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Climate Change Litigation: General Perspectives and Emerging Trends

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Abstract

This article provides an overview of the historical and current landscape of climate change litigation, highlighting its transformative impact on public perceptions and governmental policies globally. Ground-breaking cases have compelled States to adopt more ambitious greenhouse gas reduction targets, whilst emphasising a rights-based approach to climate change mitigation and adaptation measures. In fact, strategic climate change litigation is gaining momentum and is likely to continue in volume and importance. This allows for the targeting of a wider range of actors, not least within the private sector, which in turn can pose financial risks to fossil fuel firms. The article also discusses certain emerging trends in the context of climate change litigation, as well as the potential for a shift towards personal responsibility and inter-state arbitration in 2024. It concludes that climate change litigation emerges as a powerful strategy, capable of influencing policy, ensure accountability, and drive systemic change towards climate justice for present and future generations.

Keywords

climate change – litigation dispute settlement – international environmental law – human rights

1 Introduction

Climate change is arguably the most pressing challenge of our time, likely to define our generation. As recently recognised by the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, we are amid facing a global crisis of climate change.[1] Throughout the world, human rights are being negatively affected and violated because of adverse climate change effects. For millions of people, including present and future generations, climate change constitutes a serious threat to the ability to enjoy the right to life.[2] Many countries and their citizens are already experiencing significant adverse effects of climate change, including, but not limited to, increased extreme weather events, ocean warming and acidification, air pollution, sea-level rise, and forced dislocation of nationals. In 2018, the Intergovernmental Panel on Climate Change (IPCC) predicted that, should the current rate of emissions continue, the global average temperature will increase by 1.5 degrees Celsius above pre-industrial levels at some point between 2030 and 2052.[3] Climate projections also foresee the disappearance of 48 islands, including nine island states, by 2100 due to climate induced rising sea levels.[4]

States, individuals, and civil society organisations around the world are pursuing efforts to limit the effects of climate change. Amongst such efforts, climate change litigation – which broadly describes claims where climate change is a material issue in terms of science, law or fact and incorporates proceedings relating to global warming or climate change mitigation/adaptation[5] – offers a novel approach to change and impact the dynamics in the battle against climate change. The United Nations Environment Programme (UNEP) 2023

1 Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change: Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation, UN Doc A/77/226, 26 July 2022, para 1.

2 Ibid.

3 IPCC, Summary for Policymakers, in Global Warming of 1.5 °C: An IPCC Special Report on the Impacts of Global Warming of 1.5 °C Above Pre-Industrial Levels, available at https://www.ipcc.ch/sr15/chapter/spm/ (last accessed 21 December 2023) at p 4.

4 M Oppenheimer et al., 'Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities' in HO Pörtner *et al.* (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (CUP 2019) 321–445.

5 This definition guides the collection of cases included in the Climate Change Litigation databases, which are developed and maintained by the Sabin Center for Climate Change Law at Columbia Law School, see https://climate.law.columbia.edu/ (last accessed 21 December 2023).

Global Climate Litigation Report shows that people are increasingly turning to courts to combat the climate crisis.[6] This includes seeking relief through:

> (i) the enforcement of existing climate laws; (ii) integration of climate action into existing environmental, energy and natural resources laws; (iii) orders to legislators, policymakers and business enterprises to be more ambitious and thorough in their approaches to climate change; (iv) establishment of clear definitions of human rights and obligations affected by climate change; and (v) compensation for climate harm.[7]

Indeed, proceedings have been issued around the globe against governments, companies, and directors for failures to take sufficient steps to reach net zero targets, to disclose or manage the financial risks associated with climate change, and to accurately represent green credentials (so called 'greenwashing').[8] As of 15 December 2023, the United States (US) Climate Litigation database had 1,687 cases, with 114 of these filed in 2023. The Global Climate Litigation Database had 853 cases, with 70 cases filed in 2023.[9] The Databases currently include cases in 54 jurisdictions and 21 international or regional courts, tribunals, or adjudicatory bodies. In total, the databases currently have 2,540 cases,[10] – an increase from 884 cases in 2017 and 1,550 cases in 2020.[11]

This article provides an overview of the present status of climate change litigation and offers an update on the current trends in global climate change proceedings. To this end, it discusses significant national, regional, and international climate change litigation cases, including historic breakthroughs, taking into consideration cases brought against both States and private entities.

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6 United Nations Environment Programme (2023), Global Climate Litigation Report: 2023 Status Review.

7 Ibid.

8 See further on this question: Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244; Jacques Hartmann and Marc Willers QC, 'Protecting rights through climate change litigation before European courts' (2022) 13(1) Journal of Human Rights and the Environment 90, 113; Maiko Meguro, 'Litigating climate change through international law: Obligations strategy and rights strategy' (2020) 33(4) Leiden Journal of International Law 933.

