

PREVENTING CLIMATE HARM: THE ROLE OF RIGHTS-BASED LITIGATION

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ABSTRACT

Climate change is a global problem that has the potential to cause catastrophic harm, and courts have started to play an important role in attempts to turn the tides. In the global wave of climate litigation, we see increasing reliance on human rights in plaintiffs' submissions and judicial rulings. This article focuses on specific asks put forward in rights-based climate cases that focus on mitigation or harm prevention. It considers what remedies are requested, and analyzes results achieved in cases that have been decided thus far. The key finding is that rights-based climate litigation has begun to facilitate access to justice for preventable future harm, and there is considerable potential for upcoming judicial decisions in pending cases to strengthen and broaden this access to justice even further.

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INTRODUCTION

Climate change is a global problem that has the potential to cause catastrophic harm, and courts have started to play an important role in addressing it. As litigants seek to mitigate the effects of climate change and avoid its harms, they have increasingly turned to the courts to seek

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remedies that provide effective protection from the impacts of climate change.¹ While litigants have filed cases seeking damages, courts have also been used to compel climate action.² Climate litigation provides citizens with access to courts to force or block government action on climate change, to change corporate behavior, and to secure access to the benefits of clean energy. Human rights are often central to these legal challenges, providing both an avenue by which to challenge climate change and protect the rights of the most vulnerable people in society. According to the Global Climate Litigation Snapshot 2022, the use of human rights law and remedies to address climate-related concerns “continues to intensify.”³ Indeed, rights-based climate litigation⁴ has already prompted courts worldwide to demand increased mitigation ambition from states—and more recently also from private companies. This growing trend has the potential to impact policy and could catalyze change at a systemic level, not only through court victories but also through extra-legal impacts such as awareness-raising and strengthening the agency of frontline communities and activists to confront the vested interests of the fossil fuel sector. In these ways, climate litigation can provide the missing link between international promises and domestic action.

The rapid rise of rights-based climate litigation can be traced back to 2013 when Urgenda, a Dutch environmental NGO, brought a landmark

¹ *In Battle Against Climate Change, Courts Become A New Frontier*, UNEP (28 May 2021), <https://www.unep.org/news-and-stories/story/battle-against-climate-change-courts-become-new-frontier> [<https://perma.cc/L9M3-ZGYD>].

² Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENV'T L.* 37 (2018).

³ Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, LONDON SCH. ECON. 1, 4 (2022), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf> [<https://perma.cc/X5JZ-7XJC>].

⁴ For the purpose of this article, rights-based climate litigation is defined as litigation where the plaintiff(s) seeks to hold governments or corporations to account for climate action or inaction based on human rights grounds. This definition is operationalized by including only those cases which (a) explicitly include human rights arguments in the plaintiff's submissions, and (b) raise material issues of law or fact related to climate change mitigation, adaptation, or the science of climate change. Notably, part (b) corresponds to the definition that guides the collection of cases included in the Sabin Center for Climate Change Law's US and non-US climate change litigation charts, as well as the Climate Change Laws of the World database, maintained jointly by the Sabin Center for Climate Change Law and the Grantham Research Institute at the London School of Economics. *Climate Change Laws of the World*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T (June 26, 2022), <https://climate-laws.org/methodology-legislation> [<https://perma.cc/8R2T-UQ4F>].

case against the State of the Netherlands, seeking to compel the state to enhance the level of ambition in its climate policies.⁵ At first instance, the Hague District Court largely agreed with Urgenda's claims and ordered the state to adopt more ambitious national targets to reduce greenhouse gas emissions.⁶ Subsequently, both the Court of Appeal and the Supreme Court of the Netherlands rejected a government appeal, affirming the lower court's judgment and opining that the state has a duty of care to protect residents of the Netherlands against dangerous climate change.⁷ As of September 2022, 135 rights-based climate cases have been filed in total, including 110 cases before domestic courts in thirty-nine different countries and 28 cases launched before regional and international human rights bodies.⁸ While judicial involvement in addressing climate change is the subject of an ongoing academic debate,⁹ the role of the judiciary in safeguarding human rights affected by climate change, or by measures taken to respond to climate change, is widely recognized.¹⁰

This article reviews remedies plaintiffs have sought and/or secured in rights-based climate litigation seeking mitigation measures (which is understood as "efforts to reduced greenhouse gas emissions as well as efforts to enhance carbon sinks").¹¹ While remedies are not the only factor influencing the impact of rights-based climate cases, the concrete asks that are put forward in litigation are a significant factor in climate litigation's capacity to contribute to the realization of climate justice.

⁵ HA 24 juni 2015, ECLI 2015, 7196 m.n.t. Bodenzaak (Urgenda Stichting en Nederland) (Neth.).

⁶ *Id.* ¶4.85.

⁷ HA 24 december 2019, ECLI 2019, 2007 m.n.t. Cassatie (Urgenda Stichting en Nederland) (Neth.).

⁸ See *Climate Change Litigation Database*, SABIN CTR. FOR CLIMATE CHANGE L., (2022), <http://climatecasechart.com/> [<https://perma.cc/XWV5-96TV>].

⁹ See, e.g., K. J. de Graaf & J. H. Jans, *The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change*, 27 J. ENV'T L. 517 (2015). Josephine van Zeven, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*, 4 TRANSNAT'L ENV'T L. 339, 339–357 (2015).

