THE RELEVANCE OF HUMAN RIGHTS LAW IN CLIMATE CHANGE LITIGATION

By

Min Chang

A dissertation submitted to the Johns Hopkins University in conformity with the requirements for the Doctor of International Affairs

Baltimore, Maryland

April 2021
Abstract

Climate change is one of the defining issues of our time. In the past, it has been defined mainly in environmental and economic terms. However, climate change by its nature is a human issue, caused mainly by human activity and impacting human life. Nevertheless, only recently has it been looked at from a human rights perspective. Most States now recognize the linkage between climate change and human rights. Climate change affects everyone, especially the most vulnerable and the ones who need the most support. Even though there is wide agreement on the impact it has on human rights, applying human rights law to motivate policy change on climate change is still open for discussion. There is currently a body of international, regional and national human rights law that holds States responsible for respecting, protecting and fulfilling human rights. Therefore, does it make sense to reference human rights law in climate change litigation and hold States accountable for human rights violations if they do not have strong enough responses and policies to control climate change? And is this approach more effective than relying on environmental/climate change laws alone? Furthermore, if human rights law is relevant in climate change litigation, then are there ‘good practices’ that can be distilled from case law?

Principal Advisor: Dr. Jason Fichtner

Committee Member: Professor Steven Schneebaum

Committee Member: Professor Daniel Magraw
Acknowledgements

I am extremely grateful to Johns Hopkins School of Advanced International Studies for creating the Doctor of International Affairs program. This program has brought me incredible mentors in Professor Schneebaum, Professor Magraw and Professor Fichtner. Thank you, Professor Schneebaum for inspiring my thesis topic and giving me the foundation from which to understand international law and human rights and thank you, Professor Magraw for connecting me to your vast network of climate change and environmental experts. I could not have completed this thesis without both of your help and generosity. Finally, thank you Professor Fichtner for everything; your guidance, understanding, mentorship and encouragement has helped me through the entire DIA program.

To my family, I am eternally grateful for your support in completing my “bucket list”!
Table of Contents

Abstract

Acknowledgements

Table of Contents

Abbreviations

I. Introduction
II. Literature Review
   a. Climate Change and its Challenges
   b. How Climate Change is Being Addressed
   c. Climate Change as a Human Rights Issue
   d. How Human Rights are Being Addressed
   e. Relevance of Human Rights Law to Climate Change
   f. Human Rights-based Approach to Climate Change
   g. State Obligations with Respect to Human Rights and Climate Change
   h. Human Rights-based Approach and How it Works in Climate Change Litigation

III. Theory and Research Design

IV. Lessons from Case Studies

V. ‘Good Practices’ for Applying Human Rights Law to Climate Change

VI. Conclusion

VII. Appendix – Case Analysis

VIII. Bibliography
<table>
<thead>
<tr>
<th>Abbreviations</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>ACHR</td>
<td>American Convention on Human Rights</td>
</tr>
<tr>
<td>AComHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>ACtHPR</td>
<td>African Court on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>ADRDM</td>
<td>American Declaration of the Rights and Duties of Man</td>
</tr>
<tr>
<td>CESCRC</td>
<td>Committee on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>CFREU</td>
<td>Charter of Fundamental Rights of the European Union</td>
</tr>
<tr>
<td>CO2</td>
<td>Carbon Dioxide</td>
</tr>
<tr>
<td>COP</td>
<td>Conference of Parties</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GHG</td>
<td>Greenhouse Gas</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
</tr>
<tr>
<td>IACoHR</td>
<td>Inter-American Commission on Human Rights</td>
</tr>
</tbody>
</table>
IACtHR  Inter-American Court of Human Rights

ICCPR  International Covenant on Civil and Political Rights

ICESCR  International Covenant on Economic, Social and Cultural Rights

ICJ  International Court of Justice

ILC  International Law Commission

IPCC  Intergovernmental Panel on Climate Change

OHCHR  Office of the High Commissioner for Human Rights

SIDS  Small Island Developing States

UDHR  Universal Declaration of Human Rights

UNEP  United Nations Environment Programme

UNFCCC  United Nations Framework Convention on Climate Change

UNHRC  United Nations Human Rights Council

WHO  World Health Organization
I. Introduction

In June 2015, the Urgenda Foundation, an organization representing 900 Dutch citizens, sued the State of the Netherlands for having taken insufficient action on climate change. In addition to claiming that the Netherlands failed to take adequate action, Urgenda said that the resulting greenhouse (GHG) emission levels infringed on specific human rights: the right to life, health and respect for private and family life. The Court in The Hague in 2015 ordered the Netherlands government to limit GHG emissions to 25% below 1990 levels by 2020. The government appealed the decision and was twice unsuccessful in the Hague Court of Appeals in 2018 and the Netherlands’ Supreme Court in 2019. Both Courts decided in favor of the claimants and ordered the Dutch government to take more effective action on climate change.¹

Urgenda Foundation v. State of the Netherlands (2015)² is a landmark case and one of the first successful³ climate change cases against a State that referenced human rights. Is the Urgenda case an anomaly or is it a template to address climate change litigation from a human rights perspective? Can this be an effective means to bring greater awareness and more importantly to drive action and policy changes in the battle against climate change? Also, what are the effective practices that can be learned from Urgenda and other cases that applied human rights law to address climate change?

Climate change is one of the defining issues of our time. In the past, it has been defined mainly in environmental and economic terms. For example, climate change was described as an

¹ Jelmer Mommers, “Thanks to this Landmark Court Ruling, Climate Change is Now Inseparable from Human Rights,” The Correspondent, December 20, 2019, 1-2.
³ “Successful” refers to climate change cases where claimants/plaintiffs applied human rights principles and/or laws and the court/judge acknowledged the relevance of these rights/laws but did not necessarily rule based on these principles/laws in addition to cases where the court/judge did rule based on these principles/laws.
increase in GHGs in the atmosphere that causes global warming. Furthermore, some described it in terms of carbon dioxide (CO2) emissions or in temperature increases beyond pre-industrial levels. Warmer temperatures were often attributed to climate change as well as melting ice, severe weather, ocean acidification and rising sea levels. Furthermore, experts have detailed its economic impacts; some estimating that climate change could reduce global GDP per capita by at least 7% by 2100\(^4\).

However, climate change by its nature is a human issue, caused mainly by human activity and impacting human life. Nevertheless, only recently has it been looked at from a human rights perspective. Most States now recognize the linkage between climate change and human rights. Climate change affects everyone, especially the most vulnerable and the ones who need the most support. Even though there is wide agreement on the impact it has on human rights, applying human rights law to motivate policy change on climate change is still open for discussion. There is currently a body of international, regional and national human rights law that holds States responsible for respecting, protecting and fulfilling human rights. Therefore, does it make sense to reference human rights law in climate change litigation and hold States accountable for human rights violations if they do not have strong enough responses and policies to control climate change? And is this approach more effective than relying on environmental/climate change laws alone? Furthermore, if human rights law is relevant in climate change litigation, then are there ‘good practices’ that can be distilled from case law?

II. Literature Review

---

a. **Climate Change and its Challenges**

In order to understand why it might make sense to consider human rights law in climate change litigation, it is necessary to first understand climate change and what makes it different and more challenging than other environmental issues. According to Rouabah, climate change is the long-term alteration of the climate in a region or the planet.\(^5\) This alteration can be measured in changes to the average weather like precipitation, temperature, and wind patterns. Although it can be caused by natural processes such as volcanic eruptions, variations in the sun’s intensity, and long-term shifts in ocean currents and land surfaces; anthropogenic (i.e., human) activities are the main factors behind the acceleration of climate change. Anthropogenic activities release large amounts of GHGs through industrial and agricultural practices, fossil fuel combustion and waste decomposition. They result in impacts like melting glaciers, rising temperatures, increased frequency and severity of weather events such as cyclones, floods, droughts, as well as ocean acidification and rising sea levels. Atapattu says there are two key features of anthropogenic climate change.\(^6\) The first is that once GHGs are emitted, they stay in the atmosphere for a long time. Therefore, climate change is cumulative and delaying action will have serious consequences for both current and future generations. The second feature is its global scale. It does not respect geographical boundaries, so addressing it requires global coordination among States. Therefore, climate change is both intergenerational and transboundary.\(^7\)

b. **How Climate Change is Being Addressed**


\(^7\) Transboundary is commonly used in climate change discussions to emphasize its global nature.
Once the key characteristics of climate change are understood, it is useful to examine how it has been addressed (both in legal and non-legal terms) so far and whether these steps have been effective. There are many approaches currently being used to address climate change. They mainly focus on changing behaviors and the ways in which energy is produced and consumed. For instance, they propose using various technologies and policies to encourage less waste and better use of resources. Climate change actions are generally categorized into mitigation and adaptation measures including geo-engineering. Mitigation efforts include improvements in energy efficiency, vehicle fuel usage, application of wind and solar power and generation of biofuels from organic waste. Adaptation actions include preventing land erosion, building energy systems that can withstand disruptions and designing buildings with rising sea levels in mind.

From a legal perspective, States have established an international legal regime over the past four decades to address climate change and its impacts. These measures started with the establishment of the Intergovernmental Panel on Climate Change (IPCC) in 1988 which then developed the UN Framework Convention on Climate Change (UNFCCC) in 1992, the Kyoto Protocol in 1997 and the Paris Agreement in 2015. Nearly 200 countries are parties to the UNFCCC including the U.S. The Convention sets a specific goal to stabilize GHG emissions to a level that would prevent dangerous anthropogenic interference with the climate system. It provides that this level should be achieved in a reasonable timeframe so that the ecosystem can adapt naturally to climate change and ensure sustainable food production and economic

---

8 Mitigation addresses ‘halting’ GHG emissions while adaptation addresses measures to ‘adapt’ to climate change.
development. Within the UNFCCC, developed countries lead in combating climate change and provide funds for climate change activities to developing countries. Under the UNFCCC, States’ responsibilities include: developing national inventories of emission sources and removals of all GHGs not regulated by the Montreal Protocol; creating mitigation and adaptation measures; cooperating in technology development and transfer; promoting sustainable management of all sinks and reservoirs; considering climate change in all social environmental and economic policies and actions; and promoting and cooperating in public awareness and education relating to climate change. The Convention is limited in its reference to human rights; it mentions only human health in relation to adverse effects of climate change and recognizes the need to protect the climate for the benefit of present and future generations.

The UNFCCC is also the main instrument reflecting multilateral cooperation among States, NGOs, and various interested stakeholders. Annually, member States of the UNFCCC meet at the Conference of Parties (COP) and review the Convention’s implementation as well as adopt or make changes to legal instruments and institutions. At the third COP, the member States adopted the Kyoto Protocol, an international agreement linked to the UNFCCC that commits its parties to internationally binding GHG emission reduction targets. Its purpose was to reduce GHG emissions to 5% below 1990 levels. The Kyoto Protocol entered into force in

---

2005. Currently 192 parties have signed onto the Kyoto Protocol. Like the UNFCCC, the Kyoto Protocol contains no direct reference to human rights. In addition, the effectiveness of the Kyoto Protocol is limited since neither the U.S. nor Canada are parties to the agreement and Japan and Russia have indicated they do not intend to attempt to achieve further GHG reduction targets. Also, the Protocol lacks effective monitoring mechanisms to ensure that States comply with their commitments.\(^\text{14}\)

The Paris Agreement of 2015 followed the Kyoto Protocol and was meant to improve upon its shortcomings. States agreed to keep the global average temperature increase to well below 2 degrees Celsius above pre-industrial levels and to do everything they can to keep it at or below 1.5 degrees Celsius. Compared to the Kyoto Protocol, in which countries responsible for only 55% of GHG emissions were represented, the Paris Agreement parties represent more than 90%. It also includes both mitigation and adaptation measures and blurs the distinction between the commitments of developed and developing countries. Currently, the Paris Agreement has 190 parties including the U.S\(^\text{15}\). Like the Kyoto Protocol, it suffers from the lack of implementation. In addition, the agreement could be strengthened since the difference between 1.5 degrees Celsius and 2 degrees Celsius is massive (i.e., the 0.5-degree Celsius difference could mean an adverse effect (e.g., death) of climate change on an additional 457 million people\(^\text{16}\)). Moreover, each State decides what commitments it wants to put forward and these commitments may not be challenged in terms of their aggressiveness. Therefore, even if


\(^{15}\) The U.S. rejoined the agreement in January 2021.

the total proposed commitments were fully implemented, it would lead to global average temperature increases of well over 2 degrees Celsius and perhaps even 3 degrees Celsius by 2030.\textsuperscript{17} However, the Paris Agreement does contain human rights language in its preamble: “acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity”.\textsuperscript{18}

Beyond international instruments, there are institutions such as international and regional environmental courts, but they have had limited success. The International Court of Justice (ICJ) in the Hague had an Environmental Chamber from 1993 to 2006 but it was discontinued due to limited usage by States. Canada, Mexico and the USA created a Commission for Environmental Cooperation that could hear disputes submitted by the three parties or their citizens, but it had no enforcement mechanism. The Court of Justice of the European Union (EU) in Luxembourg hears cases involving EU law and the Court has capabilities in interpreting environmental law. Finally, there have been discussions on creating an international environmental court, but the idea has not received significant support from States.\textsuperscript{19}

\textsuperscript{17} Dewaele Janne, “The Use of Human Rights Law in Climate Change Litigation,” (Master’s Thesis, University of Montpellier, 2019), 7.
At the national level, hundreds of multilateral environmental agreements have been adopted and hundreds of national constitutions incorporate environmental/climate change rights and policies. Moreover, there are over 1,200 environmental courts and tribunals internationally\textsuperscript{20}. Although there are more instruments and institutions at the national level, climate change is a transboundary issue and one that ultimately needs to be tackled globally.

