RIGHTS-BASED LITIGATION IN TACKLING CLIMATE CHANGE: CAN THE ECtHR BE EFFECTIVE IN PROTECTING HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE?*

İklim değişikliği ile mücadelede hak temelli davalar: İklim değişikliği bağlamında insan haklarını korumak için İHAM etkili bir merci olabilir mi?

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ABSTRACT

The impacts of climate change have emerged as one of the most pressing challenges facing the global community today. As a result, the protection of human rights in the context of climate change has become an increasingly important issue, particularly in light of the potential for climate change to exacerbate existing human rights challenges. The European Court of Human Rights (ECtHR) has emerged as a key legal institution in the protection of human rights in Europe. However, the question remains: Can the ECtHR be effective in protecting human rights in the context of climate change? This research article aims to examine the potential for litigation in the ECtHR as a means of protecting human rights in the context of climate change after establishing nexus between the climate change phenomenon and human rights. Through a comprehensive analysis of environmental case law and legal frameworks, this article explores the extent to which the ECtHR has the potential to engage with pending climate cases and future litigation in this area. The article concludes that, despite the fact that technical legal hurdles, both procedural and substantive, must be overcome during the review phases, the Court may still have significant potential to address climate cases. Furthermore, this research highlights the importance of utilising litigation as a means of protecting human rights in the context of climate change for the sake of the role that the ECtHR can play in promoting greater awareness of the human rights implications of climate change.

Key Words: Climate change, human rights, environmental case law, rights-based climate litigation, European Court of Human Rights

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** Latin phrase: 'Where there is a right, there is a remedy.'

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ÖZET

İklim değişikliğinin etkileri, günümüzde küresel toplumun karşı karşıya olduğu en acil sorunlardan biri olarak ortaya çıkmaktadır. Bu nedenle, özellikle iklim değişikliğinin mevcut insan hakları zorluklarını şiddetlendirme potansiyeli dikkate alındığında, iklim değişikliği bağlamında insan haklarının korunması giderek daha önemli bir konu haline gelmiştir. İnsan Hakları Avrupa Mahkemesi (İHAM), insan haklarının Avrupa'da korunması için kilit bir yargısal kurum olarak ortaya çıkmıştır. O halde, İHAM, iklim değişikliği bağlamında insan haklarının korunması için etkili bir merci olabilir mi? Bu araştırma makalesi, iklim değişikliği olgusu ile insan hakları arasında bağ kurduktan sonra, İHAM'ın iklim davalarıyla başa çıkma potansiyelini, iklim değişikliği bağlamında insan haklarını koruma aracı olarak, incelemeyi amaçlamaktadır. Çevre hukuku içtihadı ve ilgili hukukî çerçevelerin kapsamlı bir analizi yoluyla, bu makale Strazburg Mahkemesi'nin derdest iklim başvuruları ve gelecekteki başvurularla ne ölçüde ilgilenme potansiyeline sahip olduğunu araştırmaktadır. Makale, hem usûl hem de esas bakımından inceleme aşamalarında karşılaşılacak teknik hukukî engellerin aşılması gerektiği gerçeğine rağmen, Mahkeme'nin iklim davalarını ele alma konusunda hâlâ önemli bir potansiyeli olabileceği sonucuna varmaktadır. Ayrıca, bu araştırma, İHAM'ın iklim değişikliğinin insan hakları üzerindeki etkileri konusunda daha fazla farkındalığın teşvik edilmesinde oynayabileceği rol adına, iklim değişikliği bağlamında insan haklarını korumanın bir yolu olarak dava açmanın önemini vurgulamaktadır.

Anahtar Kelimeler: İklim değişikliği, insan hakları, çevre hukuku içtihadı, hak bazlı iklim davaları, İnsan Hakları Avrupa Mahkemesi

INTRODUCTION

International efforts to address greenhouse gases (GHGs)[1] remain insufficient, despite the gravity of the climate change phenomenon as an environmental threat. Given this halting progress, it is imperative to explore additional means to tackle the climate crisis. In the face of elusive and insufficient political efforts to tackle the climate crisis,[2] litigation has become an important tool, with the potential to hold states and other actors accountable for the failure to limit GHG emissions and to force them to act.[3] However, climate litigation involves distinctive challenges as it differs from conventional

1 In this article, the term 'GHGs' is used as an umbrella term, encompassing methane (CH4), nitrous oxide (N2O), and fluorinated gases, as well as carbon dioxide (CO2) which is widely recognised as carbon emissions.

2 See, Robert Hales and Brendan Mackey, 'The ultimate guide to why the COP26 summit ended in failure and disappointment (despite a few bright spots)' (*The Conversation*, 14 November 2021) <https://theconversation.com/the-ultimate-guide-to-why-the-cop26-summit-ended-in-failure-and-disappointment-despite-a-few-bright-spots-171723> accessed 28 November 2022.

3 See UN Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), Art2.

litigation.[4] According to Colombo and Wegener, these challenges arise due to the global and intergenerational nature of the issue, the blurred lines between perpetrators and victims, the importance of climate for modern society and the economy, and the existential threat that climate change poses to humanity and the environment.[5]

The profound impact of climate change on the environment has inevitably given rise to implications for human rights, leading to the discovery of the vital role played by rights-based arguments in lawsuits brought before local, regional, and international judicial mechanisms. The use of human rights to litigate climate change has gained momentum following the adoption of the Paris Agreement in 2015 and notable domestic cases formed the beginning of 'a rights turn'.[6] Following the *Urgenda* case in 2019,[7] rights-based arguments emerged as a prominent trend in climate litigation.[8] Because of the obligations owed by states to uphold human rights, particularly in the context of the environment, human rights law tends to serve as a gap-filler in a manner that other fields of law are less able to do.[9]

This study highlights the crucial role of rights-based litigation in addressing climate change and demonstrates that the European Court of Human Rights (ECtHR),[10] a regional human rights tribunal, can handle climate cases despite legal obstacles. The rationale for selecting the ECtHR as the focal point of this study stems from its instrumental role in shaping the advancement of international human rights law, renowned for its remarkable effectiveness, as well as the Court's extensive environmental jurisprudence, despite the absence of an explicit right to a healthy environment.

This study focuses on technical barriers specific to the Court's process and suggests ways to overcome them to become an effective forum for climate

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4 Elizabeth Fisher, Eloise Scotford, Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 (2) The Modern Law Review, p. 177.

5 Gastón Médici Colombo and Lennart Wegener 'The Value of Climate Change-Impacted Litigation: An Alternative Perspective on the Phenomenon of "Climate Change Litigation"'(*Strathclyde Centre for Environmental Law and Governance*, Working Paper, No. 12, October 2019), p. 3.

6 Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 (1) Transnational Environmental Law, pp. 37-67.

7 *Urgenda Foundation v. The State of the Netherlands*, The Supreme Court of the Netherlands (20 December 2019), Case: 19/00135 (English translation) <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 28 November 2021.

8 Joana Setzer and Catherine Higham 'Global trends in climate change litigation: 2021 snapshot' (*Grantham Research Institute*, Policy Report, 2021), p.6.

9 Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) Climate Law, p. 244.

10 Hereinafter, 'the ECtHR', 'Strasbourg Court' or 'the Court'.

litigation. To develop its transformative role on this issue, the study concludes that the Court must adopt a moral approach that eases the admissibility stage's difficulties and recognises a narrower margin of appreciation (MoA) for governments, particularly in climate matters. The execution of the ECtHR's climate judgments and separation of powers issues are excluded, as it is considered more appropriate to analyse them elsewhere. Instead, it concludes that states have positive obligations under Art(s) 2 and 8 due to the climate crisis, and it focuses on admissibility issues in pending applications and the MoA in general, inspired by environmental case-law.

Following a discussion of the interrelated and interconnected nature of climate change and human rights, Section 1 outlines both the place of human rights in international climate instruments and the place of climate change in international human rights instruments, and that there is a moral link between them. The section argues that the aforementioned moral link and legislative initiatives are requirements for the presentation of human rights arguments in climate litigation. Subsequently, it emphasises that human rights arguments are generally promising in climate litigation, referring to the decisions of different local courts across the world in which human rights arguments formulated in this context were used. The second section unpacks the Court's environmental case-law. Noting that the right to a healthy environment is not explicitly protected under the ECHR, it sets out how the right to life (Art2) and the right to respect for private life (Art8) are 'greened' by virtue of the Court's interpretation methods. Section 3 explores some of the technical barriers to the examination of climate cases at the ECtHR and argues that a softer, less strict, and less formal approach at the admissibility stage would improve the effectiveness of rights-based litigation in tackling the climate crisis. The section concludes that causality is irrelevant in finding violations in the ECtHR, and similarly, that scientific certainty should not be considered an essential prerequisite. It also suggests adopting the current approach of the Inter-American Court of Human Rights (IACtHR) regarding responsibility for extraterritorial territory. In addition, it is emphasised that there is a need for a realist (legal) perspective rather than a pragmatic one in tackling the climate crisis.

The study concludes that the ECtHR can be an effective judicial forum for climate cases. However, to achieve this, the Court must make some important procedural concessions for some hurdles, for the sake of the urgency of the climate crisis. In support of this, it concludes that mechanical hurdles should be handled flexibly in the light of morality and legal pragmatism and that the Court should avoid a purely formalist approach. It further argues that a facilitative, yet natural interpretation of relevant international human rights mechanisms can be achieved.

A. RIGHTS-BASED CLIMATE CHANGE LITIGATION

1. Climate Change and Human Rights

It has been demonstrated by the best available science that the observed and predicted effects of human-induced climate change on physical infrastructure and human settlements, livelihoods, and health and safety will inevitably and negatively affect nature and all humanity dependent on it.[11] As a result of the melting of glaciers due to global warming, the expected rise in sea levels at the end of this century will destroy many settlements, including commercial and agricultural areas.[12] Fishing lagoons will be submerged in water due to rising sea levels, floods, rainfall and rising temperatures.[13] When evaporation and drought caused by increasing temperatures are added to this, there will be serious water and food scarcity.[14] Accordingly, migrations and conflicts will arise due to limited resources,[15] not to mention the increasing frequency of epidemics with the disappearance of natural barriers. These dire consequences obviously concern, besides nature, human life, access to fundamental necessities such as food, water and shelter, our standard of living, health, property, self-determination of peoples, security, development, and culture, either directly or indirectly. These impacts will be felt more prominently by disadvantaged groups such as women, children, people with disabilities and ethnic minorities.[16] Moreover, these catastrophic effects concern not only the present but also future generations.[17]

Indeed, despite the ecocentric nature of climate change, this relationship should not be particularly hard to see, as humans are biological creatures that are both part of nature and dependent upon it. Every issue that concerns nature is directly or indirectly a matter of humanity. At this point, the reasoning behind UN Special Rapporteur John Knox's view that the environment and human rights are 'interrelated' and 'intertwined' may help us to understand the

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11 IPCC *Climate Change 1995: The Science of Climate Change* (J.T. Houghton et al. [eds.], Cambridge University Press, 1996) pp.14-20

12 *See* Sandra Cassotta et al. 'Chapter 3: Polar Regions.' in Hans-Otto Pörtner et al. (eds) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC, 2019).

