for its unfairness and ineffectiveness. For example, the United States – the largest net producer of GHG emissions at the time the Protocol was adopted – never ratified the Protocol, despite being one of the 37 countries subjected to legally binding targets.[53] On a similar note, China, who in 2006 surpassed the United States as the world's largest net producer of emissions[54], was not one of the Annex 1 states subjected to legally binding targets.[55] Moreover, the adopted reduction targets did not meet the standards that were recommended by climate scientists at the time.[56]

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[48] Art 2 UNFCCC.
[49] Compare Malcolm Nathan Shaw, *International law* (8th edn, Cambridge University Press 2017) 666; Patricia Birnie and Alan Boyle, *International Law & the Environment* (3rd edn, Oxford University Press 2009) 357.
[50] Compare Birnie and Boyle (n 49) 358.
[51] Carlarne, Gray, and Tarasofsky (n 40) 14.
[52] Art 3 Kyoto Protocol.
[53] UN Treaty Collection, 'Status of Treaties, Kyoto Protocol to the United Nations Framework Convention on Climate Change' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-a&chapter=27&clang=_en> accessed 16 February 2021; Carlarne, Gray, and Tarasofsky (n 40) 8.
[54] PBL Netherlands Environmental Assessment Agency, 'China now no. 1 in O2 emissions; USA in second position' (2006) <https://web.archive.org/web/20190709191743/https:/www.pbl.nl/en/dossiers/Climatechange/Chinan-owno1inCO2emissionsUSAinsecondposition> archived from the original source on 9 July 2019, accessed 16 February 2021.
[55] Kyoto Protocol Annex B.
[56] Timo Koivurova, 'International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects' (2007) 22 Journal of Environmental Law and Litigation 267, 268–269.

Since the adoption of the Kyoto Protocol in 1997, subsequent negotiations have largely failed.[57] Article 3.9 of the Kyoto Protocol stipulates that targets for subsequent commitment periods should be established through amendments to the Protocol. The Doha Amendment to the Kyoto Protocol was adopted in December 2012 and lays down new commitments for Annex 1 states for the second commitment period of 2013–2020. For this period, the goal was set to a total reduction of 18% compared to levels in 1990.[58] Canada, Russia, New Zealand, and Japan, however, refused to participate in the second round, meaning that the emissions reduction targets decided upon in the Doha Amendment would account for less than 13% of global emissions.[59] Due to a lack of state support, the Doha Amendment would not enter into force for another eight years. Requiring 144 instruments of acceptance, the Doha Amendment first entered into force on 31 December 2020 – one day before the commitment period and Amendment expired, rendering it useless.[60]

The Paris Agreement was adopted in 2015 and entered into force in 2016. Its main goal is to limit global warming by 2100 to well below 2 °C, and preferably to 1.5° C, compared to pre-industrial levels.[61] Unlike the Kyoto Protocol, the Paris Agreement does not contain legally binding commitments, but establishes a system of voluntary domestic mitigation measures that states will undertake in order to reduce their GHG emissions. States are obliged to communicate nationally determined contributions (NDC) every five years, starting in 2020.[62] In 2019, however, the UNEP's Emissions Gap Report concluded that there is a significant gap between the emissions levels consistent with the goals of the Paris Agreement and the emissions levels if all NDCs were to be fully implemented from 2020.[63] Moreover, the report concluded that states have to increase their NDCs threefold to achieve the stated 2° C goal and more than fivefold to achieve the 1.5 °C goal.[64] Global warming is expected to cause global temperatures to rise 4.1 – 4.8 °C above pre-industrial levels by the end of 2100 without any policies undertaken, and 3° C if the current NDCs are followed through.[65]

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[57] Peel and Osofsky, *Climate Change Litigation* (n 10) 10–12.
[58] Art 3.1 bis Doha amendment to the Kyoto Protocol (adopted 8 December 2012, entered into force 31 December 2021).
[59] Benoit Mayer, 'The Curious Fate of the Doha Amendment' (EJIL: Talk! 4 May 2020) <www.ejiltalk.org/the-curious-fate-of-the-doha-amendment/> accessed 16 February 2021.
[60] Art 20.4 Kyoto Protocol; UN Treaty Collection, 'Status of Treaties, Doha Amendment to the Kyoto Protocol' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-c&chapter=27&clang=_en> accessed 16 February 2021.
[61] Art 2 Paris Agreement.
[62] Art 4 Paris Agreement.
[63] UNEP, 'The Emissions Gap Report 2019' (n 4) X, XVIII.
[64] ibid XX.
[65] ibid XIV; Climate Action Tracker (n 4).

As things stand today, the UNFCCC regime has evidently not managed to deliver on its objective to mitigate climate change. There are likely several reasons for the failure of the international climate change regime in adequately reducing emissions. These vary from lack of political will and financing to the complexity of the issue.[66] States have often justified non-compliance with emissions reduction targets on the grounds of cost-effectiveness. The emphasis on the high cost of reducing emissions has created a bias towards the interest of present rather than future generations.[67] In addition, the UNFCCC instruments currently in force are soft-law, voluntary, and lack enforcement mechanisms. The current regime is also decidedly state-centric in the sense that the agreements only provide for obligations between states, meaning that only states can invoke breaches in case of non-compliance. This excludes individuals, corporations, and organizations from holding states accountable for non-compliance of their obligations. Article 14 UNFCCC provides for dispute settlement in the case of a dispute concerning the interpretation or application of the treaty. This clause has also been included in the subsequent Kyoto Protocol and Paris Agreement.[68] The clause allows the parties to submit the dispute to the International Court of Justice or solve it through arbitration. However, invoking state responsibility in environmental matters remains uncommon.[69] As of today, none of the UNFCCC dispute clauses have been put into practice. In fact, no climate change mitigation-related dispute between states has been brought before an international dispute settlement body.[70] States are reluctant to solve environmental matters, including climate change related matters, through adjudicative means.[71] Instead, they tend to turn to friendlier dispute settlement methods, such as negotiation, to avoid conflict.[72]

[66] Abate (n 5) 10.
[67] Tracey Skillington, *Climate justice and human rights* (Palgrave MacMillan 2017) 9–11.
[68] Art 19 Kyoto Protocol; art 24 Paris Agreement.
[69] Shaw (n 49) 652–653.
[70] Roda Verheyen and Cathrin Zengerling, 'Ch.19 International Dispute Settlement' in Cinnamon Piñon Carlarne, Kevin R Gray, and Richard Tarasofsky (eds), *The Oxford handbook of international climate change law* (Oxford University Press 2016) 419–421.
[71] Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 154–155; Tim Stephens, 'The settlement of disputes in international environmental law', in Shawkat Alam and others (eds), *Routledge Handbook of International Environmental Law* (Taylor & Francis Group LLC 2013) 182–183.
[72] Stephens (n 71) 186; Vernon I Tava, 'The Role of Non-Governmental Organisations, Peoples and Courts in Implementing International Environmental Laws', in Shawkat Alam and others (eds) *Routledge Handbook of International Environmental Law* (Taylor & Francis Group LLC 2013) 134.

2.3 Linking climate change and human rights

The international recognition of climate change as a human rights issue is a fairly recent development. While certain states stated a desire to include references to human rights in the UNFCCC during the drafting process, these attempts failed.[73] The link between human rights and climate change was first introduced in 2005 in connection with the *Inuit Petition* to the IAComHR.[74] Following this, the Malé Declaration on the Human Dimension of Global Climate Change, adopted by a number of small island developing states (SIDS) in 2007, is seen as a further milestone in this regard.[75] Meanwhile in 2008, the HR Council adopted a resolution acknowledging that "climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights".[76] In response to this resolution, the OHCHR published a detailed analytical report in 2009 with an assessment of the relationship between climate change and human rights.[77] Since then, a growing number of international bodies have explicitly recognised this relationship.[78]

Underpinning the connection between human rights and climate change is the notion that rising sea levels, droughts, extreme temperatures, floods, fires, and so on, likely undermine the realization of most human rights, including the right to life, family and private life, self-determination, health, food, water, and property.[79] Climate change's impacts can also lead to the displacement of people.[80] Being a refugee or an internally displaced person (IDP) entails an

[73] Duyck (n 7) 4.
[74] *Inuit Petition* (n 6).
[75] HR Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox' (1 February 2016) UN Doc A/HRC/31/52, 3–4; Small Island Developing States, 'Malé Declaration on the Human Dimension of Global Climate Change' (CIEL, 14 November 2007) 2 <www.ciel.org/Publications/Male_Declaration_Nov07.pdf> accessed 18 May 2021.
[76] HR Council Resolution 7/23, 'Human rights and climate change' (n 7).
[77] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (n 8).
[78] Duyck (n 7) 3; Savaresi, 'Climate change and human rights' (n 7) 31.
[79] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (n 8) 7–15; IPCC, 'Global Warming of 1.5 °C' (n 37) ch 3.4.
[80] IPCC, 'Global Warming of 1.5 °C' (n 37) ch 3.4; HR Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox' (24 January 2018) UN Doc A/HRC/37/59, 7–8; Skillington (n 67) 123–124.

increased risk of experiencing human rights violations due to the vulnerabilities that those situations give rise to.[81] In addition, climate change inhibits development and economic growth and can disrupt the stability within and between states, increasing the risk of conflict.[82]

The rise in the earth's temperature is predicted to occur at different speeds around the world, meaning that climate change-induced hazards will not be spread evenly.[83] The impacts of climate change will also vary depending on the adaptive capacities of the affected communities. The impacts are likely to exacerbate existing socio-economic vulnerabilities, too.[84] As a result, climate change is likely to have the most adverse effects on those whose rights are already the furthest from being fully realized.[85]

For the reasons outlined above, it is crucial that states undertake mitigation action. Yet it is crucial to note that mitigation action can in itself have implications for the realisation of human rights.[86] The proliferation of hydroelectric power, biofuel production, carbon pricing and other eco-taxes, financial penalties for private car use, and the closing of environmentally harmful industries are all examples of mitigation action with adverse human rights implications.[87] That said, the risks stemming from such mitigation action are unlikely to be as severe, widespread, and irreversible as the dangers presented by climate change.[88]

Drawing a connection between climate change and human rights comes with several advantages. Previous international climate change policies are often discussed in terms of future costs and benefits. Explicitly linking climate change to human rights shifts the focus from cost and benefit optimisation to

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[81] OHCHR, 'In Search of Dignity: Report on the human rights of migrants at Europe's borders' (2017) 19–20; OHCHR, *Professional Training Series No. 7, Training Manual on Human Rights Monitoring* (United Nations 2001) 8, 168.
[82] IPCC, 'Global Warming of 1.5 °C' (n 37) ch 3.4; HR Council 37/59, '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 80) 7–8; Skillington (n 67) 123–124.
[83] IPCC, 'Global Warming of 1.5 °C' (n 37) ch 3 FAQ.
[84] Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press 2012) 16; Elizabeth Ferris, 'Governance and climate change-induced mobility – International and regional frameworks', in Dimitra Manou and others (eds), *Climate Change, Migration and Human Rights – Law and Policy Perspectives* (Routledge 2017) 12; IPCC, 'Global Warming of 1.5 °C' (n 37) ch 3 Executive Summary; HR Council, 'Human Rights and the Environment' (6 April 2017) UN Doc A/HRC/RES/34/20, 2.
[85] Stephen Humphreys, 'Introduction: human rights and climate change', in Stephen Humphreys (ed), *Human rights and climate change* (Cambridge University Press 2010) 1–2.
[86] ibid 2; Sanna Markkanen and Annela Anger-Kraavi, 'Social impacts of climate change mitigation policies and their implications for inequality' (2019) 19 Climate Policy 827, 838.
[87] UNEP, 'Climate Change and Human Rights' (2015) 8–10; Markkanen and Anger-Kraavi (n 86) 833.
[88] IPCC, 'Climate Change 2014: Synthesis Report' (n 1) 17–19.

fulfilling the needs and rights of individuals.[89] In addition, it serves to move the focus of discussion from the political sphere into the legal sphere, whereby the often politicised matter of voluntary emissions reduction targets becomes a question of fulfilling existing binding obligations under international human rights law.[90] Moreover, applying a human rights lens helps to highlight the social imbalances of climate change and provides individuals and communities with a tool to address its adverse impacts.[91] Linking climate change to human rights provides access to a multitude of compliance mechanisms, including judicial and quasi-judicial bodies. Individuals and groups who otherwise would have a difficult time in influencing decision-making and policy have the possibility to submit claims in courts and thus make their voices heard. This is especially important for vulnerable communities such as individuals from SIDS, indigenous communities, and refugees/IDPs.[92] It is important to note here, however, that litigation itself requires technical and financial resources which may be out of reach for victims who suffer the most from climate change.[93]

2.4 Lack of mitigation action as a human rights violation

As highlighted in the previous section, the conceptual link between human rights and climate change is nowadays widely accepted and recognised within the international community.[94] However, it is one thing to say that climate change produces effects that impact the enjoyment of human rights, but another to use the human rights framework as a way of holding states accountable for lack of mitigation action. 12 years ago, the OHCHR held that "while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as

[89] The International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008) 14; Eike Düvel, 'Human rights-based precautionary approached and risk imposition in the context of climate change', in Markku Oksanen, Ashley Dodsworth, and Selina O'Doherty (eds), *Environmental human rights: a political theory perspective* (Routledge, an imprint of the Taylor & Francis Group 2018) 185.
[90] Franziska Knur, 'The United Nations Human Rights-Based Approach to Climate Change – Introducing a Human Dimension to International Climate Law' in Sabine Von Schorlemer and Sylvia Maus (eds), *Climate Change as a Threat to Peace: Impacts on Cultural Heritage and Cultural Diversity* (Peter Lang AG 2014) 55–56.
[91] J E Ensor and others, 'A Rights-Based Perspective on Adaptive Capacity' (2015) 31 Global Environmental Change 38, 39–41; Shelton (n 30) 23–24.
[92] Compare Verheyen and Zengerling (n 70) 433–435.
[93] Wewerinke-Singh (n 26) 146–147.
[94] HR Council Resolution 7/23, 'Human rights and climate change' (n 7); OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (n 8); Duyck (n 7) 3; Savaresi, 'Climate change and human rights' (n 7) 31.

human rights violations in a strict legal sense.[95] If a court is to rule that a state's mitigation efforts are in breach of an international obligation under international human rights law, there needs to have been 1) a breach of an international obligation, 2) that can be attributed to the state.[96] If the first requirement of the two is to be considered fulfilled in this context, this requires a determination of two things: that human rights provisions are *applicable* to the issue of climate change, and that they entail an *obligation to mitigate* against it.