In sum, international instruments have been somewhat useful in addressing climate change, but they lack adequate enforcement mechanisms and a sufficient global commitment. According to Nunn, whether climate change is measured based on CO2 emissions (which are now the highest in history) or by temperature rises (on track to rise beyond the Paris target of 2 degrees Celsius), its impacts have continued and, in some cases, become even worse.\textsuperscript{21} Current efforts have not been enough. Perhaps taking a human rights-based approach might help to give climate change more urgency and priority given that human life is at stake.

c. Climate Change as a Human Rights Issue

So why should climate change be seen as a human rights issue? It is caused by human activity and it affects human life. Lewis believes that climate change also poses significant questions of justice and equality, since those who are least responsible for GHG emissions will suffer the most from climate change. This makes climate change not just a scientific or economic issue but also an issue of justice.\textsuperscript{22} The human impacts are significant. For example, extreme weather events and climate change related pollution can lead to deaths and damages


\textsuperscript{22} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 151.
to property and physical infrastructure. People can lose their homes due to floods, storms, and erosion. Moreover, small island states like the Maldives, Kiribati, Tuvalu and the Marshall Islands are at risk of going underwater, threatening the livelihoods of the people who live on these islands. Furthermore, droughts and floods can seriously affect food and water security. They can also destroy the sources of revenue of families all around the world and could force hundreds of millions of people into extreme poverty. The WHO estimates that climate change will cause around 250,000 excess deaths per year between 2030 and 2050. In addition, it can impact human security leading to massive displacement and an increase in violence. Finally, those countries least responsible for the emission of GHGs, like those in Sub-Saharan Africa, will be more affected by the negative consequences of climate change. For indigenous communities, it can threaten traditional ways of life forcing them to relocate and jeopardizing their cultural identity.

d. How Human Rights are Being Addressed

In order to consider human rights law in climate change litigation, it is important to understand how human rights are being addressed currently and how human rights law has evolved. Moreover, understanding the human rights instruments and institutions will be important in analyzing the effectiveness of invoking these principles in climate change cases. Human rights are “universal legal guarantees protecting individuals and some groups against actions and omissions that interfere with fundamental freedoms, entitlements and human

---

23 Bridget Lewis, Environmental Human Rights and Climate Change (Singapore: Springer Nature, 2018), 158.
25 All “climate change cases” mentioned in this thesis refer to the Sabin Center for Climate Change Law definition which defines climate change cases as those where climate change issues are raised.
During the past six decades the international human rights legal regime has grown into a broad network of instruments and institutions with most developments coming at the regional and national levels.

At its core, international human rights law is based on the relationship between two groups: duty bearers (States) and right holders (individuals). States have obligations toward their citizens under human rights treaties. Human rights law both obligates States to do certain things and forbids them from doing other things. Under international law, States are generally not accountable for the activities of private individuals; however, States may be liable if they fail to control activities of private individuals and companies and if, in cases of wrongdoing, they do punish the perpetrators.\(^2\)

All States have ratified at least one of the nine core international human rights treaties and most have ratified several covering human rights of all kinds — economic, social, cultural, civil, and political.\(^3\) The Universal Declaration of Human Rights (UDHR), which sets out fundamental human rights to be universally protected, has inspired two Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In total there are nine instruments currently constituting the basis of international human rights law: the ICCPR, the ICESCR, the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of

---


Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on Migrant Workers (CMW), the Convention Against Torture (CAT), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on Enforced Disappearances (CED)\footnote{There are two additional human rights conventions on Refugees and Genocide that are sometimes included in the group of core human rights instruments.}. The three most relevant for climate change are the ICCPR, with 172 parties, ICESCR with 170 and the CRC, with 196 parties. The ICCPR requires each State party to “respect and ensure to all individuals within its territory, and subject to its jurisdiction the rights recognized in the Covenant”\footnote{“International Covenant on Civil and Political Rights,” United Nations, 1966, 1-26.}. The ICESCR requires that each party “take steps individually and through international assistance and cooperation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means including legislation”\footnote{“International Covenant on Economic, Social and Cultural Rights,” United Nations, 1966, 1-8.}. The CRC obligates States to “act in the best interest of the child”\footnote{“Convention on the Rights of the Child,” United Nations, 1989, 1-15.}. The major GHG emitters are parties to all three of these conventions with the exceptions of China, which signed but has not ratified the ICCPR, and the U.S. which signed but has not ratified the ICESCR or the CRC\footnote{Alice Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani, Human Rights and Climate Change: A Review of the International Legal Dimensions (Washington D.C.: The World Bank, 2011), 4.}.\footnote{30} \footnote{31} \footnote{32} \footnote{33} \footnote{34}

All nine global human rights conventions have relevant committees/treaty-based institutions that monitor States’ compliance. These institutions have similar structures and functions and consist of independent experts who monitor and examine periodic reports filed by States. If needed, the committee can invite a representative of the State whose report is
being examined to answer questions. If the State is non-compliant, then the committee can make suggestions and recommendations.35 Another group of institutions are developed through the UN Charter. At the international level the most important is the United Nations Human Rights Commission established in 1946 and renamed the United Nations Human Rights Council (UNHRC) in 2006. In addition, the UNHRC is assisted by the Office of the High Commissioner for Human Rights (OHCHR). The High Commissioner for Human Rights is appointed by the Secretary General, with approval from the General Assembly. When appropriate, the UNHRC appoints various special rapporteurs, representatives, or experts and establishes working groups that investigate, discuss, and report on specific human rights issues based on a country or thematic mandate. For example, a Special Rapporteur on Human Rights and the Environment was commissioned to study the relation between human rights and environmental rights.36

Regional instruments and institutions are extremely important in protecting human rights since broad definitions at the global level are often translated into specific enforceable legal obligations and policy implications at the regional level. The most significant regional human rights instruments are the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights

Each of these instruments has at least one institution with responsibility for interpreting it and reviewing compliance.\textsuperscript{37}

The Inter-American system of human rights includes two key institutions: The Inter-American Commission on Human Rights (IAComHR) in Washington D.C. and the Inter-American Court of Human Rights (IACtHR) in San Jose, Costa Rica. The Court has jurisdiction to hear cases brought by States or the Commission. The Commission hears cases brought by individuals against States and it also holds thematic hearings and issues thematic reports. The Inter-American system has three legal instruments: the American Declaration of the Rights and Duties of Man (ADRDM), which was adopted by the Organization of American States (OAS) in 1948; the ACHR, adopted in 1969 and entering into force in 1978, which has 24 parties excluding the U.S.; and the San Salvador Protocol to the ACHR in the areas of economic, social and cultural rights (including a right to a healthy environment) adopted in 1988 with 16 parties excluding the U.S. Because the U.S. is not a party to the ACHR, it is not subject to the jurisdiction of the IACtHR. States that have ratified the Convention accept the jurisdiction of the Commission to hear cases brought against them. Only the Commission can refer petitions to the Court since individuals have no standing before the Court (i.e., the Commission serves as a filter for cases initiated by individuals). The Commission also oversees each State party’s reporting, monitoring and individual complaints. Over the years, the Inter-American Commission and Court have developed considerable jurisprudence on environmental rights.\textsuperscript{38}


In Europe, two entities are important in the discussion of climate change and human rights: the European Union (EU) and the Council of Europe. The EU is an international organization comprising 27 member States. Human rights to a high level of environmental protection and quality are outlined in Article 37 of the Charter of Fundamental Rights of the EU (CFREU)\(^\text{39}\). The Treaty of the EU includes obligations to develop international measures that preserve and improve the quality of the environment and sustainably manage natural resources\(^\text{40}\). In addition, the EU has committed to GHG reduction targets under the UNFCCC, the Kyoto Protocol and the Paris Agreement. Finally, the EU has an ambitious international sustainability policy regarding climate change and intends to integrate human rights into all of its climate change mitigation and adaptation policies\(^\text{41}\).

The Council of Europe is composed of 47 member States including the 27 EU members. The Council, through the work of both the ECtHR and the European Committee of Social Rights (ECt eSR), has integrated environmental rights with the right to private and family life and health. Even though the ECHR does not include express reference to a right to a healthy environment, the ECtHR has incorporated environmental protection in its interpretation of the human rights that are embedded in the ECHR. Moreover, the Aarhus Convention, adopted in 1988 by the EU and most European States, speaks to access to information, public participation in decision-making and access to justice in environmental matters. The Aarhus Convention has

\(^{41}\) Anne Kling, “Climate Change and Human Rights – Can the Courts Fix It?” Heinrich Boell Foundation, March 18, 2019, 1.
become the main reference document as it relates to procedural rights in climate change for Europe and parts of Central Asia. The European system has also been a leader in human rights and has influenced other international and national institutions.

The African human rights system is governed by the African Charter on Human and Peoples’ Rights (ACHPR) which was adopted in 1981 and came into effect in 1986. It currently has 53 parties: all the independent States in the African continent. The system has two tribunals: the African Charter created the African Commission on Human and Peoples’ Rights (AComHPR) in Arusha, Tanzania and the 2005 Protocol to the Charter created the African Court on Human and Peoples’ Rights (ACtHPR) in Banjul, Gambia. The African Charter explicitly recognizes a right to a healthy environment. In Africa, through the ACHPR, every individual has the right to respect for his life, liberty and security of person. In addition, the ACHPR “protects the right of peoples to the best attainable state of physical and mental health”. The ACHPR also describes collective rights in Article 20 and recognizes that peoples have a right to existence. Article 21(1) provides that all peoples shall freely dispose of their wealth and natural resources. Article 21(2) recognizes a claim to compensation in case of spoliation and the right of dispossessed people to the lawful recovery of their property as well as to adequate compensation. The ACHPR recognizes a progressive right to development under Article 22 and “peoples are assured a collective right to a general satisfactory environment favorable to their

---

42 Procedural rights pertain to access to information, ability to review procedures and participation in decision-making.

An Asian regional human rights system does not currently exist. While Asian countries adopted the Asian Human Rights Charter in 1998 and recommended the establishment of a commission or court to address complaints, this has not yet happened. There is an Asian Human Rights Commission, an independent non-governmental body that promotes awareness of human rights in the region. There is also an ASEAN (Association of Southeast Asian Nations) Human Rights Declaration adopted in 2012 that includes economic, social and cultural rights including the right to a safe, clean and sustainable environment. However, it does not have a tribunal for dispute settlement.46 The ASEAN Inter-governmental Commission on Human Rights is responsible for promoting and protecting human rights in the region, but it also lacks any mechanism for addressing individual complaints. Finally, the Arab Charter on Human Rights was adopted in 2004 by the League of Arab Nations. It recognizes a right to a healthy environment as a component of the right to an adequate standard of living. An Arab Human Rights Committee was established but it also does not provide an individual right to petition.47

At the national level, over 100 countries have national human rights instruments (e.g., law) and institutions48 with the mandate to monitor and facilitate the implementation of

48 Every State has some form of human rights instrument whether written down or on a statutory basis.
human rights. Moreover, the constitutions of more than 100 nations also include a right to a healthy environment in various forms.\textsuperscript{49}

e. Relevance of Human Rights Law to Climate Change

So, when did climate change start being thought of in human rights terms? Lewis says that although the link between human rights and climate change was apparent very early on, the international community did not consider it a major concern until recently.\textsuperscript{50} One of the initial references to human rights and climate change was made by the Small Island Developing States (SIDS) when they met in November 2007 to adopt the Male’ Declaration on the Human Dimension of Global Climate Change. SIDS has been the most vocal about applying a human rights approach to climate change. The Male’ Declaration requested the Office of the High Commissioner for Human Rights (OHCHR) to conduct a detailed study on the relationship between human rights and climate change. In 2009 the OHCHR concluded that climate change impacts a wide range of human rights including life, health, food water, housing and self-determination. Furthermore, the OHCHR highlighted that States have obligations to protect individuals from foreseeable climate change threats, to provide access to information and participation in decision-making about climate change issues, and to cooperate internationally to combat climate change.\textsuperscript{51}

In addition, human rights references entered the climate change canon through the preamble of the Paris Agreement in 2015. The agreement says that “States should respect,

\textsuperscript{50} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 188.
\textsuperscript{51} Dewaele Janne, “The Use of Human Rights Law in Climate Change Litigation,” (Master’s Thesis, University of Montpellier, 2019), 22.
promote and consider human rights in their response to climate change and emphasizes the
rights of indigenous peoples, women, migrants, children and those in vulnerable situations\textsuperscript{52}.