13 K. Sian Davies-Vollum, Debadayita Raha, and Daniel Koomson 'Climate Change Impact and Adaptation: Lagoonal Fishing Communities in West Africa' in Walter Leal Filho et al. (eds) *African Book Climate Change Adaptation* (Springer, 2021).

14 *See* World Bank Group, 'High and Dry: Climate Change, Water, and the Economy' (The World Bank, 2016)

15 *See* Ashok Swain et al. *Climate Change and the Risk of Violent Conflicts in Southern Africa* (Global Crisis Solutions, 2011).

16 *See* Rose Mwebaza, 'Climate Change and the International Human Rights Framework in Africa', in Rose Mwebaza and Louis J. Kotzé (eds), *Environmental Governance and Climate Change in Africa: Legal Perspectives,* (Institute for Security Studies, Monograph 167, 2009).

17 Pierre Friedlingstein and Susan Solomon, 'Contributions of past and present human generations to committed warming caused by carbon dioxide' (2005) 102(31) PNAS, pp. 10832-10836, p. 10835.

relationship between climate change and human rights.[18] As he explains, it is an undeniable fact that while a safe, clean, healthy and sustainable environment is a natural necessity to enjoy human rights, enjoyment of human rights makes it more possible to enjoy a safe, clean, healthy and sustainable environment.[19]

Human rights are essentially moral claims that go beyond the constraints of positive law.[20] According to Hart's perspective, human rights find their foundation and legitimacy in moral principles and values, rather than being solely based on legal rules and statutes established by a particular legal system. [21] In other words, the moral underpinnings and ethical considerations serve as the primary basis for the existence and recognition of human rights, suggesting that they transcend mere legal norms and are rooted in fundamental moral principles. Following this approach, Roschmann argues that it is a moral obligation to recognise new rights and to make structural changes to existing rights in order to effectively protect humanity against climate change impacts.[22] Thus, the severity of the consequences of the climate crisis justifies moral demands such as protection and prevention. Ultimately, despite their anthropocentric focus, it may be feasible to link current human rights provisions with climate change via judicial interpretation. Such an approach would require an examination of whether states possess obligations under human rights law to respect, protect, and fulfil the rights of individuals in the context of climate change's harmful consequences. However, recognising the link between climate change and human rights alone does not imply a sufficient legal basis for finding violations of such rights.[23]

Having identified the key relationship between climate change and human rights, it is now necessary to look at the international legislation that also contributes to the basis of rights-based litigation.

2. Human Rights and Global Climate Framework

2.1. Before the Paris Agreement

Although concerns about environmental issues had been made progress since the early 1970s[24], the first explicit and specific consideration of climate

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18 UNGA 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' UN GAOR 37th Session UN Doc A/HRC/37/59 (2018).

19 Ibid.

20 Christian Roschmann, 'Climate Change and Human Rights' in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds) *Climate Change: International Law and Global Governance - Volume I: Legal Responses and Global Responsibility* (Nomos, 2013), p. 210.

21 Ibid, p.211.

22 Ibid, pp. 212-215.

23 Peel and Osofsky, [Rights Turn] (n.6), p. 42.

24 *See*, UN 'Report of the United Nations Conference on the Human Environment' UN Doc

change was in the UN Framework Convention on Climate Change (UNFCCC), which was adopted in 1992 under the auspices of the UN's Earth Summit.[25]

The Rio Declaration was one of the major achievements of this summit.[26] The right to development for present and future generations, as a human right, is recognised in the Rio Declaration, which states that the protection of the environment is the only way to ensure long-term economic progress.[27]

The UNFCCC requires States Parties to hold regular meetings each year, and since 1995, sessions have been held annually. Significant efforts to reduce GHGs have been observed at these annual conferences. The first of these was the adoption of the Kyoto Protocol in 1997, the first international legal binding instrument on climate change.[28] This protocol, which entered into force in 2005, took into account the necessity of going below the 1990 level of emissions and adopted different emission restriction rates for each country, alongside various flexibility mechanisms.[29] However, what was seen as one of the most important shortcomings of this protocol was that it did not impose any responsibility on developing countries.[30] As far as human rights were concerned, the protocol did not contain any substantive rights nor any relevant references.

In search of a more comprehensive and binding treatment, the UN held the Copenhagen conference of 2009 (COP15) which, whilst initially promising, ultimately failed,[31] despite the acceptance of the Copenhagen Accord within it.[32] However, this failure turned into an important milestone as we now

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A/Conf.48/14/Rev.1 (1972) (known as 'Stockholm Declaration'); UN Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals (adopted 24 June 1998, entered into force on 29 December 2003) 2237 UNTS 4; UN Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293' UN Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, 1 January 1989) 1522 UNTS 3.

25 UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

26 UN 'Conferences: Environment and Sustainable Development: Rio 1992, A new blueprint for international action on the environment' (UN) <https://www.un.org/en/conferences/environment/rio1992> accessed 27 August 2021

27 UNGA 'Report of the United Nations Conference on Environment and Development' UN Doc A/Conf.151/26 (Vol. I) (1992), Principle 3. (Rio Declaration).

28 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162.

29 For 'mechanisms' *see* Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, 'Kyoto Protocol', *International Climate Change Law* (Oxford University Press, 2017), pp.179-193.

30 *See* Jon Hovi, Detlef F. Sprinz, and Guri Bang, 'Why the United States did not become a party to the Kyoto Protocol: German, Norwegian, and US perspectives', (2010) 18(1) European Journal of International Relations, pp. 129-150.

31 Peter Christoff, 'Cold climate in Copenhagen: China and the United States at COP15' (2010) 19(4) Environmental Politics, pp. 637-656.

32 UNFCCC, 'Copenhagen Accord' UN Doc UNFCCC/CP/2009/11/Add.1 (2010), *see* Decision 2/CP.15, §§1,2.

recognise it as the start of an acceleration in climate litigation.[33]

The first, albeit small, achievement in recognising human rights under the UNFCCC was experienced in 2011. In Cancun, in a decision taken within the scope of the work of the *Ad Hoc* Working Group on Long-term Cooperative Action, it was agreed that there was a link between climate change and human rights with reference to the UN Human Rights Council's resolution[34] on human rights and climate change.[35] It was also emphasised in the decision that parties must fully respect human rights in all actions related to climate change.[36]

These instances spurred calls for human rights language to be included in climate legislation, and for this purpose, an open letter to the UNFCCC States Parties was issued by the UN Special Procedures Mandate-Holders, at the meeting of the *Ad Hoc* Working Group on the Durban Platform which was created to prepare a binding agreement.[37] Intensive efforts were made at Cancun to ensure that human rights arguments entered into a binding climate agreement.[38] Whilst the end result provided only a small gain, it is important to note the attention paid to participation in the decision-making process as it demonstrates an improved awareness of the importance of participatory and procedural and substantive human rights in protecting environmental rights.[39]

2.2. The Paris Agreement

The Paris Agreement, which can be considered a marginal victory in terms of linking climate change and human rights,[40] was finally adopted in 2015,

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33 Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015), p.13; Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2020 snapshot' (*Grantham Research Institute*, Policy Report, 2020), p.7.

34 UNHRC Res 'Human Rights and Climate Change' UN Doc 10th Session A/HRC/10/4 (2009).

35 UNFCCC, 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010' UN Doc FCCC/CP/2010/7/Add.1 (2011), *see* Decision 1/CP.16.

36 Ibid.

37 'A New Climate Change Agreement Must Include Human Rights Protections for All' (17 October 2014) (Open letter) <https://unfccc.int/resource/docs/2014/smsn/un/176.pdf> accessed 28 August 2021; Benoit Mayer 'Human Rights in the Paris Agreement', (2016) 6 Climate Law, pp.110-112.

38 Mayer, (n.37) pp.110-112.

39 Open letter (n.37). See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447. *See* Norwegian Institution for Human Rights, 'Climate and Human Rights' (Norwegian National Human Rights Institution, 19 May 2021) Chapter 7.

40 Annalisa Savaresi, 'The Paris Agreement: a new beginning?' (2016) 34(1) Journal of Energy & Natural Resources Law, p. 24.

and entered into force in 2016 as a result of meeting the condition that at least 55 parties ratified the Agreement, in turn representing 55% of global GHG emissions.[41] Yet, it can be said that the ambitious human rights advocacy carried out in the pre-agreement process reaped fewer rewards than expected.[42] Indeed, human rights, which were not included in the final main text,[43] only found a place for themselves in the preamble of the Agreement.[44] Accordingly, when state parties take action to address climate change, they should 'respect, promote and consider their respective obligations on human rights'. In the Agreement, the positive obligations of the states were referred to in the climate context by the addition of 'promote and consider'.[45] Mayer argues that the recital, even if located in the preamble rather than an article of the Agreement, holds considerable human rights value in comparison to the 'respect' win through a COP decision in Cancun.[46] Nevertheless, the proposition of extraterritorial application of human rights treaties in general faces resistance from multiple states, raising doubts about the genuine significance of this preambular phrase.[47]

Thus, the inquiry arises as to whether the human rights methodology espoused in the preamble is sufficient to confer legal enforceability. According to international customary law, the preamble should be considered in the interpretation of the Agreement, even though this does not create new human rights obligations for state parties that have not previously recognised them as such.[48] Thus, the human rights reference in the preamble obliges state parties to comply with human rights (and obligations) adopted previously alongside

41 Paris Agreement (n.3), Art21.

42 For 'the build-up of human-rights advocacy before the Agreement' *see* Mayer, (n.37) pp.110-112.

43 The human rights reference added to Art2 in the earlier draft was removed from the final text, *see* Sumudu Atapattu, 'Climate Change, Human Rights, and COP 21: One Step Forward and Two Steps Back or Vice Versa?' (2016) 17 (2) Georgetown Journal of International Affairs, p.48.

44 *See* Paris Agreement (n.3), Preamble paragraph 11.