¹⁰ See, e.g., Laura Burgers, *Should Judges Make Climate Change Law?*, 9 TRANSNAT'L ENV'T L. 55, 55-75 (2020). Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L. Q. 731, 764 (2019). Christina Eckes, *The Shell Case in Light of Separation of Powers: The Courts Strike Back*, VERFBLOG (June 15, 2021), <https://verfassungsblog.de/the-courts-strike-back/> [<https://perma.cc/K52J-QKMT>].

¹¹ See *Introduction of Mitigation*, UNFCCC (access date), <https://unfccc.int/topics/mitigation/the-big-picture/introduction-to-mitigation> [<https://perma.cc/JM4W-5TX7>]. See also Laura Schäfer et al., *National and International Approaches to Address Loss and Damage from Slow-onset Processes – Status Quo, Challenges, and Gaps*, GERMANWATCH (Feb. 2021), <https://www.germanwatch.org/en/20127> [<https://perma.cc/D77K-BTT9>].

Studying current practice in rights-based climate litigation relating to remedies therefore has the potential to contribute insight into the capacity of human rights law to contribute to systemic change. Conducting an analysis of remedy claims advanced in these cases at a relatively early stage, with many cases still pending, means that an assessment of the normative developments triggered by these cases involves a degree of speculation. Still, assessing remedies sought in these pending cases, in addition to examining remedies won and denied in early decisions, will provide important indications about the direction these developments may take. Further, assessing early results of rights-based climate litigation helps us understand what kind of remedy claims seem to “fly” and conversely, what kind of claims may have a lower prospect of success before courts and human rights bodies.

The article is divided in two parts. The first part provides an overview of mitigation-focused remedies sought in rights-based climate litigation to date. The second part reviews results obtained in these cases so far and reflects on trends and prospects. In the analysis, particular attention is paid to the ways in which remedy claims engage with the responsibilities of states towards people within their territories who are disproportionately affected by the impacts of climate change, such as local and Indigenous communities. The conclusion provides reflections on the contributions of these cases to the overall protection and promotion of human rights in the context of climate change, as well as some considerations for moving forward. The key finding is that rights-based climate litigation is starting to support access to justice for future climate harm that can still be prevented, with the extent of its contribution depending to a significant extent on judicial decisions in cases that are currently pending.

I. MAPPING THE FIELD

Mitigation-centric remedy claims in domestic rights-based climate litigation are relatively numerous (103 cases). Among those claims, there is significant variety in the type and scope of remedies sought. First, a distinct category of cases focuses on securing changes to a state’s climate policy so as to bring it in line with international standards. The most prominent example is *Urgenda Foundation v. State of the Netherlands (Urgenda)*, mentioned above, in which the claimant sought a ruling ordering the Dutch government to reduce greenhouse gas emissions

by 25-40 percent compared to 1990 levels in 2020.¹² Cases seeking similar orders have been filed in Belgium,¹³ the Czech Republic,¹⁴ France,¹⁵ Germany,¹⁶ Ireland,¹⁷ Italy,¹⁸ South Korea,¹⁹ Switzerland,²⁰ and the United Kingdom.²¹ Related cases, most notably *Notre Affaire à Tous and others v. Total (Total)*²² and *Milieudefensie et al v. Royal Dutch Shell Plc (Milieudefensie)*,²³ seek orders requiring fossil fuel companies to bring their policies and practices in line with the goals of the Paris Agreement. Other cases, including *Juliana v. United States (Juliana)*,²⁴ and numerous similar cases filed in the United States (at both the federal and state levels),

¹² HA 24 juni 2015, ECLI 2015, 7196 m.n.t. Bodenzaak (Urgenda Stichting en Nederland) (Neth.).

¹³ Klimaatzaak v. Kingdom of Belgium and Others, Judgment, (Brussels Ct. First Instance, June 17, 2021). See also Charlotte Renglet & Stefaan Smis, *The Belgian Climate Case: A Step Forward in Invoking Human Rights Standards in Climate Litigation?*, AM. SOC'Y INT'L L. INSIGHTS, Oct. 2021, at 1.

¹⁴ Městský soud v. Praze 21.4.2021 [MS] [Circuit Court in the City of Prague] (Petition Filed) (Czech).

¹⁵ Conseil d'État [CE] [highest administrative court] Nov. 19, 2020, 427301. *External Contribution to the French Constitutional Council*, CLIMATE CHANGE LITIG. DATABASE, (Oct. 15, 2020), <http://climatecasechart.com/non-us-case/external-contribution-to-the-french-constitutional-council/> [https://perma.cc/JET4-RTVA].

¹⁶ Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court], Feb. 6, 2020. (Ger.).

¹⁷ Friends of the Irish Environment CLG v. Government of Ireland [2020] IESC 49 (SC).

¹⁸ Petition, Association A Sud and Others v. Italy, Tribunale Ordinario di Roma, 5 giugno 2021. http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210605_14016_petition.pdf [https://perma.cc/A85U-8XBV].

¹⁹ Compliant, Do-Hyun Kim et al. v. South Korea [Const. Ct], Mar. 13, 2020. <http://climatecasechart.com/non-us-case/kim-yujin-et-al-v-south-korea/> [https://perma.cc/UC2Q-FCW4].

²⁰ Bundesgericht [BGer] [Federal Supreme Court], May 5, 2020, 1C_37/2019 (Switz).