According to Duyck, the Paris Agreement contains the strongest language on human rights in
any environmental treaty to date.\textsuperscript{53} Furthermore, in 2016, John Knox, then U.N. Special
Rapporteur on Human Rights and the Environment, said that “States need to cooperate to meet
their Paris Agreement commitments so that they can avoid negative human rights
consequences resulting from climate change”\textsuperscript{54}. Specifically, there are strong linkages between
climate change and human impacts (see Table 1 below\textsuperscript{55}), and specific human rights (e.g. the
rights to life, health, water, food, and an adequate standard of living) are affected by it. These
will be examined in detail in the subsequent sections.

\textsuperscript{52} “Paris Agreement,” United Nations, 2015, 1-27.
\textsuperscript{53} Sebastien Duyck, Sebastien Jodoin and Alyssa Johl, Routledge Handbook of Human Rights and Climate
Governance (London and New York: Routledge Taylor & Francis Group, 2018), 146.
\textsuperscript{54} Bridget Lewis, Environmental Human Rights and Climate Change (Singapore: Springer Nature, 2018), 156.
\textsuperscript{55} The referenced human rights law in the table will be discussed in detail in subsequent sections of the thesis.
<table>
<thead>
<tr>
<th>Climate Impact</th>
<th>Human Impact</th>
<th>Human Rights Implicated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sea Level Rise</td>
<td>• Loss of land</td>
<td>• Self-determination (ICCPR; ICESCR, 1)</td>
</tr>
<tr>
<td>• Flooding</td>
<td>• Injury</td>
<td>• Life (ICCPR, 6)</td>
</tr>
<tr>
<td>• Sea surges</td>
<td>• Lack of clean water, disease</td>
<td>• Health (ICESCR, 12)</td>
</tr>
<tr>
<td>• Erosion</td>
<td>• Damage to coastal infrastructure, homes, and property</td>
<td>• Water (CEDAW, 14; ICRC 24)</td>
</tr>
<tr>
<td>• Salination of land and water</td>
<td>• Loss of agricultural lands</td>
<td>• Means of subsistence (ICESCR, 1)</td>
</tr>
<tr>
<td></td>
<td>• Threat to tourism, lost beaches</td>
<td>• Standard of living (ICESCR, 12)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Adequate housing (ICESCR, 12)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Culture (ICCPR, 27)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Property (UDHR, 17)</td>
</tr>
<tr>
<td>Temperature Increase</td>
<td>• Spread of disease</td>
<td>• Life (ICCPR, 6)</td>
</tr>
<tr>
<td>• Change in disease vectors</td>
<td>• Changes in traditional fishing</td>
<td>• Health (ICESCR, 12)</td>
</tr>
<tr>
<td>• Coral bleaching</td>
<td>• Livelihood and commercial fishing</td>
<td>• Means of subsistence (ICESCR, 1)</td>
</tr>
<tr>
<td>• Impact on fisheries</td>
<td>• Threat to tourism, lost coral and fish diversity</td>
<td>• Adequate standard of living (ICESCR, 12)</td>
</tr>
<tr>
<td>Extreme Weather Events</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• High intensity storms</td>
<td>• Dislocation of populations</td>
<td>• Life (ICCPR, 6)</td>
</tr>
<tr>
<td>• Sea surges</td>
<td>• Contamination of water supply</td>
<td>• Health (ICESCR, 12)</td>
</tr>
<tr>
<td></td>
<td>• Damage to infrastructure: delays in medical treatment, food crisis</td>
<td>• Water (CEDAW, 14; ICRC 24)</td>
</tr>
<tr>
<td></td>
<td>• Psychological distress</td>
<td>• Means of subsistence (ICESCR, 1)</td>
</tr>
<tr>
<td></td>
<td>• Increased transmission of disease</td>
<td>• Adequate standard of living (ICESCR, 12)</td>
</tr>
<tr>
<td></td>
<td>• Damage to agricultural lands</td>
<td>• Adequate and secure housing (ICESCR, 12)</td>
</tr>
<tr>
<td></td>
<td>• Disruption of educational services</td>
<td>• Education (ICESCR, 13)</td>
</tr>
<tr>
<td></td>
<td>• Damage to tourism sector</td>
<td>• Property (UDHR, 17)</td>
</tr>
<tr>
<td>Changes in Precipitation</td>
<td>• Outbreak of disease</td>
<td>• Life (ICCPR, 6)</td>
</tr>
<tr>
<td>• Change in disease vectors</td>
<td>• Depletion of agricultural soils</td>
<td>• Health (ICESCR, 12)</td>
</tr>
<tr>
<td>• Erosion</td>
<td></td>
<td>• Means of subsistence (ICESCR, 1)</td>
</tr>
</tbody>
</table>

Source: Submission by the Maldives to the OHCHR in September 2008 as part of the OHCHR’s consultative study on the relationship between climate change and human rights.\(^{56}\)

i. Climate Change and the Rights to Life and to Respect for Private and Family Life

All international human rights instruments protect the right to life in some way. These include Article 3 of the UDHR, Article 6 of the ICCPR, Article 4 of the ACHR, Article 2 of the ECHR, and Article 4 of the ACHPR. In some cases, it is a procedural right (i.e., right to access on information and decision-making) while in others (particularly in regional human rights instruments), it is a substantive right, like that in Article 8 of the ECHR, where there is a right to respect for private and family life. In the Americas, the ADRDM says that every human has the right to the preservation of health and right to life\textsuperscript{57}. Furthermore, Article 6 of the ICCPR imposes on states two categories of obligations: “a prohibition of the arbitrary deprivation of life and an obligation to take positive measures to ensure that right”\textsuperscript{58}. Article 6 of the ICCPR says that every human being has an inherent right to life. In addition to the ICCPR, the CRC also provides that all children have the right to life and obligates States “to ensure to the maximum extent possible the survival and development of the child”\textsuperscript{59}. The right to life can be described as the right to the means of survival, to realize full life expectancy, to avoid environmental risks to life and to enjoy protection from the State against the deprivation of life\textsuperscript{60}.

This definition of the right to life has been applied particularly effectively to indigenous communities. It was applied in the Yanomami Indians Petition (1988) before the IACmHR. In this case, the Commission found that the actions of the Brazilian government in allowing the construction of a road and in granting mining licenses on the Yanomami’s indigenous land

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{57} “American Declaration of the Rights and Duties of Man,” United Nations, 1948, 1.
\item \textsuperscript{58} “International Covenant on Civil and Political Rights,” United Nations, 1966, 4.
\end{itemize}
\end{footnotesize}
causing their displacement violated their human rights including the right to life and health. The forced displacement of the Yanomami people and the influx of other people wanting to exploit the natural resources of their lands had led to new diseases, loss of livelihood and the outbreak of violence. In Sawhoyamaxa Indigenous Community v. Paraguay (2006), the Court further held that the right to life is not limited to avoiding the arbitrary deprivation of life but includes the right that conditions preventing a decent existence are not created. Therefore, the right to life would be threatened where environmental degradation is so severe that it deprives a person or community of their means of subsistence.\(^\text{61}\)

Both the IACoHR and IACtHR have been at the forefront of environmental rights jurisprudence, especially as it relates to indigenous communities. Although these cases are not specific to climate change, they are useful as authority for the proposition that human rights and the right to life are impacted by the environment inclusive of climate change. The most important cases in addition to the Yanomami one are: Mayagna Awas Tingny Community v. Nicaragua (2001), Maya Indigenous Community of the Toledo District v. Belize (2004), Yakye Axa Indigenous Community v. Paraguay (2005), Kawas-Fernandez v. Honduras (2009), and the Kichwa Peoples of the Sarayaku Community and Its Members v. Ecuador (2012).\(^\text{62}\) The IACtHR also issued an advisory opinion on environmental human rights in 2017, in response to a request from Colombia for clarification of State obligations in relation to environmental protection and the rights to life and physical integrity (ACHR, Articles 4 and 5). The Court stated


that in order to respect and ensure the rights to life and physical integrity, States have a duty to prevent significant environmental damage within and outside their territories\textsuperscript{63}.

In Europe, the ECtHR has found right to life violations where States have failed to protect their citizens against known environmental risks. State obligations entail both preventing violations of the right to life as well as ensuring that appropriate procedural and legal frameworks are in place. There have been several cases in which courts have found a State responsible for a breach of Article 2 (right to life) of the ECHR where it failed to implement effective protective measures. In Oneryildiz v. Turkey (2004), the ECtHR found that Turkish authorities were aware of the risk of a methane explosion at the rubbish dump next to the applicant’s residence but did not take appropriate steps to address that risk. In fact, an explosion occurred, destroying the applicant’s house and killing nine people. The Court held that the State had failed to protect the applicant’s right, a violation of Article 2. Similarly, in Budayeva v. Russia (2008), despite warnings of the risk of mudslides in the area surrounding the claimants, the government had failed to take effective steps to ensure the safety of people living nearby. Based on Article 2 of the ECHR, the ECtHR held that the Russian government had positive obligations to ensure that the right to life is adequately protected against dangerous activities (e.g., policies)\textsuperscript{64}.

Similar case law can be found that interprets Article 8 of the ECHR, the right to respect for private and family life; oftentimes Articles 2 and 8 are cited together in environmental/human rights cases. Violations of Article 8 of the ECHR can occur where a State

\textsuperscript{63} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 34.

\textsuperscript{64} Ottavio Quirico and Mouloud Boumghar, \textit{Climate Change and Human Rights: An International and Comparative Law Perspective} (London and New York: Routledge Taylor & Francis Group, 2016), 74-75.
fails to take the necessary steps against interference by itself or private actors. In Lopez v. Spain (1994), the ECtHR ruled that environmental pollution that was not controlled by the State can nevertheless entail violation of Article 8 of the Convention. In Tatar v. Romania (2009), the ECtHR focused on the precautionary principle which says that “the absence of certainty about current scientific and technical knowledge does not justify any delay on the part of the State in adopting effective and proportionate measures”\(^{65}\). Therefore, even though the applicants failed to show a causal link between exposure to a certain industrial pollutant and their health issues, Romania should have taken measures to prevent this risk. The Court explicitly referred to the precautionary principle under international environmental law as contained in the Rio Declaration and the jurisprudence of the European Court of Justice. In Fadeyeva v. Russia (2005), the ECtHR found that the State did not have sufficient legislation in place to control the volume of toxic discharges by industries. The decision of Russian authorities to allow the construction of a steel plant in a populated town was held to be a violation of the right to respect for private and family life since the State had failed to install measures to limit the impact of toxic emissions on those living within close proximity to the plant. Similarly, in Brincat and Others v. Malta (2014), the ECtHR confirmed that the State had to adopt reasonable and appropriate measures to address asbestos harms to employees of a state-owned corporation under Articles 2 and 8\(^{66}\).

In Africa, the ACTHPR has decided only two cases relating to the right to life, whereas, the AComHPR has made several decisions concerning it. For example, the opinion of the


AComHPR in Center for Minority Rights Development on Behalf of Endorois Community v. Kenya (2010) is crucial. In this case, the Commission ruled on the removal of an indigenous community from its ancestral land and held the government of Kenya responsible for violating several fundamental rights including the right to life,\textsuperscript{67} in breach of its obligations to respect and fulfil fundamental rights of the Endorois Community. The AComHPR took the same position in the case of Ogoniland v. Nigeria (2002). The Commission said that the challenged oil extraction disregarded health and environmental rights of the local community since toxic wastes were released into the environment and local waterways. Furthermore, the Nigerian government did not adequately monitor oil operations, set safety measures or conduct health and environmental impact studies. The Commission further stated that governments have a positive obligation to protect their citizens from harmful acts committed by private entities. This decision is a milestone in terms of outlining a comprehensive substantive and procedural framework for the right to a sustainable environment using a human rights analysis.\textsuperscript{68}

Although relying on the right to life can be useful in environmental/climate change related human rights claims, it can also be limiting. The limiting factors are the individual nature of the right to life in most instances and the requirement of identifying a specific victim with standing to sue, along with the difficulty of proving causation. To be more effective, climate change challengers who rely on a human rights approach should try to invoke the right to life in


addition to other fundamental rights (e.g., right to health, an adequate standard of living and a healthy environment)\textsuperscript{69}.

\textit{ii. Climate Change and the Right to Food and Water}

The right to food was first included in Article 25(1) of the UDHR adopted in 1948. The 1966 ICESCR provides in Article 11 that “State parties to the Covenant recognize the right of everyone to an adequate standard of living including adequate food, clothing and housing and to the continuous improvement of living conditions and to be free from hunger”\textsuperscript{70}. Article 11 of the ICESCR also recognizes the right to water. Article 24(2) of the CRC provides that “State parties recognize the right of the child to the enjoyment of the highest attainable standard of health and access to treatment of illness and rehabilitation of health”\textsuperscript{71}. This can be interpreted as requiring States to take appropriate measures to combat disease and malnutrition caused by environmental/climate change impacts through adequate food and clean drinking water.

