



Bringing Climate Change to Strasbourg. The Convention and Healthy Environment Claims

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Abstract

Climate change profoundly impacts all aspects of human life, including health. International fora and nation States recognise the importance of urgently cutting greenhouse gas emissions as a primary cause of global warming. States' commitment to alter climate change has resulted in several treaty documents referring explicitly to human rights obligations. But what exactly are States' obligations under climate change treaty law and other human rights treaties? And what is the judiciary's role when confronted with the right to health violations and systemic deficiencies relating to climate change? Can climate change litigation give individual citizens a remedy to right to health violations and reduce the impact of climate change?

Keywords

climate change litigation – healthy environment – human rights – state obligations

1 Introduction

Nowadays, no reasonable person denies that global warming, sea water level rise and flooding, and extreme weather events are related to or even the result of human-induced climate change. Climate change profoundly impacts all aspects of human life, including housing and living conditions, food supply and individual health.¹ Climate change has been recognised as one of the critical challenges to address at the international and national levels. International fora, nation States and multinational business entities recognise the importance of urgently cutting greenhouse gas emissions as a primary cause of global warming. Their commitment to alter climate change has resulted in several treaties such as United Nations Framework Convention on Climate Change (1994) and the Paris Climate Agreement (2015), aimed at reducing greenhouse gas emissions.

The Paris Agreement refers explicitly to States' human rights obligations, including the rights to life and health, when taking action to address climate change.² Focusing on health, what exactly are States' obligations under

- 1 E.g., C. Antonelli, M. Coromaldi, S. Dasgupta, J. Emmerling and S. Shayegh, 'Climate impacts on nutrition and labor supply disentangled – an analysis for rural areas of Uganda', *Environment and Development Economics* 26(5–6) (2021) 512–537, doi: 10.1017/S1355770X20000017; S. Asseng, F. Ewert, P. Martre, R.P. Rötter, D.B. Lobell, D. Cammarano, B.A. Kimball, M.J. Ottman, G.W. Wall, J.W. White, M.P. Reynolds, P.D. Alderman, P.V.V. Prasad, P.K. Aggarwal, J. Anothai, B. Basso, C. Biernath, A.J. Challinor, G. De Sanctis, J. Doltra, E. Fereres, M. Garcia-Vila, S. Gayler, G. Hoogenboom, L.A. Hunt, R.C. Izaurralde, M. Jabloun, C.D. Jones, K.C. Kersebaum, A.-K. Koehler, C. Müller, S. Naresh Kumar, C. Nendel, G. O'Leary, J.E. Olesen, T. Palosuo, E. Priesack, E. Eyshi Rezaei, A.C. Ruane, M.A. Semenov, I. Shcherbak, C. Stöckle, P. Stratonovitch, T. Streck, I. Supit, F. Tao, P.J. Thorburn, K. Waha, E. Wang, D. Wallach, J. Wolf, Z. Zhao and Y. Zhu, 'Rising temperatures reduce global wheat production', *Nature Climate Change* 5(2) (2015) 143–147; K.N. Atuoye, I. Luginaah, H. Hambati and G. Campbell, 'Who are the losers? Gendered-migration, climate change, and the impact of large scale land acquisitions on food security in coastal Tanzania', *Land Use Policy* 101 (2021) 105154, doi: 10.1016/j.landusepol.2020.105154; M. Barange, G. Merino, J.L. Blanchard, J. Scholtens, J. Harle, E.H. Allison, J.I. Allen, J. Holt and S. Jennings, 'Impacts of climate change on marine ecosystem production in societies dependent on fisheries', *Nature Climate Change* 4(3) (2014) 211–216, doi: 10.1038/Nclimate2119; B.I. Cook and E.M. Wolkovich, 'Climate change decouples drought from early wine grape harvests in France', *Nature Climate Change* 6(7) (2016) 715–719, doi: 10.1038/Nclimate2960, see also note 6, derived from Intergovernmental Panel on Climate Change, H.O. Pörtner, D.C. Roberts, M.M.B. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem and B. Rama, *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022).
- 2 See <https://www.un.org/en/climatechange/paris-agreement>.

climate change treaty law and other human rights treaties? And what is the judiciary's role when confronted with the right to health violations and systemic deficiencies relating to climate change? Can climate change litigation give individual citizens a remedy to right to health violations and reduce climate change impact?

On a global level, national courts have increasingly dealt with health-related climate change claims with different outcomes (climate change litigation database).³ On a regional level, the Inter-American Human Rights Court has already provided an authoritative explanation of the correlation between environmental protection and human rights in 2016. Further questions address the scope of the state obligations for responding to the climate emergency under the frame of international human rights law, including the right to health.⁴ Similar cases are pending for the European Court of Human Rights (ECtHR), claiming that climate change threatens human health and challenges the Convention's human rights.⁵

This paper examines the human rights legal framework on climate change, actions and policies reducing climate change impact. Explaining the normative framework enables to formulate health-related human rights obligations related to climate change. Secondly, it will discuss the legal hurdles in national and regional climate change litigation cases since the ECtHR will be confronted with similar legal questions in pending rulings. Although any outcome remains speculative, the search for international consensus and cross-fertilisation of human rights-related environmental health obligations may increase the understanding of the role of human rights and environmental law in climate change decision-making.