9 Maria Antonia Tigre and Margaret Barry, *Climate Change in the Courts: A 2023 Retrospective* (Sabin Center for Climate Change Law, December 2023), available at: https://scholarship.law.columbia.edu/sabin_climate_change/212 (last accessed 21 December 2023).

10 Ibid.

11 Ibid.

Section 2 particularly looks at domestic climate change cases, whereas Section 3 addresses representative climate change cases at an international and regional level. Section 4 identifies some key trends in relevant 2023 cases which have the potential of influencing the trajectory of climate change litigation going forward. Section 5 concludes. Importantly, the article treats the question of climate change litigation as entailing contentious proceedings between two (or more) legal entities. As such, the question of ongoing climate change advisory proceedings is not discussed.[12]

2 Domestic Climate Change Litigation

2.1 *Proceedings against States*

The historical landmark case in the context of climate change litigation came with the delivery of the *Urgenda* judgment, which is widely considered to be instrumental in the development of climate change litigation.[13] The non-governmental organisation (NGO) Urgenda argued that the Dutch government was under a legal obligation to take action to reduce GHG emissions by at least 25% by 2020, or alternatively by 40% by 2030 (compared to 1990 levels). Failure to take such action would violate their human rights under the European Convention on Human Rights (ECHR),[14] including Article 2, protecting their right to life, as well as Article 8, protecting their right to private life, family, home, and correspondence. In 2019, the Dutch Supreme Court held that the Netherlands' existing emissions pledge was insufficient to meet the State's fair emissions contribution required under the Paris Agreement and ordered the Government to reduce emissions by at least 25% by 2020.[15]

In reaching this conclusion, the Supreme Court stated that the Netherlands had a 'positive obligation' under Articles 2 and 8 ECHR 'to take appropriate

12 Requests for advisory opinions have been filed before the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ).

13 Urgenda v the Government of the Netherlands (Ministry of Infrastructure and the Environment), Judgment of 20 December 2019, 19/00135, Supreme Court of the Netherlands. See also A. Nollkaemper and L. Burgers, A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case, EJIL:Talk!, 6 January 2020, available at www.ejiltalk.org/a-new-classic-inclimate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/ (last accessed 21 December 2023).

14 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

15 *Urgenda* (n 13).

measures to prevent dangerous climate change', requiring 'as an absolute minimum' compliance with emissions targets.[16] Although the Supreme Court recognised climate change as a consequence of collective human activities that cannot be solved by one State alone, it held that the Netherlands is individually responsible for failing to do its part to protect individuals from the threat of climate change. Thus, while a State may only be a minor contributor to climate change compared with others, this does not reduce that State's individual responsibility.[17] In response to the judgment, the Netherlands pledged more ambitious carbon emission cuts and explicitly listed 'Urgenda' measures in its national budget for 2022.[18]

A similar claim was filed by a group of German youth in February 2020, challenging Germany's Federal Climate Protection Act (KSG) in the Federal Constitutional Court. The group of youth argued that the KSG's target of reducing GHGs by 55% until 2030 from 1990 levels was insufficient and that the KSG violated their human rights as protected by the Basic Law and Germany's constitution, including violations of the right to a future consistent with human dignity, the right to life and the right to physical integrity.[19] In March 2021, the Constitutional Court found that parts of the KSG was incompatible with fundamental rights for failing to set sufficient emission cuts beyond 2030 as the legislature had not proportionally distributed the budget between current and future generations as required by the Basic Law.[20]

The Court stated in particular that 'one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom'.[21] The Court also noted that the fact that 'no state can resolve the problems of climate change on its own (…) does not invalidate the national obligation to take climate action'.[22] The Court ordered the legislature to set clear reduction targets from 2031. In response, a bill approving an adapted KSG

16 Ibid.
17 Ibid.
18 See '2022 Budget Memorandum: Resilience and further steps forward', Government of the Netherlands, 2019, https://www.government.nl/latest/news/2021/09/21/2022-budget-memorandum-resilience-and-further-steps-forward (last accessed 20 December 2023).
19 *Neubauer et al. v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20.
20 Ibid.
21 Ibid.
22 Ibid.

that requires reduction of 65% in GHGs from 1990 levels by 2030 was passed and has been in effect since 31 August 2021.[23]

Since the delivery of the landmark *Urgenda* and *Neubauer* judgments, 2023 has witnessed a stream of successful climate change cases. In the US, one of the most recent include *Held v Montana*, pertaining to the constitutional climate lawsuit against the state of Montana as filed by a group of 16 children and young people.[24] The plaintiffs asserted that Montana was violating their constitutional rights to a clean and healthful environment; to seek safety, health, and happiness; and to individual dignity and equal protection of the law by supporting a fossil fuel-driven energy system contributing to the climate crisis. In August 2023, the Montana Court held that since a provision of Montana law prohibited consideration of GHG emissions and corresponding climate change impacts in environmental reviews, the state was violating the plaintiffs' constitutional right to 'a clean and healthful environment', as well as their rights to dignity, health and safety, and equal protection of the law.[25] The Montana attorney general's office has announced that the state will appeal this judgment, which would bring it to the state Supreme Court.[26]