\textit{iii. Climate Change and the Right to Health (care)}

The ICESCR recognizes the right to the highest attainable standard of physical and mental health which includes timely and appropriate health care, access to safe water, adequate sanitation, adequate food, nutrition and housing as well as healthy environmental conditions and access to health-related education and information\textsuperscript{72}. The CRC requires States to take appropriate measures to combat disease and malnutrition through adequate food and

\textsuperscript{69} Ottavio Quirico and Mouloud Boumghar, \textit{Climate Change and Human Rights: An International and Comparative Law Perspective} (London and New York: Routledge Taylor & Francis Group, 2016), 73.


clean drinking water taking into consideration the impacts of environmental pollution. The ICESCR (Article 12) further requires States to cooperate and to take joint and separate action to achieve the full realization of the right to health through reducing infant mortality, improving environment and industrial hygiene, preventing epidemics and providing necessary medical services.\textsuperscript{73}

The right to health is also included in CEDAW, CERD, CRPD and CMW. Moreover, the right to health is one of the few human rights specifically mentioned in the Paris Agreement preamble. The right to health is also recognized within several regional human rights regimes. In Africa, the importance of the environment in fulfilling the right to health was confirmed by the ACHPR in the Ogoniland decision. The right to health is referenced in the ADRDM in Article 11\textsuperscript{74}. Also, the ECteSR which reviews alleged breaches of the 1986 European Social Charter (ESC) has addressed the relationship between climate change and human rights based on the right to health\textsuperscript{75}. Furthermore, the Committee on the ICESCR recognized in general Comment 14 that indigenous peoples’ availability of traditional food sources or medicines may affect their health. This was confirmed by the IACtHR in Yakye Axa Indigenous Community v. Paraguay (2005). In this case the Yakye Axa alleged that the Paraguayan government was preventing them from accessing and using their traditional lands. The Court held that this amounted to a violation of several human rights and noted that this separation from land had a negative impact on the health and well-being of the Yakye Axa people\textsuperscript{76}.

\textsuperscript{73} Achim Steiner, *Climate Change and Human Rights* (Kenya: UNEP and Columbia Law School, 2005), 12.
\textsuperscript{74} “*American Declaration of the Rights and Duties of Man,*” United Nations, 1948, 3.
\textsuperscript{75} “*European Social Charter,*” Council of Europe, 1996, 7.
\textsuperscript{76} Bridget Lewis, *Environmental Human Rights and Climate Change* (Singapore: Springer Nature, 2018), 34.
The right to health as protected under Article 12 of the ICESCR and numerous other human rights instruments, is a right that States can progressively realize. This means that States with differing capabilities may determine what is achievable for them. The ICESCR uses the “respect, protect and fulfill” formulation to describe states’ obligations regarding the right to health. For instance, the ICESCR has interpreted the right to health as requiring respect for the right to health of a people within a State’s territory and in other States. Therefore, this right could be violated by engaging in activities that harm the global atmosphere or interfere with healthy environmental conditions. Furthermore, the ICESCR Committee’s interpretation of the right to health could be read as an obligation to regulate private actors in order to achieve adequate emission standards through adopting and implementing laws, plans and policies that address the adverse effects of climate change\textsuperscript{77}.

\textit{iv. Climate Change and the Right to an Adequate Standard of Living and the Right to Property}

The right to an adequate standard of living is protected in Article 11 of the ICESCR including adequate food, clothing and housing and the continuous improvement of living standards. Severe weather events associated with climate change can endanger this right. The situation is quite serious when it comes to impacts on Small Island States and Arctic communities. With sea level rise and increased storms, some small islands will become uninhabitable and possibly at risk of being underwater\textsuperscript{78}.


\textsuperscript{78} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 162.
The right to property is guaranteed under the European, Inter-American and African regional human rights systems. In Europe, the right to property is protected under Protocol 1 to the ECHR, and cases that have addressed the right to property have adopted similar approaches to those used for the right to private and family life, with claimants arguing that environmental degradation interferes with the enjoyment of their property. As discussed earlier, in Oneryildiz v. Turkey (2004), the ECtHR held that the risk of methane explosion occurring at a rubbish dump located close to the applicant’s home constituted a violation of the right to the enjoyment of his property. Violations can come from direct interference by the State or indirectly through the State’s failure to properly regulate the activities of private actors.

Many of the cases within the Inter-American system involve the right of indigenous peoples to property in their traditional lands. Article 23 of the ADRDM says that every person has a right to own private property that meets the needs for decent living and helps to maintain the dignity of the individual. The right to property is also protected by Article 21 of the ACHR which states that everyone has the right to the use and enjoyment of his property. In Mayagna Awas Tingni Community v. Nicaragua (2001), the IACtHR held that the Nicaraguan government grant of a logging permit over the traditional lands of the Awas Tingni community without their consent violated the community’s right to property under Article 21. The Court held that Article 21 extends to protect the communal property rights enjoyed by indigenous communities.

communities and encompasses the significant cultural and spiritual as well as economic and material elements of their relationship with the land.\textsuperscript{82}

The Inter-American Commission and Court have also confirmed that the right to property enjoyed by indigenous communities includes the right to enjoy and use the natural resources within that territory. The Commission held in Maya Indigenous Community of Toledo (2004) that a logging permit granted over the Maya people’s land led to irreversible environmental damage which threatened the community’s means of subsistence. This emphasis on a means of subsistence as a component of the right to property helps to extend its application to environmental and climate change situations. Therefore, a violation of the right to property can occur not only where a person or community is unable to use their property but also where environmental conditions interfere with their ability to benefit and rely on their property for subsistence.\textsuperscript{83}

\textbf{v. Climate Change and the Right to Self-determination}

Both the ICESCR and ICCPR include the right of self-determination (i.e., to freely determine political status and freely pursue economic, social and cultural development). The application of this right is relevant in the context of climate change for Small Island States that are likely to be submerged as a result of sea levels rising as well as for indigenous peoples that could be deprived of their right to self-determination.\textsuperscript{84} The UDHR implies that the right to self-determination is a fundamental right which impacts the enjoyment of all other human rights.

\textsuperscript{84} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 34.
This right can be directly affected by environmental/climate change factors which destroy natural resources or diminish people’s ability to provide for them.

**vi. Climate Change and the Right to an Environment of a Certain Quality**

The relationship between people and the environment can be described along a spectrum. At one end people have the right to be protected from environmental degradation which may cause them harm. Next is the recognition that the environment can be beneficial in fulfilling human rights (i.e., “greening of human rights”). Further along the spectrum are rights which focus more on the well-being of the environment and are not directly linked to humans. These rights are closest to a standalone right to an environment of a certain quality, which can be defined in terms of ecological balance, conservation of biodiversity and protection of areas of significant environmental value. At the most extreme level is the rare case where constitutional rights are granted to nature itself.85

Although many of the international human rights instruments do not recognize a right to a healthy environment or one of a certain quality, there are a few that do. The first time the right to an environment of a certain quality was explicitly recognized was at the UN Conference on Human Environment through the Stockholm Declaration Principle 1 in 197286. Neither the UDHR nor the ICESCR mentions a right to a healthy environment. The ACHPR, however, does contain this right and the additional Protocol to the ACHR in the area of economic, social and cultural rights (San Salvador Protocol) also refers to it. Moreover, the Aarhus Convention, the Arab Charter on Human Rights and the ASEAN Human Rights Declaration all include the right to

---

a healthy or safe, clean and sustainable environment as an element of the right to an adequate standard of living.\textsuperscript{87}

There are 85 countries whose domestic laws recognize a right to an environment of a certain quality. In some of them, the right is described as that of individuals while in others it is described as belonging to the community or a group. In addition, over 100 States impose a duty on governments to protect the environment to some extent and over 75 countries make it a duty of citizens to protect the environment. There is a lot of variation among those constitutions which grant a right to an environment of a certain quality and those which frame environmental protection as a duty of the government, individual or community. There is also much variety with respect to the standard of environment being assured; rights can be described in terms of an environment that is good, healthy, clean, safe or decent.\textsuperscript{88}

Given the acceptance by so many countries of the right to an environment of a certain quality, it may appear that the right is already part of the general principles of international law. However, less than half of UN members recognize this right and those that do are concentrated in certain regions; this suggests that recognition of such a right is confined to certain types of States and is not truly widespread. Furthermore, few States have defined this right in a way that enables it to be enforceable. Many of these State constitutional provisions are merely aspirational in nature.\textsuperscript{89}


\textsuperscript{88} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 239.

\textsuperscript{89} Bridget Lewis, \textit{Environmental Human Rights and Climate Change} (Singapore: Springer Nature, 2018), 56.
Nevertheless, one of the most noteworthy aspects of human rights law over the last thirty years is that international and regional instruments and institutions have applied human rights law to environmental/climate change issues even without an explicit stand-alone right to a healthy environment. They have done so by “greening” existing human rights (i.e., applying already recognized rights such as the rights to life and health to environmental/climate change problems). Human rights bodies have recognized how environmental/climate change harm interferes with the full enjoyment of human rights and have concluded that States have legal obligations to protect against such harms.90

f. Human Rights-based Approach to Climate Change

If there are strong linkages between climate change and human rights, then is human rights law relevant to climate change litigation and is a human rights-based approach to climate change litigation more effective than just applying environmental/climate change law? According to Lewis, a human rights-based approach to climate change has certain benefits that an environmental/climate change law only approach may lack.91 For instance, the international human rights regime provides a broader framework of legally binding obligations of States to individuals and some groups. This framework can reinforce and complement international environmental/climate change law and put in place both substantive and procedural standards for action. Moreover, it can strengthen participation, accountability and access to justice and

encourage a focus on the human aspects of climate change with a particular focus on the most vulnerable groups.\textsuperscript{92}

Furthermore, the environmental/climate change and human rights legal regimes developed separately so they have distinct features. The focus of the environmental/climate change legal regime is prevention. Thus, regulation of activities that causes environmental damage is the focus, rather than providing remedies for violations. While the human rights legal regime also cares about prevention, it also addresses providing remedies in the event of violations. Environmental/climate change advocates see this feature as a main benefit: the ability to seek a remedy for violations which is often lacking in the environmental/climate change regime.

However, Atapattu says there are drawbacks to a human rights-based approach to climate change. For example, climate change issues encompass many species and ecosystems which are difficult to accommodate within a human rights framework. These issues also extend to future generations and transboundary aspects.\textsuperscript{93} The human rights framework is unable to encompass these challenges since it focuses on the immediate violation or harm. Therefore, in the absence of a specific right to a healthy environment, a victim must establish a clear causal link between an established human right (e.g. the right to life) and the climate change issue in question.


\textsuperscript{93} Sumudu Atapattu, \textit{Human Rights Approaches to Climate Change Challenges and Opportunities} (London and New York: Routledge Taylor & Francis Group, 2016), 50.
Moreover, there are challenges to litigating a climate change case using human rights law. Human rights law can form the basis of a legal claim where an individual or community alleges that climate change, or the failure of government to address it, amounts to a violation of their human rights as guaranteed under the law. Whether a case is successful depends on the approach in the way the right is interpreted and how the obligations are defined for the relevant duty bearer (i.e., State). The key is how decision-makers approach the difficult issue of balancing human rights and climate change against other potentially competing interests like economic development. Another challenge with this approach is related to the cumulative and transboundary impacts of GHG emissions. The impact of one State’s emissions is not limited to its territory. This presents a difficult challenge for human rights law since duties are typically owed by a State to its citizens or to those within its territory or jurisdiction. In addition, the timeframe over which the effects are realized raises questions about responsibilities for past emissions and those owed to future generations.