2 Climate Change and Health

Global warming because of human-induced climate change affects various aspects of human life, including health and well-being. Numerous health impact studies reveal many direct and indirect negative health effects due to global

3 See <http://climatecasechart.com/non-us-case-category/human-rights/>.

4 E.g., joint request by Colombia and Chile for an advisory opinion on the scope of the state obligations for responding to the climate emergency, 9 January 2023, available online at http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition-1.pdf (unofficial translation).

5 E.g., *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20); *Carême v. France* (application no. 7189/21); *Duarte Agostinho and Others v. Portugal* (application no. 39371/20).

warming.⁶ These outcomes have been confirmed by the Intergovernmental Panel on Climate Change (IPCC) in its 2022 Climate Change report, presenting a comprehensive assessment of the current state of knowledge of the observed impacts and projected risks of climate change.⁷ For instance, temperature changes have caused more frequent and severe heat waves, which resulted in the loss of premature death, particularly of vulnerable people such as the elderly and children.⁸ Record high temperatures and severe drought conditions are also drivers of spreading infectious diseases like Zika and Dengue in South America and West Nile fever in southeastern Europe.⁹ There is also a growing body of evidence that increases in temperature, heavy rainfall and flooding events are associated with outbreaks of waterboard diseases (diarrhea, cholera, polio).¹⁰ Finally, high temperatures and extreme weather events

6 E.g., T. Kjellstrom, A.J. Butler, R.M. Lucas and R. Bonita, 'Public health impact of global heating due to climate change: potential effects on chronic non-communicable diseases', *International Journal of Public Health* 55(2) (2010) 97–103; N.A. Hassan and J.H. Hashim, 'Impact of Climate change on Air Quality and Public Health in Urban Areas', *Asia Pacific Journal of Public Health* 28(2 Suppl.) (2016) 38S–48S, arguing that climate change deteriorates air quality by increasing the concentration of pollutants affecting human health; W.K. Al-Delaimy, V. Ramanathan and M. Sánchez Sorondo (eds.), *Health of People, Health of Planet and Our Responsibility: Climate Change, Air Pollution and Health* (Berlin: Springer Open, 2020); P. Ammann, 'Health impact assessment and climate change: A scoping review', *Journal of Climate Change and Health* 3 (2021) 100045; P. Prabhakaran, 'Climate change and its impact on human health. An overview', in: A. Thomas, K.S. Reddy, D. Alexander and P. Prabhakaran (eds.) *Climate Change and the Health Sector* (Abingdon: Routledge, 2021), pp. 58–66; M. Romanello, A. McGushin, C. Di Napoli, P. Drummond, N. Hughes, L. Jamart, H. Kennard, P. Lampard, B. Solano Rodriguez, N. Arnell, S. Ayeb-Karlsson, K. Belesova, W. Cai, D. Campbell-Lendrum, S. Capstick, J. Chambers, L. Chu, L. Ciampi, C. Dalin, N. Dasandi, S. Dasgupta, M. Davies, P. Dominguez-Salas, R. Dubrow, K.L. Ebi, M. Eckelman, P. Ekins, L.E. Escobar, L. Georgeson, D. Grace, H. Graham, S.H. Gunther, S. Hartinger, K. He, C. Heaviside, J. Hess, S.-C. Hsu, S. Jankin, M.P. Jimenez, I. Kelman, G. Kiesewetter, P.L. Kinney, T. Kjellstrom, D. Kniveton, J.K.W. Lee, B. Lemke, Y. Liu, Z. Liu, M. Lott, R. Lowe, J. Martinez-Urtaza, M. Maslin, L. McAllister, C. McMichael, Z. Mi, J. Milner, K. Minor, N. Mohajeri, M. Moradi-Lakeh, K. Morrissey, S. Munzert, K.A. Murray, T. Neville, M. Nilsson, N. Obradovich, M.O. Sewe, T. Oreszczyn, M. Otto, F. Owfi, O. Pearman, D. Pencheon, M. Rabbaniha, E. Robinson, J. Rocklöv, R.N. Salas, J.C. Semenza, J. Sherman, L. Shi, M. Springmann, M. Tabatabaei, J. Taylor, J. Trinanes, J. Shumake-Guillemot, B. Vu, F. Wagner, P. Wilkinson, M. Winning, M. Yglesias, S. Zhang, P. Gong, H. Montgomery, A. Costello and I. Hamilton, 'The 2021 report of the Lancet Countdown on health and climate change: code red for a health future', *The Lancet* 398 (2021), 1619–1662; F. Perera, *Children's Health and the Peril of Climate Change* (Oxford: Oxford University Press, 2022).

7 Pörtner *et al.*, *supra* note 1.

8 *Ibid.*, p. 1046.

9 *Ibid.*, p. 1063.

