

## **Climate Change Litigation and Human Rights: Pushing the Boundaries**

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### **Abstract**

The adoption of the Paris Agreement has prompted a flurry of climate change litigation, both to redress the impacts of climate change and to put pressure on state and non-state actors to adopt more ambitious action to tackle climate change. The use of human rights law as a gap-filler to provide remedies where other areas of the law do not is not new, especially in the environmental context. It is therefore not a surprise that human rights arguments are increasingly being made, and human rights remedies increasingly being sought, in climate change litigation. While relatively few cases have been argued on human rights grounds so far, the trend is continuing and accelerating, with some striking results. This article takes stock of human rights arguments made in climate change litigation to date to gauge what they reveal about the evolving relationship between human rights and climate change law—and about possible future developments.

### **Keywords**

Human rights; climate litigation; state actors; non-state actors; carbon majors

### **1. Introduction**

In recent years, litigants around the world have increasingly tried to push the boundaries of the law by filing test cases to prompt state and corporate actors to take action to reduce emissions or to obtain redress for climate-change-related damage to persons, property, or the environment.

The use of human rights law as a gap-filler to provide remedies where other areas of the law do not is not new.<sup>1</sup> It is thus hardly a surprise that human rights arguments are increasingly used in climate change lawsuits. While numerous scholars have attempted to make sense of the tidal surge in climate change litigation,<sup>2</sup> little specific attention has

<sup>1</sup> See, for example, Alan E. Boyle and Michael R. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1998); Alan E. Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18(3) *Fordham Environmental Law Review* 471 (2007); Dinah Shelton (ed.), *Human Rights and the Environment* (Edward Elgar, 2011); Alan E. Boyle, 'Human Rights and the Environment: Where Next?', 23(1) *European Journal of International Law* 613 (2012); Donald K. Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2012).

<sup>2</sup> The literature on this issue is vast: see e.g. Christopher James Hilson, 'Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)', in *Climate Change: la Risposta del Diritto*,

been paid thus far to the use of human rights arguments.<sup>3</sup> This article focuses specifically on the use of human rights law arguments in this litigation. At the time of writing, the main global repositories of climate change litigation, curated by the Sabin Centre for Climate Change Law, at Columbia Law School, and the Grantham Research Institute on Climate Change and the Environment, at the London School of Economics,<sup>4</sup> together list a total of 29 climate cases that make some reference to human rights. This ‘human rights based’ climate change litigation comprises both cases argued solely on human rights grounds and cases argued on the basis of human rights together with other grounds. While these databases are not complete, we use them as a source to reflect on the practice of climate change litigation associated with human rights arguments.

More specifically, this article looks at climate change litigation to understand when and how human rights arguments can successfully be used in relation to climate change. The aim is to gauge what this case law reveals about the evolving relationship between human rights and climate change law, the limitations inherent in this linkage, and opportunities for further development. First we contextualise human rights arguments in climate change litigation, distinguishing between the litigation strategies and actors involved. We then review recent case law, highlighting the most significant developments in relation to the rights of future generations and extraterritoriality. We conclude with some reflections on what this analysis reveals about the evolving relationship between human rights and climate change law.

## 2. Climate Change Litigation and Human Rights

The copious literature on climate change litigation commonly distinguishes between so-called ‘proactive’ litigation—initiated in order to engender policy change, for example by civil-society actors asking for the adoption or reform of climate legislation; and ‘reactive’ litigation—initiated to oppose such change, for example by corporate actors

edited by Fabrizio Fracchia and Massimo Occhiena (Naples: Editoriale Scientifica, 2010); Navraj-Singh Ghaleigh, ‘“Six Honest Serving-Men”: Climate Change Litigation as Legal Mobilization and the Utility of Typologies’, 1(1) *Climate Law* 31 (2010); Lisa Vanhala and Chris Hilson, ‘Climate Change Litigation: Symposium Introduction’, 35(3) *Law & Policy* 141 (2013); Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); Jolene Lin, ‘Climate Change and the Courts’, 32(1) *Legal Studies* 35 (2012); Kim Bouwer, ‘The Unsexy Future of Climate Change Litigation’, 30(3) *Journal of Environmental Law* 483 (2018); Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’, 38(4) *Oxford Journal of Legal Studies* 841 (2018).

<sup>3</sup> With the sole exception of Jacqueline Peel and Hari M. Osofsky, ‘A Rights Turn in Climate Change Litigation?’, 7 (1) *Transnational Environmental Law* 37 (2018); Joana Setzer and Lisa C. Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’, 10 (3) *Wiley Interdisciplinary Reviews: Climate Change* e580 (2019); Margaretha Wewerinke Singh, ‘State Responsibility for Human Rights Violations Associated with Climate Change’, in *Handbook on Human Rights and Climate Governance*, edited by Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (Routledge, 2018).

<sup>4</sup> See the databases curated by the Sabin Centre at Columbia Law School: <<http://climatecasechart.com/>> and the Grantham Research Institute at the London School of Economics: <<http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/>> accessed 28 February 2019.

resisting the adoption of new or reformed legislation.<sup>5</sup> While the latter strand of litigation has long been common,<sup>6</sup> a surge in proactive climate change litigation followed the adoption of the Paris Agreement.<sup>7</sup>

Proactive climate change litigation may itself be divided into legal suits between non-state and state actors (e.g. citizens suing governments); between non-state actors (e.g. citizens suing corporations); and between state actors (one state suing another).<sup>8</sup> While the first category encompasses the lion's share of litigation, the second one has grown rapidly in recent years, and the last one for the time being is of scholarly interest only.<sup>9</sup>

This division also holds for human rights based climate change litigation. In May 2019 there were 29 human rights cases listed in the databases of the Sabin Centre and the Grantham Institute. Of these cases, fifteen are pending at the time of writing and just a quarter have been successful, while the rest have been denied. In all except two, citizens or civil-society organizations challenged state action (or inaction).