²¹ Plan B Earth v. The Sec'y of State for Bus., Energy, and Indus. Strategy [2018], EWHC 1892 (Admin) (U.K.).

²² Complaint, Notre Affaire a Tous and others v. Total, Tribunal Judiciaire [Dist. Ct.] Nanterre, 2020, Jan. 28, 2020, <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/#:~:text=The%20plaintiffs%20allege%20that%20Total,brought%20before%20the%20commercial%20court> [https://perma.cc/S8WJ-98FP].

²³ *RBDHA Haag, 26 mei 2021*, HA ZA 19-379 2021, Milieudefensie/Royal Dutch Shell plc. (Neth). See Benoit Mayer, *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: Milieudefensie v. Royal Dutch Shell – District Court of The Hague (The Netherlands)*, 11 TRANSNAT'L ENV'T L. 407, 407-418 (2022) (critiquing the judgement).

²⁴ See *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). See also Renee N. Salas, Wendy Jacobs, and Frederica Perera, *The Case of Juliana v. U.S. — Children and the Health Burdens of Climate Change*, 380 NEW ENG. J. MED. 2085, 2085-2087 (2019). Robin Kundis Craig, *Juliana, Climate Change, and the Constitution*, 35 NAT. RES. & ENV'T 53, 53-55 (2020). Dana Neacșu, *The Aesthetic Ideology of Juliana v. United States and its Impact on Environmentally Engaged Citizenship*, 12 J. ENV'T STUD. & SCI. 28, 28-42 (2022).

as well as in Canada,²⁵ India,²⁶ Pakistan,²⁷ and Uganda,²⁸ seek specific mitigation measures, including the draw-down of excess atmospheric carbon dioxide, based on the best available scientific evidence. Again other cases seek to prevent the approval or implementation of specific projects or activities that would contribute significantly to global emissions, such as oil and gas exploration in Norway;²⁹ a coal-fired power plant in South Africa;³⁰ airport expansions in Austria;³¹ and the United Kingdom;³² or the protection and restoration of carbon sinks in countries such as Colombia,³³ India,³⁴ Pakistan,³⁵ Nepal,³⁶ Peru,³⁷ and Brazil.³⁸ Finally, cases in Ukraine,³⁹ Brazil,⁴⁰ and Sweden have sought procedural remedies relating to transparency in decision-making on climate

²⁵ See *La Rose v. Her Majesty the Queen*, [2019] T-1750-19 (Can Fed. Ct.).

²⁶ See *Ridhima Pandey v. Union of India & others*, 2019, No. 187/2017 (case dismissed) (India).

²⁷ See *Maria Khan v. Federation of Pakistan*, 2019, 8960 (Lahore High Court).

²⁸ See *Complaint, Mbabazi v. The Attorney General and National Environmental Management Authority*, High Court of Uganda, Aug. 28, 2015. <http://climatecasechart.com/non-us-case/mbabazi-et-al-v-attorney-general-et-al/> [<https://perma.cc/MXH8-QMNJ>].

²⁹ Rt. 2021 s. HR-2020-846-J (*Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*). See also *Christina Voigt, The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics*, 33 J. ENV'T L. 697, 697-710 (2021).

³⁰ *EarthLife Africa Johannesburg v. Minister of Environmental Affairs* 2017 (2) All SA 519 (CC) (S. Afr.).

³¹ *Bundesverwaltungsgericht [BVwG] [Federal Administrative Court]* Feb. 2, 2017 W109 2000179-1/291E (Austria).

³² *Plan B Earth v. The Secretary of State for Transport* [2020] UKSC 52 (U.K.).

³³ *Corte Suprema de Justicia [C.S.J] [Supreme Court]*, abril 5, 2018, M.P.: L. Armando Tolosa Villabona, STC4360-2018 (Colom.). See *Complaint, Devant Le Tribunal Judiciaire [Judicial Court] Saint-Étienne*, Mar. 2, 2021 (Fr.).

³⁴ See *Ridhima Pandey v. Union of India & others*, 2019, No. 187/2017 (case dismissed) (India).

³⁵ *Farooq v. Fed'n of Pak.* (2018), Stereo H CJ DA 38 (Pak.).

³⁶ *Pro Pub. v. Godavari Marble Indus.*, 068-WO-0082, Sup. Ct. (2016) (Nepal).

³⁷ *Complaint, Álvarez et. al. v. Peru*, Super Ct. Lima (Dec. 16, 2019), <http://climatecasechart.com/non-us-case/alvarez-et-al-v-peru/> [<https://perma.cc/CBL6-MCSY>].

³⁸ *Application, PSB et al v. Brazil*, S.T.F.J. (Nov. 11, 2020), <http://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/> [<https://perma.cc/38MT-A3Y5>]. *Complaint, Envol Vert et al v. Casino, St. Étienne* Jud. Ct. (Mar. 2, 2021), <http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/#:~:text=Summary%3A,environmental%20and%20human%20rights%20harms>

[<https://perma.cc/6KE5-VBFJ>].

³⁹ *Access to Information on International GHG Emissions Trading by Ukraine*, ENV'T PEOPLE L. (Jan. 27, 2017), <http://epl.org.ua/en/environment/6599/> [<https://perma.cc/LZH2-N4KU>].