10 *Ibid.*, p. 1064.

further threaten mental health¹¹ and contribute to food insecurity, which can lead to malnutrition, increasing the risk of diseases.¹²

Evidence also shows that the health impact varies by geographical region and disproportionately affects the most disadvantaged (indigenous people, elderly, children, etc.), amplifying existing inequalities.¹³ States are therefore obligated to mitigate the health impact of climate change and take adequate measures to improve (environmental) health for all. Climate change policies and measures can be based on international human rights, although not exclusively. Here, the focus is on the right to health framework setting standards for a healthy environment.

3 Healthy Environment in International Human Rights Law

International human rights law recognises that global warming and greenhouse gas (GHG) emissions threaten human life and health.¹⁴ Human rights law may help policymakers formulate standards and principles for defining climate policy measures, monitoring progress in climate policy measures, and holding States accountable for inaction on climate change ('climate litigation') by relying on fundamental human rights.¹⁵

But it took until 2022 that the United Nations General Assembly declared access to a 'clean, healthy and sustainable environment' a human right.¹⁶ Although this resolution is not legally binding, it can help define climate change policy and law worldwide.

Also, at the European level, the Council of Europe (CoE) has confirmed the need to adopt a new right in its recommendation 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe'.¹⁷

¹¹ *Ibid.*

¹² *Ibid.*, p. 1045.

¹³ *Ibid.*, pp. 1050–1058, 1251.

¹⁴ GA A/HRC/32/23, 6 May 2016.

¹⁵ Reflecting the human rights-based approach, as explained by F. Bustreo and C.F.J. Doebbler, 'The Rights-Based Approach to Health', in: L.O. Gostin and B. Meier (eds.), *Foundations of Global Health & Human Rights* (Oxford: Oxford University Press, 2022) pp. 89–107.

¹⁶ General Assembly, A/76/L.75 26 July 2022. The resolution's human rights obligations are based on the Special Rapporteur report 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', A/73/188, 19 July 2018.

¹⁷ Parliamentary Assembly Recommendation 2211 (2021) 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe', confirmed by Committee of Ministers Recommendation CM/Rec(2020)20, on human rights and the protection of the environment, 27 September 2022.

Using the same terminology as the UN resolution, the interpretation of the CoE's recommendation of a healthy environment is not restricted to a good quality one, considered as the absence of environmental damage affecting human health or well-being. Instead, a healthy environment is understood as a right to a 'descent' or 'ecologically viable' environment, a broader concept incorporating the link with sustainable development and protection of the natural environment.¹⁸

The CoE Parliamentary Assembly suggests including the right to a 'healthy', 'descent' or 'viable' environment in an additional protocol to the European Convention on Human Rights and one to the European Social Charter. Including such a right in the human rights framework would strengthen Contracting Parties' legislative obligations to protect (future) generations from environmental health threats and enhance individual and collective complaints to enforce their legal rights.¹⁹

Although the right to a healthy environment is missing at a global level, it has been linked to the right to health under the International Covenant on Economic, Social and Cultural Rights (Article 12 ICESCR), generally understood as the right to access various facilities and services necessary to realise the highest attainable standard of health. Health is interpreted as an inclusive right extended to underlying determinants of health, 'such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information'. A further important aspect is citizens' participation in all health-related decision-making at the community, national and international levels.²⁰

The improvement of all aspects of environmental and industrial hygiene is also an explicit component of the right to health (Article 12 (2)(b)), referring to the minimalisation of the causes of health hazards inherent in the working environment.²¹ Finally, the prevention and control of diseases require both the promotion of social determinants of good health, like environmental safety and the use of epidemiological surveillance and infectious disease control (Article 12(2)(c)).

These references make clear that under international human rights law, a right to a healthy environment has been incorporated into the right to health.

18 Report rapporteur draft Recommendation, Doc. 15367, 13 September 2021, para. 8.

19 Recommendation 2211(2021).

20 General Comment (GC) No. 14, para. 11.

21 *Ibid.*, para. 15.

That means all relevant State obligations, principles and concepts defined in General Comment No. 14 apply to a healthy environment. This includes references to key elements such as:

- the availability, accessibility, acceptability, and quality applied to health and underlying determinants²² (e.g., the availability of potable drinking water and functioning sanitation facilities); the (financial and geographical) accessibility of health(related) services without discrimination and with particular focus on groups the most vulnerable to environmental harm. Accessibility also refers to accessing information about the environment held by public authorities, without having to prove an interest. It requires States to consult citizens in advance regarding the state of the environment, policies or measures affecting the environment, and public health and safety where these are affected by the state of the environment). Ensuring access to environmental information is also a key element of the Aarhus Convention, imposing governments to define a set of procedural rights, including receiving information on effective remedies when citizens' rights have been violated.²³ Finally, acceptability and quality elements may refer to generally accepted science- and technology-based healthy environment measures:
- Defining types of State obligations (respect, protect and fulfil):²⁴ For instance, States should respect a healthy environment by refraining from pollutive activities, must protect the environment and biodiversity, and prevent any irreparable and irreversible damage to life on earth by third parties, as well as the obligation to formulate and implement environmental health policies and actions. These measures should be based on demonstrated environmental and epidemiological sound evidence, public participation, and a transparent process, as well as incorporating appropriate remedies for victims to address human rights violations.
- Taking steps through international assistance and collaboration, especially economic support (e.g., financing climate mitigation and adaptation efforts) and technical support (e.g., transfer of green technologies), to realise a healthy environment in developing countries.²⁵

22 *Ibid.*, para. 12.