45 Mayer, (n.37) p.113.

46 Ibid.

47 While certain human rights bodies have supported the notion that states may bear human rights responsibilities towards individuals beyond their jurisdiction, the majority of states uphold the belief that their human rights obligations are restricted to those within their territorial boundaries. Consequently, these states are unlikely to acknowledge the need for positive measures to ensure the safeguarding of human rights linked to climate change impacts outside their own territories. See, Savaresi, (n.40) p.24.

48 See UN International Law Commission (ILC), 'Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur', UN Doc A/CN.4/672 (2014), §76. *See* Sam Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?' (2018) 7(1) Transnational Environmental Law, p.23, *fn.38*. Also see Mayer, (n.37) p.113-114.

those adopted in the Agreement for purposes such as mitigation, adaptation, or loss and damage.[49]

Knox, who supported the incorporation of human rights into the text during the negotiation phase, emphasised two different (and successful) aspects of this recognition of human rights in the Agreement, one being that climate change should not be a threat to the full enjoyment of human rights, and another being that the steps taken towards climate change do not impose a burden on human rights.[50] Savaresi claims that in both cases, human rights law and its practice are able to achieve what is intended by climate law, considering substantive and procedural obligations under international human rights.[51] The climate regime faces several obstacles, including but not limited to the Paris Agreement's contested legal bindingness because of the flexibility of some clauses.[52] In this regard, human rights can serve as a catalyst, offering a facilitating function and serving as effective instruments to secure favourable outcomes in climate litigation.

In the next subsection, the proliferation of 'climate change' within international human rights law (IHRL) will be briefly taken into account.

2.3. Climate Change within IHRL

Adverse impacts of climate change are avowedly related to the values protected under human rights: the right to life, the right to private life, the right to an adequate standard of living (which includes the right to water, food and housing), the right to the highest attainable standard of health, the right to property, the right to self-determination, the right to development, the right to culture and so forth.[53] Upon scrutiny of the principal sources of IHRL, it is discernible that a majority of these rights are incorporated within legal documents.[54] However, it is extremely rare to see a right such as the right to the

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49 Similarly *see* Savaresi, (n.40) p.25.

50 UNHRC, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', UN Doc A/HRC/31/52, (2016), § 22.

51 Savaresi, (n.40) p.25.

52 The Paris Agreement incorporates flexible clauses besides legally-binding ones, exemplified by the inclusion of Nationally Determined Commitments and a Review Mechanism, granting countries the ability to establish their own climate change targets and actions based on national circumstances, thereby resulting in varying interpretations and debates about the enforceability of the agreement's provisions, which, in turn, engender uncertainties and challenges concerning legal obligations and accountability. See Christina Voigt, 'The Paris Agreement: What is the standard of conduct for parties?' (2016) 26 Questions of International Law, pp. 17-28.

53 UNGA 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' UN GAOR 74th Session UN Doc A/74/161 (2019).

54 *See* UN OHCHR, Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights, No. 2

environment that would enable climate change to be addressed directly in the context of human rights under IHRL, with the exception of the African Charter of Human and Peoples' Rights. Although this right is also enshrined in the International Covenant of Social Economic and Cultural Rights, the Additional Protocol of the American Convention on Human Rights, and the Convention on the Rights of the Child (CRC), they confined to the context of human health.[55] This right is not explicitly recognised under the International Covenant on Civil and Political Rights (ICCPR) or the ECHR. Therefore, the majority of aforementioned human necessities -even aspirations- affected by the climate crisis need to be associated with classical anthropocentric human rights.

The first step that could help this was taken – albeit belatedly – at the UN Human Rights Council (UNHRC) in 2008, which expressed concern that climate change is a direct and long-term threat to individuals and communities, with consequences for the full enjoyment of human rights.[56] The same concern was reiterated and the need for a comprehensive international agreement was expressed in a subsequent report by the OHCHR.[57] In addition to rights being affected generally, the determination that climate change may have a greater impact on certain vulnerable groups of society in terms of age, gender, disability, ethnicity, nationality, and indigenousness was highlighted later reports and decisions by the HRC.[58] As mentioned in my outline of climate law, this approach of IHRL bodies has also had an impact on climate legislation from time to time.[59] The most important of these to date is that some human rights, albeit limited ones, were clearly included in the preamble of the Paris Agreement:

'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

(Rev.1) (1996).

55 See ICESCR Art12, AmCHR Art11, CRC Art24; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) European Journal of International Law, pp.613-642, p. 614.

56 UNHRC Res (28 March 2008) UN Doc A/HRC/7/23. *See* John H. Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review, pp. 477-498.

57 *See* UN OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights', UN Doc A/HRC/10/61 (2009).

58 *See* UNHRC Res 'Human Rights and Climate Change' UN Doc 10th Session A/HRC/10/4 (25 March 2009); 'Report of the Independent Expert on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, J.H. Knox, Mapping Report', UN Doc A/HRC/25/53 30 (2013); UNHRC Res 'Human Rights and Climate Change' UN Doc 29th Session A/HRC/29/L.21 (2015).

59 *See* supra note 34.

women and intergenerational equity'.[60]

3. Rights-Based Climate Litigation

The COP15 failure in Copenhagen and the adoption of the Paris Agreement are considered to have triggered climate litigation in general.[61] Both the failure to reach an agreement on a binding treaty, and the successful agreement of a binding treaty caused litigation to flare up. Although this situation may seem paradoxical, it has been demonstrated that a binding treaty is not 'a miraculous cure for all the maladies'.[62] In such a scenario, the non-compliance of states in fulfilling their individual commitments, such as those outlined in the Nationally Determined Contributions (NDCs), as per the Agreement, can readily serve as grounds for litigation. This is due to the fact that the targets are determined at the national level rather than being imposed, and the true challenge lies in effectively implementing these commitments.[63] It also highlights the notion that litigation can be seen as a remedy at every stage of the fight against the climate crisis.

The link between human rights and climate change dates back more than a decade,[64] however the reflection of this on rights-based litigation has not been very quick. Despite a relatively late acceleration in numbers, this 'human rights turn' in climate litigation owes a great deal to the process and negotiations that started before and continued beyond the Paris Agreement.[65] Subsequently, applicants have become more willing to put forward their human rights arguments, and courts have likewise been more receptive to this approach, at least in some cases.[66] Indeed, even the preambular reference to human rights in the Paris Agreement provides very fruitful justifications for rights-based arguments. Some of the rights-based cases after the Paris Agreement illustrate that the plaintiffs' claims that their fundamental rights and freedoms had been violated, mostly relied on the paragraph 11 of the preamble to the Agreement. These cases considered as follows: failure to protect forests as carbon sinks[67], permits for activities that

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60 *See* Paris Agreement (n.3), Preamble paragraph 11.

61 *See* Peel and Osofsky (n.33).

62 Savaresi, (n.40), p.26.

63 Lord Carnwath 'Climate Change Adjudication after Paris: A Reflection' (2016) 28 (1) Journal of Environmental Law, pp. 5-9.

64 *See* supra note 34.

65 Peel and Osofsky, [Rights Turn] (n.6), p.48.

66 Ibid, p.40, See *Urgenda*, Supreme Court (n.7); also *Asghar Leghari v. Federation of Pakistan,* The Lahore High Court (Judgment, 25 January 2018) Case: W.P. No. 25501/2015 <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180125_2015-W.P.-No.-25501201_judgment.pdf> accessed 1 September 2021.

67 See *Future Generations v. Ministry of the Environment and Others* [Colombia], The Supreme Court of Colombia (4 April 2018), Case: 11001-22-03-000-2018-00319-01, (English translation)

increase global GHG emissions[68], negligence due to non-adoption of climate policies that protect rights and freedoms[69], negligence of public authorities in their obligation to protect the lives of individuals or vulnerable groups in the face of climate crises and to inform them of dangerous situations[70]. After all, it cannot be denied that the Paris Agreement creates moral obligations to respect human rights even if one claims that the preamble is not binding.

Rights-based litigation has recently taken its place as a dominant trend in litigation.[71] The purpose of rights-based litigation in combating the climate crisis is simply to reveal that duty-bearers - in the context of this study, states - do not comply with their human rights obligations to protect, respect and fulfil.[72] However, this may not always be easy, nor may its success merely depend on this single outcome. The contentions of litigation based on rights can be structured into two distinct categories: assertions of infringements upon negative obligations arising from governmental actions that impinge upon protected rights, such as the issuance of permits or licenses, and allegations of breaches of positive obligations due to governmental inaction in addressing the climate crisis.[73] In addition, 'mitigation', 'adaptation', and 'loss and damage' measures adopted by climate legislation, may be used in climate litigation as arguments, including rights-based litigation.[74] As a rule, human rights cases should not come into play before the harms have occurred.[75] However, rights-based climate litigation tries to circumvent this as human rights law is considered to have a gap-filling function, providing remedies where other

<http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf> accessed 2 September 2021.

68 *Earthlife Africa Johannesburg v. Ministry of Environmental Affairs and Others*, Hight Court of South Africa, no. 65662/16, 8 March 2017.

69 *Kelsey Cascade Rose Juliana v. USA*, District Court, [Oregon, USA] Case no. 6 :15-cv-01517-TC <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2021/20210923_docket-615-cv-01517_declaration.pdf> accessed 25 September 2021.

70 *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, ECtHR, App no.53600/20, 17 March 2021.

71 Setzer and Higham (n.8), p.14.

72 Savaresi and Auz, (n.9), p. 244.

73 Annalisa Savaresi 'Plugging the enforcement gap: The rise and rise of human rights in climate change litigation' (2021)77 Questions of International Law, p. 2.

74 Setzer and Higham (n.8), pp.32-33; for 'loss and damage' see Patrick Toussaint, 'Loss and damage and climate litigation: The case for greater interlinkage', (2021) 30(1) RECIEL, pp.16-33.

75 Julie H. Albers, 'Human Rights and Climate Change: Protecting the Right to Life of Individuals of Present and Future Generations'(2017) 28, Security and Human Rights, p.120.

areas of law cannot.[76]

Climate litigation in general, the first examples of which were encountered in 1986, started to gather pace from the mid-2000s.[77] Looking at climate litigation databases, there had been over 1800 ongoing or concluded climate cases worldwide to 2021, with over 100 categorized as human rights cases, and more than 90 of them filed against governments.[78] The numbers are on the rise, indicating an increasing trend in the use of litigation to hold governments accountable for their actions related to climate change.[79] By 2021, 55 of the rights-based cases had been concluded, with positive judgments being given in 25 cases, while negative judgments were given in 32 cases.[80] Considering that 29 of these cases were filed in 2020 alone, it is clear that there has been an increase in rights-based litigation in recent years.[81] It is widely observed that the most notable acceleration in these cases occurred in 2020, the year following the final judgment of the Dutch Supreme Court in the Urgenda case.[82]

3.1. The Urgenda Case

The *Urgenda* Foundation filed a rights-based climate lawsuit against the Dutch Government before The Hague District Court in 2015, where the Court ordered the state to reduce GHG emissions because it violated its own international commitment.[83] According to this decision, GHG emissions should be mitigated up to at least 25% by the end of 2020 compared to 1990. The decision was upheld by the Court of Appeal in 2018,[84] and the matter came to an end once the decision was upheld in the final judgment of the Dutch

76 Savaresi and Auz, (n.9), p. 245.

77 Setzer and Higham (n.8), p.7; Some key cases in the early 2000s are considered as emblematic, so it is believed that they triggered that increase, see Kim Bouwer and Joana Setzer, 'Climate litigation as climate activism: what works?' (The British Academy, CoP 26 Briefings, 2020), p.5.