According to Wewerinke-Singh, the application of human rights law is further complicated by the fact that significant proportions of GHG emissions are contributed by non-state actors, like private companies. Such companies are not parties to human rights treaties and are not directly bound by international law although they are subject to domestic laws. Also, human rights-based climate change cases brought before a court need to address legal challenges like standing, causation, attribution and the discernment of environmental/climate
change standards in abstract human rights laws.\textsuperscript{94} The combination of these factors makes climate change litigation complex and challenging for international human rights law.\textsuperscript{95}

However, taking a human rights-based approach to climate change has benefits beyond litigation. For instance, it is useful to incorporate human rights principles into climate change negotiations and policy development. This includes acknowledging human rights implications of climate change, alongside economic, environmental, scientific and other factors. Human rights standards can also be used to assess climate change implications on individuals and communities. A human rights-based approach to climate change provides all of these additional benefits.

g. State Obligations with Respect to Human Rights and Climate Change

Since the State is involved in many climate change human rights-based cases, it is important to understand State obligations as they pertain to human rights and climate change. The specific obligations of a certain State will depend on which human rights and environmental/climate change treaties it has ratified. However, the statements of UN human rights institutions can be used as guidelines. For instance, the OHCHR in 2015 identified several State obligations (i.e., as customary law) such as protecting individuals against foreseeable threats of weather-related hazards, providing access to information and participation in decision-making and addressing the transboundary impacts of climate change. Specifically, the OHCHR describes State obligations with respect to international human rights as of three types:


the duty to respect human rights (a negative obligation, which requires States to refrain from actions that would interfere with the enjoyment of human rights); the duty to protect (a positive obligation, that requires States to protect against human rights violations by themselves and for those whom they are legally responsible; and the duty to fulfill human rights, a positive obligation, which requires States to undertake measures to ensure the realization of human rights for all members of society. Some interpretations of OHCHR statements also include a duty to promote human rights which entails promoting respect, observance and protection of all human rights. Within these State duties, there are procedural obligations, substantive obligations and obligations related to members of specific groups. Each group of obligations is supported by hard law (e.g., treaties and domestic legislation) as well as soft law (e.g., UN declarations, treaty-body pronouncements, and interpretations from UN special rapporteurs and other experts). 96

In terms of the three categories of duties: the duty to respect human rights can be interpreted in climate change situations as requiring States to limit or reduce GHG emissions. This duty applies to the State’s own actions as well as to those of State-owned or operated entities. For example, the decision of a State to approve the construction of a new privately-owned coal mine could represent a breach of the duty to respect human rights since the State action would facilitate the mine’s GHG emissions. The duty to respect could also include a State’s duty to develop energy policies and regulations which minimize GHG emissions and ensure compliance with international commitments. States also have a duty to protect their citizens from harmful impacts of climate change which could entail taking effective mitigation

---

96 Achim Steiner, *Climate Change and Human Rights* (Kenya: UNEP and Columbia Law School, 2005), 16.
and adaptation measures within their territory. States also must protect against actions from private actors that could violate human rights and provide remedies for such violations. For example, the ECtHR requires States to put in place regulatory frameworks to ensure that non-State actors do not violate human rights. The ECtHR separates the State’s duty to protect from the underlying cause of the harm. In Budayeva v. Russia (2008), the State was held to have a duty to protect against the adverse effects of a mudslide even though it did not cause the damage. The State has an obligation to take measures to protect against climate change impacts beyond its own contributions to those results. States also owe a duty to protect the human rights of their citizens against interference from other States. This duty may require that States help reduce global emissions and negotiate for an international response. Finally, a State’s duty to fulfill includes facilitating, promoting and providing human rights. This means ensuring that people continue to enjoy human rights in the face of climate change including adopting policies that address climate change as well as cooperating internationally to reduce GHG emissions.97

According to the OHCHR there are two different types of State obligations pertaining to climate change and human rights. “States have procedural obligations to: (a) Provide the public with accessible, affordable and understandable information regarding the causes and consequences of the global climate crisis, including incorporating climate change into the educational curriculum at all levels; (b) Ensure an inclusive, equitable and gender-based approach to public participation in all climate-related actions, with a particular emphasis on empowering the most affected populations, namely women, children, young people,

indigenous peoples and local communities, persons living in poverty, persons with disabilities, older persons, migrants, displaced people, and other potentially at-risk communities; (c) Enable affordable and timely access to justice and effective remedies for all and to hold States and businesses accountable for fulfilling their climate change obligations; (d) Assess the potential climate change and human rights impacts of all plans, policies and proposals, including both upstream and downstream effects (i.e. both production-and consumption-related emissions); (e) Integrate gender equality into all climate actions, enabling women to play leadership roles; (f) Respect the rights of indigenous peoples in all climate actions, particularly their right to free, prior and informed consent; (g) Provide strong protection for environmental and human rights defenders working on all climate-related issues, from land use to fossil fuels.”98 With respect to substantive obligations, the OHCHR says ”States must not violate the right to a safe climate through their own actions; must protect that right from being violated by third-parties, especially businesses; and must establish, implement and enforce laws, policies and programs to fulfil that right.99 According to the UN Secretary General, these human rights principles govern all climate actions and are reinforced by international environmental law by which States are obliged to ensure that polluting activities within their jurisdiction or control do not harm the environment or peoples of other States and areas beyond their jurisdiction.”100

The OHCHR in 2011 further emphasized that businesses should adopt human rights policies, conduct human rights assessments, remedy human rights violations that they are responsible

100 David R. Boyd, “Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,” Note by Secretary General of the UN, July 15, 2019, 18.
for, and work to influence others to respect human rights. Businesses should comply with the Guiding Principles on Business and Human Rights\textsuperscript{101} and reduce GHGs from their own activities, minimize GHGs from their suppliers, disclose their emissions and to ensure that people affected by business-related human rights violations have access to effective remedies. In addition, businesses should support effective climate change public policies\textsuperscript{102}.

Transboundary impacts and responsibilities for human rights violations present some of the most difficult challenges for States in the context of a human rights-based approach to climate change. Whether the ICCPR, ICESCR and other global human rights treaties apply with respect to transboundary effects of States’ conduct is still heavily debated\textsuperscript{103}. Some experts suggest that one approach would be to recognize that while a State is not necessarily responsible for conditions outside its jurisdiction, each State is required to ensure that it does not interfere with the enjoyment of rights of other States; a State must not interfere with another State’s ability to meet its human rights obligations. One of the established obligations under general and customary international environmental law\textsuperscript{104} is the obligation to ‘do no harm’ that was first articulated in 1941 in the Trail Smelter case and was reinforced in the 1972 Stockholm and 1992 Rio Declarations.\textsuperscript{105} The ‘do no harm’ principle is widely recognized as customary international law requiring States to prevent, reduce and control the risk of environmental harm to other States.

\textsuperscript{102} David R. Boyd, “Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,” Note by Secretary General of the UN, July 15, 2019, 20.
\textsuperscript{104} Customary international law can be established by showing State practice and opinio juris (i.e., a sense by a State that it is bound to the law in question and that the custom is “accepted as law”).
While specific obligations vary depending on which human rights treaties (e.g., ICCPR or ICESCR) and environmental agreements (e.g. UNFCCC or the Paris Agreement) they have ratified, it seems that States must protect their citizens against the foreseeable threats of climate change and respect, protect and fulfil their human rights. States should make sure that their climate policies and actions do not negatively impact human rights, with particular attention paid to members of vulnerable groups. Moreover, the OHCHR, the CESCR, and the rapporteurs, have all given clear statements on human rights and climate change. Although these are all soft law and not legally binding, they do provide strong guidance to States.

h. Human Rights-based Approach and How it Works in Climate Change Litigation

Using litigation to address climate change can pressure governments to adopt more climate change policies as well as to sign and ratify treaties.\textsuperscript{106} Litigation can also generate media attention, mobilize public interest, and gain remedies for victims. Although treaties require States to restrict GHG emissions, treaty negotiations have stalled in the past and even when signed, these treaties are generally weak (e.g., Paris Agreement). Since international human rights law is robust and most States belong to at least one of the human rights regimes, it makes sense to look at human rights law as a means to enhance the effectiveness of climate change cases against States. Individuals or groups can bring human rights claims (after exhausting local remedies) against their own State and other States in certain international

courts and may prevail if they can show that failure to regulate GHG emissions has resulted in a violation of their human rights.\textsuperscript{107}

In most climate change cases, States are the defendants. There are different types of climate litigation. Some challenge the validity or application of existing national laws and international climate treaties while others try to have governments implement more ambitious climate policies. Some challenge climate policies in general, others focus on specific initiatives that impact climate change. Using human rights as the basis for a claim can be complex and does not guarantee success. While the linkage is clear between climate change and human impact, it is not easy to attribute climate change related harms to acts or omissions by specific States and to classify these harms as human rights violations. For climate change, the challenge is in identifying the appropriate rights holders and duty bearers to formulate a legal claim and demonstrate the causal connection for the violation. There are also challenges in balancing the State’s complex and competing interests as well as its multiple responsibilities and finite resources.\textsuperscript{108}

To bring a human rights-based climate change case successfully to court, the plaintiffs must first establish that they are victims of a human rights violation. They must also establish that the national, regional or international institution in question has jurisdiction over the case. To meet this requirement, the plaintiff does not need to be a national or resident of the State but must present a prima facie case that his or her human rights have been violated as a result of acts for which the State in question is responsible. In cases of climate change, this could


involve providing evidence of a causal link between the State’s climate laws, policies, or practices and a harm suffered by the plaintiff. Establishing causation can be challenging due to lack of or uncertainty around the data. The precautionary principle can help since it says that scientific uncertainty is not necessarily a limitation to bringing claims forward. Plaintiffs who bring a case before an international human rights body must generally demonstrate that all relevant remedies available domestically have been exhausted. Moreover, claims before regional as well as global human rights bodies will only be entertained if the State is party to both the treaty containing the relevant rights and the treaty establishing the complaint mechanism.\textsuperscript{109}

Building a successful human rights-based climate change case entails both establishing climate change impacts as the relevant facts and conceptualizing human rights as the relevant law.\textsuperscript{110} Impacts of climate change that threaten human rights include sea level rise, droughts, heat waves, desertification, fires, diseases, floods, storms, and other natural disasters. These harms can provide the factual basis for a human right claim when the harm is severe enough to impact a human right and the causal link to climate change is established. International human rights treaties can form the basis for a case, where a State has either ratified the treaty or included its rights in its Constitution or national laws. These rights could include the rights to

life, health, food, water, property, self-determination as well as procedural rights like the rights of access to information, participation and justice.\textsuperscript{111}

To effectively develop a human rights-based climate change case, the questions of who, what and where are essential to answer. The who is who can sue and who can be sued. International human rights law generally recognizes the standing of individuals and some groups to bring forward human rights complaints. Many human rights treaties establish that States subject themselves to complaints if they are alleged to have violated provisions of treaties they have ratified. Regarding the what, human rights law does not need to directly recognize climate change to provide a basis for a claim. What matters is whether an applicable human rights treaty or law protects the right that was impacted by climate change. Applicability is important given that treaties only bind States that have ratified them. As an example, if a State’s action with respect to climate change resulted in the spread of a disease, thereby infringing on the right to health, then legal action is possible before an international body like the Committee on Economic, Social and Cultural Rights (CESCR), which hears complaints related to rights in the ICESCR. To be admissible before the CESCR, the claim must be against a State that ratified both the ICESCR and its Optional Protocol. After the relevant legal norm is identified the next step is to determine whether the harm rises to the level of a violation of that legal norm. The text of the law itself as well as past decisions and jurisprudence of the institutions hearing claims under that law will be important. The question of where largely

follows from the determination of who and what; identifying the proper parties and the relevant law will often determine where to bring the case.\footnote{112}

Finally, there are differences in regions around the world in terms of how they have addressed climate change through a human rights-based approach. Jacqueline Peel and Jolene Lin have done some analysis on climate change litigation in the Global South\footnote{113} reviewing cases in the Pacific, Africa and Latin America. In these cases, human rights-based arguments are more prevalent. In contrast to many Global North\footnote{114} cases seeking to force governments to adopt more stringent climate change policies, Global South cases focus more on implementing existing policies. In the Global South cases, there is more usage of the Public Trust Doctrine\footnote{115} and more cooperation with NGOs. Moreover, Global South cases often stress human rights or environmental constitutional rights claims when describing States’ mitigation or adaptation failures. The national constitutions of Global South countries generally contain environmental rights. On the other hand, in the U.S. and Australia, the two Global North countries with the most climate change cases, the possibilities of using a human rights-based approach is more limited given their legal structures and lack of an express constitutional or legislative recognition of environmental rights.\footnote{116}


\footnote{113} Global South refers to countries that are the less developed regions in Africa, Asia and South America.

\footnote{114} Global North refers to countries that are developed such as the U.S., Canada, Western European nations and developed parts of Asia.

\footnote{115} Public Trust Doctrine refers to the principle that some resources are so critical to the well-being of the community that they must be protected by law.

III. **Theory and Research Design**

From the literature review on climate change and human rights, it appears that human rights law is relevant in climate change litigation. However, the application of human rights law in such cases has been limited. This thesis aims to fill a gap in the literature by developing and suggesting ‘good practices’ based on case studies of how human rights law can be relevant in climate change litigation. Taking a human rights-based approach to climate cases at a minimum does not hurt the claimants’ arguments and often helps to strengthen them. In addition, because the human rights regime has a robust legal framework, more jurisprudence to pull from, and the added benefit of focusing on remedies, it seems prudent whenever feasible to invoke human rights law in climate change litigation. In other words, a human rights-based approach provides more cases to draw upon and more instruments and institutions to cite. Moreover, the existing human rights framework as articulated by the UN of State obligations provides granularity to how States should respect, protect and fulfill human rights.