No primary source of international human rights law provides an answer to the questions of whether the human rights framework is applicable to climate change and if it entails an obligation to mitigate against it. Hall and Weiss argue that recognising the link between climate change and human rights "provides a tangible legal framework for analysing the state actions that lead to climate change".[97] In 2016, the Special Rapporteur for Human Rights and the Environment indicated that states are obliged to protect their citizens from environmental harm and that those obligations encompass climate change.[98] The Special Rapporteur further wrote:

> [t]he 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. […] Specifically, States have obligations to protect against the infringement of human rights by climate change. This conclusion follows from the nature of their obligations to protect against environmental harm generally.[99]

The report by the Special Rapporteur goes on to explain the various existing procedural and substantive human rights obligations that states have in relation to climate change, such as the obligation to adopt legal frameworks that assist individuals with climate change adaptation and the obligation to facilitate participation in decision-making relating to climate policy.[100] However, the report fails to provide any clarity in regard to the existence of a state obligation to mitigate climate change.[101]

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[95] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (n 8) para 70.
[96] Art 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts (International Law Commission 2001) Supplement No. 10 (A/56/10), chp.IV.E.1.
[97] Margaux J Hall and David C Weiss, 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) 37 Yale Journal of International Law 309, 311.
[98] HR Council 31/52, '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 75) paras 33, 36.
[99] ibid, paras 33, 36.
[100] ibid, paras 50–80.
[101] For a brief discussion on the matter, see HR Council 31/52, '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 75) para 71.

Since human rights law imposes obligations on the state to *protect, respect,* and *fulfil* human rights[102], and since climate change risks undermining the realisation of most human rights, there is a strong argument for saying that human rights law is applicable to climate change and that it implies an obligation to mitigate against it.[103] This argument has been put forward by five United Nations (UN) human rights treaty bodies, which conclude that "[i]n order for States to comply with their human rights obligations, […] they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition".[104] Moreover, the OHCHR highlights in its submission to the 21st COP that states have an obligation to mitigate climate change.[105] A large part of the relevant scholarly literature argues for the existence of such an obligation too.[106] As an example, Lewis proposes that the obligation to *respect* human rights imposes an obligation on states to refrain from activities that contribute to climate change, which in specific terms can be understood as an obligation to prevent or reduce GHG emissions.[107] Michael and Wentz highlight the "growing consensus that a mitigation obligation does exist under international human rights law".[108] Mayer, meanwhile, takes a more restrictive approach, suggesting that the state obligation to mitigate climate change is "far more limited than what judges and scholars have suggested so far".[109] Nevertheless, as of today, the answer to these questions remains unclear. As will be demonstrated in the following chapters, the emerging trend of rights-based litigation may have an important role to play here in filling this gap.

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[102] See for example CESCR, 'General Comment No. 12: The Right to Adequate Food in art 11 ICESCR' (12 May 1999) UN Doc E/C.12/1999/5, para 15.
[103] See also Benoit Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115 Pre-publication manuscript accepted by the American Journal of International Law 1, 3–4.
[104] Committee on the Elimination of Discrimination Against Women and others, 'Joint Statement on Human Rights and Climate Change' (OHCHR, 16 September 2019) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> accessed 17 April 2021.
[105] OHCHR, 'Understanding Human Rights and Climate Change' (2015) Submission to the 21st COP, 2.
[106] Compare Mayer, 'Climate Change Mitigation' (n 103) 8. See also for example Wewerinke-Singh (n 26) 108–110, 130–133; Annalisa Savaresi, 'Human Rights Responsibility for the Impacts of Climate Change: Revisiting the Assumptions' [2019] Oñati Socio-Legal Series 1, 7; Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer 2018) 175; UNEP, 'Climate Change and Human Rights' (n 87) 22–23; Michael Burger and Jessica Wentz, 'Climate Change and Human Rights', in James R May and Erin Daly (eds), *Human Rights and the Environment: Legality, Indivisibility, Dignity and Geography* (Elgar Encyclopedia of Environmental Law, Edward Elgar Publishing 2019) 202–206.
[107] Lewis (n 106) 175.
[108] Burger and Wentz (n 106) 205.
[109] Mayer, 'Climate Change Mitigation' (n 103) 10.

2.5 Concluding remarks

Previous efforts to combat climate change via intra-state obligations within the international climate change regime have largely failed. The current climate change obligations, consisting of voluntary commitment targets, are not enough to reach the target in the Paris Agreement. States are also unwilling to invoke state responsibility in case of non-compliance of their obligations under international climate change law. Hence, there is an urgent need to search elsewhere and to employ other methods to combat the threat of climate change. Over the last 15 years, the issue of climate change has gained an increased foothold in the sphere of human rights law. This discourse opens up the possibility to hold states accountable for failing to fulfil legally binding obligations under international human rights law. While the link between climate change and human rights nowadays is undeniable, the applicability of human rights provisions to the issue of climate change and the ensuing nature of an obligation to mitigate against it is less clear. The following chapter will explore how international, regional, and domestic judicial and quasi-judicial fora have adjudicated rights-based mitigation claims.

3 A survey of rights-based mitigation case law

The amount of litigation employing human rights arguments to compel states to undertake more mitigation action is growing all over the world. The cases are mostly domestic, with a few international and regional examples.[110] This chapter contains a survey of rights-based litigation aimed at mitigating climate change as of May 2021. It begins with examining how the UN human rights treaty bodies and the three regional human rights systems in America, Europe, and Africa have dealt with the matter. The chapter ends with a brief description of some relevant high-profile domestic cases.

3.1 United Nations human rights treaty bodies

UNEP's Global Climate Litigation Report, published in 2020, predicts that there will be an increase in rights-based climate cases before international adjudicatory bodies in the years to come.[111] The report gives some reasons as to why this is, such as the availability within the international fora of a large amount of favourable soft law, as well as strategic opportunities. The report highlights that national courts might be less inclined to hold their governments accountable than international bodies would, and that international litigation could have a large influence and thus be employed as part of a broader strategy.[112] The recent case *Portillo Cáceres and others v. Paraguay* from 2019 marks the first time that the HRC recognised the link between human rights and environmental protection. The HRC acknowledged that environmental harm may undermine rights under the ICCPR, and it defined states' human rights obligations in this context. The HRC held, among other things, that threats to the right to life include threats from environmental pollution and that states must take appropriate measures to protect people from reasonably foreseeable threats.[113]

Still, as of today, no international human rights body has dealt with a case concerning climate change, although, this is about to change. There are currently two petitions, filed in 2019, pending and awaiting decisions from two

[110] Setzer and Byrnes (n 9) 4, 7–8.
[111] UNEP, 'Global Climate Litigation Report 2020' (n 32) 31–32.
[112] ibid 31–32.
[113] *Portillo Cáceres and others v. Paraguay*, CCPR/C/126/D/2751/2016 (HRC, 25 July 2019), paras 7.3–7.5.

separate UN human rights treaty bodies. *Torres Strait Islanders v. Australia* concerns eight people from the Torres Strait Islands who submitted a petition against Australia to the HRC, claiming that Australia is violating articles 6 (life), 17 (privacy, family, home), and 27 (culture) of the ICCPR because of its insufficient GHG mitigation plans and targets. The complainants argue that the future impact of climate change on the low-lying Torres Strait Islands is sufficiently severe to constitute a violation of their rights. Among several things, the claimants are asking Australia to reduce its emissions by at least 65% compared to levels in 2005 by 2030, and reach zero net emissions by 2050.[114] In the second petition, *Sacchi and others v. Argentina and others*, 16 children filed a petition to the CRC alleging that Argentina, Brazil, France, Germany, and Turkey are violating articles 3 (best interest of the child), 6 (life), 24 (health), and 30 (culture) under the United Nations Convention on the Rights of the Child due to their inadequate efforts to reduce GHG emissions.[115] Specifically, the applicants allege that the states have failed to prevent foreseeable harms caused by climate change through their insufficient emissions reductions, and they ask the CRC to recommend that the defendants review and amend their policies to ensure accelerated mitigation action.[116] These two petitions have gotten widespread attention and have already been backed by the current and former UN Special Rapporteur for Human Rights and the Environment, both of whom have submitted briefings to the HRC and CRC in support of admissibility.[117] After a discussion on the limitations and possibilities of the complaint procedures within the UN human rights treaty bodies, Wewerinke-Singh argued that the chances of success for a climate change case are "potentially significant".[118]

3.2 Regional human rights systems

A significant advantage of domestic and regional human rights litigation, compared to litigation in the international quasi-judicial bodies described above, is that it can result in binding judgements.[119] Moreover, the people

[114] ClientEarth, 'Torres Strait FAQ' (n 12).
[115] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; *Sacchi and others v. Argentina and others* (n 12) paras 15–33.
[116] *Sacchi and others v. Argentina and others* (n 12) paras 15–33.
[117] David R Boyd, 'Newsletter #7: December 2020' (UN Special Rapporteur on Human Rights and the Environment) <http://srenvironment.org/newsletter/newsletter-7-december-2020> accessed 18 March 2021; David R Boyd and John H Knox, 'Amici Curiae Brief of Special Rapporteurs on Human Rights and the Environment in Support of Admissibility' (Before the CRC, Sacchi and others v. Argentina and others) <www.hausfeld.com/uploads/documents/crc_admissibility_brief_boyd_knox_final_-_1_may_2020.pdf> accessed 21 May 2021.
[118] Wewerinke-Singh (n 26) 158–160.
[119] ibid 149

serving in the regional human rights bodies likely have a better understanding of the regional issues specific to each case. Regional bodies are also typically closer in proximity to the plaintiffs, making them more accessible as a forum.[120]

3.2.1 Americas

The American regional human rights system, consisting of the IAComHR and the Inter-American Court of Human Rights (IACtHR), has jurisdiction under the ACHR.[121] The American system has been considered progressive in relation to environmental rights and indigenous peoples' rights, with extensive jurisprudence on these matters.[122] However, up to now, no case concerning climate change has been examined on the merits.

The American system contains an autonomous right to a healthy environment. This right is stipulated in article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (Protocol of San Salvador).[123] However, the direct invocability of the rights in the Protocol has been a debated issue.[124] The Protocol of San Salvador only provides jurisdiction to the IAComHR and the IACtHR over two rights: the right to education and trade union rights.[125] This fact seems to prevent individual petitions against states for non-compliance with the right to a healthy environment. However, article 26 ACHR provides for the progressive realisation of economic, social, and cultural rights. Scholars have pondered over how article 26 ACHR relates to the rights stipulated in the Protocol of San Salvador. In other words, there is a debate as to whether article 26 ACHR provides for direct invocability of all the rights stipulated in

[120] Wewerinke-Singh (n 26) 151.
[121] Art 33 ACHR.
[122] See for example *Mayagna Awas Tingni Community v. Nicaragua*, IACtHR Series C No. 79 (31 August 2001); *Yakye Axa Indigenous Community v. Paraguay*, IACtHR Series C No. 125 (17 June 2005); *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR Series C No. 146 (29 March 2006); *Saramaka People v. Suriname*, IACtHR Series C No. 172 (28 November 2007); *Kichwa Indigenous People of Sarayaku v. Ecuador,* IACtHR Series C No. 245 (27 June 2012); Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards' (2017) 24 International Journal on Minority and Group Rights 229, 229; Wewerinke-Singh (n 26) 152.
[123] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (adopted 17 November 1988, entered into force 16 November 1999) OAS Treaty Series No 69 [hereinafter Protocol of San Salvador].
[124] Art 1 Protocol of San Salvador; Oswaldo R Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties – Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2013) 31 Netherlands Quarterly of Human Rights 159, 159–163.
[125] Art 19 Protocol of San Salvador.

the Protocol of San Salvador.[126] In *Acevedo Buendía and others v. Perú,* the IACtHR provided guidance on the matter for the first time. It held that civil and political as well as economic, social, and cultural rights should be understood as "enforceable in all the cases before competent authorities", hence declaring that the IAComHR and IACtHR have jurisdiction over the rights in the Protocol.[127]

In the groundbreaking *Advisory Opinion OC-23/17*, the IACtHR provided extensive advice on the relationship between the environment and human rights.[128] The Court held that the right to a healthy environment under article 11 of the Protocol of San Salvador is an autonomous human right that is protected under article 26 ACHR, empathising that the right is directly justiciable under the Inter-American system.[129] It also held that a healthy environment is instrumental to the realisation of other human rights.[130] In this sense, the Court thus distinguished between two approaches to protect the environment: the first one being by having an autonomous right to a healthy environment, the second one being the "greening" of human rights, meaning incorporating the protection into already existing rights.[131] In regard to these approaches, the Court stressed that the autonomous right protects the nature and the environment in itself, even in the absence of harm or risk of harm to individuals.[132] Moreover, the Court specified that the right to a healthy environment is both an individual and collective right, where the collective dimension entails that the right "is owed to both present and future generations".[133] Lastly, the Court held that the adverse impacts of climate change affects the enjoyment of several human rights, and that states have an obligation to prevent that activities under their effective control does not impact the enjoyment of those rights.[134] In the subsequent landmark ruling from 2020, *Lhaka Honhat Association v. Argentina*, the IACtHR held that Argentina had violated indigenous peoples' right to a healthy environment.[135] This was the first time that the Court based its decision on, and established standards for, the autonomous right to a healthy environment under article 26 ACHR.