⁴⁰ *Complaint, Parents for Future Brazil v. State Government of Sao Paulo*, Ct. Just. S.P., (Nov. 25, 2020) https://climate-laws.org/geographies/brazil/litigation_cases/parents-for-future-brazil-v-state-government-of-sao-paulo-familias-pelo-clima-vs-governo-do-estado-de-sao-paulo [<https://perma.cc/2BB7-QHRE>].

mitigation or emission-producing activities.⁴¹ The vast majority of cases (eighty-five) in this category are filed against public actors, including fifty-two cases against governments in the Global North and thirty-three cases against governments in the Global South. Fifteen cases in this category are filed against corporations.

In addition to these domestic cases, there are several international cases that have sought to hold states accountable for their emissions in the context of sustainable development and climate change. In terms of the scope and ambition, some cases—most notably *Union of Swiss Senior Women v. Switzerland*,⁴² *Mex M v. Austria*,⁴³ *Plan B v. United Kingdom*,⁴⁴ and *Careme v. France*,⁴⁵ all filed before the ECtHR—mirror the *Urgenda*-type claims pursued before domestic courts. In all these cases, relief centers on bringing the state's climate policy in line with international standards, most notably the long-term temperature goal contained in the Paris Agreement.⁴⁶ Also noteworthy about this set of cases is their focus on the differentiated impacts (both economic and environmental) that climate change will have on different segments of the population, such as women, youth, and persons with disabilities.⁴⁷ In contrast, the right of Indigenous peoples to protect their culture and way of life featured center-stage in *Billy et al v. Australia (Torres Strait Islanders)*.⁴⁸ In this case, the

⁴¹ Ricardo Luporini, *The 'Last Judgment': Early Reflections on Upcoming Climate Litigation in Italy*, 77 QUESTIONS INT'L L., 27-34 (2021).

⁴² *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*, App. No. 53600/20, (Nov 26, 2020), <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/> (where the applicants seek a declaration from the ECtHR that Switzerland has violated their rights under the ECHR as a result of its inadequate climate policies and the failure of the domestic courts to undertake a substantive review of relevant Convention provisions in light of the alleged violations).

⁴³ *Complaint, Mex M v. Austria*, (Mar. 25, 2021) (where the applicant asks the ECtHR to find that his Convention rights were violated because of Austria's failure to more quickly and effectively combat climate change) <http://climatecasechart.com/non-us-case/mex-m-v-austria/> [<https://perma.cc/NB8Y-BXHQ>].

⁴⁴ *Complaint, Plan B. Earth and Others v. U.K.*, (July 11, 2022) <http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/> [<https://perma.cc/F554-4XYM>].

⁴⁵ Press Release, *Careme v. France*, Eur. Ct. H.R. (June 7, 2022) <http://climatecasechart.com/non-us-case/careme-v-france/> [<https://perma.cc/6RNN-23JW>].

⁴⁶ Lucy Maxwell et al., *Standards for Adjudicating the Next Generation of Urgenda-style Climate Cases*, 13 J. HUM. RTS. & ENV'T. 35, 35-63 (2022).

⁴⁷ *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*, Eur. Ct. H.R., 2017. *Mex M v. Austria*, Eur. Ct. H.R. (2021); *Mex M v. Austria*, Eur. Ct. H.R. (2021).

⁴⁸ Human Rights Council Dec. *Billy v. Australia*, U.N. Doc. CCPR/C/135 (2019), <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations->

authors of the communication sought more specific mitigation-related relief: alongside asks relating to adaptation, they asked the UN Human Rights Committee to recommend that Australia reduce its emissions by at least 65 percent below 2005 levels by 2030 and to net zero before 2050, and to phase out thermal coal.⁴⁹ Other cases have sought relief targeting emission-intensive projects,⁵⁰ procedural relief related to mitigation,⁵¹ and, finally, six cases seek mitigation-related redress from regional organizations representing multiple states, or from multiple states simultaneously.⁵² The global significance of these cases will be discussed below.

human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/ [https://perma.cc/M678-UTAC].

⁴⁹ *Id.*

⁵⁰ Complaint, Case T-141/19, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, 2005 E.C.R. (discussed below). Relief targeting emission-intensive projects is also sought in a case pending before the East African court of Justice. *Id.* Application for Injunction, Ctr. for Food and Adequate Living Rts. et al. v. Tanz. and Uganda, ECLI:EU:C, (Nov. 6, 2020) <http://climatecasechart.com/non-us-case/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda/> [https://perma.cc/LNH9-QSKW]. In this case, the applicants seek an injunction to stop the East African Crude Oil Pipeline based on the alleged failure of Tanzania and Uganda to conduct proper environmental, social, human rights, and climate impact assessments as required under Ugandan domestic law and the East African Community Treaty and its protocols. *Id.* Application for Injunction, Ctr. for Food and Adequate Living Rts. et al. v. Tanz. and Uganda, ECLI:EU:C, (Nov. 6, 2020) <http://climatecasechart.com/non-us-case/center-for-food-and-adequate-living-rights-et-al-v-tanzania-and-uganda/> [https://perma.cc/LNH9-QSKW]. In this case, the applicants seek an injunction to stop the East African Crude Oil Pipeline based on the alleged failure of Tanzania and Uganda to conduct proper environmental, social, human rights, and climate impact assessments as required under Ugandan domestic law and the East African Community Treaty and its protocols. *Id.*