Furthermore, since the environmental/climate change and human rights regimes are complex and not necessarily integrated seamlessly at the global, regional or national levels, climate change claims should fare better at the national level where environmental/climate change and human rights law and policies are much more integrated and specific. This is also where the case is presumably best understood and where the environmental/climate and human rights laws are strongest (e.g., written in State constitutions and national laws) and most relevant as well as required by law (i.e., claimants must exhaust local remedies before resorting to regional/global solutions). State obligations are also stronger at the national level (e.g., transboundary obligations are difficult to prove so regional and global litigation is more
challenging to maintain). Furthermore, a standalone right to a healthy environment is recognized in many national Constitutions so this provides another avenue for climate change litigation. It seems that a logical approach is to rely on this right if it exists at the national or regional level and if not, then to cite existing human rights law (e.g., right to life, health, standard of living) and urge that it be interpreted in the context of climate change.

Most of the literature considering the application of human rights law in arguing climate change cases does so by reviewing individual cases and not through a thorough analysis of all climate change cases. Determining whether cases that applied a human rights approach have been more effective seems to require a more comprehensive view. Likewise, the literature is sparse when it comes to detailing ‘good practices’ for applying human rights law in climate change cases. The best way to determine whether these cases benefit from a human rights-based approach is to see it in action. Conceptually it makes sense to apply human rights law to climate change; however, realistically it is more compelling to show that a human rights-based approach helps plaintiffs’ arguments climate change cases in actual practice. Examining all climate change cases will help demonstrate whether this approach is effective and whether there are ‘good practices’.

There have been 1,598 climate change cases\footnote{Cases are from the Sabin Climate Change Database which includes all cases globally that reference “climate change” in the claim and/or decisions. The appendix section details all the cases discussed in this thesis.} globally and in only a small portion of them have claimants appealed to human rights law in their arguments. The analysis will begin with a few of the more prominent and often referenced climate change human rights-based cases from 2005 to 2019. They are summarized in terms of the nature of the claims as well as
the key arguments and any decisions made as well as the relevant rationale and teachings behind the decisions.

IV. Lessons from Case Studies

a. Inuit Circumpolar Conference v. USA (2005, IACHR)

The 2005 petition brought by the Inuit Circumpolar Conference on behalf of the Inuit of the U.S. and Canada before the IACHR was the first climate change case to apply human rights law. The petitioners argued that the U.S., the biggest contributor of GHG at the time, was responsible for climate change damage to the Arctic, which violated their human rights. The Inuit culture is linked to snow and ice levels and is being threatened by climate change. The sea ice which is a critical resource for the Inuit for travel, harvesting and communications has become thinner, freezing later and thawing earlier, thus affecting the Inuit’s everyday lives. The quantity, quality and timing of snowfall have also been altered by climate change. Moreover, permafrost is melting rapidly, causing slumping landslides and severe erosion. Loss of sea ice has also resulted in violent storms hitting the coastline, forcing some coastal communities to relocate. In addition, it has impacted plant and animal species and has increased the risk of health problems such as sunburn, skin cancer and cataracts.

118 The “cases” term used in the Sabin database pertains to more than judicial administrative actions and proceedings and includes rulemaking petitions, requests for reconsideration of regulations, and notices of intent to sue. Cases in the U.S. Sabin database are organized by type of claim: federal statutory, constitutional, state law, common law, public trust, securities and financial regulation, trade agreements, adaptation, climate change protesters and scientists. Cases in the non-U.S. Sabin database are organized by suits against the government and suits against corporations and individuals.

119 See appendix for detail case analysis including jurisdiction, principal law applied, type of claim, decisions and motions made and supporting filings. The dates reference the date the litigation was filed.

The petitioners argued that several international human rights instruments are relevant here: the ADRDM, the ICCPR and the ICESCR. Moreover, under the UNFCCC, the U.S. is obligated to not cause transboundary harm to the Inuit living in Canada, for example. They argued further that under ADRDM, the rights of culture, property, health, life, security and means of subsistence and movement are protected. The petitioners requested the Commission to make an onsite visit to investigate the harm, hold a hearing, prepare a report, and recommend that the U.S. adopt measures to limit its emissions, and establish and implement a plan to provide assistance to adapt to the impacts of climate change.

Based on the questions that the Commission had, it can be inferred that they ultimately dismissed the petition on the grounds that there was insufficient information to determine the causal link between the damage to the victims and the actions or omissions of the United States, the alleged wrongdoer. In the Inuit case, in order to succeed, the petitioners would have had to establish that the GHG emissions by the U.S. directly caused the damage to the Arctic and the Inuit people. Given that climate change is a global issue and every member of the international community is a contributor, establishing that the damage caused to the Inuit was the result of U.S. emissions alone was difficult. Another challenge was the time lag between emissions and their eventual impacts. Damage to future generations is difficult to capture within a causal framework. This petition did, however, prompt the UNHRC to request the OHCHR to prepare a report on the link between human rights and climate change. The
report published in 2009 said that climate change threatened the enjoyment of a wide range of human rights.  

b. Arctic Athabaskan Council v. Canada (2013)

The IACHR has received two petitions related to climate change harms and indigenous peoples in the Arctic: Inuit Circumpolar Conference v. USA (2005) for acts and omissions causing global warming and Arctic Athabaskan Council (AAC) v. Canada (2013) for inadequate regulation of black carbon emissions. Both cases alleged violations of rights to culture, property, health, and means of subsistence. The Commission declined to rule on the 2005 petition but allowed a hearing. They have yet to rule in the 2013 case. The Arctic Athabaskan peoples’ petition to the IAComHR argued that black carbon pollution from Canada is harming the Arctic environment, and that the rapid warming and melting in Athabaskan lands caused by Canada’s failure to reduce black carbon emissions violates their fundamental rights to culture, property and health. This case is very similar in scope to the Inuit petition. It remains to be seen how the Commission will handle it. The petition requests Canada to act domestically to reduce black carbon emissions.

Like the Inuit petition, the Athabaskan case asks the IAComHR to interpret the ADRDM in light of both the ‘do no harm’ principle and the precautionary principle. The AAC requested the IAComHR to recommend that Canada adopt mandatory measures to limit black carbon emissions.

---

121 Sumudu Atapattu, Human Rights Approaches to Climate Change Challenges and Opportunities (London and New York: Routledge Taylor & Francis Group, 2016), 70.
emissions from key sectors, consider the climate impacts of these emissions on the Arctic before approving major actions, and implement in coordination with the Athabaskan people a plan to protect their culture and resources from the effects of accelerated Arctic warming. The challenge in both cases was establishing causation (i.e., that the acts of the respondent States resulted in a material increase in risk of damage sufficient to permit the inference of causation). Even if it turns out that substantive rights cannot be proved, one can argue that fundamental procedural rights should have been recognized in this case.\textsuperscript{123}

c. \textit{VZW Klimaatzaak v. Kingdom of Belgium et al} (2014, Brussels Court of First Instance)\textsuperscript{124}

This case draws significantly on the Urgenda case in the Netherlands in asserting that the government’s failure to take adequate climate change action has been to the detriment of human rights. In 2014 the non-profit organization, Klimaatzaak, brought a suit against four Belgian governmental authorities (three regions and the federal State). Around 60,000 people signed as co-claimants. The demand was that the Belgian Court order the authorities to reduce their collective GHG emissions by 40% or at least by 25% in 2020 compared to 1990 and by 87.5% or at least 80% in 2050 compared to 1990. The claimants also asked the Court to impose a penalty on the government of 100,000 euros for each month it delays working on the new reduction goals. Klimaatzaak claimed that the defendants through their inaction violated human rights, the principle of prevention, the precautionary principle, and the duty of care.


They claim that climate change is already causing damage including deaths. The request was to limit GHG to recover for current damage and to prevent future damage.

The organization referred to Article 2 of the ECHR. It brought up the Oneryildiz v. Turkey (2004) case where the ECHR made clear that Article 2 contains positive obligations for the right to life. It also referred to Budayeva v. Russia (2008) to support the claim that the State is not relieved of these positive obligations even when it cannot predict exactly when a natural disaster will occur. The organization also invoked Article 8 of the ECHR, the right to respect for private and family life and the Belgian Constitutional provisions regarding that right, the right to health protection and the right to the protection of a healthy environment. Furthermore, Klimaatzaak cited Lopez v. Spain (1994) in which the ECtHR recognized a positive obligation to protect citizens against the consequences of environmental pollution, even if it is not life-threatening. It also brought up Tatar v. Romania (2009) to stress that the obligation is not affected in case of scientific uncertainty or if damage has not yet occurred. This case showed how European case law applying Articles 2 and 8 can be leveraged effectively. This case is pending, and a decision is expected in 2021.¹²⁵

d. **Leghari v. Pakistan (2015, Lahore High Court)**¹²⁶

In 2015, Mr. Leghari, a farmer, claimed that the Pakistani government violated his constitutional rights by failing to act on climate change. He sued the government for violations of his rights including the right to life, healthy environment, human dignity, property and


information. Mr. Leghari alleged that the government failed to make progress on its national climate change policy and its implementation.

On September 4, 2015 the Lahore High Court agreed with Leghari that climate change has led to dramatic alterations in our planet’s climate system with heavy floods and droughts in Pakistan raising serious concerns regarding water and food security. The Court found that the State’s delay in implementing the policy offended the fundamental rights of its citizens. The Court subsequently ordered the government of Pakistan to appoint a climate change lead person in each of its relevant ministries, develop a list of adaptation actions and establish a national climate change commission. The implementation of this decision is still pending. This plaintiff was successful mainly because the Pakistan Constitution recognizes relevant rights of its citizens (such as rights to life, human dignity, property and information).


In 2015 a Dutch environmental group, the Urgenda Foundation along with 900 Dutch citizens, sued the Netherlands for inaction on climate change. The Court ruled for Urgenda and based its decision on the State’s duty of care under Articles 2 and 8 of the ECHR. The Court found that inadequate mitigation of climate change was a dangerous violation of this duty. The Court said that the government’s legal duty to prevent climate change impacts life and health

---

129 Duty of care refers to parties being responsible to one another (inclusive of States) through reasonable foresight of harm, sufficient proximity and whether it is fair, just and reasonable to impose a duty.
and that it must adopt an emissions reduction path (i.e., 25% GHG reduction from 1990 levels) that leads to the 2-degree target specified by the IPCC. The order that the Netherlands must reduce emissions by at least 25% was presented in the 2007 IPCC report as the bare minimum reduction the developed countries of the world needed to achieve by 2020.\(^{130}\)

This case illustrated how to apply human rights law to harms resulting from climate change and was one of the most successful climate change case that used a human rights-based approach. While the Court did not find violations of human rights law directly, it used human rights law to inform its analysis, referencing both Articles 2 and 8 of the ECHR.\(^ {131}\) Furthermore, the Urgenda decision illustrated how to assess whether a State has been aware of climate change and the human rights obligations related to it. It acts as a guide on how to demonstrate the responsibility of the State towards its own citizens through precautionary measures\(^ {132}\).

The first step in the Urgenda case was to prove that there was a scientific basis to require urgent actions in reducing GHG levels. The materials used by the plaintiffs included scientific reports from both international and domestic institutions. The second step was to develop relevant State obligations based on international climate change law as well as European Union climate change policy. For instance, the fact that the Netherlands was part of

\(^{130}\) Jelmer Mommers, “Thanks to this Landmark Court Ruling, Climate Change is Now Inseparable from Human Rights,” The Correspondent, December 20, 2019, 1.


\(^{132}\) Precautionary approach means that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
the UN and the EU climate change agreements and policy measures proved that the State should have been aware of the risks of climate change since 1997.\textsuperscript{133}

Even though the Court ultimately did not find that the rights contained in the ECHR were violated, it made use of human rights principles in developing the standards applied to the State’s duty of care under Articles 2 and 8 of the ECHR. The Court referred to human rights in articulating the harms presented by climate change to the Dutch citizens. As a result, the Dutch government has committed to implementing stronger emissions reduction measures.\textsuperscript{134} For these reasons, Urgenda is a landmark case that shows what can be achieved by applying human rights law to climate change.

f. \textit{Juliana v. U.S. (2015, the Ninth Circuit Court of Appeals)}\textsuperscript{135}

In August 2015, 21 young people filed a claim with the U.S. District Court of Oregon against the U.S. government. They said that the government had actively contributed to causing climate change, which they claimed was a violation of their constitutional rights to life, liberty and property. The plaintiffs said that the U.S. government has known for over 50 years that burning fossil fuels was causing global warming and dangerous climate change. They asked the Court to hold the government primarily responsible for authorizing and incentivizing fossil fuel production, consumption and combustion that created dangerous levels of atmospheric CO2 concentrations. They said that the U.S. has been responsible for emitting 25.5% of the world’s cumulative CO2 emissions to the atmosphere between 1751 and 2014, and referred to negative

\begin{itemize}
  \item \textsuperscript{133} Sebastien Duyck, Sebastien Jodoin and Alyssa Johl. \textit{Routledge Handbook of Human Rights and Climate Governance} (London and New York: Routledge Taylor & Francis Group, 2018), 364.
  \item \textsuperscript{134} Dewaele Janne, “The Use of Human Rights Law in Climate Change Litigation,” (Master’s Thesis, University of Montpellier, 2019), 38-51.
  \item \textsuperscript{135} “\textit{Juliana v. United States},” Sabin Center for Climate Change Law, last modified October 15, 2020, https://climatecasechart.com/case/juliana-v-united-states/.
\end{itemize}
effects of droughts, lack of snow and forest fires on their psychological well-being and health. They asked the U.S. Court of Appeals for the Ninth Circuit to declare that the government has violated their fundamental rights and to order the government to reduce CO2 emissions to a level of less than 350ppm by 2100 and to develop an action plan to this end. The government claimed the plaintiffs lacked standing, that they failed to state a claim under the Constitution and that the Court therefore lacked jurisdiction.