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[126] Ruiz-Chiriboga (n 124) 159–163.
[127] *Acevedo Buendía and others v. Perú*, IACtHR Series C No. 198 (1 July 2009), para 101.
[128] The Environment and Human Rights*, Advisory Opinion OC-23/17*, IACtHR (15 November 2017).
[129] ibid, para 57.
[130] ibid, paras 55, 59
[131] For the term "greening", see John H Knox and Ramin Pejan, 'Introduction', in John H Knox and Ramin Pejan (eds), *The human right to a healthy environment* (Cambridge University Press 2018) 2.
[132] *Advisory Opinion OC-23/17* (n 128) paras 62, 63.
[133] ibid, para 59.
[134] ibid, paras 47, 104.
[135] *Indigenous Community Members of the Lhaka Honhat Association v. Argentina*, IACtHR Series C No. 400 (6 February 2020), paras 202–209.

While the American System has not yet examined a case concerning climate change mitigation on the merits, two petitions relating to this have been filed. In 2005, the world's first climate change mitigation case based on claims of human rights violations was submitted to the IAComHR. The *Inuit Petition* was brought by Inuit peoples of the United States and Canada against the United States, based on allegations that the impact of climate change caused by the United States' activities and emissions led to human rights violations in the Arctic region.[136] The IAComHR dismissed the petition without an examination of the merits, claiming that "the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration".[137] Hence, the Commission's decision not to move forward with the case was attributed to insufficient information. Had the *Inuit Petition* not been dismissed, the issue of extraterritorial jurisdiction would have been a challenge. This is because the petitioners were partly Canadians, complaining about the acts and omissions of the United States. Even though the petition was found inadmissible, it played a major role in raising public awareness around human rights and climate change. In fact, this case is often seen as a watershed moment following which a new discourse linking climate change and human rights emerged.[138]

Arctic Athabaskan Petition, filed in 2013 by the Arctic Athabaskan peoples of Canada and the United States, has many similarities to the *Inuit Petition*. In this petition, the complainants allege that Canada's failure to regulate black carbon emissions violates the Athabaskans people's right to health, property, culture, and means of subsistence.[139] This case is still pending and awaiting decision on admissibility. It thus remains to be seen if the petition will, unlike the *Inuit Petition*, be examined on its merits. Since the petition was filed, both the *Advisory Opinion OC-23/17* (2017) and *Lhaka Honhat Association v. Argentina* (2020) have certainly provided new support to the Athabaskan peoples' claims.[140] As mentioned in regard to the *Inuit Petition*, the issue of extraterritorial jurisdiction is likely to play a role in the upcoming procedure,

[136] *Inuit Petition* (n 6) 5.
[137] *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*, Petition No. P-1413-05, IAComHR (16 November 2006).
[138] Duyck (n 7) 5.
[139] *Arctic Athabaskan Petition* (n 12).
[140] See also Agnieszka Szpak, 'Arctic Athabaskan Council's petition to the Inter-American Commission on human rights and climate change – business as usual or a breakthrough?' (2020) 162 Climatic Change 1575, 1587–1588; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' [2019] Climate Law 1, 9–10; Monica Feria-Tinta and Simon Milnes, 'The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights' (EJIL: Talk! 26 February 2018) <www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-

since the petition involves applicants from the United States whose complaints are directed against the omissions of Canada. The petition contains several points regarding Canada's duty to avoid transboundary harm with regards to its emissions affecting the rights of Athabaskan people in the United States.[141]

3.2.2 Europe

Unlike the Protocol of San Salvador, the ECHR does not contain an autonomous right to a healthy environment. Nevertheless, Pedersen believes that the ECtHR's extensive and elaborate case law "all but in name provides for a right to a healthy environment".[142] The ECtHR has on several occasions ruled that rights under the ECHR may be undermined due to environmental harm or a risk thereof.[143] The Court has treated risk regulation cross-dimensionally, confirming on several occasions that a disregard for environmental risks may lead to human rights violations.[144]

The ECtHR's extensive jurisprudence concerning the environment and human rights consists of around 300 cases.[145] The largest group of environmental-related cases concern situations where individuals claim that their rights have been interfered with due to situations like governmental land expropriation or governmental restrictions put in place with the aim of protecting wildlife and endangered species.[146] Hence, the majority of the environmental-related cases do not concern claims with the aim of protecting the environment, but rather in opposition to environmental protection. Nonetheless, the ECtHR has also heard cases concerning situations in which individuals claim that their rights have been violated due to environmental harm or a risk thereof.

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american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/> accessed 1 March 2021.

[141] *Arctic Athabaskan Petition* (n 12) 1, 52.

[142] Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejan (eds), *The human right to a healthy environment* (Cambridge University Press 2018) 86.

[143] For a full list of past and pending cases concerning the environment, see European Court of Human Rights, 'Environment and the European Convention on Human Rights' (Factsheet, April 2021) <www.echr.coe.int/documents/fs_environment_eng.pdf > accessed 3 April 2021.

[144] Letizia Seminara, 'Risk Regulation and the European Convention on Human Rights' (2016) 7 European Journal of Risk Regulation 733, 733–734; Lucretia Dogaru, 'Preserving the Right to a Healthy Environment: European Jurisprudence' (2014) 141 Procedia – Social and Behavioral Sciences 1346, 1346.

[145] Council of Europe, 'Protecting the environment using human rights law' <www.coe.int/en/web/portal/human-rights-environment> accessed 2 March 2021.

[146] See for example *N.A. and others v. Turkey*, no. 37451/97 (ECtHR, 11 October 2005). See also Natalia Kobylarz, 'The European Court of Human Rights: An Underrated Forum for Environmental Litigation' in Helle Tegner Anker and Birgitte Egelund Olsen (eds), *Sustainable Management of Natural Resources: Legal Instruments and Approaches* (Intersentia 2018) 102.

These cases relate to issues such as dangerous industrial activities, nuisance, exposure to pollution, nuclear radiation, industrial emissions, and incidents from natural disasters.[147] On one hand, it could be assumed that this extensive environmental jurisprudence could easily be applied analogously to cases concerning climate change, seeing as though the harm brought about by climate change is caused by environmental degradation. On the other hand, it is important to note that climate change differs in many ways from the typical situations covered in the ECtHR's environmental case law, which tend to be specific and isolated environmental harms occurring within a limited territory and rarely extending across international borders.[148]

While the ECtHR has not yet considered a case regarding climate change, there are currently two pending petitions awaiting decisions. In September 2020, an application was filed by six Portuguese children and young adults against 33 states.[149] *Agostinho and others v. Portugal and 32 other States* concerns allegations that GHG emissions from the 33 defendant states contribute to climate change, which in turn has resulted in heat waves affecting the lives of the six applicants. Specifically, the applicants complain that their rights under articles 2 (life), 8 (private and family life), and 14 (discrimination) in conjunction with articles 2 and 8 have been violated because the respondent states are: a) permitting the release of emissions within their territory and offshore areas under their jurisdiction; b) allowing the export of fossil fuels; c) allowing the import of goods whose production contribute to emissions; and d) enabling entities within their jurisdictions to contribute to emissions abroad, such as by the extraction or financing of fossil fuels abroad.[150] In November 2020, the ECtHR communicated the case and asked questions to the respondent states.[151] The respondents will have until May 27, 2021 to respond to the questions. The Court also gave notice that it will deal with the case under article 41 of the Rules of the Court as a matter of priority.[152] The fact that the Court did not immediately reject the case as being inadmissible and that it has invited states to respond to the allegations perhaps give some indication, however small, that it will not immediately dismiss the

[147] See for example *Budayeva and others v. Russian Federation*, nos. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008); *Öneryildiz v. Turkey*, no. 48939/99 (ECtHR, 30 November 2004); *López Ostra v. Spain*, no. 16798/90 (ECtHR, 9 December 1994).
[148] See also Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (The World Bank 2011) 39.
[149] All of the 27 EU states plus the United Kingdom, Norway, Switzerland, Russia, Ukraine, and Turkey.
[150] Global Legal Action Network, 'Court application filed 3rd September 2020' (Youth4ClimateJustice) 6 <https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf> accessed 2 March 2021.
[151] *Agostinho and others v. Portugal and 32 other States* (n 12).
[152] ibid.

case due to a lack of admissibility. The ECtHR has received many submissions in which arguments are put forth in support for the claims, including from the UN Special Rapporteurs on human rights and the environment and on toxics and human rights, as well as the Council of Europe Commissioner for Human Rights.[153] The former two argue that "[t]he present case provides the Court with a timely and historic opportunity to provide the Respondent States with principled, rights-based guidance" and that the case provides an "opportunity for the Court to extend its environmental jurisprudence in response to this unprecedented threat, thereby contributing to the achievement of climate justice".[154] Moreover, both submissions hold that the ECtHR's approach in its environmental case law and in cases concerning children's rights could be applied analogously to cases concerning climate change.[155]

The second pending petition, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland,* was filed to the ECtHR in November 2020. The applicants are a group of Swiss senior women alleging that Switzerland is violating their rights under the ECHR. The application consists of three main arguments: a) Switzerland's lack of sufficient climate policies is violating their rights under articles 2 (life) and 8 (private and family life); b) the Swiss Supreme Court dismissed their appeal arbitrarily, violating their right under article 6 (fair trial); and c) the Swiss Courts and other authorities are violating their rights under article 13 (effective remedy) by failing to deal with the content of their complaints.[156] In March 2021, the ECtHR communicated the case to the Swiss government and gave it the same high priority as it did with *Agostinho and others v. Portugal and 32 other States.* Switzerland has until July 16, 2021 to respond to the questions asked by the Court.[157]

A key principle essential to the admissibility of complaints in the UN human rights treaty bodies, the IAComHR/IACtHR, the ECtHR, and the African Commission on Human and Peoples' Rights (AComHPR)/African Court on

[153] David R Boyd and Marcos A Orellana, 'Amicus Curiae Brief' (Before the ECtHR, Agostinho and others v. Portugal and 32 other States, 4 May 2021) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210504_3937120_na.pdf> accessed 21 May 2021; Council of Europe Commissioner for Human Rights, 'Third party intervention by the Council of Europe Commissioner for Human Rights' (Before the ECtHR, Agostinho and others v. Portugal and 32 other States, 5 May 2021) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210505_3937120_na-1.pdf> accessed 21 May 2021.
[154] Boyd and Orellana (n 153), paras 4, 41.
[155] ibid, para 5; Council of Europe Commissioner for Human Rights (n 153) paras 17–34.
[156] ettlersuter Rechtsanwälte and bähr ettwein rechtsanwälte, 'KlimaSeniorinnen Application' (Sabin Center for Climate Change Law, 26 November 2020) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126_No.-A-29922017_application-1.pdf> accessed 5 May 2021.
[157] *Verein KlimaSeniorinnen Schweiz and others v. Switzerland* (n 12).

Human and Peoples' Rights (ACtHPR) is that the petitioner must have exhausted all domestic remedies available to them before filing their claim within these fora.[158] This is because international adjudication should be resorted to only in cases in which domestic adjudication has failed to deliver, since domestic courts are generally considered better suited to decide on most cases. There are, however, exceptions to this rule which become applicable when domestic remedies are unavailable, ineffective, or insufficient.[159] The international and regional human rights fora frequently dismiss cases at the admissibility stage because the complainants have not exhausted such local remedies.[160] Hence, this will most definitely become a crucial issue in the upcoming climate change procedures before these international and regional fora. With one notable exception, none of the cases discussed so far – *Sacchi and others v. Argentina and others* and *Torres Strait Islanders v. Australia* before the CRC and HRC respectively, the *Arctic Athabaskan Petition* before the IAComHR, and *Agostinho and others v. Portugal and 32 other States* before the ECtHR – have had petitions that first engaged with domestic courts. The complainants in these cases argue, in similar ways, that the exception rule applies since the local remedies are futile, unavailable, or ineffective.[161] The aforementioned exception is that of *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, which went through all levels of the Swiss national court system before it was filed to the ECtHR.[162] Pedersen believes that the complainants in *Agostinho and others v. Portugal and 32 other States* will struggle to convince the ECtHR that the exception applies to them, since the petitioners have not initiated proceedings in any of the 33 defendant states while similar proceedings are currently taking place in some of those same states.[163] That being said, the general arguments put forth by the petitioners in support of the exceptional status of these cases is somewhat convincing. They argue that there are no adequate domestic remedies available to them because of the sheer urgency of the matter, and that it would be practically

[158] Art 46 ACHR; art 35 ECHR; art 56 ACHPR; art 2 and 5.2.b Optional Protocol to the ICCPR; art 7.5 Optional Protocol to the Convention on the Rights of the Child.
[159] See for example *Aksoy v. Turkey*, no. 21987/93 (ECtHR, 18 December 1996), paras 51–53; FIDH, 'Admissibility of complaints before the African Court: Practical Guide' (June 2016) 44–45 <www.refworld.org/pdfid/577cd89d4.pdf > accessed 8 April 2021.
[160] Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (EJIL: Talk! 22 September 2020) <www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 2 March 2021.
[161] *Sacchi and others v. Argentina and others* (n 12) paras 309–318; *Arctic Athabaskan Petition* (n 12) 77–84; Global Legal Action Network (n 150) 10, Annex paras 35–40. Note that the *Torres Strait Islanders v. Australia* petition is not publicly available at this time, therefore their argument on this subject is unknown.
[162] *Verein KlimaSeniorinnen Schweiz v. Bundesrat*, 1C_37/2019 (Federal Supreme Court of Switzerland, 5 May 2020) [Unofficial English Translation from KlimaSeniorinnen].
[163] Pedersen, 'The European Convention of Human Rights and Climate Change – Finally! (n 160).

impossible to pursue domestic litigation since the violations are caused cumulatively by all states – and domestic courts can only decide on the state in which they exist.[164]

On a final note, it is worth pointing out that CJEU recently dealt with a climate change mitigation case. *Carvalho and others v. Parliament and Council*, often referred to as "the Peoples' Climate case", was dismissed by the General Court (GC) in the first instance in May 2019.[165] The case concerns ten families from Germany, France, Portugal, Italy, Romania, Kenya, Fiji, and the Swedish Sami Youth Association *Sáminuorra*, who collectively allege that the EU's existing target of reducing GHG emissions by 40% compared to 1990 before the year 2030 is insufficient and in breach of several of their human rights.[166] The GC dismissed the case on procedural grounds because the plaintiffs were not considered to be individually concerned under the admissibility criterion in the fourth paragraph of article 263 of the Treaty of the Functioning of the EU, meaning that they lacked standing.[167] The plaintiffs appealed the case in July 2019, arguing that the GC erred in its arguments concerning article 263.[168] In March 2021, the Court of Justice (ECJ) upheld the lower Court's ruling and dismissed the case due to lack of standing.[169]

3.2.3 Africa

The ACHPR, overseen by the AComHPR and the ACtHPR, contains an autonomous right to a healthy environment in article 24.[170] The economic, social, and cultural rights provisions in the ACHPR do not contain wording around the "progressive realization" of said rights, which is otherwise often the case with those types of rights.[171] This means that economic, social, and cultural rights – including the right to a healthy environment – is directly invocable before the AComHPR and the ACtHPR.[172]

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[164] Global Legal Action Network (n 150) 10, Annex paras 35–40.
[165] Case T-330/18, *Armando Carvalho and others v. European Parliament and Council of the European Union* [2019] ECLI:EU:T:2019:324, 18.
[166] ibid 6, 9.
[167] ibid 11–14.
[168] Armando Carvalho and others v. the European Parliament and the Council of the European Union, 'Appeal' (11 July 2019) 4 <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-casedocuments/2019/20190711_Case-no.-T-33018_appeal.pdf> accessed 4 March 2021.
[169] *Carvalho and others v. Parliament and Council* [ECJ] (n 27).
[170] Art 24 ACHPR: "All peoples shall have the right to a general satisfactory environment favourable to their development."
[171] Compare art 1 Protocol of San Salvador and art 2 ICCPR.
[172] Fons Coomans 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 The International and Comparative Law Quarterly 749, 751, 757.