⁵¹ Case C-524/09, City of Lyon v. French Deposits and Consignments Fund, E.C.R. (2009) (in which the City of Lyon requested the CJEU to rule that the administrator of the French national registry had an obligation to release information on the sales of emissions allowances by the operators of the urban heating sites). In its decision, the court found that the data could not be released because it had not reached the expiry of the five-year period prescribed by the relevant EU regulation, and because the public interest served by disclosure did not outweigh the public interest in maintaining statistical confidentiality and tax secrecy. *Id.* Case T-9/19, ClientEarth v. European Inv. Bank, ECLI:EU:C, (Jan. 27, 2021). In its decision, the General Court of the European Union ordered the European Investment Bank to accept ClientEarth's petition for internal review of its decision to finance a biomass power plant. *Id.*

⁵² Case T-330/18, Armando Ferrão Carvalho and Others v. The European Parliament and the Council, ECLI:EU:T:2019, ¶ 4 (May 8, 2019), *aff'd* ECLI:EU:C:2021, (Mar. 25, 2021). Communication to the Committee, Chiara Sacchi et al. v. Argentina et al., Committee on the Rights of Child, U.N. Doc. CRC/C/88/D/104 (2019) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf [https://perma.cc/E6JF-DRSA]; Case T-114/19, Peter Sabo and others v.

II. UNDERSTANDING THE EVOLVING PRACTICE ON REMEDIES

Most of the cases discussed here are still pending; however, analysis of results obtained thus far reveals a mixed record of judgements: court outcomes range from an order on the State of the Netherlands to reduce its emissions by at least 25 percent against 1990 levels by 2020 in *Urgenda* to an outright rejection of the petitioners' claim in *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*.⁵³ Irrespective of their outcome, however, judicial pronouncements in these cases reflect broad acceptance of the premise that the judiciary "is obligated to determine whether the political branches have failed to recognize or uphold fundamental rights and to remedy any wrongs found to be endangering these rights."⁵⁴ Further, virtually all rulings in these cases recognize human rights law, the Paris Agreement, and IPCC reports as providing standards applicable in the judicial assessment of states' climate action.⁵⁵ Many rulings also recognize the existence of a justiciable legal obligation to reduce greenhouse gas emissions in light of those standards.⁵⁶ *Milieudefensie* notably extended this set of premises to a transnational corporation.⁵⁷ If upheld on appeal and/or replicated in other jurisdictions, this decision could contribute significantly to enhanced accountability of transnational corporations for their contributions to global emissions over time.⁵⁸

European Parliament and others, ECLI:EU:T:2020, ¶ 2 (May 6, 2020), aff'd ECLI:EU:C:2021, (Jan. 14, 2021); Complaint, Duarte Agostinho and Others v. Port., Eur. Ct. H.R. (Sept. 2, 2020) http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf [<https://perma.cc/YJS6-PAXE>]; Five Young People v. Fr., Ger., the U.K., and 9 other states, CRRP (Jan. 26, 2023), <https://climaterightsdatabase.com/2022/06/21/five-young-people-v-france-germany-the-uk-and-9-other-states/> [<https://perma.cc/WM4Q-ZUAV>]; De Conto and Uricchio v. It. and 32 other States, CRRP (Jan. 26, 2022). <https://climaterightsdatabase.com/2022/08/16/de-conto-and-uricchio-v-italy-and-32-other-states/> [<https://perma.cc/YM6Y-2MFB>].

⁵³ *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*, HR. 2020 s. 30.

⁵⁴ Cinnamon Piñon Carlarne, *The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis*, in *DEBATING CLIMATE LAW 118* (B. Mayer & A. Zahar eds., 2021).

⁵⁵ See CÉSAR RODRÍGUEZ-GARAVITO, *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, in *LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION* (2022).

⁵⁶ *Id.* at 21.

⁵⁷ Rb. Hague 26 mei 2021, RvdW 2021, (Vereniging Milieudefensie/Royal Dutch Shell PLC)(Neth.).

⁵⁸ See André Nollkaemper, *Shell's Responsibility for Climate Change: An International Law Perspective on a Groundbreaking Judgment*, *VERFASSUNGSBLOG* (May 28, 2021),

Considering the outcome of cases, success or failure has often hinged on the question whether a state has acted within its discretion to ensure compliance with its human rights obligations to mitigate climate change. Hereby the assessment tends to focus on a state's obligation towards people within its own territory; attempts to establish similar mitigation obligations on behalf of people located abroad have largely failed.⁵⁹ Nonetheless, there is emerging caselaw reflecting recognition of ecological debt owed by the Global North to the Global South. Perhaps most pronounced is the Supreme Court of the Netherlands' reliance on the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) in the interpretation of the provisions of the ECHR; a principle which according to the court entails that responsibility for mitigation measures must be based on "responsibility for past emissions by a country," and that "consideration must also be given to the possibilities for countries to reduce their emissions."⁶⁰ Further, the court emphasized that "the underlying principle of these widely accepted rules is always that, in short, 'partial fault' also justifies partial responsibility."⁶¹ On this basis, the court held that the state was obliged to reduce greenhouse gas emissions from its territory "in proportion to its share of responsibility."⁶² The Federal Constitutional Court of Germany extended this reasoning to accommodate intergenerational equity, agreeing to strike down parts of Germany's Federal Climate Protection Act as incompatible with fundamental rights for failing to provide for sufficient emission cuts beyond 2030.⁶³ Hereby fundamental rights were interpreted as

<https://verfassungsblog.de/shells-responsibility-for-climate-change/> [https://perma.cc/8QA8-6FTX]. Otto Spijkers, *Friends of the Earth Netherlands (Milieudefensie) v. Royal Dutch Shell*, 5 CHINESE J. ENV'T L. 237, 255-56 (2021); See generally Annalisa Savaresi & Jacques Hartmann, *Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 73-93 (Jolene Lin & Douglas A. Kysar eds., 2020)(on the potential impact of international and regional legislative efforts on corporate due diligence on the future of rights-based climate litigation).