78 Setzer and Higham (n.8).

79 See, Joana Setzer and Catherine Higham 'Global trends in climate change litigation: 2022 Snapshot' (*Grantham Research Institute*, Policy Report, 2022)

80 Setzer and Higham (n.8).

81 Ibid.

82 See Setzer and Byrnes (n.26), p.1.

83 *The State of the Netherlands v. Urgenda Foundation*, District Court of The Hague (24 June 2015) Case: C/09/456689 (English translation) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> accessed 1 September 2021.

84 *The State of the Netherlands v. Urgenda Foundation*, The Hague Court of Appeal (9 October 2018) Case: 200.178.245/01 (English translation) <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> accessed 1 September 2021.

Supreme Court at the end of 2019.[85]

The *Urgenda* case is essentially a private law matter based on the Dutch Civil Code; the case centred on whether the state had fulfilled its duty of care to the individuals the Urgenda Foundation was representing. While evaluating the state's fulfilment of this duty of care, human rights served as a basis for interpretation.[86] In this direction, it was decided that the Dutch state was partially responsible for the unjust actions that occurred within other states resulting from the climate crisis, as a matter of cumulative causality.[87]

The Dutch Government acknowledged its shared culpability in the anthropogenic warming phenomenon and recognised the imperative to curtail GHG emissions within the range of 25% to 40% by 2020, consistent with its international obligations and informed by climate science,[88] in order to prevent the breach of the critical warming threshold.[89] Subsequently, an assessment was made that this objective was pressing and essential, and that it ought to be accomplished on a global scale.[90] However, it was determined that the state could not achieve this target. Moreover, it limited its mitigation commitment rate, and failed to submit any legitimate reason for this.[91] Thus, the Court concluded that there was a known, real, and imminent threat to both the right to life protected by ECHR Art2, and the right to respect for private and family life under ECHR Art8.[92] So, the state could not fulfil its *duty of care*[93] to protect current generations due to its positive obligation.[94] As far as the victim status of the applicants was concerned, being one of the procedural hurdles in the trial, it was reiterated that the case filed by *Urgenda*, a legal person, on behalf of more than 800 individuals must be regarded as an *actio popularis* according to the ECHR Art34, and ECtHR case-law.[95] However, the case was not rejected on

85 See *Urgenda*, Supreme Court (n.7).

86 See *Urgenda*, District Court (n.83), § 4.46.

87 *Urgenda*, Supreme Court (n.7) §5.7.6, *fn.*35; also see Jolene Lin 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment' (2015) Climate Law, pp.65-81.

88 *See* IPCC, *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (R.K. Pachauri et al. [eds.] IPCC, 2007).

89 *Urgenda*, Supreme Court (n.7) §2.1.

90 Ibid.

91 *Urgenda*, Court of Appeal (n.84), §60.

92 *Urgenda*, Supreme Court (n.7), §5.3.2.

93 See *Urgenda*, District Court (n.83), §§ 4.52-4.53. 'Article 21 of the Dutch Constitution imposes a duty of care on the State relating to the liveability of the country and the protection and improvement of the living environment.' Ibid § 4.36.

94 Ibid, §§5.2.1-5.4.3.

95 *Urgenda*, Court of Appeal (n.84), §35.

the grounds that it also concerned domestic law.[96]

The result was ground-breaking; it was an explicit success for rights-based climate litigation and encouraging for future litigation. Nevertheless, it has since faced some criticisms. As an illustration, it is contended that the principle of separation of powers[97] was disregarded by necessitating a political course of action in response to a judicial order on a given matter.[98] Additionally, Art2§1(a) of the Paris Agreement was deemed a binding provision in a strict and literal sense,[99] among other arguments. Some scholars, on the other hand, criticise the decision, saying that bolder steps should be taken by the Court with respect to its approach to positive obligations.[100]

This case is a first in the successful use of the tort of negligence to hold a state accountable for its failure to mitigate climate change,[101] and historic in terms of containing many important achievements. One of these significant achievements is Dutch District Court's attempt to expand environmental law through the ECHR by putting forward a 'precautionary principle'[102] as an argument.[103] This recognises that a traditional human rights law approach alone might be frail without an ecocentric climate approach. Moreover, with this argument, the Court puts the burden of proof firmly on the state.[104] Also, if the *Urgenda* case is not destined to remain as an exceptional case engaging in judicial activism, it may be essential to fill in the gaps with more thorough legislation.

3.2. The Leghari Case

Another successful rights-based climate case is the *Leghari* case, which, like the *Urgenda* case, was brought before the national courts.[105] In this case, a Pakistani farmer, Mr Leghari brought a case before the Lahore High Court

96 Ibid.

97 Ibid, §§67-68.

98 Ingrid Leijten, 'The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease' (Verfassungsblog, 19 October 2018) <https://verfassungsblog.de/the-dutch-climate-case-judgment-human-rights-potential-and-constitutional-unease/> accessed 1 September 2021.

99 Chris W. Backes and Gerrit A. van der Veen 'Urgenda: the Final Judgment of the Dutch Supreme Court' (2020) 17 Journal for European Environmental & Planning Law, p. 312.

100 Ingrid Leijten, 'Human rights v. Insufficient climate action: The Urgenda case', (2019) 37(2) Netherlands Quarterly of Human Rights, p.118.

101 Lin (n.87), p.80.

102 See Rio Declaration (n.26), Principle 15.

103 See *Urgenda*, District Court (n.83), §43, §63, and §73; similarly Peel and Osofsky, [Rights Turn] (n.6), p.50.

104 Suryapratim Roy and Edwin Woerdman Dr 'Situating Urgenda v the Netherlands within comparative climate change litigation', (2016) 34(2) Journal of Energy & Natural Resources Law, p.177.

105 *Leghari,* Judgment (n.66).

complaining of the state's failure to fulfil the national climate change policy and its implementation framework adopted by the Pakistani Government. Subsequently, the High Court decided to assign a commission in order to monitor the state's practices regarding the aforementioned policy and framework, and to appoint climate change focal persons in some ministries.[106] By a supplemental decision, the High Court also appointed members to the said commission and determined its duties.[107] Based upon the subsequent report of this commission, the High Court concluded that the constitutional rights and freedoms of individuals had been violated due to the state's unsatisfactory realisation of climate policy and the 2014-2030 framework adopted by the Pakistan Government in 2012.[108]

Firstly, in its judgment, the court referred to current climate science and recognised that climate change was a 'real' issue that had adverse effects for water, food and energy security in Pakistan.[109] Secondly, it concluded that the state did not take sufficient adaptation measures for these vital requirements,[110] and due to this inaction of the government, the right to life, the right to human dignity, the right to a healthy and clean environment, the right to property, and the right to information, which are guaranteed in the national constitution, had been breached.[111]

In the *Leghari* case, unlike the *Urgenda case*, human rights law was not viewed as an ancillary element applied in interpretation, but rather it was a central issue put forward through 'public interest litigation' in which it was examined whether the state had fulfilled its positive obligations.[112] One of the criticised aspects of this case is that the link between the state's inaction and the violations alleged by Mr Leghari were not adequately addressed in terms of causation.[113] Similarly, it is difficult to identify any meaningful analysis in terms

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106 *Asghar Leghari v. Federation Of Pakistan,* The Lahore High Court (Decision, 4 September 2015) Case: W.P. No. 25501/2015<http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf> accessed 1 September 2021.

107 *Asghar Leghari v. Federation Of Pakistan,* The Lahore High Court (Supplemental Decision, 14 September 2015) Case: W.P. No.25501/2015<http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150414_2015-W.P.-No.-25501201_decision.pdf> accessed 1 September 2021.

108 *Leghari*, judgment (n.66), §19.

109 Ibid, §1, §10.

110 Ibid, §22.

111 *Leghari*, decision (n.106), §7.

112 Peel and Osofsky, [Rights Turn] (n.6), p.38.

113 Janne Dewaele, 'The Use of Human Rights Law in Climate Change Litigation: An Inquiry into the Human Rights Obligations of States in the Context of Climate Change; and the Use of Human Rights Law in Urgenda and Other Climate Cases' Dissertation p.52.

of jurisdiction or standing in the case.[114] The uncomplicated acknowledgement of this nature may garner recognition among other climate-related cases founded on rights-based claims, owing to the adaptability of public interest litigation afforded to the judiciary.[115]

On the other hand, it is quite remarkable that the Lahore High Court appealed to the *mandamus* doctrine[116] before rendering a judgment, and issued an order to appoint a commission and focal persons as mechanisms to evaluate the government's compliance with climate targets. Alongside human rights, the case took into account international environmental law principles, namely the doctrine of public trust, sustainable development, the precautionary principle, intergenerational equity principles, and even climate justice. This successful blend of principles may reflect the Pakistani judiciary's well-known history of activism in environmental matters.[117]

3.3. The Future Generations Case

Another rights-based national climate case was filed in Colombia.[118] The applicants made an application of *tutela*[119] alleging that the right to life, the right to health, the right to a healthy environment, and the right to food and water had been violated because the Colombian state had failed to realise its goal of zero deforestation by 2020 which was the NDCs adopted in accordance with the Paris Agreement.[120] Contrary to the dismissal decision of the District Court[121], the Supreme Court accepted the allegations and concluded that the government had failed to meet its deforestation commitment which caused an increase in GHG emissions, contributing to climate change, and violating the rights claimed by the applicants.[122]

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114 Ibid.

115 Birsha Ohdedar, 'Litigating Climate Change in India and Pakistan: Analysing Opportunities and Challenges' in Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci (eds) *Climate Change Litigation: Global Perspectives* (Brill-Nijhoff, 2021), p.122.