This concentration of cases is to be expected, given that under human rights law the main duty-holder is the state. And, as discussed elsewhere in this special issue,<sup>10</sup> in recent years, human rights bodies have done much work to clarify the content of states' human rights obligations in relation to climate change.<sup>11</sup> This interpretative work has clearly shown that obligations associated with both substantive human rights (e.g. the right to life, adequate housing, food, and the highest attainable standard of health) and procedural human rights (such as the right to access to remedies<sup>12</sup> and to take part in the conduct of public affairs) take on a specific character in relation to climate change.<sup>13</sup>

In particular, these obligations require that states take preventative measures to avert the impacts of climate change on the enjoyment of human rights, and, if such impacts have occurred, take remedial measures to address them.<sup>14</sup> Furthermore, human rights

<sup>5</sup> See e.g. Hilson, *supra* note 2, at 421; Ghaleigh, *supra* note 2, at 45; Peel and Osofsky, *supra* note 2, at 30–31.

<sup>6</sup> See e.g. David Markell and J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' 64(1) *Florida Law Review* 15 (2012); Peel and Osofsky, *supra* note 2.

<sup>7</sup> See Setzer and Vanhala, *supra* note n. 3 above.

<sup>8</sup> Michael G. Faure and Andre Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' 43(A) *Stanford Journal of International Law* 123 (2007), at 128.

<sup>9</sup> At the time of writing, the Grantham Institute database lists 224 cases with governments as respondents; 35 cases with corporate respondents; and 11 cases with individuals as respondents.

<sup>10</sup> **Cross reference to Knox's article.**

<sup>11</sup> OHCHR, *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Focus Report on Human Rights and Climate Change* (2014); and OHCHR, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/31/52 (2016), at paras. 50–64. See also the analysis in Annalisa Savaresi, 'Human Rights and Climate Change', in *International Environmental Law-making and Diplomacy Review 2018 - Human Rights and the Environment*, edited by Tuula Honkonen and Seita Romppanen, (Finland: University of Eastern Finland and UNEP, 2019), available at: <<https://papers.ssrn.com/abstract=3327981>> accessed 3 March 2019.

<sup>12</sup> OHCHR, *supra* note 11 (2016), at para. 63

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, at para. 33.

obligations require states to properly assess not only the impacts of climate change itself but also of measures proposed or taken to tackle climate change, and to make such information public.<sup>15</sup> States are expected to enable public participation in decision-making about climate change action, especially by those likely to be affected.<sup>16</sup> Finally, states must provide access to remedies for climate-related human rights violations, which might include monetary compensation and injunctive relief.<sup>17</sup>

Most crucially, States' human rights obligations entail that they protect individuals and groups against abuse by third parties, including business enterprises, by preventing, investigating, punishing and redressing such abuses through effective policies, legislation, regulations and adjudication.<sup>18</sup> Even though conventionally emissions are attributed to states, in fact it is non-state actors that are largely responsible for causing emissions. Recent studies suggest that a group of multinational corporations—so called Carbon majors and including like Exxon, Shell and CEMEX—are historically responsible for the lion's share of global greenhouse gas emissions.<sup>19</sup> These studies have prompted a surge in climate litigation against corporate actors, within and outside the US.<sup>20</sup> The responsibility of corporations for human rights breaches associated with climate change has also increasingly come under the spotlight, as a result.

These developments are in and of themselves remarkable, if one considers that only ten years ago, a report of the Office of the High Commissioner on Human Rights (OHCHR) warned that 'while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.<sup>21</sup> The report went on to caution that it would be 'virtually impossible to disentangle the complex causal relationships' linking emissions to human rights violations, and that in all events the adverse effects of climate change are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.<sup>22</sup>

<sup>15</sup> Ibid., at paras. 54-55.

<sup>16</sup> Ibid., at para. 59.

<sup>17</sup> Ibid., at para. 63

<sup>18</sup> Ibid., at para. 66; OHCHR, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/17/31 (2011), Annex, Principle 1.

<sup>19</sup> See Richard Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010', 122 (1-2) *Climatic Change* 229 (2014); Peter C. Frumhoff, Richard Heede and Naomi Oreskes, 'The Climate Responsibilities of Industrial Carbon Producers', 132 (2) *Climatic Change* 157 (2015); and Brenda Ekwurzel et al., 'The Rise in Global Atmospheric CO<sub>2</sub>, Surface Temperature, and Sea Level from Emissions Traced to Major Carbon Producers' 144 (4) *Climatic Change* 579 (2017).

<sup>20</sup> In May 2019, the database of Sabin Centre database listed 22 such cases outside the US, but does not systematically report information concerning law suits within the US, which are instead widely reported in the press. See for example: <https://www.climateliabilitynews.org/category/exxon-climate-investigation/>.

<sup>21</sup> OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, A/HRC/10/61 (2009), at para. 70.

<sup>22</sup> Ibid.