The plaintiffs referred to the fundamental constitutional right to be free from government actions that harm life, liberty and property. They claimed that these rights belong to them as well as to future generations. Their claim was also based on the Public Trust Doctrine (i.e., the federal government is a trustee over important natural resources). On standing, the government claimed that the plaintiffs must allege that they suffered concrete and specific injury. The Oregon Federal District Court held that the plaintiffs had adequately demonstrated the infringement of a fundamental right under the U.S. Constitution by claiming that government action is positively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespan, cause widespread damage to property, threaten human food sources and dramatically alter the planet’s ecosystem.136 In January 2020, the Ninth Circuit Court of Appeals reversed the District Court ruling and dismissed the case on the grounds that the plaintiffs lacked standing. The plaintiffs have stated that they plan to seek review in the Supreme Court.

g. Ioane Teitiota v. the Chief Executive of the Ministry of Business Innovation and Employment (2015, Supreme Court of New Zealand)\(^{137}\)

A Kiribati national applied for asylum in New Zealand based on harm that climate change was causing Kiribati. He claimed that his homeland was facing steadily rising sea water levels as a result of climate change, and over time the inhabitants of Kiribati will be forced to leave their island. The High Court and Court of Appeals of New Zealand both found that Mr. Teitiota failed to qualify as a refugee and rejected his claims based on the 1951 UN Refugee Convention, the ICCPR and New Zealand law. In July 2015, the Supreme Court also found that Mr. Teitiota would not face serious harm if returned to Kiribati and found no evidence that Kiribati was failing to take steps to protect its citizens from the effects of climate change. Although this claim was unsuccessful, it opened the future possibility of finding validity in claims brought by people who are forced from their country due to climate change.\(^{138}\)

h. Greenpeace SEAsia et al. v. Carbon Majors – Commission on Human Rights of the Philippines (2015, Philippines Commission on Human Rights)\(^{139}\)

In 2015 Greenpeace SEAsia and other groups filed a complaint before the Commission on Human Rights of the Philippines against 47 investor-owned corporations that are among the largest historic emitters of GHGs in the Philippines. The complaint asked the Commission to investigate the human rights implications of climate change and ocean acidification in the


Philippines and those companies responsible for resulting human rights violations. Greenpeace argued that these violations are the causes of the extreme weather events which have been so destructive in the country like Typhoon Haiyan which killed more than 6000 people in 2013. The petition alleged that the carbon majors (major contributors to carbon emissions) have contributed to these violations of human rights, drawing on the UN’s Guiding Principles on Business and Human Rights. The complaint requested the Commission to ask the companies for plans on how they will eliminate, remedy, and prevent human rights violations resulting from climate change in the future.

In December 2015, the Commission on Human Rights announced that it would launch an investigation as requested by the petitioners, and in July 2016, it ordered the companies to respond to the petition and 21 companies complied. In December 2016, the Commission moved ahead with a public inquiry and held hearings in 2017. On December 9, 2019, the Commission announced that all 47 corporations, including Shell, ExxonMobil, Chevron, BP, Repsol, Sasol, and Total could be found legally and morally liable for human rights harms to Filipinos from climate change impacts. The Commission also found that criminal intent may exist due to certain circumstances involving obstruction, willful obfuscation and climate denial. It also said that people affected by climate change and whose human rights have been harmed must have access to justice and remedies and that corporations have responsibilities to protect human rights.140 This case shows the effective use of the UN Guiding Principles on Business and Human Rights.

i. **Greenpeace Nordic Association and Nature Og Ungdom (nature and youth) v. the Government of Norway represented by the Ministry of Petroleum and Energy (2016, Norwegian Supreme Court)**\(^{141}\)

In October 2016, Greenpeace Nordic Association along with youth groups and indigenous peoples sued the Norwegian government for opening the Barents Sea to fossil fuel exploration. The plaintiffs asserted that the government’s decision to allow oil drilling in the Barents Sea constitutes a violation of its obligations with regard to environmental protection and human rights. It relied on Article 112 of the Norwegian Constitution (the right to an environment conducive to health and to a natural environment whose productivity and diversity are maintained) as well as Articles 2 and 8 of the ECHR (the rights to life and private and family life) and Article 12 of the ICESCR (the right to the enjoyment of the highest attainable standard of physical and mental health). The petition argued that the production licenses Norway awarded would result in increased emissions incompatible with Norway’s commitment under the Paris Agreement. The Oslo District Court had dismissed the claim in January 2018 and the plaintiffs appealed to the Borgarting Court of Appeal, which also concluded that the decision to award exploitation permits was valid and followed the requirements of section 112 of the Constitution.\(^{142}\)

---


j. **PUSH Sverige, Faltbiologerna and Others v. the Government of Sweden (2016, Stockholm District Court)**\(^{143}\)

The responsibility of a government to prevent the extraction of fossil fuels as it relates to human rights was also at the core of a petition filed in September 2016 against the Swedish government. Youth plaintiffs argued that the State-owned enterprise Vattenfall’s sale one of its lignite coals mines in Germany to a private operator would result in the future exploitation of the mine and that it was the government’s duty to prevent such a deal. Referring to science, the plaintiffs emphasized that the continued exploitation of lignite is not compatible with the objectives of the Paris Agreement. The plaintiffs said the government failed to meet its human rights obligations under the Swedish Constitution, the ECHR and the EU Social Charter.\(^{144}\) The Stockholm District Court denied the requests after determining that the plaintiffs had not experienced an injury from the government’s actions. Both this case as well as the Nordic Greenpeace one prior demonstrates that successfully applying human rights law to climate change is difficult given challenges in establishing causation.

k. **Verein Klimaseniorinnen Schweiz and Others v. Federal Council of the Swiss Confederation and Others (2016, Swiss Supreme Court)**\(^{145}\)


Drawing from the Urgenda case, this Swiss case filed in October 2016 argued that the government’s national mitigation target did not meet the standards set by the scientific community and was a violation of duties under the Swiss Constitution and ECHR. A group of 459 elderly women sued the Swiss government alleging that its climate policy violated their constitutional and human rights due to the effects of heat waves and other climate change impacts. In particular, the plaintiffs claimed that failure to take adequate climate action threatens the right to life under the Swiss Constitution and the right to private and family life under the ECHR. The plaintiffs wanted the government to strengthen its mitigation policy to meet the lower range of the IPCC’s GHG emissions reduction targets by 2030. In 2018, the Swiss Federal Administrative Court dismissed the case on the basis that Swiss women over 75 years of age were not the only population affected by climate change. The judgment has been appealed to the Swiss Supreme Court and dismissed in 2020.146

I. Future Generations v. Ministry of the Environment and Others (2018, Colombia Supreme Court)147

In 2018, 25 young Colombians brought a lawsuit against their government claiming that the government’s failure to reduce deforestation in the Amazon puts their fundamental rights at risk. They claimed that the government is not meeting its zero net deforestation target in the Amazon by 2020 (established in the National Development Plan 2014-2019 and under the national commitments in the context of the Paris Agreement). The claimants referred to the

rights to a healthy environment, to life, to health, to food and to water in the Colombian Constitution. The Colombian Supreme Court ruled in favor of the applicants in 2018 and found that deforestation leads to climate change. The Court referred to the ICESCR and recognized that future generations can be the owners of rights. The Court said that the government must address deforestation in the Amazon properly and present an action plan and work towards reducing deforestation eventually to zero. The fact that the Colombian Constitution contains a right to a clean and healthy environment was instrumental in the plaintiffs’ success.\textsuperscript{148}

m. Sacchi et al v. Argentina (2019, UN Committee on the Rights of the Child)\textsuperscript{149}

A group of 16 young people from around the world submitted a legal complaint about climate change with the UN Committee on the Rights of the Child. Their petition alleges that five regional leaders and G20 members (Argentina, Brazil, France, Germany, and Turkey) have known about the risks of climate change for decades, but have failed to limit emissions and usage of fossil fuels. In their complaint the young people described the climate change impact on their lives including brushes with death, loss of neighbors to wildfire and flooding, threats to traditional ways of life such as reindeer herding and fishing (in Sweden), significant health hazards and hardships from drought, poor air quality, poisoned marine life and mental anxiety and depression about the future. The Petition relied upon expert analysis and personal stories to support claims that the effects have violated their human rights by threatening their survival, impairing their physical and psychological development and harming their health.\textsuperscript{150} This case is still pending.

n. Torres Strait Islanders v. Australia (2019, UN Human Rights Committee)\textsuperscript{151}

Torres Strait Islanders claimed that Australia’s failure to address climate change puts their homeland and culture in danger. The seven petitioners told the UNHRC in Geneva that rising seas caused by global warming are threatening their homelands and culture. The


\textsuperscript{150} Michael Rubenstein, “16 Young People File UN Human Rights Complaint on Climate Change,” EarthJustice, September 23, 2019, 1-2.

islanders said that the Australian government has no policies in place to meet the country’s emissions reduction target and is pushing the interests of the fossil fuel industries. In their complaint, they asked the UNHRC to find that international human rights law requires the Australian government to reduce its emissions to at least 65% below 2005 levels by 2030. The complaint also demanded that Australia set aside $20 million for emergency infrastructure work for sea walls to protect the islands’ residents from rising seas. The UNHRC will assess whether Australia’s climate emission policies are adequate and whether the government is effectively stripping people of their basic human rights.152 This case is still pending.

V. ‘Good Practices’ for Applying Human Rights Law to Climate Change Litigation

Beyond the sample discussed above are many more climate change cases that have either used a human rights-based approach or not. According to the Sabin Center for Climate Change Law database, there were 1,598 climate change cases from 1986 to October 2020153. The Sabin Center database tracks developments in litigation and administrative proceedings related to climate change. Specifically, the cases in the database have the following characteristics154:

- Involve a broad range of entities with cases brought by individuals, NGOs, governments and corporations against corporations, governments, and NGOs.

153 See Chart 1
• Rely on diverse legal principles including tort, constitutional, administrative, environmental, human rights, corporations, securities and consumer protection laws.

• Challenge various acts, policies and practices, including perceived failure by governments and corporations to sufficiently mitigate GHG emissions, adapt to climate change, accurately manage, report or disclose the risks associated with it, or policies intended to facilitate the transition to clean energy and actions against those protesting climate changes.
The 1,598 cases were analyzed using the following general framework\textsuperscript{155}:

\begin{center}
\textbf{Case Analysis General Framework}
\end{center}

Climate change cases were generally defined as those that referenced ‘climate change’ in the plaintiff’s arguments or motions, and/or in the opinions and decisions of the court. According to the data, climate change cases reached a high in 2019\textsuperscript{156} and the application of human rights law in these cases grew steadily from 2015 onwards. In terms of regions, the U.S. has the most with over 1,200 cases to date with Europe being a distant second at over 180 cases. However, only 5% of all climate change cases across all regions referenced human rights law/principles, with the Americas and Europe having the most climate change and human rights

\textsuperscript{155} ‘CC’ represents climate change cases; ‘CC and HR’ represents climate change cases where claimants applied human rights; ‘Decided’ includes final as well as interim decisions by the Court when it was relevant; ‘Successful’ in the CC cases implies that the climate change proponent or issue was ‘successful’ including those cases where settlements/agreements and partial success were granted; ‘Successful’ in CC and HR cases implies that the Court invoked human rights in its decision/opinion or recognized the relevance of human rights but did not rule based on it.

\textsuperscript{156} The full year statistics for 2020 are not yet known so 2019 as of now is the highest
cases as a percentage of their total climate change cases. This makes sense since the human rights regimes in both of these regions are robust. When looking at the effectiveness of applying human rights law, it seems that there is not a significant difference in the success rate of climate change cases that applied human rights versus those that did not. In fact, one could argue that the application of climate change or environmental laws only is as effective if not more effective in almost all the regions. Only in Africa does it seem to have a measurable impact although the volume of cases in Africa is too low to fairly judge.