In Europe, the Brussels Court of Appeal handed down its much-awaited ruling in *VZW Klimaatzaak v Kingdom of Belgium and Others* on 30 November 2023. In 2021, the Brussels Court of First Instance had found a breach of the Government's duty of care under the Civil Code by failing to take necessary mitigation measures to prevent the harmful effects of climate change.[27] In particular, Belgium violated their positive obligations under Articles 2 and 8 ECHR by failing to take sufficient climate action to protect the right to life and privacy of the plaintiffs. The Court, however, did not order the Government to set more ambitious GHG emission targets.[28] On appeal, the Appellate Court partially reversed and partially confirmed the first instance judgment. It confirmed that the Government had breached Articles 2 and 8 ECHR and the

23 See e.g., https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/#:~:text=In%20response%20to%20the%20decision,reduction%20goals%20violated%20human%20rights (last accessed 21 December 2023).

24 *Held v Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023). The decision can be found online at https://westernlaw.org/wp-content/uploads/2023/08/2023.08.14-Held-v.-Montana-victory-order.pdf (last accessed 21 December 2023).

25 Ibid.

26 See e.g. OHCHR, 'This is about our human rights: U.S. youths win landmark climate case', 29 August 2023, available at https://www.ohchr.org/en/stories/2023/08/about-our-human-rights-us-youths-win-landmark-climate-case (last accessed 21 December 2023).

27 Brussels Court of First Instance, decision dated 17 June 2021, file no. 2015/4585/A, at pp. 47–51.

28 Ibid.

Belgian Civil Code by failing to take adequate climate action.[29] In addition, the Court reversed the first instance judgment by imposing a binding GHG emissions reduction target to be achieved by 2030.[30] To this end, the Court ordered the Government to reduce their GHG emissions by at least 55% compared to 1990 levels by 2030.[31]

In South America, the Brazilian Supreme Court delivered its ruling in *PSB et al. v Brazil* (*on Climate Fund*) on 16 August 2023. The case concerned the Government's neglect in implementing administrative measures related to the distribution of funds of a financial mechanism designed to support and subsidise mitigation and adaptation measures. Whereas there was a legal obligation for the Ministry of the Environment to prepare an annual plan for the Climate Fund, this plan had been inoperative since 2019. In its judgment, the Supreme Court ordered the Government to take measures to reactivate the Fund within sixty days and to refrain from engaging in omissive conduct that would hinder the Fund's operation. In doing so, the Supreme Court placed emphasis on the fact that the duty to preserve the environment derives from both the Federal Constitution and various international instruments.[32]

Lastly, in Asia, the South Korea National Human Rights Commission (KNHRC) issued a notable opinion through its *Opinion of the National Human Rights Commission on the Climate Crisis and Human Rights*.[33] The KNHRC held forth that South Korea's mitigation policies in response to climate change were inadequate to protect human rights. It also opined that the Government must set more ambitious GHG reduction targets and called for improvement in supporting groups most vulnerable to the effects of climate change, as well as in strengthening and increasing adaptation and mitigation targets.

Although 2023 offered some important cases of progressive development in the fight towards climate justice, there are examples of instances where claimants have been less successful. For instance, in June 2023, the Spanish Supreme Court found in *Greenpeace v Spain II*, where the plaintiff challenged the Government's climate plan on the grounds that it was insufficiently ambitious to meet the Paris Agreement's temperature goals and did not uphold public

29 Unofficial English translation can be found here: https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/ (last accessed 21 December 2023).

30 Ibid.

31 Ibid. The parties have 3 months to lodge an appeal with the Court of Cassation.

32 For an analysis of the case, see https://climatecasechart.com/non-us-case/psb-et-al-v-brazil/ (last accessed 21 December 2023).

33 For an analysis, see https://climatecasechart.com/non-us-case/opinion-of-the-national-human-rights-commission-on-the-climate-crisis-and-human-rights/ (last accessed 21 December 2023).

participation guarantees required for an adequate environmental assessment. However, the Supreme Court concluded that the Government's climate plan was adequate to meet the Paris Agreement goals and the 1.5 °C temperature target.[34]

2.2 *Proceedings against Businesses and Corporations*

Most human rights-based climate litigation cases have been brought against States rather than against businesses. This is unsurprising as traditionally human rights obligations rest with States. Furthermore, whereas the UN Guiding Principles on Business and Human Rights set out the responsibility of businesses not to cause harm to human rights as a result of their business activities, the UNGPs are non-binding, which in turn makes litigation more challenging. Claimants are however increasingly targeting corporations: 2021 saw the landmark Dutch case of *Milieudefense et al v Royal Dutch Shell*, in which the claimants argued that Shell's contributions to climate change breached its duty of care under Dutch law and its human rights obligations to take steps to reduce greenhouse gas emissions.[35]

The Hague District Court agreed that private corporations owe a duty to mitigate the impact of climate change. It ordered Shell to reduce its CO2 emissions with 45% by 2030 compared with 2019 levels. Although the Paris Agreement was not binding on Shell, the court took into consideration the goals of the Paris Agreement and the UN Guiding Principles in determining the extent of the emissions reduction obligation.[36] Shell filed a statement of appeal in March 2022, and a judgment by the Court of Appeals is expected in 2024.[37] Pending appeal, the decision in *Shell* has effectively extended the decision in *Urgenda* to private corporations.