These caveats were echoed in the literature, with the future UN Special Rapporteur on Human Rights and the Environment warning that, if there was scope to recognize the negative obligation to refrain from causing harm in the context of international human rights law, such an application would ‘treat climate change as a series of individual transboundary harms, rather than as a global threat to human rights.’<sup>23</sup>

So what has changed in just ten years’ time? Human rights arguments are increasingly used to prop up those based on private or public law, while only a handful of cases are argued solely on the basis of human rights arguments. While in fact human rights remedies alone are ill-suited to address environmental harm, they potentially provide an avenue to address personal injury and property damage, which can be framed in terms of human rights violations. The success of human rights arguments depends upon whether a victim can substantiate a claim that a duty-bearer has failed to comply with human rights obligations—whether positive or negative.<sup>24</sup>

In particular, human rights arguments associated with climate change can be formulated in two main ways: applicants may complain that there has been a failure to act (e.g. a failure to adopt or implement ambitious climate policies) resulting in human rights violations; or that certain activities (e.g. permits or licenses to extract fossil fuels or log forests) have led to human rights violations. The sections below look at how these arguments have been used in climate change litigation, first against states, and then against non-state actors.

### 3. The Use of Human Rights Arguments Against States

Human rights arguments in climate change litigation are increasingly used to support complaints over states’ failure to mitigate climate change, and, to a more limited extent, to address the impacts of climate change. As explained above, courts and human rights bodies have increasingly been asked to consider the human rights implications of states’ action (e.g. licenses for oil extraction<sup>25</sup>) or inaction (insufficient ambition in targets enshrined in law and policy being one example<sup>26</sup>) on climate change. Two landmark decisions taken in 2018 have shown that, when properly framed, human rights arguments may be successful.

<sup>23</sup> John H. Knox, ‘Climate Change and Human Rights Law’ 50 (1) *Virginia Journal of International Law* 163 (2009), 211.

<sup>24</sup> See Annalisa Savaresi, Jacques Hartmann, and Ioana Cismas, ‘The Impacts of Climate Change and Human Rights: Some Early Reflections on the Carbon Majors Inquiry’ (SSRN Scholarly Paper, 2018), available at <<https://papers.ssrn.com/abstract=3277568>> accessed 5 November 2018.

<sup>25</sup> *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy*, Case no. 16-166674TVI-OTIR/06 (Oslo District Court) (4 January 2018) English translation available at: <[https://elaw.org/system/files/attachments/publicresource/OsloDistrictCt\\_20180104.pdf?\\_ga=2.190227816.2102297674.1551362906-954583716.1551362906](https://elaw.org/system/files/attachments/publicresource/OsloDistrictCt_20180104.pdf?_ga=2.190227816.2102297674.1551362906-954583716.1551362906)> accessed 2 February 2019.

<sup>26</sup> *Urgenda Foundation and 886 Citizens v. The State of the Netherlands*, 9 October 2018, ECLI:NL:GHDHA:2018:2610. English translation available at <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>> accessed 2 November 2018 (hereinafter *Urgenda* case). See also the case lodged by a group of Torres Strait Islanders before the UN Human Rights Committee, challenging the Australian government for inadequate climate action, < <https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>> accessed 20 May 2019.

In the first, a group of Colombian youth successfully challenged the Colombian government for failure to tackle deforestation in the Amazon, thereby breaching several human rights obligations enshrined both in the Colombian Constitution and in international instruments.<sup>27</sup> In the second, the Urgenda Foundation and a sizeable group of citizens successfully challenged the Dutch government for not taking sufficiently ambitious action to reduce greenhouse gas emissions.<sup>28</sup> While the Dutch case had in the first instance been decided on the basis of administrative and tort law,<sup>29</sup> the Court of Appeal of The Hague set aside a restrictive interpretation of victimhood requirements and framed the state's duty of care with reference also to rights enshrined in the European Convention on Human Rights<sup>30</sup>—such as the right to life and the right to respect for private and family life.<sup>31</sup>

These victories have encouraged litigants and human rights advocates to push the boundaries even further. For example, in 2018, the UN Special Rapporteur on Human Rights and the Environment, David Boyd, unprecedentedly intervened in a case before an Irish court,<sup>32</sup> drawing attention to the state's 'clear, positive and enforceable obligations' to protect its citizens against the infringement of human rights caused by climate change.<sup>33</sup>

Applicants are also becoming more ambitious in their demands. The so-called People's Climate Case challenges lack of ambition in European Union (EU) climate legislation, on the basis of human rights enshrined in the Charter of Fundamental Rights of the EU.<sup>34</sup>

These developments clearly show not only that human rights arguments are being increasingly deployed, but also that demands associated with the protection of human

<sup>27</sup> *25 Children and Youth v. Colombian Government* [2018] Supreme Court of Justice of Colombia STC4360-2018, 11001-22-03-000-2018-00319-01 (hereinafter *Future Generations v. Colombia*). Interpretation and translation of this document, originally written in Spanish, has been carried out by the authors.

<sup>28</sup> *Urgenda*, supra note 26.

<sup>29</sup> See e.g. the commentaries by Marjan Peeters, 'Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States', 25(1) *Review of European, Comparative & International Environmental Law* 215 (2016); and Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?', 4(2) *Transnational Environmental Law* 339 (2015).

<sup>30</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (1950), arts., articles 2 and 8; *Urgenda*, supra note 26, at 43.