23 UN Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention, Denmark, on 25 June 1998.

24 *Supra* note 17, Explanatory memorandum, paras 34–37.

25 *Ibid.*, paras 38–42.

These elements guide nation states to shape policies for climate change and how to implement the right to a healthy environment. But the extensive interpretation of the right to health also incorporates the responsibilities of non-state entities such as multinational corporations.²⁶ As a result, those entities have specific responsibilities to prevent and mitigate environmental harm in their business activities ('climate due diligence').²⁷ Failure to comply with their human rights responsibilities would result in holding such corporations accountable for inaction and deficiencies. At a national level, liability for corporate actors has been accepted in various legal cases sued by states and non-governmental organisations (see also Section 4).²⁸

The extensive interpretation of the right to health in international human rights law has been confirmed by the CoE recommendation calling for the explicit recognition of a right to a healthy environment in a separate Protocol under the ECHR.²⁹ This Protocol establishes State responsibilities 'to maintain a good state of the environment compatible with life in dignity and good health'.³⁰ In addition to other measures, this Protocol would support more effective protection of a safe, clean, healthy and sustainable environment at a national level,³¹ as the Convention provides only indirect environmental protection when other Convention's rights (Articles 2 and 8) have been violated (see Section 5). The Protocol links progressive legal principles (transgenerational responsibility, equity and solidarity, and environmental non-discrimination) with prevention, precaution, non-regression, and *in dubio pro natura*, meaning: measures for preventive action, not postponing cost-effective preventive measures due to the lack of scientific certainty, restricting environmental justice shall be prohibition (Article 4). In case of doubt, decision-making should favour protecting and conserving nature. Combining ecological principles with the substantive legal right to a safe, clean, healthy and sustainable environment (Article 5) and procedural rights such as access to environmental information

26 E.g., OHCHR, Guiding Principles on Business and Human rights, Implementing the United Nations "Protect, Respect and Remedy" Framework (2011); Human Rights and Business and OHCHR, *Key messages on human rights and climate change* (2015), available online at www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf.

27 J. Dehm, 'Beyond Climate Due Diligence: Fossil Fuels, 'Red Lines' and Reparations', *Business and Human Rights Journal* 8 (2023) 151–179.

28 E.g., TotalEnergies: *Oil giant Total sued for 'climate inaction'*, available online at <https://www.business-humanrights.org/en/latest-news/france-3/>; *Milieudefensie v. Dutch Royal Shell* ECLI:NL:RBDHA:2021:5339.

29 Combined with an additional human right to a healthy environment embedded in the European Social Charter, *supra* note 17.

30 Recommendation para. 3.1.

31 *Idem*.

and justice (Article 6), the Protocol reflects a comprehensive approach to health threats described as the ‘5P’-Convention: ‘By *preventing* and *prosecuting* violations of the right to a safe, clean, healthy and sustainable environment, and *protecting* the victims, the Contracting States would adopt and implement state-wide “integrated *policies*” that are effective and offer a comprehensive response to environmental threats and technological hazards, involving *parliaments* in holding governments to account on the effective implementation of environment-friendly *pro-human rights policies*.’³² The 5P-approach will guide action Contracting States should take to realise the right to a healthy environment and to review its progress.

Embedding an autonomous human right to a healthy environment in a separate Protocol may improve environmental protection. It allows individual citizens to seek redress in case of violation of human rights and systemic deficiencies relating to climate change and environmental harm. Therefore, holding countries accountable for implementing environmental health measures.

But as long the right to a healthy environment has not been recognised as an explicit and autonomous human right under international law, the enforcement of such a right can only be realized indirectly, by applying other Convention’s rights such as the right to life, inhuman and degrading treatment and privacy, as explained hereafter.

4 Climate Change Litigation Under the Convention

Courts around the world have been increasingly involved in climate change litigation cases, relying on human rights, including a right to a healthy environment.³³ Still, human rights-based litigation represents a relatively small proportion of all climate litigation cases applied to both governments and business entities.³⁴ Climate litigation refers to ‘cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts’.³⁵ Recent studies reveal several observations and trends in climate litigation around the world, such as:

³² *Supra* note 17, Report Rapporteur S Moutquin, para. 41.

³³ The *Global Climate Change Litigation Database*, available online at <http://climatecasechart.com/non-us-case-category/human-rights/>, identifies 9 US-based and 120 non-US-based cases, of which 32 cases rely on the right to a healthy environment.

³⁴ Based on data derived from the Global Climate Change Litigation Database database.

³⁵ UNEP, *UNEP Global Climate Litigation Report 2020 status review*, available online at <https://wedocs.unep.org/handle/20.500.11822/34818>, p. 6.