⁵⁹ See HR 20 december 2019, RvdW 2020, (Stichting Urgenda/The State of the Netherlands)(Neth.); Rb. Hague 26 mei 2021, RvdW 2021, (Vereniging Milieudefensie/Royal Dutch Shell PLC)(Neth.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, Bundesverband der Deutschen Volksbanken und Raiffeisenbanken [Bvr] 2656.

⁶⁰ HR 20 december 2019, RvdW 2020, (Stichting Urgenda/The State of the Netherlands)(Neth.) ¶ 5.7.6.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 24, 2021, Bundesverband der Deutschen Volksbanken und Raiffeisenbanken [Bvr] 2656. Stephan Tomerius, *Legal Action for Climate Protection — Impulses on the International Level from the German*

“intertemporal guarantees of freedom” that afforded protection against unequal burden-sharing between generations.⁶⁴

Roach observes that successful cases thus far have been characterized by “remedial modesty”; an approach focused on “articulating the desired outcomes of remedies as opposed to dictating the means to achieve this outcome.”⁶⁵ In *Urgenda*, for example, the court upheld the emission reductions order—which was notably based on the lowest end of a spectrum—without prescribing how the state was to achieve these reductions.⁶⁶ Such an approach responds to concerns about the judiciary’s lack of direct democratic legitimacy, allowing the executive and the legislative to decide on the precise course of action to take to ensure compliance with relevant obligations.⁶⁷ A similar approach was taken in *Milieudefensie*, which, as Eckes points out, likewise raised the issue of whether it is for the courts to impose emission reduction obligations.⁶⁸ Concerns about “floodgates” may explain the apparent reluctance of judges to engage with the extraterritorial impacts of climate change. Such reluctance on the part of domestic courts could ultimately lead to a greater role for international human rights bodies in addressing those impacts.

Most of the international rights-based climate cases are still pending. Nonetheless, results obtained thus far reveal a potential for these cases to spur more ambitious climate action. For example, an early case that has resulted in a decision on the merits is *Marangopoulos Foundation for Human Rights v. Greece*, which sought a declaration that Greece was violating its international human rights obligations by virtue of its oversight and partial ownership of several lignite coal mines and coal-fired power plants which contributed to climate change.⁶⁹ This declaration was

Federal Constitutional Court: the Court Order from March 2021 on the Unconstitutionality of the Federal German Climate Protection Act, 57 BRAZ. J. ENV'T SCI. 158, 160–63 (2022).

⁶⁴ *Id.*

⁶⁵ Kent Roach, *Judicial Remedies for Climate Change*, 17 J.L. & EQUAL. 105, 109 (2001).

⁶⁶ See Laura Burgers, *The Minimum Principle: Future Generations in the Climate Case against Royal Dutch Shell*, VÖLKERRECHTSBLOG, (Jan. 19, 2022), <https://voelkerrechtsblog.org/the-minimum-principle/> [https://perma.cc/5AUL-Z446].

⁶⁷ Roach, *supra* note 65.

⁶⁸ Eckes, *supra* note 10.

⁶⁹ *Marangopoulos Foundation for Human Rights v. Greece*, No. 30/2005, Decision, European Committee of Social Rights, ¶¶ 1-4 (Feb. 6, 2007), <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/> [https://perma.cc/SPF5-5QE9].

granted.⁷⁰ Another successful case is *ClientEarth v. European Investment Bank*, in which the General Court of the European Union ordered the European Investment Bank to accept ClientEarth's petition for internal review of its decision to finance a biomass power plant.⁷¹ In response, the European Investment Bank established a further internal review process, which included consultation with civil society stakeholders. While the court ruled in favor of ClientEarth on some issues, it denied the request to suspend financing for the project until this review was completed.⁷² A recent success is that of the Torres Strait Islanders in their communication to the UN Human Rights Committee. In its views on the communication, the Human Rights Committee noted that "the State party is and has been in recent decades among the countries in which large amounts of greenhouse gas emissions have been produced" and that it "ranks high on world economic and human development indicators."⁷³ It went on to establish violations of Articles 17 (right to family life) and 27 (right to culture) and found that the Torres Strait Islanders are entitled to "full reparation."⁷⁴ Critically, it also noted that the state party has an obligation "to take steps to prevent similar violations in the future"⁷⁵ and ordered the state party to report on the measures taken to implement the decision within 180 days.⁷⁶ One of the Torres Strait Islanders who brought the complaint reflected on the importance of the decision saying: "This win gives us hope that we can protect our island homes, culture and traditions for our kids and future generations to come."⁷⁷

However, no fewer than five cases have been dismissed for procedural reasons. These include the *Inuit petition*, which was not heard by the Inter-American Commission of Human Rights for "lack of information" about alleged violations,⁷⁸ and three cases dismissed by the

⁷⁰ *Id.* ¶ 202.

⁷¹ Case T-9/19, *ClientEarth v. European Investment Bank*, ECLI:EU:T:2021:42, ¶ 171 (Jan. 27, 2021).