116 A writ of mandamus is a legal directive issued by a court to an inferior government official, compelling them to fulfil their official duties in a proper manner or rectify an instance of discretionary misconduct. This legal concept is exemplified in cases such as Cheney v. United States District Court for D.C. (03-475) 542 U.S. 367 (2004) 334 F.3d 1096.

117 Ohdedar (n.115), p. 106: also see Peel and Osofsky, [Rights Turn] (n.6), p.52.

118 See supra note 67.

119 *Tutela* is a domestic human rights protection mechanism in Colombia, for more *see* Patrick Delaney, 'Legislating for Equality in Colombia: Constitutional Jurisprudence, *Tutelas*, and Social Reform' (2008) 1 The Equal Rights Review, pp.50-59.

120 *Future Generations* (n.67) §§1-2.5.

121 Ibid, pp.10-13; For the original District Court decision in Spanish see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180212_11001-22-03-000-2018-00319-00_opinion-1.pdf> accessed 2 September 2021.

122 *Future Generations* (n.67) §§11.1-13.

The District Court's conclusion that the complaint was not suitable for a *tutela* trial because it was of a collective rather than an individual nature was superseded by the decision of the Supreme Court which referred to the exceptional nature and gravity of the issue.[123] Despite the collective nature of the subject matter, the Supreme Court noted that the threat was not hypothetical but proven; therefore, it was possible for the plaintiffs to be directly and individually affected.[124] The court then moved on to its merits-based review, following which it delivered its judgment in favour of the plaintiffs. The most specific feature of this case is that besides present generations, future generations[125] and even Amazon forests - referred to as the *lungs of the world*- were recognised as subjects of the rights.[126] Although there have still been criticisms that satisfactory evaluations pertaining to standing and causality remain insufficient,[127] some argue that the success of the judgment can be attributed to the constitutional recognition of the right to a clean and healthy environment.[128]

4. Legal Hurdles

As previously discussed, climate litigation has encountered several legal obstacles. It is also possible to encounter such obstacles in rights-based cases, regardless of whether they ultimately succeed or not.

Early rights-based climate change litigation also faced a number of legal hurdles, such as a purported lack of causality between a state action (or inaction) and human rights violations, as well as jurisdictional issues arising from a state's extraterritorial activities.[129]

To provide an example, the *Inuit* case, which was among the initial cases concerning climate change and human rights, saw the rejection of the petitioners' claim by the Inter-American Commission on Human Rights due to the inadequacy of information provided to evaluate the alleged violation.[130] This approach suggests that the state's negative obligations were addressed

123 Ibid, p.13.
124 Ibid, pp. 10-13.
125 Ibid, §14.
126 Ibid, §10.
127 Dewaele (n.105), p.54.
128 Samvel Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation' (2019) 9 MPIL Research Paper Series, p.11; Dewaele (n.105), p.54.
129 See OHCHR Report (n.48), also Siobhán McInerney-Lankford, 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33(2) Harvard Environmental Law Review, p. 433; Peel and Osofsky, [Rights Turn] (n.6), p.46.
130 See Commission's decision (short letter), (16 November 2006) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf> accessed 31 August 2021

rather than positive obligations in examining this particular rights-based climate complaint.[131]

In *Teitiota v. New Zealand* case heard by the UN Human Rights Committee, a person from the island state of Kiribati in the Pacific Ocean, whose application for refugee status was rejected by New Zealand, claimed that due to climate change, the sea water level had risen in his country, among many other problems, and that it had become difficult to access fresh water[132] and food[133]. He also claimed that violent clashes had occurred following land disputes due to the rising water level.[134] He complained that these issues violated his right to life as protected under ICCPR Art6.[135] The Committee did not find any violations,[136] but noted that the victim, facing a real and reasonably foreseeable risk to their life due to climate change, should have been protected by ICCPR Art6 (right to life).[137]

In *The People's Climate Case*, ten families, including children, filed a lawsuit in the European General Court (ECG) to force the European Union (EU) to reduce emissions. The plaintiffs argued that the EU's existing target of reducing local GHG emissions by 40% by 2030, compared to 1990 levels, was insufficient to avoid the danger zone and thus their life, health, occupation and property rights were threatened. However, the ECG noted that the plaintiffs were not sufficiently and directly affected by these policies and found the case inadmissible on procedural grounds.[138] The decision was upheld by the Court of Justice of the European Union.[139]

Notwithstanding the technical challenges encountered, these setbacks have acted as a catalyst for initiating novel litigations, and proactive measures have been subsequently undertaken to surmount these impediments.[140] As a result,

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131 Marguerite E. Middaugh, 'Linking Global Warming to Inuit Human Rights', (2006) 8, San Diego International Law Journal, p. 194.

132 *Teitiota v. New Zealand*, UN Human Rights Committee (24 October 2019), CCPR/C/127/D/2728/2016, §2.1.

133 Ibid, §2.3.

134 Ibid, §2.4.

135 Ibid, §3.

136 Ibid, §9.9.

137 *See* Ibid, §§9-10.

138 For inadmissibility decision, see *Armando Carvalho and Others v. European Parliament and Council of the European Union*, General Court [European Union], Case no. T-330/18, 8 May 2019; Also see Plaumann & Co. v Commission of the European Economic Community, Case 25-62, 15 July 1963, ECJ.

139 *Armando Carvalho and Others v. European Parliament and Council of the European Union*, Court of Justice [European Union], Case no. C 565/19 P, 25 March 2021.

140 Peel and Osofsky, [Rights Turn] (n.6), pp.47-48.

some of these cases, especially those at the national level, have the potential to serve as models for international human rights frameworks.

5. The Role of a Rights-Based Approach

It is ideal for states to spontaneously take political steps against the phenomenon of climate change. However, due to the importance of the economy in our daily life and the fact that it has taken us captive, it would be naive to expect governments, whose success criteria are focused on mostly economic parameters, to include climate crisis in their legislative programmes. Therefore, it is necessary to take steps at the international level to combat the climate crisis, which is a global and urgent issue. In doing so, a binding international climate legislation is important. However, as seen above, the Paris Agreement, the most comprehensive binding treaty adopted to date, has some gaps that need to be filled. Climate litigation is important as the gaps in the legislation can be filled by judicial action. However, climate litigation also has tough legal hurdles to overcome. We have observed how local courts in diverse regions of the world have courageously addressed these impediments. One of the elements behind their success is undoubtedly the manoeuvrability that human rights arguments provide. These arguments make it easier to deal with difficulties such as causality, attribution, standing and extraterritoriality, all of which we shall unpack in the final section.

Despite its increasing success, rights-based litigation has been severely criticised on the grounds that traditional human rights law fulfils a remedial function rather than a preventive one. Adopting applicable and consistent principles is vital if this traditional approach is to be reformed using human rights. Difficulties such as standing and causation can be eased with the help of the principles of climate and environmental law, as in the *Leghari* case. Or, as in the *Future Generations* case, it may be more convincing to illustrate the imminence of the potential risk to human rights with an emphasis on environmental rights and an ecocentric approach. Thus, these cases, which owe some of their success to the activist attitudes of domestic courts, should not be marginalised, and can provide common principles for litigation for the climate crisis that will have international impact. This could create a critical impetus for tackling the climate crisis, noting that the international success of rights-based litigation will have binding implications for all.[141]

Also, rights-based litigation may be viewed with suspicion due to bias towards the legitimacy of IHRL.[142] However, it should be noted that the threat

[141] Norwegian Institution, Report (n.32) §9.1.

[142] *See* Joana Setzer, Lisa C. Vanhala 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) Wiley, p.10.

level of the issue is almost equivalent to that posed by an enormous asteroid heading straight for Earth. Therefore, the urgency associated with this issue is of a scientific nature rather than a political one.

There might be also a pragmatic aspect to using human rights arguments in climate litigation. Given the hegemonic and selfish attitude of humankind who still sees itself in the centre of the universe,[143] it may be more striking and dissuasive, and therefore successful, to explain the threat to the public through right-based arguments.

In tackling the climate crisis, international collaboration is both an urgent need and an effective one. However, its progression is disappointingly slow and painful. Therefore, litigation in general is an important complement. In persuading states to comply with their climate commitments, rights-based litigation has been found to be an important tool. Also, the enlargement of IHRL in favour of the environment, and international climate legislation in which human rights are adopted (despite its shortcomings) has played an important role in the victories achieved in the local courts.

Rights-based litigation has a very strong potential to contribute to mitigating the factors that cause climate change and adapting to its adverse effects. It will be examined next section whether the ECHR, as a well-known regional human rights mechanism, can contribute to climate litigation thanks to its relatively rich jurisprudence and interpretative tools, considered in the context of its interaction with IHRL. Despite the failure of the *People's Climate* case[144], the ECtHR remains a potential mechanism that may influence the national judiciaries in Europe.

B. The Environmental Protection of ECHR

1. The ECHR and ECtHR

The ECHR, signed by the 46 member states[145] of the Council of Europe (CoE), is one of the most important regional human rights treaties in existence. Membership of the CoE includes EU and non-EU states from mainland Europe in addition to member states at the outer limits of the continent such as Turkey, Ukraine, Azerbaijan, Georgia and Armenia. As such, the ECHR protects the human rights of more than 700 million individuals, a significant responsibility which reveals the ECtHR's extraordinary sphere of influence.[146]

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143 *Future Generations* (n.67) p.16.

144 See supra note 138.

145 Subsequent to its expulsion from the Council of Europe on March 16, 2022, the Russian Federation discontinued its status as a signatory to the ECHR on September 16, 2022.

146 'The European Convention on Human Rights - how does it work?' (CoE) <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works> accessed 30 March 2023.

States within the jurisdiction of the ECtHR are deemed to be in a category composed of either developed or transitional economies.[147] However, the distinction between developed and developing countries has largely lost its importance due to the universal need to combat the climate crisis[148] and it can be argued that all member states have the potential to significantly impact the fight against the climate crisis by fulfilling their climate-based human rights obligations voluntarily or at the command of the ECtHR. This potential warrants an examination of the significant capacity of the Strasbourg Court for positive transformative climate litigation.

Before diving into the relevant case-law, the next subsection will shed light on the right to a clean and healthy environment and demonstrate how this is relevant to addressing climate cases.

2. The Right to a Clean and Healthy Environment

There is no reference to the concept of 'environment' in the ECHR and its protocols, which is not surprising considering the period in which the ECHR was signed.[149] The main purpose of this text and the CoE, after the Second World War and the great destruction caused by the Nazi regime, was to guarantee the rights of physical and moral integrity, security, liberty, and so on. Therefore, the right to a healthy environment was not considered a serious concern in these circumstances.