- the increase of human rights-related cases on several continents;
- most of them launched against governments seeking to enforce ‘climate change standards’, or questioning the adequacy of policy response on climate change;
- the complexity of human rights obligations and legal hurdles to overcome to see a judgment on the merits;
- a relatively high success rate of decisions favourable to climate change action, and
- a number of these (high profile) cases were brought to the European Court of Human Rights (hereafter).³⁶

Although excluded from this analysis, the rise in climate litigation cases makes the courtroom increasingly relevant to address climate change, influencing climate policies, and changing the behaviour of governments and industries (also known as ‘strategic litigation’ that goes beyond the individual litigant’s motives and aim to a broader societal shift).³⁷

Here, the focus is on individual rights-based litigation challenging the government’s climate inaction and identifying positive obligations of the State to prevent and protect from harm due to climate change under the European Convention on Human Rights, even when that includes a certain degree of speculation.

Recently, the European Court of Human Rights has been confronted with climate change litigation and fundamental rights complaints. When writing this paper, eleven cases have been submitted to the Court.³⁸ Most are pending, and three have been referred to the Grand Chamber to decide as the case raises

36 J. Setzer and C. Higham, *Global trends in climate change litigation: 2023 snapshot* (London: London School of Economics, 2023), pp. 2–3; UNEP, *supra* note 35, chapter 3.

37 See, e.g., B. Betros and T. Khan, Thinking Strategically about Climate Litigation, in: C. Rodríguez-Garavito (ed.), *Litigating the Climate Emergency. How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge: Cambridge University Press, 2022), pp. 97–116; H. Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (London: Bloomsbury Publishing, 2018), reviewing the complexity of SHRL.

38 *Duarte Agostinho and Others v. Portugal and Others* (application no. 39371/20); *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (application no. 53600/20); *Carême v France* (application no. 7189/21); *Uricchio v. Italy and Others* (application no. 14615/21); *Soubeste and Others v. Austria and Others* (application no. 31925/22); *De Conto v Italy and others* (application no. 14620/21); *Müllner v Austria* (application no. 18859/21); UK cases were decided inadmissible, see *ECtHR Factsheet Climate Change* (2023), available online at https://www.echr.coe.int/documents/d/echr/fs_climate_change_eng, p. 4 (date of submission May 2023).

serious questions on interpreting the Convention.³⁹ The complaints are similar; the applicants allege the government's failure to comply with their human rights obligations under the Convention.

What these cases have in common is the following. First, the issue of 'victimhood': who can be considered as victim under the Convention? According to Article 34 ECHR, a victim is the person or persons directly or indirectly affected by the alleged violation, and even allows potential victims to complain. In such a situation, the applicant 'must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient.'⁴⁰ This is the question the Court has to answer in *Klimaseniorinnen*, whether the association and its members are a victim of a violation of one of the Convention rights because of the failure of the Swiss authorities to protect them effectively against the effects of global warming. In particular, have the applicants suffered directly or indirectly and substantially the consequences of the insufficient action or inaction alleged by the respondent State?⁴¹ It can be argued that the elderly are particularly vulnerable to heat waves, leading to increased mortality and morbidity rates in Switzerland.⁴² For that reason, the elderly can be qualified as victims directly affected by the alleged violation. In addition, one may argue that the elderly — and elderly women in particular - can be classified as potential victims as future harm is not merely hypothetical but already existing.⁴³ Besides the elderly, that would qualify other vulnerable groups (children, indigenous persons, etc.) as persons directly affected due to climate change too.⁴⁴

Victimhood and future risks are also addressed in *Carême v France*. Again, it is on climate risk caused by insufficient government action on reducing GHG emissions. The French Conseil d'Etat rejected his complaint about the risk of marine submersion in the future. How the Strasbourg court will respond to a future risk-argument remains to be seen. Is the risk theoretical or foreseeable? Toore-Schaub refers to the Court's previous case law on environmental

39 Duarte, *KlimaSeniorinnen* and *Carême*.

40 ECtHR, *Practical Guide on Admissibility Criteria*, Updated on 31 August 2022, available online at https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng, p. 15.

41 *Klimaseniorinnen*, question 1, confirmed by H. Keller and C. Heri, 'The Future is Now: Climate Cases Before the ECtHR', *Nordic Journal of Human Rights* 40(1) (2022) 153–174 at pp. 157–158.

42 A.M. Vicedo-Cabrera, 'The burden of heat-related mortality attributable to recent human-induced climate change', *Nature Climate Change* 11(6) (2021) 492–500, Fig. 4, quoted by ENNHRI, written observations in application no. 53600/20, para. 8.

43 IPCC, IPCC AR6 WGII Impacts, Adaptation and Vulnerability (2022), p. 1053.

44 ENNHRI, para. 9.

pollution, allowing the Court to assess future risks and harm, when the threat of danger is present, sufficiently serious and real.⁴⁵ If so, then the lack of preventive action could be considered a violation of the obligation of the State to protect the lives of persons under their jurisdiction.⁴⁶ In the past, the failure to ensure effective protection of citizens against environmental pollution has been interpreted as a failure or deficiency of the State under Articles 2 and 8 of the Convention.⁴⁷

Instead of future or potential risk, one may even argue that the risk of harm (sea level rise, flooding, heat waves and heat-related deaths) is not hypothetical but already present, particularly for vulnerable individuals.⁴⁸ GHG emissions induced climate change is 'unequivocal', with a 'near-linear relationship between cumulative CO₂ emissions and the global warming they cause'.⁴⁹ The risk of harm causing threats to life and private life of the present and future generations under the Convention.