⁷² *Id.* ¶¶ 170–73.

⁷³ Human Rights Committee Dec., U.N. Doc C/135/D/3624/2019, ¶ 7.8 (Sep. 22, 2022).

⁷⁴ *Id.* ¶ 11.

⁷⁵ U.N. Hum. Rts. Comm., *Billy v. Australia* (Torres Strait Islanders Petition) ¶ 11, U.N. Doc. CCPR/C/135/D/3624/2019 (Sept. 22, 2022).

⁷⁶ *Id.* ¶ 12.

⁷⁷ *Torres Strait Islanders Win Historic Human Rights Legal Fight Against Australia*, CLIENTEARTH (Sept. 23, 2022), <https://www.clientearth.org/latest/press-office/press/torres-strait-islanders-win-historic-human-rights-legal-fight-against-australia/> [<https://perma.cc/YUU6-XPSM>].

⁷⁸ *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*, Watt-Cloutier

ECJ for lack of standing,⁷⁹ or other procedural reasons.⁸⁰ The Committee on the Rights of the Child (CRC Committee)'s admissibility decision in *Sacchi et al v. Argentina et al (Sacchi)*, referred to above, is a procedural loss with a silver lining. This case was filed by sixteen children against five states that were all party to the Convention on the Rights of the Child and its Optional Protocol that allows individual communications, and which were said to have contributed disproportionately to global emissions over time.⁸¹ On the positive side, the CRC Committee found it had jurisdiction *ratione materiae* over the communication as the petitioners demonstrated a link between specific harm each of them suffered and the states' action or inaction.⁸² This finding is significant from a climate justice perspective, as it entails recognition of states' extraterritorial obligations to protect the rights of children, as a particularly impacted group, against the adverse effects of climate change.⁸³ However, the CRC Committee ultimately found the communications inadmissible on the grounds of failure to exhaust domestic remedies.⁸⁴ This finding of inadmissibility highlights the importance of the principle of subsidiarity in rights-based climate litigation,⁸⁵ which finds expression in the procedural rule that applicants are expected to pursue domestic avenues before claims will be admitted at the international level.⁸⁶ General arguments about the urgency of addressing climate change, the time-consuming nature of

v. United States, No. P-1413-05, (Inter-Am. Comm'n. H.R. 2005); See Letter from Ariel E. Dulitzky, Assistant Executive Secretary at the Inter-American Commission on Human Rights, to Paul Crowley, Legal Representative (Nov. 16, 2006).

⁷⁹ See Case T-330/18, Armando Ferrão Carvalho and Others v. The European Parliament and the Council, ECLI:EU:T:2019, ¶¶ 70,71 (May 8, 2019), aff'd ECLI:EU:C:2021, (Mar. 25, 2021); Case T-114/19, Peter Sabo and others v. European Parliament and others, ECLI:EU:T:2020, ¶ 41 (May 6, 2020), aff'd ECLI:EU:C:2021, (Jan. 14, 2021).

⁸⁰ See Case C-524/09, City of Lyon v. French Deposits and Consignments Fund, E.C.R. (2009).

⁸¹ *Sacchi*, *supra* note 52, ¶ 237 ("Each of the respondents ranks in the top 50 historical emitters since 1850, based on fossil fuel emissions . . . When land-use, such as deforestation, is factored in, Brazil surpasses France in its historical share.") (footnote omitted).

⁸² *Sacchi v. Argentina*, Decision adopted by the Committee on the Rights of the Child Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019, ¶ 10.7, U.N. Doc. CRC/C/88/D/104/2019 (Oct. 8, 2021).

⁸³ *Id.*

⁸⁴ *Id.* ¶ 10.21.

⁸⁵ See generally Jan Jirásek, *Application of the Principle of Subsidiarity on Decision Making of the ECJ in the Area of Fundamental Rights Protection*, 1 DNY PRAVÁ – 2009 – DAYS OF LAW: THE CONFERENCE PROCEEDINGS, BRNO: MASARYK UNIVERSITY 325, 326.

⁸⁶ G.A. Res. 66/138, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, at art. 7(e) (Feb. 7, 2012).

pursuing remedies at the domestic level, or the complexity of addressing a global issue through domestic courts appear to provide insufficient basis for setting aside this requirement.⁸⁷ The CRC Committee's approach stands in contrast with that of the Human Rights Committee in *Billy et al.*, where the communication was found admissible, despite the fact that the authors themselves did not pursue their case through domestic courts first.⁸⁸ It appears that the authors' argument that exhausting domestic remedies would be futile in light of the domestic court's ruling in *Sharma* persuaded the committee that the admissibility requirements had been met in this case.⁸⁹

It remains to be seen how subsidiarity is dealt with in pending and future international rights-based climate cases. This question is particularly relevant for *Duarte Agostinho and Others v. Portugal and 32 Other States (Duarte Agostinho)*, which is pending before the ECtHR, and three similar cases filed subsequently before the same court. *Agostinho* is innovative in its approach to state responsibility for human rights violations related to climate change. The applicants are asking the ECtHR to find that the thirty-three respondent states have violated their convention rights and specifically, to adopt or rely upon the approach taken by the Climate Action Tracker, a scientific analysis that measures states' climate action against the long-term temperature goal of the Paris Agreement, to assess the fairness of the respondent states' mitigation measures.⁹⁰ In connection to the requirement that domestic remedies must