<sup>31</sup> Jonathan Verschuuren, 'The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions', 0(0) *Review of European, Comparative & International Environmental Law* (2019), available at: <<https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12280>> accessed 28 February 2019.

<sup>32</sup> Climate Case Ireland, available at: <<https://www.climatecaseireland.ie>>.

<sup>33</sup> Special Rapporteur on Human Rights and the Environment, *Statement on the Human Rights Obligations related to Climate Change with a Particular Focus on the Right to Life*, 2018, available at: <<https://www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf>> accessed 29 January 2018.

<sup>34</sup> European Union, 'Charter of Fundamental Rights of the European Union', 55 *Official Journal of the European Union* OJ C 326/02 (2012), at 391., 26.10.2012.

rights are becoming bolder. Far from targeting only actual harm to persons and/or property, in fact, human rights arguments are deployed to sanction harm that is predicted to happen in future – and thus affect future generations – or harm occurring outside of the bounds of a state’s territory. The next sections look more closely at how these arguments are potentially revolutionary and how they fit into the bigger picture of climate change litigation.

### ***3.1. The Rights of Present and Future Generations***

In April 2018, Colombia’s Supreme Court of Justice handed down a pioneering ruling that recognizes the link between deforestation, climate change, and the violation of the human rights of present and future generations.<sup>35</sup> The applicants—twenty-five children and young people from different regions of Colombia—argued that deforestation in the Amazon region causes climate change, threatening the enjoyment of the rights to a healthy environment, life, health, food, and access to water—rights enshrined in the Colombian Constitution and in international human rights instruments ratified by Colombia.<sup>36</sup> Accordingly, they filed an *accion de tutela* against the Colombian government. Similar to the *amparo*—a constitutional-law institution present in most Latin American countries<sup>37</sup>—the *tutela* is a procedure established by the Colombian Constitution to enable alleged victims of human rights violations to request Colombian courts to scrutinize the actions or omissions of public authorities and, exceptionally, of individuals.<sup>38</sup>

The applicants’ request was at first deemed to be inadmissible on the grounds that other legal action, namely *accion popular*, was more appropriate.<sup>39</sup> Eventually, this decision was overturned on appeal by the Supreme Court of Justice, which went on to decide the merits of the case. The court accepted the applicants’ complaints, finding that projected temperature rises associated with greenhouse gas emissions from deforestation in the Amazon violated the human rights of future generations.<sup>40</sup> The court reasoned that the rights of future generations hinge on two elements: ‘solidarity of our species as an ethical duty’—a concept that builds upon that of sustainable development and imposes

<sup>35</sup> *Future Generations v. Colombia*, supra note 27, at 37.

<sup>36</sup> José Daniel Rodríguez Peña et al., *Accion de Tutela*, Higher Court of Bogota’s Judicial District, 29 January 2018, at 143.

<sup>37</sup> Allan R. Brewer-Carias, ‘The Amparo as an Instrument of a *Ius Constitutionale Commune*’, in *Transformative Constitutionalism in Latin America: The Emergence of a new Ius Commune*, edited by Armin von Bogdandy et. al. (Oxford University Press, 2017).

<sup>38</sup> Liliana Carrera Silva, ‘La Acción de Tutela en Colombia’, 5(27) *Revista del Instituto de Ciencias Jurídicas de Puebla* 72 (2011); Katrin Merhof, ‘Building a Bridge between Reality and the Constitution: The Establishment and Development of the Colombian Constitutional Court’, 13(3) *International Journal of Constitutional Law* 714 (2015), at 719.

<sup>39</sup> *25 Children and Youth v. Colombian Government* [2018] Decision of First Instance by the Higher Court of Bogota’s Judicial District, 11001220300020180031900, available at <[http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180212\\_11001-22-03-000-2018-00319-00\\_decision-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180212_11001-22-03-000-2018-00319-00_decision-1.pdf)> accessed on 20 May 2019, at p. 20 DeJusticia, ‘Línea de Tiempo Tutela Generaciones Futuras y Cambio Climático’, *DeJusticia*, 27 April 2018, available at: <<https://www.dejusticia.org/tutela-cambio-climatico-colombia/>> accessed 2 March 2019.

<sup>40</sup> *Future Generations v. Colombia*, supra note 27, at 37.

limits to the freedom of present generations; and ‘the intrinsic value of nature’, which transcends an ‘anthropocentric perspective’ and requires avoidance of an ‘irresponsible’ use of the environment.<sup>41</sup> The court rooted these concepts in a ‘global ecological public order’, built on the foundations of international instruments, including the International Covenant on Economic, Social and Cultural Rights; the Stockholm and Rio Declarations; and the Paris Agreement.<sup>42</sup>

The court ordered the Colombian government to take action to tackle deforestation in the Amazon, and unprecedentedly asked it to involve the applicants in the related decision-making process.<sup>43</sup> In particular, the court ordered several governmental entities, including the Presidency of Colombia and the Ministry of Environment and Sustainable Development, to liaise with the applicants, the affected communities, and interested members of the public, to formulate a comprehensive policy plan to counter deforestation in the Amazon as a way to mitigate and adapt to the effects of climate change.<sup>44</sup>

This judgment consolidates the Colombian courts’ reputation for being particularly innovative when it comes to ruling in favour of those affected by environmental harm,<sup>45</sup> establishing precedents that are likely to inspire other courts in the region.<sup>46</sup> This case therefore eloquently illustrates the potential to use human rights arguments in strategic litigation, to put pressure on states to protect the interests of future generations. However, the enforcement of this and similar judgements is not to be taken for granted—a problem that resonates well beyond Latin America, and indeed affects human rights and environmental law in general.<sup>47</sup>

### ***3.2. Extraterritorial Application of Human Rights Obligations***

Like the rights of future generations, states’ responsibility to protect the human rights of those beyond their territorial boundaries has long been regarded as problematic. While arguably under some instruments these obligations have extraterritorial application,<sup>48</sup>

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., at 22–34.