A second observation concerns the applicability of the Convention's rights. For instance, in *Duarte* the applicants complain about GHG emissions, which allegedly contribute to global warming and are manifested by heat waves that affect the applicants' living conditions and health.⁵⁰ The applicants argue that forest fires directly result from global warming. They allege they have experienced health problems from these fires (sleep disorders, allergies, and breathing difficulties, all exacerbated by very high temperatures during the hot season). Their prospect is living in an increasingly hot climate for the rest of their lives, which would impact them and their families in the near future. It is argued that the Portuguese State and 32 other States have failed to comply with their positive obligations under Articles 2 and 8 of the Convention. Articles 2 and 8 impose adequate legal and administrative measures to cut GHG emissions. That duty to mitigate leaves states a margin of appreciation in the *choice*

45 M Torre-Schaub, Marta, 'The Future of European Climate Change Litigation: The Carême case before the European Court of Human Rights', *VerfBlog*, 2022/8/10, <https://verfassungsblog.de/the-future-of-european-climate-change-litigation/>.

46 Similar as in *Öneryıldız v. Turkey* (GC application no. 48939/99).

47 *Ostra Lopez v Spain* ECtHR, application no. 16798/90.

48 IPCC AR6 WGII Impacts, Adaptation and Vulnerability (2014), pp. 720–721; confirmed in IPCC, *supra* note 43, pp. 1051–1053.

49 ICPP AR6 WGI (SPM) (2021) pp 5, 36 and 1295 as quoted by ENNHRI, par. 9 in *Klimasenioreninnen* and confirmed by domestic courts, e.g., *Urgenda v. Netherlands* (hereafter) para. 5.6.2; *Neubauer*, Federal Constitutional Court (Germany), 24 March 2021, 1BvR 2656/18, 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20, para. 99.

50 *Duarte Agostinho and Others v. Portugal and Others* (application no. 39371/20).

of means to reduce emissions, but not in the minimum *rate of emission* cuts necessary to avoid dangerous climate change.⁵¹

They also allege a violation of Article 14 in conjunction with Articles 2 and 8, arguing that global warming affects the health of the young generation harder than others during their remaining lifetime.⁵² As a result, younger generations are treated differently regarding climate impact and mitigation burdens based on their age.⁵³

What these cases have in common is incorporating environmental treaty standards into human rights norms. Most cases involve GHG emissions, causing climate change and health problems, and the inaction of States to implement climate preventive and harm reduction measures affecting applicants' life, private life and discriminating younger generations disproportionately. Since most States are party to the UN Framework Convention on Climate Change, they agreed to take measures to prevent climate change specified in the IPCC reports. In the pending cases, the obligation to do 'their part' are based on the positive obligations under the ECHR.

A third observation concerns a common procedural issue: the exhaustion rule under the Convention (Article 35). The applicants stress the urgency to act in favour of the climate, therefore asking the Court to absolve the applicants from the obligation to exhaust domestic remedies in each State. Once the Court has confirmed the admissibility under the direct threat argument, it has to opportunity to assess climate-related human rights claims and related questions of the nature and extent of injury, sources of harm and causation. For instance, in *Uricchiov v. Italy*⁵⁴ a young woman claims to suffer from allergies and psychological distress due to global warming (the inability to go out during the day given the extraordinarily high temperatures and concerns about the future and the possibility of continuing to live there). *Uricchiov* also complains about insufficient measures to protect the environment and prevent harmful effects of global warming. Domestic remedies would also be ineffective since she would be forced to complain to the courts of 33 States (Article 13). This burden would be impossible for her to bear because of her young age and limited financial resources. Given the general rule on exhaustion of domestic

51 *Urgenda*, paras 6.3, 8.2.7; *Öneryıldız v. Turkey*, para. 107.

52 E.g., IPCC AR5 WGII Impacts, Adaptation, and Vulnerability 2014, pp. 717–718.

53 *Zeggai v France*, ECtHR application no. 12456/19, para. 55; confirmed by Keller and Heri, *supra* note 41, p. 165; Although the non-discrimination argument has been challenged by S. Schmahl, Internationale Klimaklagen aufgrund von Menschenrechtsverträgen: sinnvoll oder vergeblich?, *JuristenZeitung* 77 (2022) 317–327, at 322.