⁸⁷ Başak Çali, *A Handy Illusion? Interpretation of the 'Unlikely to Bring Effective Relief' Limb of Article 7(e) OPIC by the CRC in Saachi et al.*, EJIL: Talk!: Blog of the European Journal of International Law (Nov. 1, 2021), <https://www.ejiltalk.org/a-handily-illusion-interpretation-of-the-unlikely-to-bring-effective-relief-limb-of-article-7e-opic-by-the-crc-in-saachi-et-al/> [https://perma.cc/QMA5-KXRW]. See also Margaretha Wewerinke-Singh, *Between Cross-Border Obligations and Domestic Remedies: The UN Committee on the Rights of the Child's decision on Saachi v. Argentina*, LEIDEN CHILD. RTS OBSERVATORY (Oct. 28 2021), <https://childrensrightsobservatory.nl/case-notes/casenote2021-10> [https://perma.cc/FDH4-QMBU].

⁸⁸ Compare *Saachi*, supra note 82, at ¶10.21, with *Billy*, supra note 75, ¶¶ 7.3, 7.11.

⁸⁹ Minister for the Env't v. Sharma, [2022] FCA 560 ¶ 748, (Mar. 15, 2022) (Austl.); See also Jacqueline Peel & Rebekkah Markey-Towler, *Today's Disappointing Federal Court Decision Undoes 20 Years Of Climate Litigation Progress In Australia*, THE CONVERSATION (Mar. 15, 2022), <https://theconversation.com/todays-disappointing-federal-court-decision-undoes-20-years-of-climate-litigation-progress-in-australia-179291> [https://perma.cc/DJ5B-2R9P].

⁹⁰ *Agostinho*, supra note 52, ¶ 31; see also Violetta Ritz, *Towards a Methodology for Specifying States' Mitigation Obligations in Line with the Equity Principle and Best Available Science*, TRANSNAT'L ENV'T L. 1, 1–26 (2022) (on the use of the Climate Action Tracker as a legal methodology to assess states' greenhouse gas emissions).

be exhausted, the applicants suggest that the potential of domestic courts to provide adequate domestic remedies for human rights violations resulting from climate change hinges on interpretative guidance from the ECtHR. Specifically, they argue, “[t]o ensure the availability of an adequate remedy within the Respondent States which ‘bear[s] fruit in sufficient time’, . . . the Court must recognize the approach to responsibility for climate change outlined [in this petition].”⁹¹ The petition marks the first attempt to address the question of burden-sharing for mitigation head-on: as the applicants argue,

[t]he question of what constitutes a state’s ‘fair share’ of the global burden of mitigating climate change is central to the determination of whether that state’s mitigation measures are adequate for the purpose of the Convention. In light of the above, ambiguity on this issue . . . must be resolved in favour of the Applicants.⁹²

It is therefore clear that *Agostinho* purposefully seeks to surpass the limitations inherent in domestic rights-based climate litigation, including the risks of incoherence and inequity in standard-setting for mitigation. If the ECtHR were to hear this claim, or any of the similar cases filed subsequently, on the merits, it would mark a significant breakthrough in rights-based climate litigation signaling that international human rights bodies may interpret procedural rules in an evolutive manner and thus, to borrow from Sicilianos, the ECtHR’s former President, “provide genuine responses to the problems of our time.”⁹³

III. CONCLUSION

This article has provided an overview of key climate litigation cases in which human rights have been invoked to seek remedies relating to climate change mitigation. The analysis shows that although more cases are needed in order to better understand the implications of the case law, the legal landscape is starting to shape up in a way that can underpin

⁹¹ *Agostinho*, *supra* note 52, ¶ 39.

⁹² *Id.* ¶ 29.

⁹³ Linos-Alexandre Sicilianos, President of the Eur. Ct. of Hum. Rts, Solemn Hearing on the Occasion of the Opening of the Judicial Year (Jan. 31, 2020) (Transcript available at ECHR Website); See Jacques Hartmann & Marc Willers, *Protecting Rights through Climate Change Litigation before European Courts*, 13 J. OF HUM. RTS. & THE ENV’T 90, 91–92 (2022); See Tim Eicke, *Climate Change and the Convention: Beyond Admissibility*, 3 EUR. CONVENTION ON HUM. RTS. L. REV. 8, 8–16 (2022).

meaningful access to justice for people affected by climate change. The initial cases discussed in this article indicate that courts are willing to acknowledge human rights obligations of states in relation to climate change mitigation, and even to recognize that companies have responsibilities to respect the rights of climate-affected populations. The next step is to strengthen judicial understanding of the multiple ways in which climate change affects human rights and use this understanding to develop robust legal norms and standards to guide climate action in the future.

Furthermore, courts can use human rights norms and principles as interpretative tools when balancing sustainable development concerns related to climate change measures. Courts should also take note that ensuring the implementation of environmental standards, including standards which are traditionally regarded as “soft law” as opposed to “hard law,” is a critical step towards achieving substantial emissions reductions. Finally, the recognition of certain human rights and non-legal duties may help to create a broader sense of collective responsibility for tackling the climate challenge, thereby increasing the prospects of successfully implementing climate change policy. Ultimately, this could lead to long-term positive changes in how societies respond to these challenges. However, the scholarly community will need to continue to monitor and assess the evolution of this field over time in order to identify the most effective strategies for promoting and protecting the rights of people affected by climate change.