Following the *Shell* case and its successful outcome, Milieudefense threatened 29 additional multinational corporations with legal action if they did not commit to more ambitious climate plans.[38] Later in 2022, one of those corporations, Ahold Delhaize, significantly increased its GHG emission reduction

34 For an analysis, see https://climatecasechart.com/non-us-case/greenpeace-v-spain-ii/ (last accessed 21 December 2023).

35 *Vereniging Milieudefensie & Others v Royal Dutch Shell PLC*, HADC 19-379-26052021, The Hague District Court, 26 May 2021.

36 Ibid.

37 See e.g., https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ (last accessed 21 December 2023).

38 See 'Letter to big polluters: this changes everything', 13 January 2022, available at https://milieudefensie.nl/actueel/brief-klimaatplan-grote-vervuilers (last accessed 20 December 2023).

target to 45% by 2030 compared with 2018 levels (in contrast to its previous goal of a 15% reduction target). However, it is not entirely clear if this was in response to Milieudefense's pressure. As recently outlined by Kaminski, Ahold Delhaize told the BBC 'that its increased ambition was not related to Milieudefense's campaign, and that it had already been working on revising its strategy in line with the latest climate science'.[39]

3 International and Regional Climate Change Litigation

3.1 *Litigation at International Level*

At international and regional level, most climate change litigation has taken a 'rights-based approach': individuals have emphasised the nexus between human rights and climate change in suing Governments and argued that human rights should be integrated in any climate change adaptation or mitigation measures. As such, the integration of a human rights-based approach calls on States to respect, protect, and fulfil human rights in the context of climate action. The core international civil and political rights instrument embodying first generation rights – the International Covenant on Civil and Political Rights (ICCPR)[40] – does not explicitly refer to a right to a clean environment or impose any climate change obligations on States. Recent years have however seen several important developments in this regard.

For instance, in July 2022, the UN General Assembly passed a landmark resolution recognising the right to a clean, healthy, and sustainable environment as a human right and called upon States, international organisations, businesses, and other stakeholders to 'scale up efforts'.[41] In its General Comment No 36, the Human Rights Committee (HRC) clarified that States parties' obligations under international environmental law should inform the content of Article 6 ICCPR, protecting the right to life.[42] Furthermore, in *Portillo Cáceres v Paraguay*, the HRC held that the right to life also concerns the entitlement of individuals to enjoy a life with dignity and to be free from acts or omissions

39 Isabella Kaminski, 'The legal battles changing the course of climate change', 8 December 2023, available at https://www.bbc.com/future/article/20231208-the-legal-battles-changing-the-course-of-climate-change (last accessed 21 December 2023).

40 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

41 Resolution A/76/L.75.

42 UN Human Rights Committee (HRC), General comment no 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, para 26.

that would cause their unnatural or premature death, including from environmental pollution.[43]

In September 2022, the HRC delivered a landmark decision in *Daniel Billy and others v Australia* (Torres Strait Islanders Petition), finding that the Australian Government was violating its human rights obligations to the Indigenous Torres Strait Islanders through climate change inaction and by failing to take adequate measures to protect indigenous Torres Islanders against adverse impacts of climate change.[44] In particular, Australia's inaction violated the Torres Strait Islander's rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home under the ICCPR. The HRC also called on Australia to adopt further climate adaptation measures to continue to secure the communities' safe existence on their respective islands.[45]

The decision is remarkable in the sense that it was the first time a UN adjudicative body found that a member State had violated the ICCPR through inadequate climate action. For instance, a communication made to the UN Committee on the Rights of the Child by 16 children in *Sacchi, et al. v Argentina et al.* was rejected in October 2021 due to a failure to exhaust domestic remedies. The communication alleged that Argentina, Brazil, France, Germany, and Turkey violated their rights under the United Nations Convention on the Rights of the Child (CRC)[46] by making insufficient GHG emissions reduction targets.[47] However, although rejected, the reasoning of the CRC Committee provided some valuable insight on the rights of children in the context of climate change. In particular, the Committee stated that the potential harm of the States' acts or omissions regarding carbon emissions was reasonably foreseeable. Even more importantly, the Committee made clear that the respective States' GHG emissions actively contribute to the harmful effects of climate change and that these emissions are not limited to emissions within their territorial boundaries. As such, the Committee emphasised the transboundary

43 *Portillo Cáceres v Paraguay* 25 July 2019 CCPR/C/126/D/2751/2016.