Since its adoption in 1950, the ECHR has been amended many times through additional protocols, and new rights have been added to the main text. However, although the importance of including a right to a clean environment in the ECHR has been considered, a concrete proposal to include the right to a healthy environment through an additional protocol was rejected by the CoE Committee of Ministers in 2010.[150]

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147 UN 'World Economic Situation and Prospects 2021-Statistical Annex' (UN, 2021), pp. 125-126 <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2021_ANNEX.pdf> accessed 16 September 2021.

148 *See* Paris Agreement (n.3).

149 'The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.' See <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> accessed 6 September 2021.

150 See 'Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment' (Parliamentary Assembly of the Council of Europe), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24830&lang=en> accessed 6 September 2021. Also *see* A high-level panel taking place in Strasbourg from 27 to 30 September 2021 by Autumn Session of the Parliamentary Assembly of the Council of Europe, including 'Council of Europe's action to anchor a "right to a healthy environment"' <https://pace.coe.int/en/pages/session-202110> accessed 6 September 2021.

Having said that, the UN General Assembly's recent declaration that everyone has a right to a healthy environment is a significant development in the protection of environmental rights.[151] The resolution highlights the urgency of addressing climate change and environmental degradation as a threat to humanity's future, and calls on states to ensure access to a clean, healthy, and sustainable environment.[152] Although not legally binding, the resolution has the potential to prompt states to adopt similar measures at the national and regional levels. If this were to happen, it could lead to a positive change in the approach of the CoE. Thus, the UN's recognition of the right to a healthy environment may ultimately have implications for the development of environmental law at the European level.

The fact that a right to the environment is not explicitly included in the text of the ECHR does not mean that this right is not protected or that it has been completely ignored. On the contrary, it can be argued that the ECtHR has interpreted the Convention text to accommodate the development of an environmental right, in parallel with the increase in environmental issues. Indeed, the ECtHR has given judgment in around 300 cases addressing various complaints about environmental threats and harms and it has already demonstrated a willingness to incorporate environmental considerations in its judgments.[153]

3. Environmental Human Rights

The ECtHR identifies the rights it guarantees as substantive and procedural rights. To define these groups simply, the enjoyment of substantive rights requires only basic measures to be taken, while procedural rights require either effective domestic procedures that enable their exercise or sufficient domestic remedies in the event of infringement.[154] The greening of rights that has occurred under the ECHR has included rights from these two categories. Substantive examples are the right to life (Art2), prohibition of inhuman or degrading treatment (Art3),[155] respect for private and family life (Art8), protection of property (Art1 of Protocol No.1 to the ECHR),[156] and prohibition of discrimination (Art14).[157] Also, it should be noted that these rights may also have procedural dimensions.[158] Procedural and participatory rights, on the other

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151 *See* UNGA Res 76/300 (26 July 2022) UN Doc A/76/L.75.

152 Ibid.

153 CoE 'Protecting the environment using human rights law' (CoE) <https://www.coe.int/en/web/portal/human-rights-environment> accessed 7 September 2021.

154 See David Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, (4th edn, Oxford University Press, 2018), p.502.

155 *Florea v. Romania*, ECtHR, App no. 37186/03, 14 September 2010.

156 See *Öneryıldız v. Turkey*, ECtHR [GC] App no.48939/99, 30 November 2004.

157 See *Roche v. United Kingdom,* ECtHR [GC], App no.32555/96, 19 October 2005.

158 See, ECtHR, 'Factsheet-Environment and the ECHR' (ECtHR, Press Unit, July 2021).

hand, include freedom of expression and the right of access to information[159] (Art10), freedom of assembly and association[160] (Art11), the right to a fair trial[161] (Art6), and the right to an effective remedy[162] (Art13). Of these rights, the case-law for Art(s)2 and 8 will be considered in greater depth.

To better understand its frequent application in climate litigation that focuses on rights, it is essential to briefly examine the Court's previous rulings on environmental cases, particularly on the right to life and right to private life, which are among the environmental rights pertaining to substantive rights.

3.1. Right to Life

In numerous previous environment-related cases, applicants have applied to the ECtHR, alleging that their right to life was threatened due to the inaction of either the state or private actors during environmental events and disasters. In the *Budayeva and Others* case, many people were injured, died, or disappeared as a result of landslides and mudslides in Russia.[163] The ECtHR determined that the right to life had been violated, and while the state had been aware of the danger, it had failed to take the necessary precautions. Additionally, the state had neglected to alert the public about the issue and continued to display negligence even after the event had occurred.[164] As it can be seen that the Court examines not only environmental disasters caused by human activities[165] but also determines if the state has a positive obligation in cases of environmental disasters arising from natural causes. However, according to the Court, natural disasters, which are beyond human control, do not require the same level of state involvement.[166] Moreover, the state's obligation to safeguard property from weather-related threats may not extend as far as it does in the case of dangerous human-made activities.[167]

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159 *Guerra and Others v. Italy,* ECtHR App no.14967/89, 19 February 1998; *McGinley and Egan v. United Kingdom*, ECtHR, App no.21825/93 and 23414/94, 9 June 1998; *Brincat and Others v. Malta*, ECtHR, App no. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, 24 July 2014; *Öneryıldız v. Turkey* (n.156).

160 *The Argeş College of Legal Advisers v. Romania,* ECtHR, App no. 2162/05, 8 March 2011.

161 *Zander v. Sweden,* ECtHR, App no. 14282/88, 25 November 1993. *Taşkın and Others v. Turkey*, ECtHR, App no. 46117/99, 10 November 2004.

162 *Hatton and Others v. United Kingdom*, ECtHR [GC], App no. 36022/97, 8 July 2003; *Öneryıldız v. Turkey*, (n.156).

163 *Budayeva and Others v. Russia*, ECtHR, App no15339/02; 21166/02; 20058/02; 11673/02 and 15343/02, 20 March 2008.

164 Ibid, §§147-160.

165 See *Öneryıldız v. Turkey*, (n.156). For a case in which the right to life was discussed due to radiation as a result of nuclear tests, see *L.C.B. v. the United Kingdom*, App no.14/1997/798/1001, 9 June 1998.

166 Ibid, §174.

167 Ibid.

Examining whether the state has a positive obligation to protect the right to life in both environmental disasters caused by human activities and environmental destruction resulting from natural disasters is promising in addressing climate change, as demonstrated in the *Öneryıldız v. Turkey* case. Indeed, complaints related to climate change should be assessed not only as natural disasters but also as human-induced phenomena. It is important to note that in cases where the violation of the right to life is alleged, the court seeks to establish a sufficient and scientific causal link between the resulting deaths and the state's action or inaction, as indicated in the *Smaltini v Italy* case.[168]

3.2. Right to Private Life

The right to private life (Art8) is frequently invoked in environmental cases before the ECtHR, as it is regarded as the most flexible provision, reflecting the dynamic nature of the instrument.[169] The ECtHR has interpreted this right expansively, recognising that the detrimental impacts of environmental issues on individuals can be addressed under this provision. Various forms of interference, including noise, emissions, odours, and other environmental disruptions, can be grounds for invoking this right.[170] The Court has classified environmental cases related to Art8 under several themes, such as noise pollution, industrial wastes and emissions, landfills, and environmental disturbances caused by base stations and antennas.[171] Given the practical flexibility of Art8 in shaping climate-related cases, it is highly likely that climate change will be considered by the Court within the scope of this right.

The first judgments rendered by the ECtHR in environmental rights matters arose after people living near airports complained about the noise pollution caused by night flights. In the *Powell and Rayner* case as well as the *Hatton and Others* cases, the Court recognised that aeroplane noise interfered with nearby residents' privacy and tranquillity under Art8.[172] Nonetheless, in both cases, the Court accepted the legal basis of the interference, namely the economic

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168 *Smaltini v. Italy*, ECtHR [Decision], App no. 43961/09, 24 March 2015. *Smaltini v Italy* is a case related to industrial emissions that was found manifestly ill-founded and inadmissible. The case involved the impact of environmental nuisance caused by the operation of a steelworks on the health of the first applicant, who had died of leukaemia. The applicant claimed that the harmful emissions from the facility were the cause of the cancer and violated the procedural aspect of the right to life. However, the Court found that proper investigations and judicial process were carried out after the applicant's initial complaint to the authorities. The Court concluded that there was insufficient scientific evidence to establish a causal link between the death and the operation of the facility.

169 See Factsheet (n.158) pp.8-24.

170 *See* Boyle (n.55); also Harris et al. (n.154), p.502.

171 See Factsheet (n.158) pp.8-24.

172 *Powell and Rayner v. United Kingdom*, ECtHR App No. 9310/81, 21 February 1990, §40; *Hatton and Others v. United Kingdom* (n.162), §118.

well-being of the country, and found the state's conduct proportional. The Court emphasised the broad MoA enjoyed by states in environmental matters, particularly in the *Hatton and Others* case.[173] In contrast, in a case about noise pollution from other vehicles, the Court ruled in favour of the applicant, finding the state's measures inadequate and depriving the applicant of the right to home and private life.[174] The Court also found a violation of the state's positive obligation regarding increased noise levels from rail traffic in a separate case.[175] These cases illustrate the Court's broad interpretation of the positive measures states must take to prevent land transportation noise pollution while taking a narrower approach to aviation matters. Although the primary concern in those cases pertains to noise pollution, it is evident that the ECtHR considers legitimate reasons, as outlined in the second paragraph of Art8, in its various approaches. However, claiming that a state has a MoA for climate change - a global issue - based on certain legitimate reasons such as the state's exclusive economic interest and sovereign right, would pose potential difficulties.

In a separate case, *Moreno Gomez* case,[176] concerning noise pollution, the city council of the applicant's residence had issued a resolution to address the noise issue and improve the quality of life for local residents. However, the council also continued to grant licenses for discotheques to operate in violation of the rules it had established. The Court therefore concluded that the right to respect for the applicant's home and her private life had been violated.[177] This approach demonstrates that simply having legislation may not suffice for states. According to this ruling, granting licenses for activities that result in GHG emissions beyond the scope of existing legal regulations that conforms to international regulations governing mitigation and adaptation with regard to climate change may also constitute a violation.

The ECtHR has examined environmental pollution caused by industrial waste in several cases, given its serious nature and the threat it poses to private and family life. One such case is *López Ostra* case, where unlicensed waste facilities near the applicant's home caused severe harm to the environment, depriving the applicant of the enjoyment of his home and right to family and private life.[178] Although the Court stated that the pollution must reach a 'minimal level', [179] it was ruled that it was unnecessary to demonstrate that

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173 *See Hatton and Others v. United Kingdom* (n.162), §§116-130.

174 *Dées v. Hungary,* ECtHR, App no.2345/06, 9 November 2010, §§23-24.