<sup>43</sup> Ibid., at 22.

<sup>44</sup> Ibid., at 48–50.

<sup>45</sup> Everaldo Lamprea, ‘Collective Environmental Litigation in Colombia: An Empirical Assessment’ in *Courts and the Environment*, edited by Christina Voigt and Zen Makuch (Edward Elgar Publishing, 2018).

<sup>46</sup> José Parra, ‘The Role of Domestic Courts in International Human Rights Law: The Constitutional Court of Colombia and Free, Prior and Informed Consent’, 23(3) *International Journal on Minority and Group Rights* 355 (2016) at 381.

<sup>47</sup> International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (Switzerland: OHCHR, 2005); Felice D. Gaer, ‘The Effectiveness of the United Nations Human Rights Protection Machinery: The UN High Commissioner for Human Rights’, 108 *Proceedings of the ASIL Annual Meeting* 281; Par Engstrom, ‘Human Rights: Effectiveness of International and Regional Mechanisms’, *Oxford Research Encyclopaedia of International Studies* (2017); and Neil Gunningham, ‘Enforcing Environmental Regulation’, 23(2) *Journal of Environmental Law* 169 (2011), Pages 169–201.

<sup>48</sup> See e.g. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) and Oona A. Hathaway et al ‘Human Rights Abroad: When Do

many states and companies resist this understanding, maintaining that states are the *sole* bearers of human rights obligations, which only protect those within a state's territory, or in another territory under its effective control.<sup>49</sup>

These questions were at the core of Inuit petition filed before the Inter-American Commission on Human Rights (IACHR) in 2005.<sup>50</sup> As recounted already in this special issue,<sup>51</sup> the applicants argued that the United States—then the world's largest greenhouse gas emitter—was responsible for human rights violations associated with the impacts of climate change in the Canadian and US Arctic.<sup>52</sup> The IACHR, however, dismissed the petition on procedural grounds.<sup>53</sup> The question of states' responsibility to protect the human rights of those beyond their territory has since been considered in 2017, in a landmark advisory opinion by the Inter-American Court of Human Rights (IACtHR).<sup>54</sup>

In reply to a question over state obligations on the environment, in the context of the rights recognized by the American Convention on Human Rights,<sup>55</sup> in the Organization of American States system and by regional environmental instruments,<sup>56</sup> the court explained that states have the obligation to prevent significant damage to the environment inside or outside their territory, whether produced by themselves or third parties.<sup>57</sup> The court considered that any harm that can directly or indirectly have an effect on the enjoyment of substantive human rights is to be considered significant in this connection.<sup>58</sup> From this obligation to prevent significant harm, a series of specific obligations arise, which include an obligation to regulate, supervise, and monitor activities carried out by a state or *private entities* under a state's jurisdiction that can lead to environmental damage.<sup>59</sup>

The IACtHR advisory opinion opens a window of opportunity for future climate litigation based on human rights arguments, and may well inspire other human rights

Human Rights Treaty Obligations Apply Extraterritorially?', *Faculty Scholarship Series* 4722 (2011). Available at: <[http://digitalcommons.law.yale.edu/fss\\_papers/4722](http://digitalcommons.law.yale.edu/fss_papers/4722)> accessed 2 November 2018.

<sup>49</sup> See e.g. Supplemental Amicus Briefs in Support of Neither Party (Kiobel II) in *Kiobel v. Royal Dutch Shell Petroleum Co, et al*, 621 F.3d 11 (2d Cir Sept 17, 2010) 12.

<sup>50</sup> *Petition to the Inter-American Commission on Human Rights, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005, available at: <[www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf)> accessed 3 March 2019.

<sup>51</sup> Cross reference to Knox piece.

<sup>52</sup> *Ibid.* at 5.

<sup>53</sup> IACHR, *Letter from Ariel E Dulitzky, Assistant Executive Secretary, OAS, to Paul Crowley, Legal Representative for Sheila Watt-Cloutier and Others, regarding Petition P-1413-05*, 16 November 2006.

<sup>54</sup> See Inter-American Court of Human Rights, *Advisory Opinion OC-23/17*, 15 November 2017

<sup>55</sup> OAS, *American Convention on Human Rights*, 9(4) *International Law Materials* 673 (1970). (adopted 22 November 1969, entered into force 18 July 1978).

<sup>56</sup> Namely, the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1506 UNTS 25974 (adopted 24 March 1983, entered into force 11 October 1986).

<sup>57</sup> *Supra* note 54, at paras. 119, 133, 174. For a commentary, see Ricardo Abello and Walter Arevalo, 'Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection', *Review of European, Comparative and International Environmental Law* (Forthcoming, 2019).

<sup>58</sup> *Ibid.*, at para. 140.