The African system has not dealt directly with a case concerning climate change, though one particular case concerning environmental protection could be instructive regarding possible future climate change mitigation cases. In *SERAC and CESR v. Nigeria* from 2002, the AComHPR interpreted the right to a healthy environment under article 24 for the first time and laid out the positive obligations that the right imposes upon states. The Commission held that the right to a healthy environment requires that states take measures "to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".[173] This case has been praised for its progressiveness in terms of the substantive environmental obligations it places on states.[174] The Commission finished the judgment by stating that "[…]collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa".[175] The case does not mention climate change specifically, but the AComHPR concluded that Nigeria had breached several human rights by failing to prevent and protect against the ecological degradation and environmental consequences of oil extraction.[176] This interpretation of the right to a healthy environment indicates that climate change could also fall within the scope of the ACHPR.[177] It is worth pointing out, however, that African states are not currently among the principal contributors to climate change globally. In this sense, litigation aimed at mitigating climate change within the African system may not be as effective as litigation in other parts of the world.[178]

3.3 Relevant domestic litigation

The Sabin Center for Climate Change Law has identified domestic climate-related cases in 41 different countries between 1986 and today. Around 75% of these cases are from the United States.[179] Outside the United States, most of the cases have been adjudicated in either Australia or the United Kingdom.[180] From an approximate total of 1782 past and pending domestic climate-related cases, around 73 rely on human rights arguments.[181] These cases

[173] *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v. Nigeria*, Communication no. 155/96 (AComHPR, 27 May 2002) para 52.
[174] Birnie and Boyle (n 49) 273–274.
[175] *SERAC and CESR v. Nigeria* (n 173) 14.
[176] ibid, para 50–54.
[177] See also Wewerinke-Singh (n 26) 155.
[178] ibid 155.
[179] Sabin Center for Climate Change Law, 'About' (n 18); Sabin Center for Climate Change Law, 'Non-U.S. Jurisdiction' <http://climatecasechart.com/non-us-jurisdiction/> accessed 19 May 2021.
[180] Setzer and Byrnes (n 9) 4.
[181] See Savaresi and Setzer (n 19) 3–4.

have been litigated in different jurisdictions with varying degrees of success.[182] Savaresi and Setzer note that out of the rights-based cases that had been decided in January 2021, 23 had been successful and 21 unsuccessful.[183] The success of some of the more high-profile cases has attracted wider attention and led to a large uptick in domestic cases relying on human rights arguments in recent years. This trend has been described within the context of climate change litigation as a human "rights turn".[184] As of today, several cases are pending before domestic courts worldwide.[185] The following paragraphs will discuss domestic cases from four different jurisdictions to demonstrate different examples of litigation approaches and outcomes.

Ashgar Leghari v. Federation of Pakistan marks the first ever successful case in which human rights arguments were employed to mitigate climate change. The plaintiff, a Pakistani farmer, challenged the inaction of the Pakistani government to "address the challenges and to meet the vulnerabilities associated with climate change".[186] The plaintiff argued that the inaction and failure of the government to implement the state's National Climate Change Policy and the corresponding Framework to implement said policy had violated several of his fundamental rights, most importantly the right to life and the right to a healthy environment.[187] The Court ruled in the plaintiffs favour, holding that "the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded".[188] Moreover, the Court held that "existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., Climate Change", and that fundamental rights "provide the necessary judicial toolkit to address and monitor the Government's response to climate change".[189] The Court finished by issuing several orders detailing how to implement the policies in question.[190] This case undoubtedly represents an important contribution to climate change litigation in the Global South which, compared to the Global North, has received far less attention.[191] It is especially notable in that, compared to many cases originating in the Global North,

[182] Sabin Center for Climate Change Law, 'Non-U.S. Climate Change Litigation, Suits Against Governments, Human Rights' (n 19); Setzer and Byrnes (n 9) 14.
[183] Savaresi and Setzer (n 19) 4.
[184] Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 37.
[185] In January 2021, half of the 85 cases remained pending, see Savaresi and Setzer (n 19) 4.
[186] *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (Lahore High Court, 4 September 2015), para 1.
[187] ibid, paras 1,7.
[188] ibid, para 8.
[189] ibid, para 7.
[190] ibid, para 8.
[191] 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

it deals with adverse climate change impacts that can already be seen and felt as opposed to only predictions of future damage.[192] In Pakistan, as with other states in the Global South, the negative impact of climate change is already plainly visible.

The more recent *Future Generations v. Ministry of the Environment and others* from Colombia saw 25 youths suing various governmental bodies, municipalities, and corporations through a *tutela*: a domestic legal remedy used to enforce fundamental rights. The youths alleged that the defendants' failure to prevent the deforestation of the Amazon rainforest was resulting in higher GHG emissions, which in turn contributed to climate change and thereby threatened several of their rights, most notably their right to a healthy environment, life, health, food, and water.[193] The Court granted the requested protection and ordered the defendants to formulate and implement several action plans to counteract the deforestation, reduce GHG emissions, and tackle the impact of climate change.[194] Notably, the Court also recognized the Colombian Amazon rainforest as a "subject of rights" and declared that it was entitled to protection and conservation.[195]

Perhaps the most renowned and groundbreaking climate change mitigation case up to now is *Urgenda Foundation v. the Netherlands*, the first successful case globally in which a court ordered a state to reduce its GHG emissions in specific numbers. In this case, a Dutch non-governmental organisation (NGO) sued the Dutch government in order to compel it to reduce its GHG emissions. The complainants sought a court order to declare that by 2020 the Dutch state had to reduce its GHG emissions by 40%, or 25% at least, compared to levels observed in 1990. Failing to do so would be incompatible with the state's positive obligations under the right to life and private and family life in articles 2 and 8 ECHR.[196] The Supreme Court upheld the Court of Appeal's judgement and ordered the Dutch state to reduce its GHG emissions before the end of 2020 by at least 25% compared to 1990.[197] The Court held that the positive obligations under articles 2 and 8 ECHR required the Dutch

203, 204; Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679, 680–682.
[192] See also Barritt and Sediti (n 191) 207–208.
[193] *Future Generations v. Ministry of the Environment and others*, STC 4360-2018 (Supreme Court of Justice of Colombia, 5 April 2018) [Unofficial English Translation from Dejustica], "Background".
[194] ibid, "Decision".
[195] ibid 45, para 14.
[196] *Urgenda Foundation v. the Netherlands* (n 11) paras 2.2.1–2.2.2.
[197] ibid, "Opinion of the Supreme Court" at 3.

State to undertake these specific mitigation efforts in order to protect individuals from harm due to climate change.[198] Two of the Court's main conclusions were that the effects of climate change imply a risk of harm to human life and health, and that articles 2 and 8 ECHR are applicable in this context and provide for a state obligation to take preventative measures.[199] It is worth noting how the Court interpreted articles 2 and 8 ECHR as entailing specific emissions reduction obligations for the Netherlands. In making this interpretation, the Court used the *principle of effectiveness* and the "common ground" method of interpretation, meaning that scientific insights and widely accepted standards had to be taken into account when interpreting the content of the ECHR's obligations. The high degree of consensus within the international community that Annex 1 countries need to achieve at minimum a 25% reduction in GHG emissions by 2020 (as evidenced in scientific research and previously agreed-upon climate change law) meant that this could be considered "common ground" and hence be taken into account. The reduction target of 25 % was therefore to be regarded as the very least the state was obliged to achieve under articles 2 and 8 ECHR in order to prevent dangerous climate change.[200]

A similar case with an altogether different outcome is the aforementioned *Verein KlimaSeniorinnen Schweiz v. Bundesrat*. As mentioned in section 3.2.1, this case concerns a group of senior women who alleged that the Swiss government had violated their rights under articles 2 and 8 ECHR because it had failed to reduce emissions in line with the goal of keeping global temperatures less than 2 ºC above pre-industrial levels. The authority in the first instance dismissed the case, concluding that the women did not have victim status under the ECHR since they were pursuing public interests.[201] The Federal Administrative Court also dismissed the case, concluding that the remedy sought as well as the alleged injury was not specific to the women – in the sense that Swiss women over the age of 75 are not the only part of society affected by climate change.[202] In May 2020, the Supreme Court denied the appeal, concluding that the women's rights had not as yet been sufficiently affected with enough intensity. The Supreme Court pointed to the fact that global warming of 1,5 ˚C is expected to occur around the year 2040, meaning

[198] *Urgenda Foundation v. the Netherlands* (n 11) paras 5.6.2 – 5.6.3.
[199] See Jonas Ebbesson, 'Klimatprocesser mot staten – runt om i världen och i Sverige' [2020/2021] Juridisk Tidskrift 106, 117; *Urgenda Foundation v. the Netherlands* (n 11) paras 4.7–4.8, 5.6.2 – 5.6.3.
[200] *Urgenda Foundation v. the Netherlands* (n 11) paras 5.4.1–5.4.3, 6.1–7.5.3.
[201] *Verein KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC),* (DETEC, 25 April 2017) [Unofficial English Translation from KlimaSeniorinnen] 13–14.
[202] *Verein KlimaSeniorinnen Schweiz v. Bundesrat*, A-2992/2017 (Federal Administrative Court of Switzerland, 27 November 2018) [Unofficial English Translation from KlimaSeniorinnen] paras 7.4.3–9.

that warming of 2 ˚C is expected to occur later. Since it is assumed to still be some time left to prevent warming from exceeding that limit, the petitioners' rights could not be considered affected at this point in time.[203] Moreover, the Court held that the petitioners' claims must be advanced by political means and not by legal action.[204] These conclusions can by all means be questioned. It seems contrary to the objective and goal of the international climate change regime if one has to wait until global warming of 2 ˚C has already occurred before one can claim the existence of rights-violations. This stance undoubtedly disregards states' duty to take positive action to prevent violations from occurring.

3.4 Concluding remarks

This chapter has examined a selection of cases that are representative of the key issues at stake with regards to rights-based litigation aimed at mitigating climate change. Most of the cases are from recent years, with several currently pending, indicating that human rights litigation is playing an ever-larger role in combating climate change. As of today, there is no international or regional human rights body that has found a climate change case admissible and examined it on its merits. However, there are currently five of these cases pending before international and regional human rights fora. If any of these cases were to be declared admissible, it would set an extremely important precedent that would lead the way for similar domestic climate lawsuits.

Cases such as *Portillo Cáceres and others v. Paraguay, Lhaka Honhat Association v. Argentina, Budayeva and others v. Russian Federation*, and *SERAC and CESR v. Nigeria* demonstrate that UN human rights treaty bodies plus three regional human rights systems all now recognise that environmental damage can undermine human rights and that states are obliged to prevent this from happening. While these cases do not mention climate change specifically, many aspects of them could be applied analogously to future mitigation lawsuits, including the cases currently pending in international and regional fora.

The analysed cases also reveal that the various legal systems of the international, regional, and domestic fora differ in the availability of the substantive provisions that may offer protection against climate change-related harm. Also, the varying degrees of success between cases reveal that there are major obstacles remaining before this litigation can be successful across the board.

[203] *Verein KlimaSeniorinnen Schweiz v. Bundesrat* [Supreme Court] (n 162) paras 5–5.5.
[204] ibid, para 5.5.

4 Main factors affecting justiciability

This chapter draws on the findings in the previous chapter to identify and analyse the main factors that affect the justiciability of rights-based claims aimed at mitigating climate change. The first section discusses two factors relating to the substantive legal framework while the second section looks at four procedural issues.

4.1 The substantive legal framework

As highlighted in section 2.4, ruling that a state's climate change mitigation efforts are in breach of an international obligation under human rights law requires that human rights provisions are applicable to the issue of climate change and that they entail an obligation to mitigate against it. These next two sections will elaborate on what the case law presented tells us about these questions. Specifically, they seek to answer how the substantive provisions under the human rights system have and can be applied to the issue of climate change, and if they have been interpreted as to entail an obligation to mitigate against it.

4.1.1 The applicability of human rights provisions to the issue of climate change

In order for a climate change mitigation case to be successful, the substantive provisions under the human rights treaties must be applicable to the issue of climate change. In other words, there needs to exist a substantive provision with a protective scope that includes harm caused by climate change. The analysed case law illustrates the different approaches taken by the international, regional, and domestic fora as to which human right may offer this protection.