44 *Daniel Billy and others v Australia* (Torres Strait Islanders Petition), United Nations Human Rights Committee, CCPR/C/135/D/3624/2019, 23 September 2022.

45 Ibid.

46 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

47 *Sacchi, et al. v Argentina, et al.*, United Nations Committee on the Rights of the Child, Communication No 104/2019 (Argentina), Communication No 105/2019 (Brazil), Communication No 106/2019 (France), Communication No 107/2019 (Germany), Communication No 108/2019 (Turkey), 12 October 2021.

nature of the effects of climate change and the fact that States have extraterritorial responsibilities related to carbon pollution.[48]

3.2 *Litigation at Regional Level*

At regional level, some human rights treaties, such as the African Charter on Human and Peoples' Rights (ACHPR)[49] and the Additional Protocol to the American Convention on Human Rights (ACHR) in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), contain explicit rights to a healthy environment.[50] As early as in *SERAC and CESR v Nigeria*, the African Commission on Human Rights found that the Nigerian government had violated the right to health and the right to a clean environment as recognised under Articles 16 (right to health) and 24 (right to satisfactory environment) of the ACHPR by failing to fulfil the minimum duties required to protect against and prevent widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals.[51]

Furthermore, although only embodied in the additional San Salvador Protocol to the ACHR, the Inter-American Court of Human Rights (IACtHR) in its *Advisory Opinion Concerning the Obligations of States parties to the American Convention on Human Rights in Respect of Infrastructural Works Creating a Risk of Significant Environmental Damage to the Marine Environment of the Wider Caribbean Region* defined the right to a healthy environment as an 'autonomous right' under the ACHR. This right has connections and implications for the rights to life, personal integrity, privacy, health, water, housing, cultural participation, property, and the prohibition not to be forcibly displaced.[52] Furthermore, the IACtHR had previously recognised in a 2017 advisory opinion that persons potentially affected by transboundary environmental harm must

48 *Sacchi* (n 47).

49 Article 24: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

50 Article 11: '1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment'.

51 Decision Regarding Communication 155/96, *Social and Economic Rights Action Centre* (*SERAC*) *and the Centre for Economic and Social Rights* (*CESR*) *v Nigeria*.

52 *Advisory Opinion on the Environment and Human Rights* (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), OC-23/17, para 66.

have access to justice without discrimination based on their nationality, residence, or the location of the environmental damage.[53]

In contrast to the Inter-American and African system for the protection of fundamental rights, the ECHR does not contain an explicit right to a healthy environment. This has not precluded the European Court of Human Rights (ECtHR) to link environmental rights and protections to other substantive rights in the ECHR in a range of cases,[54] and – on 9 April 2024 – the Grand Chamber handed down its first three judgments on the issue of State climate-change action. The first of these, *Carême v France*, concerned a complaint by a former resident and mayor of the Grande-Synthe municipality that France had taken insufficient steps to prevent climate change and that this failure entailed a violation of the right to life (Article 2) and the right to private life (Article 8) – a case that modelled *Urgenda* as discussed above.[55] The ECtHR unanimously declared the application inadmissible. It reasoned that since the applicant had no relevant links with Grande-Synthe and because he did not currently live in France, he could not claim to have victim status under Article 34 of the Convention, and that was true irrespective of the status he invoked, namely that of a citizen or former resident of Grande-Synthe.

In the second case, a group of older Swiss women known as the Klima-Seniorinnen Schweiz argued that they are particularly vulnerable to the climate crisis because their health is at risk from heatwaves.[56] They argued that Switzerland has failed to fulfil its positive obligations to protect life and to ensure respect for their private and family life since it is not doing everything in its power to prevent a global temperature rise of more than 1.5 °C, in violation of their rights to life, respect for private and family life, and right to a fair trial and an effective remedy. A core question of the *KlimaSeniorinnen* case was whether the applicants had victim status as required by Article 34 ECHR and

53 *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017.

54 Particularly in relation to Article 2 (right to life), Article 8 (right to private life, home, family and correspondence) and Article 1 of Protocol 1 (right to property), see e.g. *López Ostra v Spain* (Application no 16798/90, 9 December 1994); *Hatton and others v United Kingdom* (Grand Chamber, Application no 36022/97, 8 July 2003); *Öneryildiz v Turkey* (Grand Chamber, Application no 48939/99, 30 November 2004); *Fadeyeva v Russia* (Application no 55723/00, 9 June 2005).