Furthermore, the overall data is inconclusive since there are many cases that are pending and undecided so the ultimate success rate could be better with human rights law applied to climate change cases, but we just do not know yet. Moreover, the application of human rights law in climate change litigation is relatively new (i.e., steadily growing since 2015) so there may not be enough case law to draw a conclusion. Finally, as discussed in prior sections, claimants are limited by the human rights laws and processes that have been ratified by the relevant States in each case. Even though quantitatively the results are inconclusive, qualitatively the review of these cases show that as long as there was recognition of human rights principles and law in the case, it was successful. The success is measured in terms of moving the conversation forward on the impact climate change has on human rights and the possible impact of this conversation on future policy change.

---

157 See Table 2
Table 2 Climate Change Cases with/without Applying Human Rights Law
What can be learned from the 76 climate change cases globally that applied human rights law\(^{167}\)? Of these, 27 (36% of total CC and HR cases) had claims that were successful in

\[\text{Global} & \quad \text{Europe} & \quad \text{Americas} & \quad \text{APAC} & \quad \text{Africa} & \quad \text{U.S.} \\
\hline
\text{Total # of CC Cases}\(^{158}\) & 1598 & 184\(^{159}\) & 53\(^{159}\) & 144 & 7 & 1209 \\
\text{Total # of CC Cases w/HR}\(^{161}\) & 76 & 36 & 13 & 12 & 1 & 10 \\
\text{CC Cases w/HR as % of Total CC Cases}\(^{162}\) & 5\% & 20\% & 25\% & 8\% & 14\% & 1\% \\
\text{Total CC Success Rate}\(^{163}\)^{164}\) & 43\% & 59\% & 45\% & 53\% & 57\% & 38\% \\
\text{CC Only Success Rate}\(^{165}\) & 43\% & 67\% & 45\% & 52\% & 50\% & 38\% \\
\text{CC Cases w/HR Success Rate}\(^{166}\) & 36\% & 28\% & 46\% & 50\% & 100\% & 10\% \\
\hline
\]

\(^{158}\) Total number of climate change cases as described in the Sabin Center for Climate Change Law.

\(^{159}\) Sacchi v. Argentina Case is counted in the Europe numbers although it also applies to the Americas.

\(^{160}\) Sacchi v. Argentina Case is counted in the Europe numbers; Americas excludes U.S.

\(^{161}\) Total number of climate change cases that applied human rights law.

\(^{162}\) Percentage of the total climate change cases that applied human rights law.

\(^{163}\) Percentage of the total climate change cases that were ‘successful’; cases that are pending/undecided are not included; success is defined where courts recognized climate change or climate change and human rights in their decisions whether it was instrumental in the decision or not.

\(^{164}\) The average % of pending and undecided cases is 25% globally.

\(^{165}\) Percentage of the total climate change cases that only used climate or other laws and not human rights law that are ‘successful’; cases that are pending/undecided are not included; success is defined where courts recognized climate change or climate change and human rights in their decisions.

\(^{166}\) Percentage of the total climate change cases that applied human rights law and that are ‘successful’; cases that are pending/undecided are not included; success is defined where courts recognized climate change or climate change and human rights in their decisions.

\(^{167}\) See Appendix for full case citations and details.
terms of applying human rights to climate change litigation\textsuperscript{168}. They span from 2005 to 2020 and represent all the regions. Early on in 2005 with the Petition to the Inter-American Commission on Human Rights (the Inuit case referenced earlier) the success was achieved when the Court recognized that a hearing was needed to better understand the climate change impacts on human rights. In addition, in 2005 there were two successful cases that also referenced human rights: one in Nigeria and one in Greece. In Marangopoulos Foundation for Human Rights \textit{v.} Greece, questioning Greece’s management of coal mines and power plants, the European Committee on Social Rights held that Greece had violated several articles of the European Social Charter (ESC), including Article 11 which protects citizens’ right to a clean environment, by requiring restrictions on pollutants known to harm human health.\textsuperscript{169} In the Nigerian case of Gbemre \textit{v.} Shell, the Nigerian Federal Court found that gas flaring was unconstitutional as it violates the fundamental rights of life and dignity of human persons provided in the Nigerian Constitution and the ACHPR.\textsuperscript{170} In 2006, the German case of German Federation for Environment and Conservation \textit{v.} Minister for Commerce and Labor was focused on access to information and the Berlin Administrative Court found that information relevant to climate change should be released based on German law (Access to Environmental Information Act) and policy.\textsuperscript{171} In 2007 and 2009, there were two cases in the UK and France that applied

\textsuperscript{168} The Sabin Center for Climate Change Law is the central database for all primary case documentation that was used for this thesis.
\textsuperscript{171} “German Federation for Environment and Conservation e.V. \textit{v.} Minister for Commerce and Labor on behalf of Federal Republic of Germany,” Sabin Center for Climate Change Law, last modified October 15, 2020,
the Aarhus Convention on Access to Environmental Information (Greenpeace v. Secretary of State for Trade and Industry, City of Lyon v. French Deposits and Consignments Fund). In 2010, a case in Poland (Poland v. European Parliament, Council of the EU) was successfully argued by plaintiffs in front of the EU Court of Justice, which referenced the EU Directives of 2003 and focused on protection of human health and the environment. In 2013, in In re Court on its own motion v. State of Himachal Pradesh and others, the plaintiffs effectively argued for the right to a clean environment contained in the Indian Constitution and won this case on black carbon emissions in India. In 2014 and 2015, three cases addressed island nations and the potential of climate change to affect the livelihoods of persons living there. In these cases, based on the islands of Tuvalu and New Zealand (In re: AD (Tuvalu), Ioane Teitiota v. The Chief Executive of Ministry of Business, Innovation and Employment, UN HR Committee Views Adopted on Teitiota Communication), the NZ Courts recognized that climate change could have substantial impact on these island nations even though the plaintiffs ultimately lost the case based on immigration laws. In 2015, there were four significant cases from the Philippines, the Netherlands, Pakistan and the U.S. The two cases in Pakistan (the Leghari case referenced earlier) and the U.S. (In re Maui Electric Co.) effectively applied their national/state Constitutions (e.g. the Hawaiian Constitution) which recognized either human rights or the right to a healthy environment. In the Netherlands case (Urgenda, referenced earlier) the Court also cited Articles 2 and 8 of the ECHR which protects the right to life and the right to private and family life. In the Philippines case (the Greenpeace case referenced earlier) the claimants’ success drew mainly from the UN Human Rights Commission’s Guiding Principles on Business

and Human Rights. In 2016, the IACtHR issued an advisory opinion that recognized the right to a healthy environment as a human right. In 2017 although the claimants in the case of Friends of the Irish Environment CLG v. Fingal County Council lost their case, the Irish High Court recognized a right to a healthy environment under the Irish Constitution.\textsuperscript{172} Also, in 2017 in Nepal, Shrestha v. Office of the Prime Minister et al. was successfully argued by plaintiffs based on a right to a dignified life and a healthy environment and referenced the Nepal Constitution, the UNFCCC and the Paris Agreement. In 2018 in cases in Poland, France, UK, Canada, Colombia and Pakistan the Courts recognized the right to health, property and an environment as a fundamental right of human dignity and well-being. In Sheikh Asim Farooq v. Federation of Pakistan etc., the Pakistani High Court touched upon the right to a healthy environment, the precautionary principle and the public trust doctrine.\textsuperscript{173} In a Polish case (Development YES-Open-Pit Mines NO v. Group PXU S.A.), the Court applied the OECD (Organization for Economic Co-operation and Development) Guidelines for Multinational Enterprises\textsuperscript{174} and recommended that coal companies implement policies that recognize human rights and the environment. In the Colombian case of Future Generations v. Ministry of the Environment and Others (referenced earlier), the Supreme Court applied the Constitution and recognized the fundamental rights of the youth claimants and ordered the government to address the

\begin{footnotes}
\end{footnotes}
deforestation of the Amazon.\textsuperscript{175} Furthermore in 2019, a case was effectively argued in Mexico (Ruling on Modification to Ethanol Fuel Rule) based on a right to a healthy environment in the Mexican Constitution. Finally, in 2020 in Canada, the Canadian Charter on Rights and Freedoms was effectively applied by the Ontario Court of Justice (Corporation of the Canadian Civil Liberties Association v. Attorney General of Ontario).

Of the climate change cases that applied human rights law and were unsuccessful, it is unclear if they were very different from the successful cases described above. In many cases, the plaintiffs argued the same international and national norms and policies, but were unable to persuade the relevant courts. For the pending cases, it seems that the plaintiffs in many instances are arguing the national constitutions and laws and supplementing them with international law when relevant. There also seems to be more climate change cases referencing human rights law in 2018, 2019 and 2020.

What do these cases, both successful and unsuccessful; tell us about general ‘good practices’ to use when considering whether to cite human rights law to climate change cases?

Here are some suggestions:

- From an international environmental and climate change perspective, it is helpful in climate change cases to cite the UNFCCC since it references the health impacts of climate change. It is helpful to base arguments on the Kyoto Protocol and especially the Paris Agreement when possible since they have the strongest language linking climate

change to human rights (e.g., referencing the right to health, the right to development and State obligations); 

- From an international human rights perspective, it is useful in climate change cases to invoke the ICCPR, ICESCR (in particular the right to health in the ICESCR) and the CRC when the relevant State has ratified these treaties, and if not, then using the declarations and statements of the UNHRC and the OHCHR as guidelines can also be helpful since they reference State obligations pertaining to climate change and human rights; 

- In general, the right to life, the right to health, the right to property and the right to self-determination in relevant treaties can be used effectively in climate change cases, especially if they pertain to indigenous populations; 

- Whenever possible, use national and local environmental, climate change and human rights law and policies, especially if a right to an environment of a certain quality is recognized in a national constitution; 

- Include procedural rights like those in the Aarhus Convention on Access to Environmental Information in addition to looking at substantive rights; 

- In Europe, it is often helpful to reference Articles 2 and 8 of the ECHR as well as the precautionary principle and the ‘do no harm’ principle from environmental law. In addition, the ESC can be cited to strengthen the arguments; 

- In Africa, bringing cases from a community perspective and referencing the collective nature of climate change impacts is helpful. Also, the recognition of the right to a
healthy environment in the ACHPR as a collective right can be used effectively to argue climate change cases in this region;

- In Asia, national constitutions and the recognition of a right to a healthy environment can assist in cases until there is a regional wide human rights instrument as well as an effective institution to address complaints;
- In the Americas, rights of indigenous peoples to life, property, self-determination and other fundamental rights can be invoked in climate change cases. Furthermore, the citation of the ACHR, the ADRDM and the San Salvador Protocol can assist in climate change cases, especially since the San Salvador Protocol references a right to a healthy environment;
- In the U.S., it may be helpful to cite the ADRDM and the Public Trust Doctrine;
- For cases that include business practices, it may also be useful to reference the UN’s Guiding Principles on Business and Human Rights;
- Finally, when it comes to the transboundary and intergenerational challenges posed by climate change, referencing the ‘do no harm’ and the precautionary principles when feasible can be very helpful.

VI. Conclusion

In examining the 1,598 climate change cases to date, it appears that referencing human rights law, whether international or national, does not hurt the arguments and in some cases has helped frame the discussion around how climate change impacts human well-being and fundamental rights. It seems that claimants’ arguments are more effective when the steps the State has taken on climate change are insufficient or if claimants have suffered specific
individual harm already; this makes it easier for courts to establish a causal link between the climate change harm and State’s actions or inactions. Furthermore, whether the court can interpret human rights law in a progressive way to address climate change often determines the outcome.

It appears that climate change has a significant impact on human rights, and human rights law can positively impact climate change litigation and policies as seen from case analysis. Moreover, many in both the environmental/climate change and human rights regimes believe that States should allow stakeholders and impacted communities to participate in projects and initiatives that affect their environment. There is a strong argument from the UN that States should respect, protect and fulfill human rights when it comes to climate change. There are also some ‘good practices’ that are relevant to apply in climate change cases that invoke human rights. Even though the full case analysis and data did not conclusively show that invoking human rights law impacted the success of the case, the analysis did show that referencing human rights law and principles did not hurt the claimants’ arguments and in many cases helped the arguments. Even when the decision was unfavorable to the plaintiffs – especially if such a failure moves the general issue forward in the policy process, then it was considered successful. Furthermore, utilizing a human rights perspective in climate change litigation not only did not hurt the arguments, but it also further laid the groundwork for future cases or policy change. Therefore, human rights law can be both relevant and effective in climate change litigation.

VII. Appendix – Case Analysis

Case Analysis.xlsb.xlsx
VIII. Bibliography

Books


Theses


News/Magazine Articles


Journal Articles


**Websites**


**Interviews**


Knox, John, Professor of International Law, Wake Forest University School of Law. Interview by Min Chang, Washington D.C., March 26, 2020.


Pring, George, Professor at University of Denver. Interview by Min Chang, Washington D.C., September 18, 2019.

Tripathi, Satya, UN Assistant Secretary-General Head of New York Office UNEP. Interview by Min Chang, New York City, February 13, 2020.

**Primary Sources**


American Declaration of the Rights and Duties of Man, United Nations, 1948, 1.


https://rm.coe.int/168007cf93.


https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.