One approach taken in *Urgenda Foundation v. the Netherlands* and *Verein KlimaSeniorinnen Schweiz v. Bundesrat* has been the "greening" of existing human rights.[205] This is the only approach available to future climate change mitigation cases under the ECtHR and the UN human rights treaty bodies. As seen in past and pending cases, it is *the right to life* and *the right to private*

[205] For the term "greening", see Knox and Pejan (n 131) 2.

and family life that have been invoked most often in the context of environmental protection and climate change mitigation. In its defence in *Urgenda Foundation v. the Netherlands*, the Dutch state held that the issue of climate change is not specific enough to fall within the scope of protection of articles 2 and 8.[206] While no international or regional human rights fora have as yet confirmed that human rights can in fact be applicable to the issue of climate change, the reasoning by the Court in *Urgenda Foundation v. the Netherlands* is very convincing. The Court took account of previous case law from the ECtHR regarding articles 2 and 8 ECHR and concluded the following. The two provisions encompass positive obligations to take measures to safeguard the lives and well-being of people. These positive obligations also apply in environmental matters, and the provisions have been found to be violated in cases concerning environmental harm. The positive obligations arise if there is a real and immediate risk to people's lives, or if environmental harm may affect or prevent people from enjoying their private and family life. Since climate change, based on scientific reports, constitutes a real and immediate risk in this sense, the state is – pursuant to the two provisions – required to take measures to counter this threat. Hence, the protective scope of the two provisions extends to the risk of climate change.[207]

Another approach adopted in Colombia and Pakistan, and which is also available under the American and African human rights systems, is the use of an autonomous right to a healthy environment. How the implementation of such a right would contribute to environmental protection, including climate change mitigation, has been the topic of debate among scholars for a while now,[208] and a comprehensive discussion on the matter goes beyond the scope of this study. Savaresi has surveyed rights-based climate cases (although not limited to mitigation cases) and found that in those cases where the right to a healthy environment had been invoked, the success rate seemed to increase significantly. However, due to the very limited number of existing cases, Savaresi concluded that it would be premature to draw any definitive conclusions on the matter.[209]

In light of the above, the protective scope of human rights provisions can extend to harm caused by climate change, as evident by case law in which courts

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[206] *Urgenda Foundation v. the Netherlands* (n 11) para 5.1.
[207] ibid, paras 5.2.1 – 5.3.4, 5.6.2 – 5.6.3.
[208] See for example Trevor Daya-Winterbottom, 'The legitimate role of rights-based approaches to environmental conflict resolution', in Christina Voigt and Zen Makuch (eds), *Courts and the environment* (Edward Elgar Publishing 2018) 62; Shaw (n 49) 642–643; Sumudu Atapattu, 'The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?' in John H Knox and Ramin Pejan (eds), *The human right to a healthy environment* (Cambridge University Press 2018).
[209] Annalisa Savaresi, 'Enforcing the Right to a Healthy Environment in the Climate Emergency: A View from Above' (2020) SSRN Electronic Journal 1, 6–8.

have applied different substantive provisions to the issue of climate change. While this has only been confirmed in domestic cases up until now, it seems improbable that this practice would be challenged by an international or regional human rights forum.

4.1.2 The content of the obligation to mitigate climate change

After having determined that human rights provisions can be applicable to the issue of climate change, the next step is to determine which obligations these provisions entail. For the purpose of this study, it is necessary to know if any of the human rights provisions entail an obligation to mitigate climate change, and if so, in what sense. As highlighted in section 2.4, no primary source of human rights law provides for an obligation to mitigate climate change. Also, none of the three regional human rights courts have offered any guidance on this matter to date. Nonetheless, a total of five UN human rights treaty bodies, plus the OHCHR, have stressed that states in fact do have an obligation under human rights law to mitigate climate change.[210] The case law presented in this study does offer some guidance on the matter, though it is admittedly limited in scope. The cases pending will hopefully help further clarify the content and scope of states' obligations in this regard.[211]

In *Urgenda Foundation v. the Netherlands*, the Court concluded that the obligations under articles 2 and 8 ECHR do imply an obligation for the Netherlands to mitigate climate change through a reduction of GHG emissions by at least 25% by the end of 2020 compared to 1990.[212] Meanwhile, the Colombian Supreme Court similarly concluded that the Colombian state had an obligation to reduce GHG emissions due to obligations derived from various human rights, most notably the right to a healthy environment.[213] In Pakistan, the Court held that the obligations stemming from the petitioner's fundamental rights imply a duty to take action to mitigate climate change by, among other things, implementing the National Climate Change Policy.[214] In a somewhat similar case from 2018, the Nepalese Supreme Court ordered the Nepalese government to enact a new law in order to mitigate climate change based

[210] Committee on the Elimination of Discrimination Against Women and others (n 104); OHCHR, 'Understanding Human Rights and Climate Change' (n 105) 2.
[211] Compare Matthew Scott, 'A role for strategic litigation' (2015) 1 Forced Migration Review 47, 47.
[212] *Urgenda Foundation v. the Netherlands* (n 11) "Opinion of the Supreme Court" at 3.
[213] *Future Generations v. Ministry of the Environment and others* (n 193) "Background", "Decision".
[214] *Ashgar Leghari v. Federation of Pakistan* (n 186) para 8.

on the government's obligations under human rights law and the Paris Agreement.[215] In addition, the interpretation made by the courts regarding the preventive obligations stemming from the right to a healthy environment in *SERAC and CESR v. Nigeria*[216] and *Lhaka Honhat Association v. Argentina*[217] indicate that those obligations could be extended as to include climate change mitigation.[218]

In light of the foregoing, it is evident that several entities, scholars, and courts alike, conclude that there does in fact exist an obligation under international human rights law to mitigate climate change. Some successful court decisions have resulted in direct regulatory changes as domestic courts have ordered governments to reduce emissions and enact mitigation laws.[219] As is evident too, however, the exact content of this obligation has been interpreted in varying ways by different courts. A clarification on the existence and content of the obligation to mitigate climate change is needed urgently since, in order for rights-based litigation to effectively contribute to climate change mitigation, human rights law must provide for an obligation to mitigate climate change.

On a final note, even if future legal developments were to clarify whether or not human rights law imposes an obligation on states to mitigate climate change, the derogatory nature of human rights[220] would most likely affect the practical implications of this obligation. In the event of natural disasters such as extreme flooding and fires, when the adverse effects of climate change are often most visible, states will typically take extraordinary action such as declaring a state of emergency, thus allowing them to derogate from many human rights.[221] As Humphreys puts it, "[h]uman rights are then, during times like that, less relevant as legal tools."[222] In this sense, it remains unclear how a state's obligation to mitigate would play out in practice.

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[215] *Shrestha v. Office of the Prime Minister and others*, Decision no. 10210, NKP, Part 61, Vol. 3 (Supreme Court of Nepal, 25 December 2018) [Unofficial English Translation], paras 5–7.
[216] *SERAC and CESR v. Nigeria* (n 173) paras 50–54.
[217] *Lhaka Honhat Association v. Argentina* (n 135) paras 202–209.
[218] See also Wewerinke-Singh (n 26) 155.
[219] Peel and Osofsky, *Climate Change Litigation* (n 10) 37–38.
[220] David Dyzenhaus, 'Emergencies and Human Rights: A Hobbesian Analysis', in Bardo Fassbender and Knut Traisbach (eds), *The Limits of Human Rights* (Oxford University Press 2019) 90–91.
[221] Humphreys, 'Introduction: human rights and climate change' (n 85) 2.
[222] ibid 2.

4.2 Procedural issues

Even though courts have interpreted the human rights framework as to afford protection against climate change-related harm through its substantive provisions, many procedural challenges for the success of this litigation remain. First, an applicant has to overcome certain admissibility requirements in order for their complaint to be heard. Assuming this is achieved and the case is examined on its merits, the complainant must be able to prove that they have been the victim of human rights violations attributable to climate change, and that the defendant state is responsible for said violation. This entails linking the harmful act or omission to the state in question. The following sections will elaborate on four procedural areas that have proven to present challenges to this type of litigation, namely: standing, extraterritorial jurisdiction, attribution and causation, and the separation of powers.

4.2.1 Standing

Successfully establishing standing is a key obstacle in the cases discussed in the previous chapter. To have standing means to have an interest in the matter of the dispute which entitles the applicant to bring the case before the court.[223] The issue of standing is an admissibility requirement that all petitioners must overcome on every level of adjudication, though the different legal bodies each have specific requirements and may vary in their restrictiveness. In general, the way in which standing requirements have been formulated up to now has proven ill-suited in relation to cases concerning climate change. A key issue is the juxtaposition of the inherently individualistic character of international human rights law and the universal, collective nature of climate change. The effects of climate change are, of course, not limited to certain individuals or isolated events, rather they concern humanity as a whole. Consequently, it is difficult to integrate climate change mitigation – which relates to the potential for future harm and is primarily concerned with systemic and often indeterminant violations experienced by many – into a human rights system that seeks to protect the rights of individuals from isolated harms.[224]

An important concern in regard to standing is whether the different bodies allow for *actio popularis*, meaning petitions in the interest of the public as a whole, or "class actions".[225] These kinds of petitions are highly relevant to

[223] Wewerinke-Singh (n 26) 148.
[224] See also Evadne Grant, 'International human rights courts and environmental human rights: re-imagining adjudicative paradigms' (2015) 6 Journal of Human Rights and the Environment 156, 156–159.
[225] Julie H Albers, 'Human Rights and Climate Change: Protecting the Right to Life of Individuals of Present and Future Generations' (2018) 28 Security and Human Rights 113,

climate change litigation since the impact of climate change is not limited to the experience of a few distinct individuals. The UN human rights treaty bodies and the ECtHR explicitly do not allow for *actio popularis*.[226] They require the fulfilment of a victim requirement, meaning that the plaintiff has to be a victim who is personally affected by the issue at hand, not someone merely acting on behalf of the common good.[227] This victimhood criteria is difficult to fulfil when the alleged violation is diffuse or does not target someone specific, which can be the case with regards to climate change.[228] As highlighted previously, *Carvalho and others v. Parliament and Council* was dismissed by the CJEU in line with the restrictive standing requirements under EU law because the complainants were not considered to be "individually concerned" under the Court's admissibility criterion.[229] The American system is more flexible and allows for "various categories of petitioners to submit petitions on behalf of victims", meaning that the victim and petitioner do not have to be the same person.[230] However, there has to exist a "specific, individual and identifiable victim", which at first glance seems to prevent *actio popularis*.[231] Nevertheless, this seemingly rather strict victim requirement has often been disregarded in cases concerning indigenous people.[232] For example, the IAComHR considered one case admissible in which the petitioner constituted the entire population of a town of 5600 people.[233] This less restrictive approach to *actio popularis*, taken together with the groundbreaking *Advisory Opinion OC-23/17*, most definitely offers promise for future claims such as the *Arctic Athabaskan Petition*.[234] Finally, the African human rights regime is unique in the sense that its Charter includes group rights and that the

121–122; William J Aceves, 'Actio Popularis – The Class Action in International Law' [2003] University of Chicago Legal Forum 353, 353– 354.

[226] European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (updated 28 February 2021) para 17 <www.echr.coe.int/documents/admissibility_guide_eng.pdf > accessed 6 April 2021; OHCHR, 'Human Rights Treaty Bodies – Individual Communications'<www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx> accessed 6 April 2021.

[227] Art 34 ECHR; art 1 Optional Protocol to the ICCPR; Mayer, 'Climate Change Mitigation' (n 103) 28; Wewerinke-Singh (n 26) 148; Riccardo Pavoni, 'Environmental Jurisprudence of the European and Inter-American Courts of Human Rights: Comparative Insights', in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (Oxford University Press 2015) 92.

[228] See also Mayer, 'Climate Change Mitigation' (n 103) 29.

[229] *Carvalho and others v. Parliament and Council* [ECJ] (n 27) 11–14.

[230] *Metropolitan Nature Reserve v. Panama*, IAComHR, Judgement on Admissibility, Case No. 11.533, Report No. 88/03 (22 October 2003), 27.

[231] ibid 28; Art 44 ACHR.

[232] Pavoni (n 227) 92–98.

[233] *Community of San Mateo de Huanchor and Its Members v. Peru*, IAComHR, Judgement on Admissibility, Case No. 504/03, Report No. 69/04 (15 October 2004), paras 15, 42.

[234] Compare Pavoni (n 227) 92–98.