55 Grand Chamber, Application no 7189/21, 9 April 2024.

56 Application no 53600/20, 9 April 2024. On the judgment, see Marko Milanovic, 'A Quick Take on the European Court's Climate Change Judgments', EJIL Talk! 9 April 2024, available at https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/ (last accessed 24 April 2024).

whether a causal link between Switzerland's alleged omission and the effects of global warming could be established.[57] In its submission, Switzerland denied the existence of such a causal link due to its low intensity of GHG emissions and the fact that climate change is a global phenomenon.[58]

In its judgment, the Grand Chamber made some important pronouncement on the question of standing in climate change cases. The Court remarked that associations (NGOs) will have standing in their own right if they meet certain conditions, even if their members do not individually meet conditions for victim status. Those conditions include whether the relevant NGO is:

> (a) lawfully established in the jurisdiction concerned or have standing to act there; (b) able to demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights of its members or other affected individuals within the jurisdiction concerned, whether limited to or including collective action for the protection of those rights against the threats arising from climate change; and (c) able to demonstrate that it can be regarded as genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction who are subject to specific threats or adverse effects of climate change on their lives, health or well-being as protected under the Convention.[59]

Individuals will have standing in climate change mitigation cases only if there is '(a) high intensity of exposure of the applicant to the adverse effects of climate change; and (b) a pressing need to ensure the applicant's individual protection'.[60] On the facts, the applicant association fulfilled the above-mentioned criteria and had standing – but only for the purpose of Article 8 ECHR protecting the right to private life, home and family – whereas the applicant individuals were not considered to be especially affected by climate change and lacked standing altogether.[61]

57 See further on this, Evelyne Schmid, 'Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case', EJIL Talk! 30 April 2022, available at https://www.ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/ (last accessed 21 December 2023).

58 See https://www.klimaseniorinnen.ch/wp-content/uploads/2021/11/2021.07.16-Stellungnahme-schweiz-en.pdf (last accessed 21 December 2023) at para 39.

59 *KlimaSeniorinnen* para 478 et seq.

60 Paras 478–488.

61 Paras 521–527.

On the merits, the Court held that mitigating climate change is an obligation that can fall within the scope of Article 8 (and Article 2) ECHR. At the same time, the Court was mindful of the potential pitfalls of subjecting the actions and inactions of State authorities to highly stringent and rigorous examination within the complex realm of climate change mitigation. Therefore, the margin of appreciation afforded to States plays a central role as the burden upon the State must not be disproportionate, and the Court maintains a supervisory role only. In assessing whether a State has remained within its margin of appreciation, the Court will examine whether the competent domestic authorities had due regard to the need to:

(a) adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future GHG emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;
(b) set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;
(c) provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction …;
(d) keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and
(e) act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[62]

In this vein, the implementation by the Swiss authorities of the relevant regulatory framework was flawed as they failed to quantify, through a carbon budget or otherwise, national GHG emissions limitations. Swiss authorities also failed 'to act in good time and in an appropriate and consistent manner regarding the devising, development and implementation of the relevant legislative and administrative framework' in a way that proved that the respondent State 'exceeded its margin of appreciation and failed to comply with its positive obligations in the present context'.[63] Switzerland was therefore found to have violated Article 8 of the Convention.

On the one hand, the judgment is significant as the 'Court has previously not gone through the trouble of spelling out in such detail what specific measures

62 Para 550.
63 Para 573.

a state ought to adopt in its environmental case law'.[64] On the other hand, the requirements laid down by the Court do not appear overly onerous. In fact, the most burdensome duty placed on States is to adopt a regulatory framework for climate change mitigation and to enforce that framework in an appropriate and timely manner. States still retain a wide margin of appreciation with respect to 'their choice of means, including operational choices and policies adopted in order to meet internationally anchored targets and commitments in the light of priorities and resources'.[65] The judgment does therefore not go as far as *Urgenda* and *Klimaatzaak*, where the domestic courts spelled out clear and quantified reduction targets under the ambit of Articles 2 and 8 ECHR.

The third and last case, *Duarte Agostinho and Others v Portugal and 32 Others*,[66] concerned the polluting GHG emissions from 33 member States which contribute to global warming. The claimants, who were six young citizens and residents of Portugal, argued that the States are failing to comply with their positive obligations under Articles 2 and 8 ECHR, read in light of their undertakings under the Paris Agreement. They also alleged a violation of Article 14 (prohibition of discrimination), arguing that global warming affects their generation more given their age, being youths.[67] Lastly, they argued that the States are under a positive obligation to enact effective domestic responses to climate change which satisfy the 1.5 °C target in the Paris Agreement.[68]

As previously discussed by Pedersen, one core challenge to be overcome by the applicants was the question of jurisdiction in respect of the 32 non-territorial States.[69] On the one hand, the responding States had argued that 'extending the scope of article 1 to cover the extraterritorial effects of climate change amounts to building an entire new model of extraterritoriality'.[70] On the other hand, the applicants had claimed that the Grand Chamber ought to

64 Ole W Pedersen, 'Climate Change and the ECHR: The Results Are In', EJIL Talk!, 11 April 2024, available at https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/ (last accessed 24 April 2024).

65 See para 543 of the judgment. See also Jeremy Letwin, 'Klimaseniorinnen: the Innovative and the Orthodox', EJIL Talk! 17 April 2024, available at https://www.ejiltalk.org/klimaseniorinnen-the-innovative-and-the-orthodox/ (last accessed 24 April 2024).