<sup>59</sup> *Ibid.*, at paras. 145-150.

bodies to recognize breaches of state obligations in the context of climate change. For instance, the IACHR may rely on the court's reasoning in its ongoing investigation of *Athabaskan v. Canada*.<sup>60</sup> The Athabaskan people allege that Canada has breached human rights obligations by failing to regulate emissions of black carbon, which affect Athabaskan communities, and also of those situated outside Canada's territory. This would be the first time that an international human rights body acknowledges the extraterritorial reach of states' human rights obligations in relation to the impacts of climate change, adding a missing piece to the puzzle of the human rights and climate change nexus.<sup>61</sup>

While it remains to be seen whether the Commission's assessment of the Athabaskan petition will significantly differ from that of *Inuit*, the IACtHR advisory opinion certainly provides fresh new ground to establish that harm arising from black carbon emissions constitutes a violation of human rights with an extraterritorial dimension.

### 3.3. 'Systemic' Litigation

Litigation strategies construed on human rights arguments are becoming ever more audacious and systemic in scope. The most ambitious to date is probably the so-called People's Climate, lodged before the Court of Justice of the EU in 2018, by 37 applicants from Kenya, Fiji, Portugal, Germany, France, Italy, Romania, and the Swedish Sami youth association Sáminuorra.<sup>62</sup> The applicants seek to set aside and replace a whole set of EU climate law instruments at the heart of the EU's 2030 Climate and Energy Framework, to be implemented between 2021 and 2030. These are: the Emissions Trading Directive, which covers greenhouse gas emissions from large industrial installations in the EU; the Effort Sharing Regulation, which sets reduction targets for the other sectors, such as energy efficiency in buildings and transport; and the LULUCF Regulation, on emissions from land use, land-use change, and forestry.<sup>63</sup> The applicants argue that these instruments lack ambition, and asked the Court to set them aside and to

<sup>60</sup> Arctic Athabaskan Council, *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, 13 April 2013, at 52, available at: <[http://earthjustice.org/sites/default/files/AAC\\_PETITION\\_13-04-23a.pdf](http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf)>.

<sup>61</sup> For more information on the role of human rights treaty bodies in the context of climate change, see CIEL and The Global Initiative for ESC Rights, *States' Human Rights Obligations in the Context of Climate Change: 2019 Update* (2019), available at <<https://www.ciel.org/reports/states-human-rights-obligations-context-climate-change-2019-update/>> accessed 20 May 2019.

<sup>62</sup> European Union General Court, 'Action brought on 23 May 2018 — Carvalho and Others v. Parliament and Council T-330/18' 61 *Official Journal of the European Union* 2018/C 285/51 (2018) (hereinafter *Carvalho and Others v. Parliament and Council*).

<sup>63</sup> European Parliament and Council, 'Directive 2018/410 of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814', 61 *Official Journal of the European Union* L 76/3 (2018); European Parliament and Council, 'Regulation 2018/842 of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013' 61 *Official Journal of the European Union* L 156/26 (2018); European Parliament and Council, 'Regulation 2018/841 of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU' 61 *Official Journal of the European Union* L 165/1 (2018).

order the EU to adopt and implement more stringent measures for the reduction of greenhouse gas emissions.<sup>64</sup>

In particular, the applicants used human rights arguments to contend that the EU is obliged to prevent climate change related violations of the rights protected by the Charter of Fundamental Rights of the EU, including the rights to health, life, work, property, and equal treatment, as well as the rights of children to such protection and care as is necessary for their well-being and education.<sup>65</sup> Human rights obligations are thus here used to argue that the EU ‘is responsible for taking measures to regulate emissions of greenhouse gases from within the Union to avoid [this] harm and to prevent infringements of fundamental rights’, and to ‘adopt positive steps to reduce emissions even if these are attributed to private actors’.<sup>66</sup> In construing their arguments, the applicants invoked the case law of the European Court of Human Rights concerning the duty of a state to protect its citizens from environmental harm;<sup>67</sup> and they relied on the customary international law obligation to prevent significant harm in areas beyond national jurisdiction—thereby justifying the inclusion of applicants from Kenya and Fiji.<sup>68</sup> The precautionary approach was furthermore used as a basis to ask for measures averting widespread human rights violations associated with delays in climate change mitigation.<sup>69</sup> Finally, the applicants put forward criteria to determine what may be considered adequate action on the basis of principles enshrined in international climate treaties, including equity, the right to development, and common but differentiated responsibilities and respective capabilities.<sup>70</sup>

At the time of writing, the CJEU is in the process of deciding on the admissibility of the case. The defendants filed pleas of inadmissibility, contending that the CJEU is an inappropriate forum to address widespread responsibility, uncertain causation, and damages that are not individually felt but rather indistinguishable.<sup>71</sup> They concluded that the applicants’ redress would be better attained through legal action before national courts.<sup>72</sup> However, the applicants have retorted that the 2030 Climate and Energy Framework sets EU member states on track to emit ‘unlawfully excessive’ greenhouse gases, constituting an interference with the enjoyment of the applicants’ human rights.<sup>73</sup>

<sup>64</sup> *Action brought on 23 May 2018 — Carvalho and Others v. Parliament and Council*, supra nota 61, at 35.

<sup>65</sup> European Parliament, Council and Commission, ‘Charter of Fundamental Rights of the European Union’, 55 *Official Journal of the European Union* C 326/2 (2012). See art. 35 (health care), art. 2 (right to life), art. 15 (right to engage in work), art. 17 (right to property), art. 20 (equality before the law), art. 24 (right of the child).

<sup>66</sup> *Carvalho and Others v. Parliament and Council*, available at <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/07/application-delivered--european-general-court.pdf>, at para 165.