AComHPR and ACtHPR allow for *actio popularis*.[235] Even non-victims, NGOs, and other groups have the possibility to file complaints without showing that they have personally experienced violations under the Charter.[236] This comparatively lenient standing requirement is justifiable since it allows people with limited economic and technical resources to make their cases heard.[237] Due to its permission of *actio popularis*, the African system is seemingly a highly suitable forum for climate change mitigations claims. However, standing is still limited for NGOs and individuals as states are required to recognize the competence of the ACtHPR through a declaration in order for it to receive submissions. As of today, only eight of the 30 member states have made such a declaration.[238]

Domestic tribunals set their own standing requirements, which are often more lenient and favourable than the requirements under the international and regional fora.[239] The Dutch Supreme Court found that the Urgenda Foundation had standing in accordance with Article 3:305a of the Dutch Civil Code which allows for class actions by interest groups, while noting that the Urgenda Foundation would not have had victim status under article 34 ECHR since the foundation is not a potential victim.[240] Similarly, the Administrative Court of Paris allowed standing to a number of NGOs who represented the public interest in a petition challenging France's mitigation action. The Court issued a decision in 2021 recognizing that the French state is liable for insufficient action in mitigating climate change.[241] In *Ashgar Leghari v. Federation of Pakistan*, the issue of standing was avoided and thus not a barrier to justiciability. The petitioner, in fact, structured their claim as a class action, which is a well-established concept in the Pakistani legal system.[242] In contrast, lack of standing regarding human rights claims in mitigation-related cases has

[235] Arts 19–24, 56 ACHPR; International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (Climate Change Justice and Human Rights Task Force Report 2014) 69.
[236] *Law Society of Zimbabwe and others v. Zimbabwe*, Communication no. 321/2006 (AComHPR, 25 February 2013), paras 58–59.
[237] Morten Peschardt Pedersen, 'Standing and the African Commission on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 407, 407.
[238] Lilian Chenwi, 'The Right to a Satisfactory, Healthy and Sustainable Environment in the African Regional Human Rights System', in John H Knox and Ramin Pejan (eds), *The human right to a healthy environment* (Cambridge University Press 2018) 77.
[239] Mayer, 'Climate Change Mitigation' (n 103) 31.
[240] *Urgenda Foundation v. the Netherlands* (n 11), para 5.9.3.
[241] *Notre Affaire à Tous and others v. France*, nos. 1904967, 1904968, 1904972, and 1904976/4-1 (Paris Administrative Court, 3 February 2021) [Unofficial English Translation from petitioners], para 10.
[242] Adeel Mukhtar Mirza, 'Environmental Rights and Case of Climate Justice in Pakistan' (2020) 40 Quarterly Journal Institute of Strategic Studies Islamabad 45, 56.

been an issue in states such as Switzerland[243], the United States[244], Canada[245], and Ireland.[246]

A second concern in terms of establishing standing lies in the fact that the establishment of a human rights violation is usually contingent on a harm having already occurred, as opposed to a prediction of future harm or a risk thereof.[247] In other words, the human rights framework is more *reactive* than *preventive*.[248] The reduced focus on future harms in the human rights system corresponds poorly to climate change mitigation, seeing as though mitigation action is in itself a preventive measure in order to avoid future potential harms. For a person to claim to be a victim under the UN human rights treaty bodies, they must be "actually affected".[249] This means they have to show that "an act or an omission of a state party has adversely affected his or her enjoyment of [a] right, or that such an effect is imminent".[250] This imminence requirement could potentially be a hurdle for establishing standing in *Sacchi and others v. Argentina and others* and *Torres Strait Islanders v. Australia,* given that many of the claimed violations might not occur for several decades to come. In *Ioane Teitiota v. New Zealand*, however, the HRC concluded that, for the purpose of admissibility, the impact of climate change on the small pacific island of Kiribati constituted a genuine risk to the right to life under article 6 of the ICCPR.[251]

One of the questions asked by the ECtHR to the 33 defendant states in *Agostinho and others v. Portugal and 32 other States,* namely, whether the applicants could be considered to be current or potential victims of a violation, illustrates that this admissibility requirement will have a crucial part in the upcoming procedure.[252] However, the fact that the petition points to past

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[243] *Verein KlimaSeniorinnen Schweiz v. Bundesrat* [Supreme Court] (n 162).
[244] *Juliana v. the United States*, no. 18-36082 D.C. no. 6:15-cv-01517-AA (US Court of Appeal for the Ninth Circuit, 17 January 2020).
[245] *ENvironnement JEUnesse v. Canada*, 500-06-000955-183 (Superior Court of Québec, 11 July 2019).
[246] *Friends of the Irish Environment v. Ireland*, 2017 No. 793 JR (Supreme Court of Ireland, 31 July 2020).
[247] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (n 8) 23. Note that there are exceptions to this, see for example the *principle of non-refoulement* under article 3 ECHH.
[248] Albers (n 225) 120.
[249] *EP and others v. Colombia*, CCPR/C/39/D/318/1988 (HRC, 25 July 1990) para 8.2.
[250] *Aalbersberg v. the Netherlands*, CCPR/C/87/D/1440/2005 (HRC, 12 July 2006), para 6.3.
[251] *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016 (HRC, 7 January 2020) paras 8–9. Note that in the merit stages of the case, the HRC concluded that the expected timeframe of ten to fifteen years for when Kiribati was expected to become completely inhabitable, was too far in the future to conclude that article 6 ICCPR had been violated (para 9.12).
[252] *Agostinho and others v. Portugal and 32 other States* (n 12).

events that have already impacted the petitioners' rights speaks in favour of them in this sense. Under the ECHR, anticipated violations can under rare circumstances be declared admissible. Most of the time, however, they are deemed inadmissible because the victim requirement is considered unfulfilled. Only "real and immediate risks" that the state knew about or should have known about are covered by the scope of ECHR. A high degree of probability is required for a claim concerning anticipated violations to be admissible, meaning that the petitioner must be able to provide solid and convincing evidence that the state will violate their right in the future.[253] The approach taken by the ECtHR has been criticized since it often leads to a disregard for the *precautionary principle* – a principle that is highly relevant in matters concerning climate change.[254] In *Verein KlimaSeniorinnen Schweiz v. Bundesrat,* the Swiss Supreme Court held that the petitioners could not be considered potential victims in terms of article 34 ECHR since the intensity threshold was not fulfilled.[255] In Colombia and the Netherlands, the respective courts took a progressive approach with regards to future harms. In Colombia, the Supreme Court specifically recognised the rights of future generations to a healthy environment.[256] In terms of the threshold "real and immediate risk", the Dutch Supreme Court did not interpret "immediate" as to mean that the risk has to materialise within a short period of time, but rather that the risk should be "directly threatening the persons involved".[257] Hence, the Court held that articles 2 and 8 ECHR also protect from risks that may only materialise in the longer term.[258] The Court concluded as follows: "[t]he mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken".[259] This interpretation indeed offers promise as to how courts could adjudicate these claims. It illustrates how special circumstances inherent to climate change – such as prospects of future harm – could be dealt with under the seemingly strict standing requirements by emphasising a more precautionary approach.

In sum, the standing requirements vary between different fora and can, if strictly interpreted and applied, be a major obstacle to rights-based mitigation cases. It is thus warranted that courts take into consideration the specificities of climate change and adapt their practice accordingly. After all, climate change did not pose as much of a threat when the standing requirements

[253] Seminara (n 144) 734, 737, 749; European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (n 226) para 37.
[254] Seminara (n 144) 737.
[255] *Verein KlimaSeniorinnen Schweiz v. Bundesrat* [Supreme Court] (n 162) para 5.4.
[256] *Future Generations v. Ministry of the Environment and others* (n 193) 13, 18, 22.
[257] *Urgenda Foundation v. the Netherlands* (n 11), para 5.2.2.
[258] ibid, paras 5.2.2–5.2.3.
[259] ibid, para 5.6.2.

within the human rights framework were developed. As the Council of Europe Commissioner for Human Rights neatly held in regard to the ECHR:

> The extraordinary nature of climate change, and the resulting human rights challenges, create a need to adapt the protection offered by the Convention: a strict and formalistic interpretation of standing requirements when human violations caused by climate change are at stake, […] would have the undesired effect of depriving [people] of any reasonable prospect of seeking and obtaining redress for violations of their human rights.[260]

4.2.2 Extraterritorial jurisdiction

Another important procedural requirement imposed by human rights treaties is the exercise of state jurisdiction.[261] Jurisdiction under international human rights law determines if an individual has a right against a state, which in turn corresponds to state obligations towards the individual. In other words, the responsibility of a state under international human rights law requires the state to exercise jurisdiction.[262] The exact meaning of the term "jurisdiction" under the different human rights treaties and their corresponding judicial fora has evolved slowly over time and is still widely debated. It thus falls outside the scope of this study. Instead, this section merely seeks to highlight one factor in particular which potentially poses a major obstacle to mitigating climate change through human rights litigation. Namely that of the extraterritorial application of international human rights law and its contested status.[263]

To what extent states have human rights obligations outside their territory is especially important in relation to climate change, since climate change by definition is a global issue that extends across borders. Also, harm caused by climate change in developing countries is typically not caused by those states in the main, but by the developed contributing more to global GHG emissions.[264] Consequently, a state's liability for transboundary harm becomes a crucial question when assessing the potential of rights-based climate change litigation in mitigating climate change. For example, while the United States is one of the largest net producers of GHG emissions globally, and SIDS are among the smallest, the inhabitants of SIDS are far more likely to suffer from the adverse effects of climate change than the inhabitants of the United

[260] Council of Europe Commissioner for Human Rights (n 153) para 49.
[261] See for example art 1 ECHR and art 2 ICCPR.
[262] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 Human Rights Law Review 411, 447.
[263] International Bar Association (n 235) 68; Stephen Humphreys, 'Competing claims: human rights and climate harms', in Stephen Humphreys (ed), *Human rights and climate change* (Cambridge University Press 2010) 62–65.
[264] Humphreys, 'Introduction: human rights and climate change' (n 85) 3; Verheyen and Zengerling (n 70) 433–435.

States.[265] To what extent international human rights law impose obligations on the United States for harms experienced by inhabitants of SIDS is, however, far from clear.

On a general note, the jurisdiction of states under human rights law is primarily territorial but can be exercised extraterritorially in exceptional situations.[266] There are two established models for applying human rights treaties extraterritorially: when a state has effective control over a territory (spatial model) or over an individual (personal model).[267] These jurisdictional models are yet to be applied and interpreted by an authoritative human rights body in the context of climate change.[268] However, if one were to apply these models to the example of the United States and SIDS in line with the standards developed by the HRC, ECtHR, IACtHR, and the ACtHPR, the climate change-induced transboundary harm would most definitely fall outside of the United States' jurisdiction since the United States does not have effective control over the territory or inhabitants of SIDS.[269]

Advisory Opinion OC-23/17, formulated by the IACtHR in 2017, significantly expanded the extraterritorial application of the American Convention and the Protocol of San Salvador by expressly stating that states' human rights obligations extend to people outside their borders.[270] The Court recognised the two established jurisdictional models but went further in establishing a third model in situations of transboundary harm:

> When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises

[265] Our World in Data, 'Annual total CO_2 emissions, by world region' (2019) <https://ourworldindata.org/grapher/annual-co-emissions-by-region> accessed 22 May 2021; Humphreys, 'Introduction: human rights and climate change' (n 85) 1–2; IPCC, 'Global Warming of 1.5 °C' (n 37) ch 3 Executive Summary, FAQ.
[266] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [1990] ICJ Rep 92, para 109; *Banković and others v. Belgium and others*, no 52207/99 (ECtHR, 12 December 2001), para 59.
[267] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2013) 118.
[268] Natalie L Dobson, 'Exploring the Crystallization of 'Climate Change Jurisdiction': A Role for Precaution?' (2018) 8 Climate Law 207, 220; McInerney-Lankford, Darrow, and Rajamani (n 148) 41.
[269] See also Milanovic, 'From Compromise to Principle' (n 262) 172; McInerney-Lankford, Darrow, and Rajamani (n 148) 41.
[270] *Advisory Opinion OC-23/17* (n 128) para 104 (c); ESCR-Net, 'Advisory Opinion OC-23/17' (8 January 2019) <www.escr-net.org/caselaw/2019/advisory-opinion-oc-2317 > accessed 11 April 2021.

> effective control over the activities that caused the damage and the consequent human rights violation.[271]

This jurisdictional link is thus considerably broader than the two previously established models.[272] The new model focuses on effective control over *activities causing damage*, rather than control over territory or individuals. The ECtHR has somewhat ambiguously held that "acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1"[273], but it has never applied this as a standalone model of jurisdiction as is done in *Advisory Opinion OC-23/17*.[274] Such a model is groundbreaking in the sense that it creates the potential for cross-border claims with regards to transboundary environmental harm. While it does not refer to climate change specifically in discussing the jurisdictional link, it is possible to argue that the accumulation of GHG emissions resulting in cross-border harm is a transboundary environmental harm, making the observations on jurisdiction applicable to climate change too. Moreover, the Court's general remarks on state obligations in the context of environmental protection could most definitely be applied to climate change.[275]

It remains to be seen how the jurisdictional link formulated in *Advisory Opinion OC-23/17* will be applied in future case law, in particular in regard to climate change. The reasoning used in *Advisory Opinion OC-23/17* has, in fact, already been referenced in other rights-based litigation. For example, in *Agostinho and others v. Portugal and 32 other States* before the ECtHR, the applicants referenced the opinion and based one of their arguments on the defendant states' extraterritorial obligations.[276] The ECtHR is thus likely to receive arguments from defending states concerning their lack of extraterritorial obligations, such as how the defendant states have argued in *Sacchi and others v. Argentina and others.*[277] An important factor to take into account is

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[271] *Advisory Opinion OC-23/17* (n 128) para 104 (h).
[272] Antal Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR' (EJIL: Talk! 28 March 2018) <www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/ > accessed 11 April 2021.
[273] See for example *Al-Skeini and others v. the United Kingdom*, no. 55721/07 (ECtHR, 7 July 2011), para 131.
[274] Berkes (n 272).
[275] *Advisory Opinion OC-23/17* (n 128) para 242; Feria-Tinta and Milnes (n 140).
[276] Global Legal Action Network (n 150) Annex, paras 14–25.
[277] Petitioners' Reply to the Admissibility Objections of Brazil, France, and Germany, 'Sacchi and others v. Argentina and others' (CRC, communications no. 105/2019 Brazil, no. 106/2019 France, no. 107/2019 Germany, 20 May 2020) paras 18–20 <http://blogs2.law.columbia.edu/climate-change-litigation/wpcontent/uploads/sites/16/non-us-case-documents/2020/20200504_Not-available_reply.pdf > accessed 12 April 2021; Nadine Grünhagen and Rouven Diekjobst, 'Of crabbed age and bold youth: On the 'Youth 4

the IACtHR's observation that the exercise of jurisdiction extraterritorially applies only in exceptional situations and should be done restrictively.[278] Given the restrictive scope of application, it seems rather unlikely that the new jurisdictional link could ever be applied in a situation such as the hypothetical example involving the United States and SIDS. For now, the new link seems more likely to be used in situations in which the transboundary harm is still fairly close in proximity to the defendant state. On this note, Savaresi argues that if the reasoning in *Advisory Opinion OC-23/17* was to be applied to the *Arctic Athabaskan Petition,* it leads to a finding that Canada is responsible for climate change-induced violations occurring both inside Canada and those occurring in the territory of the United States.[279] This argument is convincing, but nevertheless, arguing that Canada exercises effective control over the activities that cause the damage and human rights violations in the United States' part of the Arctic region remains challenging.