175 See *Bor v. Hungary*, ECtHR, App no.50474/08, 18 June 2013.

176 *Moreno Gomez v. Spain,* ECtHR, App no.4143/02, 16 November 2004.

177 Ibid, §§57-63. For similar, see *Martinez Martinez v. Spain*, ECtHR, App no.21532/08, 18 October 2011.

178 *López Ostra v. Spain*, ECtHR App no.16798/90, 9 December 1994.

179 Ibid; *Guerra and Others v. Italy* (n.159); *also see Fadeyeva v. Russia,* ECtHR, App no.55723/00, 9 June 2005.

the pollution posed a serious threat to health.[180] Similarly, in the *Giacomelli* case,[181] the applicant suffered long-term exposure to persistent noise and harmful emissions due to a waste treatment plant operating without proper environmental impact assessments. The authorities took action but delayed its proper implementation, resulting in a violation of Art8.[182] In the *Fadeyeva* case,[183] the operation of a steel plant near the applicant's home endangered their health and well-being, and the state failed to strike a fair balance between the interests of society and the effective enjoyment of the applicant's right to respect for their home and private life, resulting in another violation of Art8.[184] The Court noted the state's MoA but found no evidence that it had taken effective measures to reduce industrial pollution to acceptable levels.[185]

The ECtHR has dealt with cases where states failed to protect applicants from prolonged exposure to severe pollution caused by private third parties operating illegally.[186] The Court found the states to be liable for not imposing sanctions on the perpetrators and failing to provide relocation solutions for affected people in the *Fadeyeva* and *Dubetska* cases[187], while in the *Tătar* case, cyanide gold extraction's effects on human health were not properly assessed before commencement.[188] The Court relied on objective data in its judgments, considering the level of pollution, proximity to the source, and exposure duration.[189] The precautionary principle was referred to in the *Tătar* case,[190] and the Court stressed that a lack of certainty regarding scientific and technical information could not delay the adoption of effective measures.[191] While the Court's application of this principle has been limited,[192] Omuko argues that it

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180 *López Ostra v. Spain,* (n.178).

181 *Giacomelli v. Italy*, ECtHR, App no.59909/00, 2 November 2006.

182 Ibid, §§76-98.

183 *Fadeyeva v. Russia*, (n.179).

184 Ibid, §93.

185 Ibid, §§116-134; also see *Ledyayeva and Others v. Russia*, ECtHR, App no. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006.

186 *See* Factsheet (n.158).

187 *Fadeyeva v. Russia,* (n.179) §121; *Dubetska and Others v. Ukraine,* ECtHR, App no. 30499/03, 10 February 2011, §§140-156.

188 *Tătar v. Romania,* ECtHR, App no.67021/01, 27 January 2009.

189 *Dubetska and Others v. Ukraine*, (n.208) §118; *Băcilă v. Romania*, ECtHR, App no.19234/04, 30 March 2010, §§63-73.

190 *Tătar v. Romania,* (n.188) §69.

191 Ibid, §120.

192 Natalia Kobylarz, 'The European Court of Human Rights, an Underrated Forum for Environmental Litigation' in Helle Tegner Anker and Birgitte Egelund Olsen (eds.) *Sustainable Management Of Natural Resources:Legal Instruments And Approaches* (Intersentia, 2018), pp.118-120; also see *Tătar v. Romania,*(n.188); also see *Hardy and Maile v. The United Kingdom*, App no.31965/07, 14 February 2012.

has the potential to alleviate scientific uncertainty in climate litigation.[193]

The significant contribution of Art8 to environmental protection is evident from the Court's existing environmental case law. The various interpretations of the article that have accumulated over time can also be key and mobilised in climate litigation pending before the ECtHR, especially given that complaints in such cases often involve both Art(s)2 and 8.[194] Roagna attributes the expansion of Art8's scope in the past decade to its historical position as the first article to introduce the balancing of human rights protection and the states' MoA.[195] Therefore, determining which interest prevails in this balancing act has become a critical issue in climate litigation within the ECtHR.

The ECHR has been increasingly utilised at the domestic level to prompt governments to take greater measures in addressing climate change and environmental degradation.[196] Within the ECtHR, which boasts a significant body of environmental case-law and effective techniques for incorporating environmental considerations into rights-based discourse, the manner in which climate-related cases will be adjudicated remains uncertain, as no decisions have been rendered to date.[197] The following section will discuss the potential of the Strasbourg Court as a viable forum for rights-based climate litigation given its existing jurisprudence.

C. POTENTIAL HURDLES BEFORE THE ECtHR

1. Pending Cases

As a result of the ECtHR being considered a suitable forum for climate litigation, individual applications have started to be filed at the Court with the allegation that states have not mitigated their GHGs sufficiently and have, therefore, violated their human rights obligations.

In *Duarte Agostinho and Others,* which is pending at the time of writing[198] a single application has been directly filed at the ECtHR against 33 Contracting States, without the usual confirmation that domestic remedies have been

193 Lydia Omuko, 'Applying the Precautionary Principle to Address the "Proof Problem" in Climate Change Litigation', (2016) 12(1) Tilburg Law Review, pp. 52-71; Margaretha Wewerinke-Singh 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9 Climate Law, p.232.

194 Factsheet (n.158) p.12.

195 Ivana Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights-Council of Europe human rights handbooks* (Council of Europe, 2012), p.7.

196 Section 1.3.1.

197 April, 2023.

198 *Duarte Agostinho and Others v. Portugal and Others,* ECtHR, App no.39371/20, App date: 13 November 2020.

exhausted.[199] The applicants have alleged that there is essentially a lack of an adequate domestic remedy.[200] One contention put forth is that due to the urgent nature of the matter at hand, it would be impractical for each petitioner to pursue legal action before their respective national courts in order to fulfil the requirement of exhausting domestic remedies. They further claim that such an expectation would impose an unreasonable and disproportionate burden on the applicants. The application, which is still pending before the Court, has been communicated by the Court relayed to the states concerned, and the Court has put questions to the defending governments under Art(s)1, 2, 3, 8, 14, 34, and Art1 of Protocol No. 1. Although the applicants did not make such a request with regard to Art 3, it is important that the Court requests a defence under Art3 so that the prohibition of inhuman or degrading treatment can be properly considered.[201] Having received the respondent governments' respective defences, the Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber on June 30, 2022, as the case presents a significant issue concerning the interpretation of the Convention.

Another relevant application is the *Verein KlimaSeniorinnen Schweiz and Others case* which makes history with the first-ever climate case to be heard before the ECtHR.[202] One of the applicants is an association, and the others are four elderly women. The women, who have health problems, have complained that their living conditions have been negatively affected by GHGs.[203] In contrast to the aforementioned cases, the present application does not concern any claims of extraterritorial liability. Various queries pertaining to the eligibility of the applicants and their legal entity to be recognised as victims have been raised, among other admissibility issues, which have been conveyed to the state. In this particular case, the state has been called upon to justify its

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199 *Duarte Agostinho and Others v. Portugal and 32 other States*, ECtHR Application Form, p.10 <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_3937120_complaint.pdf> accessed 16 September 2021.

200 Ibid.

201 See Corina Heri, 'The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?' (EJIL:Talk!, 22 December 2020), <https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/> accessed 21 September 2021.

202 See *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* (n.70). Following the written stage of the proceedings was completed, the case was moved to proceed to the oral stage, where a hearing was held on March 29th, 2023, by the Grand Chamber. However, the Court's final decision on the case is still pending. See, <https://echr.coe.int/Pages/home.aspx?p=hearings&w=5360020_29032023&language=en&c=&py=2023> accessed 2 April 2023.

203 Factsheet (n.158), pp. 2-3.

defence of the right to a fair trial (Art. 6) and an effective remedy (Art. 13) as procedural rights within the context of environmental claims. Additionally, positive obligations under Arts. 2 and 8 are also being contested. This case holds significant importance in establishing a causal link between adverse climate change impacts and elderly individuals. If the court rules in favour of the applicants, it may provide legal recognition to the fact that vulnerable groups, such as the elderly, are disproportionately affected by climate change.

The *Carême v. France* case is also presently awaiting adjudication by the Grand Chamber.[204] The case pertains to a grievance filed by an individual who is both a resident and a former mayor of the Grande-Synthe municipality. The claimant alleges that France has failed to take adequate measures to mitigate climate change, resulting in a violation of Art(s) 2 and 8.

After conducting a series of procedural meetings related to climate cases, which were distinct from those awaiting a hearing by its Grand Chamber, the Court decided to suspend the assessment of six other cases until the Grand Chamber delivers its judgment on the current issue.[205] Additionally, the Court found two other cases inadmissible, which will be mentioned in the *Ratione Personae* subsection.

These applications highlight a number of issues that need to be resolved, including the exhaustion of domestic remedies, victim status, jurisdiction, positive obligations and procedural rights. These matters, alongside *ratione personae*, *ratione loci*, causality and the MoA, are highly interrelated and interdependent and we will therefore consider them carefully in the remaining part of this section. In doing so we will pay close attention to the MoA, the interpretation of which has been problematic.

2. Procedural Hurdles

2.1. Exhaustion of Domestic Remedies

As previously mentioned, the ECtHR can only be appealed to after the

[204] *Carême v. France*, ECtHR, App no. 7189/21, App date: 28 January 2021.

[205] See, ECtHR, 'Factsheet-Climate Change' (ECtHR, Press Unit, March 2023); six cases adjourned are as follows: *Uricchiov v. Italy and 31 Other States,* ECtHR, App no.14615/21; *De Conto v. Italy and 32 Other States* ECtHR, App no.14620/21; *Müllner v. Austria*, ECtHR, App no.18859/21; *The Norwegian Grandparents' Climate Campaign and Others v. Norway*, ECtHR, App no. 19026/21; *The Norwegian Grandparents' Climate Campaign and Others v. Norway*, ECtHR, App no.19026/21; *Soubeste and four other applications v. Austria and 11 Other States*, ECtHR, App nos. 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22; *Engels v. Germany*, ECtHR, App no. 46906/22.

exhaustion of domestic remedies.[206] This is a result of the recognition of subsidiarity principle followed by the ECHR system. The Court has confirmed that the protection mechanism is based on this principle.[207] Accordingly, the protection of the rights in the ECHR is primarily the duty of states. As the Court's main role is the supervision of national systems, it is more appropriate for the national courts to determine first whether the issues complained of fall within the protection of the ECHR.[208] The rationale of this criterion is to give an opportunity to the national authorities to repair or prevent violations.[209]

Applications filed without the exhaustion of domestic remedies are found inadmissible as a rule. However, it has been noted that this rule should not be applied with an overly formalistic approach.[210] Therefore, some circumstances may be accepted where the exhaustion requirement is not necessary. For instance, the Court has emphasised that the domestic remedies in question must be effective, adequate and accessible for applicants.[211] States cannot, therefore, claim that remedies remain available where said remedies are inaccessible or do not provide a chance of reparation and reasonable prospects of success. Nevertheless, the Court has confirmed that mere doubts about success are not a sufficient reason to set aside the exhaustion of remedies requirement.[212]

Cases in which it would not be reasonably practicable to ask applicants to exhaust a particular remedy and where it would constitute a disproportionate obstacle to the effective exercise of the right of individual application pursuant to Art34, are also considered exempt.[213] Notably, there are additional situations in which the generally accepted rules of international law may dictate a waiver of the usual exhaustion requirement. [214] Naturally, such exceptions require an independent examination of the specific facts of each case.