<sup>67</sup> *Ibid.*, at para. 173.

<sup>68</sup> *Ibid.*, at para. 207.

<sup>69</sup> *Ibid.*, at para. 217.

<sup>70</sup> *Ibid.*, at paras. 190 and pp. 37-54.

<sup>71</sup> *Carvalho and Others v. Parliament and Council*, Applicant’s Reply to the Defendants’ Pleas of Inadmissibility (2018), available at <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/12/submission-10122018-plea-of-inadmiss.pdf>.

<sup>72</sup> *Ibid.*, at 24.

<sup>73</sup> *Ibid.*, at 32.

Far from ‘treating climate change as a series of individual transboundary harms’, therefore, the applicants here are trying to argue that climate change should be averted because it systematically threatens the enjoyment of human rights, within and without the territory of the EU. Regardless of its outcome, the People’s Climate Case is significant, in that it challenges a package of climate legislation even before it is implemented, arguing that its implementation would lead to systemic breaches, not only of the rights of EU citizens, but also of those residing outside the EU.

#### 4. The Use of Human Rights Arguments against Corporate Actors

State and non-state actors around the world are increasingly suing corporations for harm associated with climate change.<sup>74</sup> While these law suits have largely been argued on the basis of tort law, applicants have recently started to argue that corporations hold specific human rights responsibilities in this connection.

However, this is an area where human rights law is not clear-cut. The so-called business and human rights regime hinges on the state duty to protect, the corporate responsibility to respect, and access to remedies, which form the three pillars of the UN Guiding Principles on Business and Human Rights.<sup>75</sup> While these principles are commonly regarded as soft law, recent developments provide some evidence that the corporate responsibility to respect human rights has gained traction in both national and international law.<sup>76</sup>

As testified by the ongoing negotiations on an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,<sup>77</sup> and by developments in national law,<sup>78</sup> and decisions by national<sup>79</sup> and international courts, in recent years much attention has been dedicated to clarifying corporate responsibility vis-à-vis the protection of human rights. For example, in *Urbaser v. Argentina*, an arbitral tribunal relied on international human rights law to conclude:

<sup>74</sup> See the reportage: Climate Liability News, ‘Exxon Climate Investigation’, *Climate Liability News*, available at: <<https://www.climateliabilitynews.org/category/exxon-climate-investigation/>>

<sup>75</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31 (2011).

<sup>76</sup> See discussion in Ioana Cismas and Sarah Macrory, ‘The Business and Human Rights Regime under International Law: Remedy without Law?’ in *Non-State Actors and International Obligations: Creation, Evolution and Enforcement*, edited by James Summers and Alex Gough (Brill, 2018) at 224-260.

<sup>77</sup> The process was initiated by the Human Rights Council in 2014, with Resolution 26/9, *Elaboration of an International Legally Binding Instrument on Transnational and other Business Enterprises with respect to Human Rights*, UN Doc A/HRC/RES/26/9. See:

<<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>>

<sup>78</sup> See the review of legislation in Claire Methven O’Brien, and Sumithra Dhanarajan, ‘The Corporate Responsibility to Respect Human Rights: A Status Review’, 29(4) *Accounting, Auditing and Accountability Journal* 542 (2015), pp. 542-567.

<sup>79</sup> See for example *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20; *Rechtbank Den Haag 1 May*, C/09/540872 / HA ZA 17-1048 [2019] ECLI:NL:RBDHA:2019:4233.],

At this juncture, it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by *an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.*<sup>80</sup>

It is therefore no surprise that complaints against corporations on the basis of human rights arguments have started to make their appearance also in climate change litigation databases.<sup>81</sup>

The so-called Carbon Majors inquiry is especially representative of the type of arguments made in these complaints.<sup>82</sup> The inquiry – which is in its conclusive stages at the time of writing – was initiated by Human Rights Commission of the Philippines to establish the responsibility of the world's largest corporate emitters for human rights violations, or threats thereof, resulting from the impacts of climate change.<sup>83</sup> The inquiry was initiated at the request of a group of Filipino citizens and NGOs, following the widespread loss of life and harm to property and persons associated with the increasingly extreme weather events affecting the Philippines.<sup>84</sup> The petitioners based their arguments on the human rights obligations enshrined in both national and international law, suggesting that these instruments impose specific obligations on the Carbon Majors.<sup>85</sup>

The inquiry is unique for three main reasons. First, the inquiry deals with the impacts of climate change in an extraterritorial context but – unlike the IACHR petitions described above – it does not target states, but corporations headquartered outside of the Philippines. Second, the inquiry is being conducted by a national human rights commission, which is a quasi-judicial body normally tasked to look into domestic breaches of human rights issues, rather than into transnational ones. Therefore, the remedies that the Commission can offer are constrained by the domestic authorities'

<sup>80</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para. 1999 (emphasis added).

<sup>81</sup> Namely: *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. and Others*; *Greenpeace Southeast Asia et al*; and the action announced by Milieudefensie and other NGOs against Shell in the Netherlands in April 2019, available at <<https://en.milieudefensie.nl/climate-case-shell/friends-of-the-earth-netherlands-sues-shell-for-causing-climate-change>>.

<sup>82</sup> This section of the paper draws on the reflections in Savaresi, Hartmann and Cismas, *supra* note 2422.