4.2.3 Attribution and causation

Moving on to a third procedural issue that has affected the justiciability of this type of litigation is the issue of attribution and causation. In its analytical report from 2009 regarding the relationship between climate change and human rights, the OHCHR cautioned that:

> […] it is virtually impossible to disentangle the complex causal relationships linking historical greenhouse gas emissions of a particular country with a specific climate change-related effect, let alone with the range of direct and indirect implications for human rights.[280]

This type of concern is inevitably a recurring theme in relevant legal proceedings, impacting both the admissibility and merits stages of a case. In order for a climate change mitigation case to be successful, it must be shown that the complainant has been the victim of a human rights violation caused by climate change, for which the defendant state is ultimately responsible. This necessitates linking the harmful act or omission to the defendant state in question. Due to the complicated causal chains and multi-dimensional effects of climate change, this represents a significant challenge.[281] As demonstrated in section

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Climate Justice' application before the European Court of Human Rights' (Völkerrechtsblog, 24 December 2020) <https://voelkerrechtsblog.org/of-crabbed-age-and-bold-youth/ > accessed 12 April 2021.

[278] *Advisory Opinion OC-23/17* (n 128) para 104 (d).

[279] Savaresi, 'Human Rights Responsibility' (n 106) 13.

[280] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (n 8) para 70.

[281] HR Council 31/52, '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 75) 9; International Bar Association (n 235) 68–69.

4.1.1, the task of proving a breach (in the sense of a human rights violation due to climate change) could be relatively straightforward. The crux lies in attributing said breach to one state in particular and establishing a direct, causal link between its activities and a specific, isolated consequence of climate change.[282]

When attempting to attribute responsibility for climate change, there are several factors to consider. An argument made repeatedly by certain states – known as the "drop in the ocean" argument[283] – is that their GHG emissions amount to only a fraction of the global emissions.[284] The argument goes that a single state's activities are negligible and represent just one of many factors contributing to climate change, and that the activities by themselves would not lead to adverse impacts.[285] The Supreme Court in *Urgenda Foundation v. the Netherlands* tore down the "drop in the ocean" argument with a sharp line of reasoning.[286] The Court held that "the Netherlands is obliged to do 'its part' in order to prevent dangerous climate change, even if it is a global problem".[287] It went on to declare that every state has a responsibility to reduce GHG emissions and that "[t]his approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect."[288] Here, the Court made reference to shared responsibility under article 47 Draft Articles on Responsibility of States for Internationally Wrongful Acts. Grünhagen and Diekjobst highlight that this shared responsibility doctrine has been used and recognised by the ECtHR on several occasions too.[289]

Closely related to the "drop in the ocean" argument is the "fair share" question, which asks: "what constitutes a state's fair share of mitigating climate change"?[290] Liston explains the issue as such:

> In any legal challenge to the adequacy of a State's mitigation efforts based on the impacts which climate change stands to cause,

[282] See also Savaresi, 'Human Rights Responsibility' (n 106) 6–7.
[283] Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 5 Carbon & Climate Law Review 15, 16–17.
[284] See for example *Massachusetts v. Environmental Protection Agency and others*, 549 US 497 (United States Supreme Court, 2 April 2007), where the EPA claimed that its decision to not regulate GHG emissions contributed so little to the plaintiff's injuries, meaning that the relief sought would not mitigate climate change and remedy the injuries. See also the state's argument in *Urgenda Foundation v. the Netherlands* (n 11), para 2.3.2.
[285] Verheyen and Zengerling (n 70) 433–435.
[286] See the full reasoning in *Urgenda Foundation v. the Netherlands* (n 11), paras 5.7.1. ff.
[287] *Urgenda Foundation v. the Netherlands* (n 11), para 5.7.1.
[288] ibid, para 5.7.5.
[289] Grünhagen and Diekjobst (n 277).
[290] Gerry Liston, 'Enhancing the efficacy of climate change litigation: how to resolve the 'fair share question' in the context of international human rights law' (2020) 9 Cambridge International Law Journal 241, 241.

> the fair share question invariably arises as an issue. The reason this is the case is that there exists (and has existed) a global 'carbon budget' which can be exploited while still keeping global warming to the 1.5 °C target. It cannot therefore be said that any contribution which a State has made or will make to global emissions is unlawful. Determining the point at which such a contribution becomes unlawful, however, inescapably involves consideration of States' equitable share of the global carbon budget.[291]

Answering this question in practice is made harder by the vagueness of the standards set out in the Paris Agreement. The Agreement omits any mention of how to divide the mitigation responsibility by taking into account the respective capacity of states to mitigate climate change as well as their current and historical contribution to global GHG emissions.[292] The Agreement thus leaves it to the individual states to decide how to implement the standards nationally, inevitably opening up the discourse to selfishly myopic arguments like "but they do it too". Accordingly, courts in Germany and New Zealand rejected claims concerning the inadequacy of mitigation targets, and, as a part of their reasoning, held that other states' mitigation targets are relevant when deciding the fairness of their own governments' targets. After doing such a comparison, they concluded that their own governments' targets were to be considered as fair.[293] This line of reasoning is by all means unproductive and also rather illogical.

In contrast, in the recent *Neubauer and others v. Germany,* the German Federal Constitutional Court held that "the state cannot evade its responsibility by referring to greenhouse gas emissions in other states".[294] The Dutch Supreme Court in *Urgenda Foundation v. the Netherlands* approached the fair share question by concluding that there is, in fact, a high degree of consensus that Annex 1 countries need to reduce emissions by 25% to 40% by 2020, and that this obligation applies equally to the Netherlands. Accordingly, when implementing the positive obligations under articles 2 and 8 ECHR, this consensus has to be taken into account. It follows that the target of 25% is to be regarded as an absolute minimum for the Netherlands.[295] While this reasoning seems reasonable and worthy of praise, Liston reminds us that if all states

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[291] Liston (n 290) 243.
[292] ibid 244; Lavanya Rajamani, 'Part II Analysis of the Provisions of the Agreement, 8 Guiding Principles and General Obligation (Article 2.2 and Article 3)', in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: analysis and commentary* (Oxford University Press 2017) 134.
[293] *Thomson v. the Minister for Climate Change Issues*, CIV 2015-485-919 [2017] NZHC 733 (The High Court of New Zealand, 2 November 2017), paras 165–166; *Family Farmers and Greenpeace Germany v. Germany*, VG 10 K 412.18 (Administrative Court Berlin, 31 October 2019) [Unofficial English Translation] 18–19.
[294] *Neubauer and others v. Germany*, ECLIECLI:DE:BVerfG:2021:rs20210324.1bvr26561 8 (Federal Constitutional Court of Germany, 29 April 2021).
[295] *Urgenda Foundation v. the Netherlands* (n 11), paras 7.2.7, 7.3.6, 7.5.1.

were to reduce their emissions by 25% as decided by the Court in *Urgenda Foundation v. the Netherlands*, this would fall short of the goal set out by the Paris Agreement.[296] Liston's point is that the Court's approach to the fair share question in *Urgenda Foundation v. the Netherlands* in fact undermines the possibility of collectively achieving results that are consistent with the 1.5 °C goal.[297] Evidently, one potential solution to this issue would be for courts to take more country-specific considerations into account – such as the respective government's overall contribution to climate change and its mitigation capacity in relation to other states – instead of merely ordering states to adhere to the lower end of a target reduction range. It should be noted, though, that the Urgenda Foundation never challenged the first instance's finding that the discretionary power of the Netherlands prevented the Court from ordering a reduction of more than 25%. Wewerinke-Singh and McCoach stress just how much of a missed opportunity this represents, since an order of more than 25% might well have been justified.[298]

Next to determining a state's share of the global carbon budget is the equally difficult technical issue of actually establishing causation. The nature of climate change, involving complex and unclear causal chains, inevitably makes it a difficult task to establish a link between the acts or omissions and the ensuing harm. While this may seem daunting at first glance, many scholars increasingly argue that it can be overcome.[299] As the 2016 report published by the UN Special Rapporteur for Human Rights and the Environment points out: "[a]s scientific knowledge improves and the effects of climate change become larger and more immediate, tracing causal connections between particular contributions and resulting harms becomes less difficult".[300] Specifically, there is an increasing possibility of using "attribution research" to link the contribution of states' emissions to specific climate change impacts.[301] In other words, newly available data can help quantify the individual contribution of specific states or other entities to climate change.[302] One example of this is the use of a "responsibility capacity index", where the capacity and

[296] Liston (n 290) 248.
[297] ibid 249.
[298] Margaretha Wewerinke-Singh and Ashleigh McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling best practice and lessons learnt for future rights-based climate litigation' [2021] Review of European, Comparative & International Environmental Law 1, 4.
[299] See for example International Bar Association (n 235) 68–69; Wewerinke-Singh (n 26) 149; Savaresi, 'Human Rights Responsibility' (n 106) 4.
[300] HR Council 31/52, '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 75) para 36.
[301] See for example Brenda Ekwurzel and others, 'The Rise in Global Atmospheric CO2, Surface Temperature, and Sea Level from Emissions traced to Major Carbon Producers' (2017) 144 Climate Change 579, 579.
[302] International Bar Association (n 235) 68–69.

responsibility of states is calculated based on income, the distribution of that income, and emissions.[303] Knox also notes that it is not always necessary to link a particular state's contribution to a specific harm in order to assign responsibility.[304] As explained above, this was the approach adopted by the Court in *Urgenda Foundation v. the Netherlands,* concluding that the Netherlands had to do "its part".[305]

In light of what has been said, it is possible to attribute responsibility to a certain state and to establish a causal link between its activities and the following human rights violations, but it nevertheless remains a challenge in the context of climate change and risk being an impediment to justiciability.

4.2.4 Separation of powers

One final challenge associated with the case law discussed in the previous chapter is related to the *principle of separation of powers.* This principle plays a major role in the legal systems of the United States and Australia and has been a barrier to justiciability in many cases originating in these countries.[306] Today this principle is an important foundation in most of the world's democracies as it separates the powers of the different branches of government. The responsibilities of the legislative, executive, and judicial branches are divided by means of their role in creating, enforcing, and adjudicating the law.[307] The aim of the principle is to safeguard the independence of each branch and to ensure that they do not interfere with one another's responsibilities.[308] Following the rise in rights-based litigation aimed at mitigating climate change, this principle has increasingly been the focus of debate among judges and scholars.[309] Proceedings that concern a state's mitigation efforts do indeed often touch upon the relationship between the different branches of government. The court has to consider to what extent it may assess and decide on a

[303] Paul Baer and others, 'The Right to Development in a Climate Constrained World: The Greenhouse Development Rights Framework' (Heinrich-Böll-Stiftung, 2nd edn Executive Summary, September 2008) 3–4; John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477, 489.
[304] Knox (n 303) 489.
[305] *Urgenda Foundation v. the Netherlands* (n 11), para 5.7.1.
[306] Peel and Osofsky, *Climate Change Litigation* (n 10) 270.
[307] Antonios E Kouroutakis, 'Judges and Policy Making Authority in the United States and the European Union' (2014) 8 Vienna Journal on International Constitutional Law 186, 186; Heather Colby and others, 'Judging Climate Change: The role of the judiciary in the fight against climate change' (2020) 7 Oslo Law Review 168, 169.
[308] F Andrew Hessick, 'The Separation-of-Powers Theory of Standing' (2017) 95 North Carolina Law Review 673, 684.
[309] Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 Transnational Environmental Law 55, 55.

state's mitigation efforts, which often includes political interests and priorities.[310] Generally, courts are reluctant to decide on climate change issues because of the sensitivity of the matter and because of how closely it relates to the responsibility of the legislative and executive branches.[311] In many domestic cases, courts discuss and employ the separation of power principle when discussing the scope of states' margin of appreciation in regard to its mitigation efforts.[312]

The famous *Juliana v. the United States* is illustrative in this regard and demonstrates how the separation of powers is intrinsically linked to the standing requirements in the United States legal system. In this case, the applicants complained that the state had violated several of their constitutional rights through its dangerous GHG emissions.[313] The case received attention in 2016 when the first instance held that the case was admissible. The District Court concluded that the applicants had standing and delivered an extensive discussion on the separation of powers principle.[314] The Court held that the scope of the principle should not be overstated and that, while climate change certainly contains "political" aspects, this does not mean that a claim concerning climate change is necessarily a political one that prevents it from being justiciable.[315] The Court finished the ruling by 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".[316] In 2020, however, the case was dismissed in the appeal proceedings. The Court held that the redress sought by the applicants – for the Court to order the government to "phase out fossil fuel emissions and draw down excess atmospheric CO2" – was beyond the Court's power. The Court held that "the plaintiffs' impressive case for redress must be presented to the political branches of government".[317]

Two recent Canadian judgments reached opposing conclusions in terms of the scope of the separation of powers doctrine and what this meant for the justiciability of the respective claims. In *ENVironnement JEUnesse v. Canada,* the Court held that the question whether Canada had violated human

[310] Ebbesson (n 199) 112.
[311] Peel and Osofsky, *Climate Change Litigation* (n 10) 269–273.
[312] Paul Clark, Gerry Liston, and Ioannis Kalpouzos, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case' (EJIL: Talk! 6 October 2020) <www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/ > accessed 2 March 2021.
[313] *Juliana v. the United States* [Court of Appeal] (n 244) 12.
[314] See the full discussion in *Juliana v. the United States,* no. 6:15-cv-01517-TC, (US District Court of Oregon, 10 November 2016), 6–18.
[315] *Juliana v. the United States* [District Court] (n 314) 6–8.
[316] ibid 54.
[317] *Juliana v. the United States* [Court of Appeal] (n 244) 11.