66 Application no 39371/20, 9 April 2024.

67 For further discussion, see Ole W Pedersen, 'Climate Change hearings and the ECtHR', EJIL Talk! 4 April 2023, available at https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr/ (last accessed 22 December 2023).

68 Application no 39371/20, pending.

69 There is no question of whether the applicants fall within Portugal's territorial jurisdiction, being Portuguese residents.

70 Pedersen (n 67).

find jurisdiction where there is 'sufficient factual or legal connection' between a State and the alleged breach. Pedersen has correctly pointed out that this:

> argument rests, among other things, on an assumption that the doctrines of extraterritoriality developed in *Bankovic* and *Al-Skeini* ought to evolve in light of the Committee on the Rights of the Child's decision in *Sacchi*. *Sacchi* itself drew on the Inter American Court of Human Right's 2017 Advisory Opinion on Human Rights and the Environment, which famously implied that applicants are within the jurisdiction of the state on whose territory the emissions originate if there is a causal link between the emissions and the extraterritorial harm. Building on this, the applicants argued that the 'control test' arising from *Bankovic* and *Al-Skeini*, ought not focus exclusively on direct/physical control. It is sufficient that the 32 responding states control their emissions.[71]

The ECtHR rejected this line of reasoning and dismissed the case for two reasons: first because the Portuguese applicants were only within the Article 1 jurisdiction of Portugal, and not the 32 other states and secondly because they did not exhaust any domestic remedies in Portugal.[72] With respect to the former point, the Court held that given the multilateral dimension of climate change, almost anyone adversely affected by climate change wherever in the world he or she might feel its effects could be brought within the jurisdiction of any Contracting Party for the purposes of Article 1 in relation to that Party's actions or omissions to tackle climate change. Such a position could not be accommodated under the Convention.[73] It appears, therefore, that the Court disagreed with the approach adopted by the CRC in *Sacchi*.

4 Climate Change Litigation Trends 2023 and Forward

As recognised by the Sabin Centre in its recent 2023 report, there 'were fewer "groundbreaking" decisions than in recent years'.[74] That said, 2023 has

71 Ole W Pedersen, 'Climate Change Hearings and the ECtHR Round II', EJIL Talk! 9 October 2023, available at https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr-round-ii/ (last accessed 22 December 2023).

72 Para 225 of the judgment.

73 Para 206.

74 Maria Antonia Tigre and Margaret Barry, *Climate Change in the Courts: A 2023 Retrospective* (Sabin Center for Climate Change Law, December 2023) Available at: https://scholarship.law.columbia.edu/sabin_climate_change/212 (last accessed 21 December 2023).

'seen a continued proliferation of cases involving constitutional and human rights, and an increase in legal actions addressing greenwashing and climate washing'.[75] Crucial cases at the international, regional and national levels have brought important developments, with further important hearings that will likely lead to decisions in 2024 (not least the first climate cases before the ECtHR). Furthermore, many climate cases filed up until this date can be classified as being 'strategic', meaning that they are filed with the aim of influencing the broader debate around decision-making with climate change relevance. The number of strategic cases has continued to rise in 2023, with litigants employing certain recognisable strategies across different jurisdictions.[76] As recognised in the London School of Economics (LSE's) latest annual report on climate change litigation, those recognisable strategies include the following:

- *'Government framework'* cases: cases filed against governments seeking to challenge their overall climate policy response. Three new cases 2022–23 have for instance been brought against Russia, Finland and Sweden.
- *'Corporate framework'* cases: cases filed against large corporations challenging their climate plans and/or targets on the basis that these are inadequate.
- *'Integrating climate considerations'* cases: cases that seek to integrate climate considerations, standards or principles into a given decision have been filed globally.
- *'Turning off the taps'* cases: cases aimed at preventing the flow of finance to high emitting or harmful projects or activities have been filed globally, 14 against public bodies or state-owned financial institutions, and 12 against private parties.
- *'Failure-to-adapt'* cases: cases challenge a government or corporation for failure to adapt to the requirements of the climate crisis.
- *'Polluter pays'* (compensation) cases: cases seeking monetary damages based on an alleged contribution to climate change harms. These include cases seeking compensation for past and present loss as well as contributions to the costs of adapting to climate impacts.
- *'Climate-washing' cases*: cases challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future, or misinformation about climate science.[77]

75 Ibid at p. 11.

76 Setzer J and Higham C (2023) Global Trends in Climate Change Litigation: 2023 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science at 19.