54 ECtHR application no. 14615/21.

remedies, it seems unlikely the Court will withhold domestic courts the opportunity to determine questions regarding the compatibility of domestic law with the Convention (*A, B and C v. Ireland* (GC)).⁵⁵

5 The Convention's Interpretation at National Level. Relevance of the *Urgenda* Case

These observations identify several legal hurdles in climate cases challenging human rights violations at the European Court on Human Rights. Some of these obstacles have been addressed in national climate litigation reports.⁵⁶ A landmark case in which climate rights have been recognized as human rights under the Convention is the *Urgenda* case. In this case, the Dutch Supreme Court concluded that the Dutch government failed to fulfil its duty of care pursuant to Articles 2 and 8 ECHR by its refusal to reduce GHG emissions by at least 25 percent by the end of 2020. The interpretation of States to do 'their part' (partial responsibility) to counter the risk of climate change constitutes an interpretation of positive obligations under the Convention's rights.⁵⁷ It follows that the State must take appropriate measures against the threat of dangerous climate change. Considering other elements of international law, when interpreting the Convention, States have ratified various climate change instruments, binding and non-binding.⁵⁸ The continuous evolution of these norms and principles in international law shows that there is consensus among the States that should be taken into account,⁵⁹ including scientific insights and generally accepted standards.⁶⁰ Therefore, these norms, standards and widely supported views are important for interpreting and applying the State's positive obligations under Article 2 and 8 ECHR.⁶¹

55 ECtHR applicaiton no. 25579/05, para. 142, quoting: European Court of Human Rights, Practical guide on Admissibility Criteria Updated on 31 August 2022, par 86; confirmed by Keller and Heri, *supra* note 41, p. 170.

56 UNEP, *supra* note 35, p. 53; R. Luporini and A. Savaresi, 'International human rights bodies and climate litigation: Don't look up?', *The Review of European, Comparative & International Environmental Law* 32(2) (2023) 267–278, at pp. 272–275.

57 ECLI:NL:HR:2019:2006 (Supreme Court *Urgenda* case), 20 December 2019, para. 5.8.

58 E.g., Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, 1998), UN Paris Climate Agreement (2015), EU Charter of Fundamental Rights, Article 37 (environmental protection).

59 *Urgenda* para. 5.4.2, quoting the *Demir and Baykara* case, para. 85 (*Demir and Baykara v. Turkey*, application no. 34503/97).

60 *Urgenda* para. 5.4.3.

61 *Ibid.*, para. 6.3.

With this reasoning the Supreme Court applies the so-called ‘common ground’ method since ‘the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law’.⁶² Therefore, ‘any relevant rules of international law applicable in the relations between the parties, and in particular the rules concerning the international protection of human rights (...)’ should be taken into account.⁶³ From this ruling it becomes clear that the Supreme Court has accepted that Articles 2 and 8 of the Convention entail an implicit right to a healthy environment.

Then, what kind of obligations do States have to protect these rights? According to the Supreme Court, the answer to that question belongs to the political domain and thus to national parliaments.⁶⁴ But the Court is authorized to assess such policy measures, more specific, whether national measures comply with the State’s minimum ‘fair share’ of internationally accepted measures to counter the risk of climate change.⁶⁵ Given the general consensus about international climate agreements and standards, the Court includes these binding and non-binding rules and standards in its human rights assessment. The standard used by the Court is the norm set by IPCC scenario 2007. To achieve the strategic objective of limiting the increase in global average temperature to below 2°C above pre-industrial levels, a 25–40% reduction of GHG emissions below 1990 level by 2020 is required for the Netherlands.⁶⁶ That commitment is sufficiently precise, based on the UN Climate Convention principles (Articles 3 and 4) and has been confirmed by subsequent climate conferences. Consequently, the 25 per cent reduction is considered an absolute minimum. Non-compliance to that minimum norm is then considered as violating the positive State obligation under Articles 2 and 8 of the Convention.⁶⁷ As a consequence, the Court orders the State to act, i.e., to prepare adequate measures to reduce GHG emission levels with 25%. How, that remains to the political domain.

For several reasons, the *Urgenda* case can be relevant for pending climate change cases before the ECtHR. First, *Urgenda*-like cases show that individual persons can rely on the Convention’s human rights for claiming adequate action to climate change. That approach has been confirmed in the *Klimaatzaak*. In that case, the Belgian court confirmed that Articles 2 and 8 impose a positive obligation on public authorities ‘to take the necessary measures to remedy and

62 See, e.g., *Nada v. Switzerland*, application no. 10593/08.

63 Quoting *Demir and Baykara*, para. 85.

64 *Urgenda* para. 6.3.

65 *Ibid.*

66 *Ibid.*, para. 7.2.1.

67 *Ibid.*, para. 7.5.1.

prevent the adverse consequences of dangerous global warming on their lives and their private and family lives'.⁶⁸ Also, environmental harm and human rights protection has also been accepted in many ECtHR cases.⁶⁹ As long as the environmental damage has resulted in a concrete violation (i.e., adverse effect) on a person's private life,⁷⁰ causing a real and not purely hypothetical health problems.

Second, the 'extensive interpretation' given by the Dutch Supreme Court of the ECHR's principles (victimhood, positive state obligation to do 'its part', real and immediate risk, and science as a deciding factor in establishing accountability of States for breaching human rights obligations),⁷¹ strengthens the 'collective' dimension under the individual's human rights Convention.⁷² In *Urgenda*, unlike the *Klimaatzaak*, the Supreme Court was able to value scientific evidence and to determine the quantified GHG emission reduction, in order to do 'its part' in preventing dangerous global warming. That is because the targets for reducing GHG emissions were set already. Thus, in its assessment, the Supreme Court respected the principle of separation of powers. That is what makes *Urgenda* unique. It will be interesting how the ECtHR will decide on pending *Urgenda*-like cases. When GHG reduction targets have been defined but not realized, taking into account the other conditions, then a confirmation of the *Urgenda* ruling is not unlikely.