rights by failing to set an emissions reduction plan to prevent dangerous climate change impacts was a justiciable issue, meaning that the separation of powers doctrine was not an obstacle for justiciability.[318] By contrast, in *Lho'imggin and others v. Her Majesty the Queen,* the Court held that "[i]t is hard to imagine a more political issue than climate change", and that "[t]he issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government".[319] Hence, in this case, the question of whether Canada's climate policy violated human rights was determined non-justiciable.[320]

In *Urgenda Foundation v. the Netherlands*, the Court acknowledged that it is the responsibility of the government and parliament to decide on the reduction of GHG emissions and that these branches have "a large degree of discretion to make the political considerations that are necessary in this regard". However, it went on to state that it is the responsibility of the courts to decide if those institutions have remained within the limits of the law when making those decisions.[321] Furthermore, the Court held that courts may order the government to take measures to achieve a certain goal, "as long as that order does not amount to an order to create legislation with a particular content". Since the Court left it to the state to determine the measures and legislation necessary to achieve the 25% goal, the Court had not exceeded its remit.[322] Importantly, the Court also stressed that if a real and immediate risk exist, "states are obliged to take appropriates steps without having a margin of appreciation".[323]

With regards to *Agostinho and others v. Portugal and 32 other States*, to be decided upon before the ECtHR, Pedersen argues that it is unlikely that the ECtHR will reach the same conclusions in terms of the specific emissions reduction obligations as the Court did in *Urgenda Foundation v. the Netherlands.* Pedersen highlights that the ECtHR has relied on the margin of appreciation extensively in environmental cases, repeatedly stressing that: "in the area of environmental risks, it is not for the Court to second guess policy choices in the 'difficult social and technical sphere' of environmental law".[324] Moreover, Pedersen points to the ECtHR's primary function as one of supervision. In its environmental case law, the Court has focused heavily on

[318] *ENvironnement JEUnesse v. Canada* (n 245) paras 46–87.
[319] *Lho'imggin and others v. Her Majesty the Queen*, 2020 FC 1059 (Canadian Federal Court, 16 November 2020) paras 19, 77.
[320] ibid, para 116.
[321] *Urgenda Foundation v. the Netherlands* (n 11), paras 8.3.2.
[322] ibid, paras 8.2.6, 8.2.7.
[323] ibid, para 5.3.2.
[324] Pedersen, 'The European Convention of Human Rights and Climate Change – Finally! (n 160).

whether a state has in fact put in place regulatory regimes aimed at minimising environmental risks, rather than the content of those regimes.[325] In this sense, there will inevitably be a certain amount of discretion afforded to states if a mitigation case were declared admissible in an international or regional forum. For the purpose of deciding on specific emissions reduction targets, domestic courts might therefor be better suited.

4.3 Concluding remarks

The substantive provisions under the human rights framework have been interpreted as to protect against harm resulting from climate change. In some cases, courts have adjudicated through the "greening" of existing rights, most often the right to life and family and private life. In others, the autonomous right to a healthy environment has been used. While the protective scope of the substantive provisions can be extended to climate change, the exact nature of states' obligation to mitigate climate change is not clear. Some of the currently pending cases, especially those before the more authoritative human rights bodies, have the potential to solve this uncertainty. As of today, only a small handful of domestic courts have come to the conclusion that an obligation to mitigate climate change does indeed exist and duly ordered their respective governments to act accordingly.

On top of how the protection and obligations stemming from the substantive legal framework affect the justiciability of these claims, there are many remaining procedural challenges. Harm caused by climate change, which often relate to prospects of future transboundary harms and which concern systemic and indeterminant violations experienced by many, is by nature difficult to integrate into the human rights system which seeks to protect individuals from isolated harms within a limited territory. This apparent contradiction implies challenges with regards to standing, jurisdiction, attribution and causation, and the separation of powers respectively.

Many courts require a victim requirement to be fulfilled, inhibiting class actions and claims based on prospects of future harms. In addition, the extraterritorial application of human rights law remains ambiguous, limiting the allocation of liability for transboundary damages caused by climate change. Furthermore, attributing responsibility for climate change in general is difficult since it is unclear what constitutes a state's fair share of mitigating climate change. It can also be difficult technically to establish causation between the act or omission of a state and the harm caused. Lastly, the role of courts in

[325] Pedersen, 'The European Convention of Human Rights and Climate Change – Finally! (n 160).

deciding on politically sensitive issues is a philosophical question that is yet to be answered, but also represents another barrier to justiciability in some jurisdictions.

While these challenges are serious, legal developments have illustrated how many of these challenges can be dealt with and overcome. By permitting more flexible standing requirements that take into account the special circumstances inherent to climate change claims, as exemplified by certain domestic systems and the African and American systems, the admissibility hurdle could be overcome. In addition, the progressive reasoning concerning extra-territorial obligations in *Advisory Opinion 23/17* opens up the possibility to pursue cross-border diagonal claims for climate change harms. Moreover, attributing responsibility based on the approach that each state has to do "its part" based on scientific research and agreed-upon targets, together with the use of new attribution research, could potentially solve some of the issues concerning attribution and causation. Lastly, while decisions on mitigation action are often indeed politically sensitive, it is nonetheless crucial that courts fulfill their task of reviewing whether those decisions are within the limits of international human rights law. On this note, Burgers' quote deserves attention:

> […] while the role of the judiciary as such remains unchanged, the climate litigation trend is likely to influence the democratic legitimacy of judicial decisions on climate change, as it indicates a growing recognition that a sound environment constitutes a constitutional matter and is therefore a prerequisite for democracy to be protected by judges.[326]

[326] Burgers (n 309) 60.

5 Conclusion and the way forward

Recognising that climate change is the most pressing issue of our time and that more efforts have to be undertaken to combat this threat, this study aimed to gain a greater understanding of the potential impact of human rights litigation in this context. In light of this overarching purpose, this study asked: *how has human rights litigation contributed to climate change mitigation*? The following two sections summarise the findings and discuss potential future developments.

5.1 Conclusion

The first step in answering the research question was to examine the effectiveness of the international climate change regime. Only through an appreciation of the current regime can the potential contribution of human rights litigation be fully understood. The findings suggest that the existing international climate change regime – consisting of voluntary targets and lacking enforcement mechanisms – has not managed to deliver on its objective to restrict climate change to levels preventing dangerous interference with the climate system, as evidenced by the continuous rise in global GHG emissions.

In observing the discrepancy between the stated objectives and results of the international climate change regime, affected parties around the world have increasingly made use of human rights arguments in litigation against states as a way of compelling them to undertake greater mitigation efforts. The second step in answering the research question was consequently to analyse how these claims have been adjudicated in international, regional, and domestic fora. In some high-profile domestic cases, courts have ordered their respective governments to undertake greater action on mitigation. Cases such as these have inspired litigants in various other jurisdictions to present similar claims, many of which are currently pending and awaiting decisions. As of today, no international or regional human rights body has found a case concerning climate change mitigation admissible and examined it on its merits. There are, however, five such cases awaiting a decision on admissibility before the HRC, the CRC, the IAComHR, and the ECtHR respectively. The conclusions drawn by these bodies in their environmental case law, especially with regard to obligations to protect against environmental risks, have the potential to be applied analogously to future climate change mitigation claims. After all,

harm caused by climate change is ultimately a form of environmental harm and should invoke similar state obligations.

The third and final step in answering the research question was to identify and analyse the main factors that affect the justiciability of rights-based claims aimed at mitigating climate change. Starting with the substantive legal framework, the findings show that courts have interpreted the protective scope of human rights provisions as extending to include harm caused by climate change. There are two possible pathways in terms of which substantive rights that could be employed in the litigation: the use of pre-existing rights such as the right to life, or the use of an autonomous right to a healthy environment. The findings also show that a few domestic courts, UN human rights treaty bodies, the OHCHR, as well as several scholars have acknowledged the existence of an obligation to mitigate climate change. Since climate change can severely affect the enjoyment of human rights, there is a strong argument for saying that, pursuant to certain human rights provisions, states are obliged to mitigate against it. The exact content of such an obligation will nevertheless remain unclear until an authoritative human rights body issues a decisive statement on the matter.

In terms of the procedural issues that affect the justiciability of these claims, the issues identified relate to standing, extraterritorial jurisdiction, attribution and causation, and the separation of powers. The extent to which these issues are a barrier to justiciability in mitigation-related litigation depends on several factors ranging from the practice and procedural rules within the relevant legal system, to the specific circumstances of the case. Introducing a more lenient approach to standing requirements, by allowing *actio popularis*, for instance, would increase the likelihood that cases reach the merits stage. Stricter rules on standing, on the other hand, such as those currently adopted by the CJEU and the ECtHR, are likely to impede the success of these cases. In addition, basing claims on specific harms that have already occurred – as opposed to possible future threats – may increase the chance that such claims are successful. This is true as far as establishing standing is concerned but could also enable litigants to establish a more direct link between the harm suffered and the act or omission of the state. Similarly, claims based on violations within the territory of the defendant state are more likely to succeed versus claims concerning a state's extraterritorial obligations. Finally, in the absence of a clear-cut human rights obligation to mitigate climate change, cases pertaining to non-existent or clearly inadequate mitigation efforts on the part of the state are equally more likely to succeed.

In light of the above, the answer to the research question is that human rights litigation has indeed had an important role to play in terms of contributing to climate change mitigation, but there nevertheless remain many challenges to overcome before these cases can be employed in a broader context and establish clear obligations to mitigate climate change. That there is a clear link between the enjoyment of human rights and mitigating climate change is undeniable. This study has shown that courts have begun to acknowledge this fact and that human rights litigation has thus resulted in direct regulatory changes to state mitigation policies. This has occurred in multiple domestic cases wherein courts have ordered their respective governments to reduce emissions or enact mitigation laws. At this point in time, however, the emissions reduction orders that followed have failed to demand more from states than those that were previously agreed to within the voluntary international climate change regime. On top of regulatory changes, human rights litigation has contributed by increasing public awareness on climate change and its human rights implications, as illustrated by the *Inuit Petition*. In addition, human rights litigation has encouraged and influenced litigation in other jurisdictions, as evidenced by the recent human "rights turn" in climate litigation. Even cases that were ultimately unsuccessful have helped to inform the judicial understanding of certain procedural concepts and substantive obligations. Future case law will surely contribute more to this area over time.

It is important to acknowledge that while the regulatory changes brought about by human rights litigation certainly have an impact, this impact has remained relatively localised and limited in scale. This could change in the near future, however, if any of the pending cases before the regional or international bodies were to be decided on their merits. In any case, at this point in time it seems unlikely that a regional or international human rights body would reach a similar conclusion in terms of specific mitigation obligations as those held by domestic courts. Since the primary function of such bodies is still largely one of supervision, it follows that while they may go as far to determine that a state is required to increase its mitigation efforts, it is unlikely they would stipulate exactly by how much. Consequently, even if a regional or international body were to provide guidance on this topic, states would likely apply their guidance in widely varying ways, since the exact nature of the mitigation action prescribed would be at the state's discretion. A stronger emphasis on the link between climate change and human rights could make a difference in this regard, helping to negate some of the political sensitivity around climate change as a topic and thus resulting in a narrower margin of appreciation.

5.2 The way forward

This study has so far concluded what human rights litigation has contributed to in the context of climate change mitigation and the challenges it has faced. Based on these findings, some reflections on future prospects will be presented. If human rights litigation is to contribute to climate change mitigation in a broader sense, it is crucial that the substantive and procedural justiciability challenges presented first be overcome. While human rights litigation has already led directly to increased climate change mitigation efforts, it is also evident that the human rights system in its current form is both ineffective in facilitating said litigation and in responding to the new challenges presented by climate change. Considering that climate change represents the greatest threat to human rights today across the world, the fact that the human rights system itself remains ill-equipped to deal with it appears somewhat incongruous. Moreover, if there is no real possibility for victims to access the justice system – assuming an obligation to mitigate climate change can in fact be derived from existing provisions – then the protection offered by any such provision will inevitably be watered down to the point of being rendered useless.

Many of the associated challenges presented in this study could potentially be dealt with through judicial adaptation and legal shifts that take into account the special conditions inherent to climate change. If the various bodies were to interpret the rules and provisions more progressively, the human rights system surely has the potential to properly counter the new and increasing threat posed by climate change. A prime example of such progressiveness and adaptiveness is the practice of the American system in offering new solutions to extraterritorial obligations in *Advisory Opinion OC–23/17* and introducing more lenient standing requirements in its indigenous case law. If human rights bodies increasingly tailor their practice and rules in ways that take the needs of victims of climate change into account, the contribution of human rights litigation in mitigating climate change will inevitably increase. As a living entity, the human rights system needs to adapt to its current reality and the challenges it presents.

Still, forcing states to undertake more mitigation action through court orders cannot be the only approach to dealing with climate change in the long run. Ultimately, such decisions may not bring about the level of change required, even if a regional or international body were to decide on a case. Even with the contribution of human rights litigation, the global scale of climate change will still necessitate political state cooperation on the issue. This is also important in terms of assuring compliance with the court rulings. If states fail to

comply with the rulings due to a lack of political will, the courts – and their decisions – will inevitably lose legitimacy. Political cooperation and adjudication must, therefore, happen concurrently.

Looking ahead to questions for future research, it would seem worthwhile to challenge the anthropocentric perspective that the topic of this study implies. It does seem, at least today, that the case to protect our planet is likely to be strongest when framed in the context of protecting humans. While this study has sought to demonstrate this very argument, it does so while fully aware of the purely anthropocentric lens it entails. Since the human rights framework applies only to humans, the use of human rights litigation inevitably means disregarding the intrinsic value of animals and nature to some extent. Looking ahead, it would be desirable for future research to explore how climate change mitigation could be achieved in a way that is not solely dependent on its implications for human beings. It must be said that the current ineffectiveness of the international climate change regime – which is indeed less anthropocentrically-oriented than its human rights counterpart – does not suggest much promise for such an approach to combating climate change. In the meantime, this study has shown that rights-based litigation does represent a viable option with which to institute change in how we respond to climate change. There is much work to be done, but it is increasingly clear that our focus should be directed to the courtrooms.

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