77 Ibid, pp. 19–20.

As mentioned above, strategic climate change litigation cases continued to gain both volume and prominence 2023, targeting a wider variety of private sector actors with increased diversity arguments put forward.[78] This trend is likely to remain in place throughout 2024 and onwards. In fact, climate litigation shows no sign of slowing down. Instead, case numbers keep growing, with cases focusing on a wider array of various aspects. As recognised by the LSE report,[79] new cases in 2024 and onwards may also focus on aspects of:

- Personal responsibility. On 9 February 2023, ClientEarth filed an action against Shell's Board of Directors alleging mismanagement of foreseeable climate risk. The lawsuit particularily alleged that Shell's directors (11 in total) had breached their duties under the UK Companies Act by failing to adopt an energy transition strategy that aligns with the Paris Agreement. The case was rejected by the UK High Court in July 2023,[80] but does however raise pressing questions about the individual role of decision-makers in determining the need to adapt to the reality of climate change and appropriate measures in this regard.
- Cases concerning not only carbon dioxide, but also short-lived climate pollutants, such as methane and black carbon soot, which are crucial targets for mitigation.
- Inter-state litigation, particularly regarding disputes over fossil fuel production and use. For instance, on 26 February 2021, the Czech Republic filed a lawsuit against the Republic of Poland before the Court of Justice of the European Union (CJEU), accusing Poland of violating EU law in connection with the expansion of the Turów lignite mine, which supplies one of the largest coal power plants in Poland.[81] Although this case revolves around EU law, States may choose to seek to invoke wider international legal standards in the future.[82]

78 Ibid.

79 Ibid.

80 Case No: BL-2023-000215, Judgment of 24 July 2023.

81 See further https://www.bakerinstitute.org/research/obscure-mining-dispute-highlights-clash-local-interests-global-climate-goals#:~:text=path%20toward%20decarbonization.-,The%20Dispute,the%20mine%20is%20not%20new (last accessed 22 December 2023).

82 Setzer J and Higham C (n 76) pp. 44–46.

5 Conclusion

This article has provided an overview of the historical and present status of climate change litigation and offered an update on the current trends in global climate change proceedings. The current denominator amongst those proceedings is that they offer a novel approach to change and impact the dynamics in the battle against climate change. Those cases are helping rewrite the public narrative on climate change and, in some cases, are resulting in a real shift in Government and corporate policy. Starting off with the landmark *Urgenda* in 2019 (the Netherlands), followed by *Neubauer* in 2021 (Germany), the Brussels Court of Appeal in *VZW Klimaatzaak* in 2023 (Belgium), and the *Opinion of the National Human Rights Commission on the Climate Crisis and Human Rights* in 2023 (South Korea), those States – because of their inadequate climate policies – have been instructed to set clear and more ambitious GHG reduction targets in order to comply with their undertakings under international and national law. Pending appeal, the 2021 *Shell* decision – albeit in the context of the Netherlands – also extends the duty to mitigate the impact of climate change and set clear and ambitious reduction targets to private corporations.

Moreover, the recent 2023 *Held v Montana* case further anchored the rights-based approach to climate change litigation by concluding that a state's failure to consider GHG emissions and corresponding climate change impacts in environmental reviews, as well the support of a fossil fuel-driven energy system contributing to the climate crisis, violate fundamental constitutional rights. The same holds true for *Daniel Billy and others v Australia* (Torres Strait Islanders Petition), where the Australian Government was violating its human rights obligations under the ICCPR to the Indigenous Torres Strait Islanders through climate change inaction. Significantly, the recent *KlimaSeniorinnen* case further pushed the ECHR regime in the context of climate change action, the ECtHR formulating a duty for States to adopt a regulatory framework for climate change mitigation and to enforce that framework in good faith.

Looking ahead, it appears likely that the proliferation and increase in climate change cases with various strategic approaches cases will continue. Successful (and also unsuccessful) litigation can induce and encourage decision-makers to change their approaches, not least evidenced through cases ordering Governments to clearly reduce their GHG emissions as discussed above. It is also not unlikely that 2024 will witness a shift towards focus on personal responsibility and inter-State arbitration. Furthermore, as mentioned above, strategic climate change litigation cases have continued to gain both volume and prominence during 2023, targeting a wider variety of private sector actors with more diversity in the arguments being put forward.

The targeting of private sector actors can pose a real cost risk to fossil fuel firms by lowering their share prices cutting their relative value by an average of 0.57% after a case was filed, and by 1.5% after an unfavourable judgment.[83] Thus, climate change litigation emerges as an impactful strategy in reshaping the landscape of the fight against climate change. As courtrooms become avenues for awareness-rising and environmental advocacy, the power to influence policy, hold entities – including Governments and private entities – accountable, and drive systemic change is vested in the hands of those seeking environmental justice, which in many cases have been youths. In essence, climate change litigation offers a unique tool to alter the dynamics of the global effort to combat climate change, ultimately leading to climate justice benchmarks which protect the right of both present *and* future generations.

83 Sato M, Gostlow G, Higham C, Setzer J, Venmans F (2023) Impacts of climate litigation on firm value. Centre for Climate Change Economics and Policy Working Paper 421/ Grantham Research Institute on Climate Change and the Environment Working Paper 397. London: London School of Economics and Political Science.