6 Environmental Health Obligations Under the Inter-American Convention on Human Rights: Advisory Opinions

An alternative approach to clarify States' human rights obligations in the climate change crisis is the request for an advisory opinion, aimed at generating legal advice on the interpretation of the Convention's rights. These opinions

68 *Vwz Klimaatzaak*, *Tribunal de premiere Instance francophone de Bruxelles*, section Civile, 2015/4585/A, p. 61 (Appeal pending).

69 ECtHR *Lopes Ostra v Spain*, 9 December 1994, para. 51; *Tatar v Romania*, 27 January 2009, para. 107; *Öneryıldız v. Turkey* 30 November 2004 (Grand Chamber); *Brincat and Others v. Malta*, 24 July 2014 (application no. 62129/11).

70 *Fadeieva v Russia*, application no 55723/00 para. 88.

71 Ch. Bakker, 'Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond', in: I. Alogna, Ch. Bakker and J.P. Gauci (eds.), *Climate Change Litigation: Global Perspectives* (Leiden: Brill, 2021), p. 212.

72 F. Francioni, 'International Human Rights in an Environmental Horizon' *European Journal of International Law* 21(1) (2010) 41–55, quoted by Bakker, *supra* note 71, p. 212.

are generally accepted as legally-nonbinding but authoritative opinions by an international tribunal.

Referring to climate change human rights obligations, in 2017, the Inter-American Court on Human Rights (IACtHR) gave its Advisory Opinion on environmental human rights obligations under the Convention's right to life and personal integrity.⁷³ Although the tribunal's opinions formulate 'inter-American standards' to respond to climate emergencies, the arguments refer to international law, including the ECtHR's doctrine on positive state obligations under the Convention in relation to health and environment. Particularly the 2017 opinion is inspired by the ECtHR's jurisprudence, formulating corresponding obligations to respect and ensure human rights under the Convention. In a way, the Inter-American Court applied a similar extensive interpretation as in the *Urgenda* case, arguing that the right to a healthy environment is indirectly justiciable,⁷⁴ that the jurisdiction concept is not restricted to the territory of a State (transboundary pollution),⁷⁵ as well as affirming the concept of positive State obligations and defining derived specific environmental duties under the Convention.⁷⁶ The IACtHR further defined the imminent danger concept,⁷⁷ elaborating environmental due diligence obligations (supervision and monitoring, environmental impact assessments),⁷⁸ accepted a duty to mitigate damages,⁷⁹ to cooperate,⁸⁰ as well as a series of obligations such as access to information and public participation.⁸¹ These obligations correspond to those as formulated in the Council of Europe draft Recommendation on a healthy environment (general principles and substantive rights), indicating evidence of growing cross-fertilisation.⁸²

More recently (January 2023), Colombia and Chile jointly requested the IACtHR for a second opinion to clarify the scope of the State's obligations to respond to the climate emergency, and what measures should be taken in relation to vulnerable groups (pending).⁸³ It is expected that the IACtHR's expla-

73 AO OC-23/17, unofficial translation available online at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

74 *Ibid.*, paras 69, 105–107, 242.

75 *Ibid.*, para. 104.

76 *Ibid.*, para. 115.

77 *Ibid.*, para. 120.

78 *Ibid.*, para 124.

79 *Ibid.*, para. 172.

80 *Ibid.*, para. 182.

81 *Ibid.*, para. 125.

82 See note 17.

83 Joint AI 9 January 2023, *supra* note 3.

nation of differentiated duties will enable States to comply with their relevant international obligations and to define and implement environmental health policies to protect human rights. Moreover, international consensus on the State's human rights obligations in the environmental setting may help the ECtHR to formulate more favourable decisions on climate changes under the ECHR.

7 Conclusions

Nowadays, it is generally accepted that international human rights law provides obligations in relation to prevent and mitigate human-induced climate change. Domestic and international rights-based litigation has contributed to that idea by formulating both procedural and substantive requirements to cope with climate change. First of all, by defining procedural obligations such as providing access to information (on hazardous activities affecting health), disseminating and publishing such information (transparency), performing and monitoring environmental impact assessments, public participation in environmental decision-making, and access to justice (providing effective remedies for individual violations of human rights). More substantive obligations can be derived from the right to life and private life, such as refraining from unlawfully polluting the environment, and protecting and preserving life. This imposes positive obligations such as formulating and implementing environmental health policy objectives preventing harm and reducing climate change impact, and regulating dangerous activities (e.g., licensing, supervision and effective protection) to reduce the threat to life. In addition, it is argued that protecting life requires an obligation to collaborate in good faith with other States by exchanging information, knowledge, and experiences on trans-border harmful matters.

These human rights obligations respond to a right to a healthy environment, understood as preventing and mitigating human-induced climate change.