<sup>83</sup> Decision of Philippines Human Rights Commission to assert its jurisdiction to investigate the petition, see National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People (2017), available at

<[http://www.greenpeace.org/seasia/ph/PageFiles/735291/Press%20Release%20\(NICC%20Press%20Con%2012%20Dec.%202017\).docx](http://www.greenpeace.org/seasia/ph/PageFiles/735291/Press%20Release%20(NICC%20Press%20Con%2012%20Dec.%202017).docx)> accessed 2 November 2018.

<sup>84</sup> Republic of the Philippines Commission on Human Rights, *Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Case No: CHR-NI-2016-0001 (2015), available at:

<<http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf>> accessed 2 November 2018.

<sup>85</sup> Annalisa Savaresi, Ioana Cismas and Jacques Hartmann, 'Amicus Curiae Brief: Human Rights and Climate Change' (Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions 2017) 6, <[www.asiapacificforum.net/media/resource\\_file/APF\\_Paper\\_Amicus\\_Brief\\_HR\\_Climate\\_Change.pdf](http://www.asiapacificforum.net/media/resource_file/APF_Paper_Amicus_Brief_HR_Climate_Change.pdf)> accessed 5 July 2018.

limited capability to affect the behaviour of the Carbon Majors.<sup>86</sup> Third – and unlike the Dutch and the Colombian cases analysed above – several of the petitioners have allegedly already experienced actual harm associated with the impacts of climate change.

Should the Philippine Human Rights Commission find that the Carbon Majors' are responsible for human rights violations resulting from the impacts of climate change, this would be a primer and could have repercussions on the use of human rights arguments in ongoing climate change litigation against the Carbon Majors elsewhere. For example, Friends of the Earth (Netherlands), six NGOs and around 400 citizens have recently announced their plans to sue Shell for breaches of the duty of care associated with its contribution to climate change and its continued investments in fossil fuels. Similar to *Urgenda*, the applicants are planning to rely, amongst others, on the right to life and the right to respect for private and family life, home and correspondence recognised by the European Convention of Human Rights.<sup>87</sup>

The outcome of the Carbon Majors inquiry may therefore resonate well beyond the Philippines. For the time being, the inquiry has already set a significant precedent, by showing that a national human rights commission may look into the responsibility of corporate actors headquartered outside of the state where it operates. The inquiry's findings may furthermore establish that corporations may be held responsible for human rights violations associated with the impacts of climate change, marking another milestone in the history of climate change litigation worldwide.

## 5. Conclusion

Given the pace of new developments, a review of the use of human rights arguments in climate change litigation could not but provide a snapshot of a rapidly changing picture. This analysis shows that these human rights arguments have clearly built on and gone beyond those made in earlier case law concerning human rights and the environment. Climate change law developments following the adoption of the Paris Agreement are clearly blowing wind in the sails of the burgeoning debate on the links between human rights and environmental law.<sup>88</sup> It is therefore no coincidence that the UN Special Rapporteur is now preparing a new thematic report focusing on human rights obligations related to climate change, including for the first time a right to a stable climate.<sup>89</sup>

So far, some significant milestones have been achieved. Applicants in *Urgenda* and *Future Generations v. Colombia* have convinced courts to grant declaratory relief, expose inaction, and order states to do more to tackle climate change. These decisions have relied on a novel approach to the interpretation of human rights vis-à-vis climate

<sup>86</sup> See Savaresi, Hartmann and Cismas, *supra* note 24.

<sup>87</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 30, arts. 2 and 8.

<sup>88</sup> As noted also in Savaresi, *supra* note 11.

<sup>89</sup> See Call for Inputs: Climate Change and Human Rights - a Safe Climate, available at <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SafeClimate.aspx>

change law obligations. However, human rights remedies offer little, if any, compensatory relief for the impacts of climate change, few means to deter further harm, and clearly are no replacement for tort-like liability for climate change impacts. Yet, successful human rights arguments can help to bring about a change in attitude by courts and lawmakers.<sup>90</sup> In this connection, human rights law can contribute to engendering a momentum to deal with one of the most intractable challenges yet to face humankind, by better considering the rights of future generations, and by better protecting those living outwith a state's territory against harm caused by climate change.<sup>91</sup>

Looking ahead, we expect that these successes will inspire others to use human rights arguments to put pressure on state and corporate actors, both to increase ambition in combating climate change and to redress harm caused by its impacts. The outcome of pending complaints, such as the Carbon Majors inquiry and the People's Climate case, may further embolden applicants or suggest new avenues to test the full potential of human rights arguments.

This article has sought to demonstrate that the boundaries of the law have already been shifted. Human rights arguments have been used not only to complain about actual harm, but also about future harms, and not only caused by states, but also by corporate actors, even in an extraterritorial context. We have therefore already gone a long way, compared with where we were only ten years ago, when the OHCHR report made its first assessment of the state of play. What the future may hold clearly depends on the capacity of applicants to consolidate the bridges that these early cases have built, and to continue to use them; and it also depends on judges' willingness to recognize that human rights and climate change obligations are mutually reinforcing and should be read alongside one another.<sup>92</sup>

<sup>90</sup> As suggested for example in Boyle, 'Human Rights and the Environment', supra note 1, at 642.

<sup>91</sup> As argued in Savaresi et al., supra note 24, at 16.

<sup>92</sup> As argued also in Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages', in *Routledge Handbook of Human Rights and Climate Governance*, edited by Sébastien Duyck et al. (Routledge, 2018), 31-43, 42.