It is important to acknowledge that the functioning and speed of domestic remedies provided by judicial system of each state may differ. Notwithstanding, it is crucial to recognise that urgent and global concerns, such as climate change,

206 ECHR, Art35§1.

207 ECHR 'Practical Guide on Admissibility Criteria' (CoE, Updated on 1 August 2021), p. 1; also see Protocol No.15 of the ECHR.

208 *A, B and C v. Ireland*, ECtHR [GC], *App no.25579/05,* 16 December 2010, §142.

209 *Selmouni v. France*, ECtHR [GC] App no. 25803/94, 28 July 1999, §74.

210 *Ringeisen v. Austria*, ECtHR, App no. 2614/65*,* 23 June 1973, §89; *Gherghina v. Romania*, ECtHR [GC] App no. 42219/07, 9 July 2015, §87.

211 See *Sofri and Others v. Italy,* ECtHR, App no.37235/97 4 March 2003; *Sejdovic v. Italy*, ECtHR, App no.56581/00, 1 March 2006, §46.

212 *Sejdovic v. Italy* (n.211) §45.

213 *Veriter v. France*, ECtHR, App no.25308/94, 2 September 1996, §27.

214 Admissibility (n.207), p.32.

should also be regarded as relevant factors to be taken into consideration by the Court. In addition, the contribution of GHGs to climate change has been proven as a scientific fact,[215] and efforts -whether realistic or not- are continuing internationally in consideration of this catastrophic fact.[216] In this regard, the ECtHR may draw inspiration from the Paris Agreement[217] which reflects an international consensus on the seriousness of the matter and can be considered to promote the generally recognised rules of international law despite ongoing discussion of the provisions' binding force.[218] In light of the potential aggravation of environmental damage resulting from the pursuit of domestic remedial measures hence the loss of time, it behooves one to contemplate the applicability of the precautionary principle in this context, which was successfully employed to surmount the causality impediment in the *Urgenda* case[219] as well as *Tătar v. Romania* case of the ECtHR[220], may serve as a pertinent point of reference.

Referring to the number of cases and their chances of success before local judiciaries across the Europe, Pedersen claims that, climate applications, such as the *Duarte Agostinho and Others* case, are likely to be found inadmissible due to the strict procedural stance of the ECtHR, thus putting rights-based climate litigation at stake.[221] Indeed, the rule of exhaustion of domestic remedies is a procedural instantiation of the subsidiarity principle the procedural aspect of the subsidiarity principle.[222] However, it should be noted that the underlying cause of the Court's strict attitude towards this rule, among others, is the consideration that the ECtHR should not be 'a victim of its own success', rather than the objective of ensuring legal discipline.[223] In other words, the procedural rigidity adopted by the Court is predominantly designed to deal with an increased workload, and therefore results in a restriction in access to justice. Wewerinke-Singh argues that climate change victims should be entitled to access legal institutions and procedures that guarantee a fair trial and an

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215 See UN Environment, *Global Environment Outlook – GEO-6: Healthy Planet, Healthy People* (Paul Ekins et al. [eds], Cambridge University Press, 2019).

216 Section 1.2.

217 *See* Paris Agreement (n.3) Art2.

218 Ibid.

219 See supra note 103.

220 *Tătar v. Romania,* ECtHR, App no.67021/01, 27 January 2009.

221 Ole W. Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (EJIL:Talk!, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 19 September 2020.

222 *See* ECHR 'Interlaken Follow-Up: Principle of Subsidiarity' (ECtHR, 8 July 2010), pp. 6-9.

223 *See* Oddný Mjöll Arnardóttir 'The 'Procedural Turn' Under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) International Journal of Constitutional Law, pp. 9-35.

effective remedy.[224] The rights of these victims to a fair trial and a substantive remedy should be better protected by removing any unfair procedural step. In the *Sacchi et. al* case, for instance, the UN Committee on the Rights of the Child was presented with a petition by sixteen children, which asserted that Argentina, Brazil, France, Germany, and Turkey had violated their rights under the UN Convention on the Rights of the Child by not making sufficient cuts to GHGs and by failing to encourage the world's largest emitters to reduce carbon pollution.[225] While the Committee acknowledged that the children had demonstrated, for the purposes of jurisdiction, that the State parties' acts or omissions regarding carbon emissions originating within their respective territories could reasonably foreseeably result in the impairment of their rights, it concluded that the petition was inadmissible due to the failure to exhaust domestic remedies.[226] By ensuring access to legal avenues for redress, marginalised individuals, including children in this regard, who often suffer the most severe impacts of climate change, should be able to seek justice, address power imbalances that contribute to environmental harm, and safeguard their fundamental human rights. Consequently, the formalistic approach taken by the Committee in the *Sacchi et al.* case ought not to be applied in forthcoming climate-related cases before the ECtHR as its substantive law might be potentially sufficiently effective in tackling the climate crisis.

In fact, due to the urgency of the matter, it is best to apply directly to the Strasbourg Court, whose decisions are legally binding and relatively effective in Europe - even beyond. Clark et al. argue that filing applications directly at the ECtHR would provide 'subsidiarity in action', that is, it would encourage the domestic courts to deliver *Urgenda*-like decisions.[227] Therefore, it is submitted that compromising 'procedural subsidiarity' ensures 'subsidiarity in action', and that this does not actually infringe on the subsidiarity principle. The ECtHR's ideal role is not to occupy the position of national courts, but rather to work in partnership with them.

The ECtHR has also noted that once a state claims that domestic remedies have not been exhausted, it bears the burden of proof to prove that the remedy was both available and effective.[228] At this stage, the Court will consider whether or not the state provided remedies for the violation of substantive rights, as well as remedies for the violation of procedural and participatory

224 Wewerinke-Singh (n.193) p. 227.

225 *Sacchi et al. v. Argentina, et al.,* UNCRC, CRC/C/88/D/108/2019, (8 October 2021).

226 Ibid.

227 Paul Clark *et al.*, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case' (EJIL:Talk!, 6 October 2020), <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> accessed 18 September 2021.

228 *Dalia v. France*, ECtHR, App no.154/1996/773/974, 19 February 1998, §38; *McFarlane v. Ireland*, ECtHR, [GC] App no. 31333/06, 10 September 2010, §107.

rights, depending on the nature of the complaint. Since the number of cases of loss and damage caused by climate change is almost certain to increase, evidence of an effective national compensation mechanism to provide redress could be a crucial first step for states seeking to defend themselves.[229]

2.2. Time-Limit

Following the 'exhaustion of domestic remedies' hurdle has been overcome, the Court questions whether the climate application has been filed within the time-limit; a procedural requirement reviewed under the wider test of admissibility.[230] In cases where complaints are founded on a state's negligence to address climate change mitigation or adaptation, the state's behaviour might be identified as a continued violation. In line with the Court's case law, the time limit rule should not be applied in this situation.[231] Otherwise, the issue of access to justice may arise here as well. In terms of access to justice, any formal requirements, such as time-limits, have the potential to be restrictive, as they may hinder individuals from being able to access the court. When it comes to the substantive point of view, the issue focuses on whether domestic remedies are sufficiently available to provide effective protection for the rights, as mentioned above.[232] Indeed, the Court noted in its case law that procedural rules should not be interpreted inflexibly.[233]

3. Jurisdiction

3.1. Ratione Personae: Standing

The ECtHR acknowledges the occurrence of victimisation in three forms, namely direct, indirect, and potential victimisation.[234] However, for potential victimisation, applicants must present reasonable and convincing evidence that the violation may personally affect them.[235] The consequences of the

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229 Wewerinke-Singh (n.193) p.243.

230 ECHR, Art35§1. As a result of all Member States of the CoE have ratified Additional Protocol No. 15, with effect from 1 February 2022 the time-limit will be *four months* from the date of the final domestic decision, instead of *six months*, *see* The European Court of Human Rights 'Questions & Answers for Lawyers' (Council of Bars and Law Societies of Europe, 2020), p.6 <https://www.echr.coe.int/Documents/Q_A_Lawyers_Guide_ECHR_ENG.pdf> accessed 17 September 2021.

231 *Sabri Güneş v. Turkey*, ECtHR [GC] App no. 27396/06, 29 June 2012.

232 Janneke H. Gerards and Lize R. Glas, 'Access to justice in the European Convention on Human Rights system' (2017) 35(1) Netherlands Quarterly of Human Rights, p.13.

233 *Centre For Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, ECtHR [GC], App no.47848/08, 17 July 2014, §112; *Roman Zakharov v. Russia,* ECtHR, App no.47143/06, 4 December 2015, §164.

234 *See* Admissibility (n.207), pp.11, 12, and 15.

235 Ibid, p.15; *Senator Lines GMBH v Austria and Others,* ECtHR App no.56672/00, 10 March

phenomenon of climate change have been felt much more recently and if action is not taken, science tells us that the situation will deteriorate further. Despite the international commitments made by states in response to this bleak outlook, many commentators still believe that further mitigation and adaptation steps must be taken to lessen the effect of climate change on the health, private lives, family and home lives of humanity. In particular, concern has been expressed about the protection of certain minorities and vulnerable groups and individuals. Considering how existing green case-law of the ECtHR approaches environmental threats, it is not difficult to accept that these adverse impacts and trends constitute potential harms for the people under the jurisdiction of the ECtHR. The fact that there are strong scientific predictions that these effects will increase and cause worse results if no action is taken, highlights the potential risk even more clearly.

With the above in mind, one can see that 'the risk is not hypothetical but proven' approach adopted in the *Future Generations* case could be helpful in establishing a clear case for victimisation in cases brought before the ECtHR.[236] Again, the *Teitiota* case also articulated that the adverse effects of climate change would affect human rights protected by IHRL despite the dismissal of plaintiffs' case.[237]

Similarly, in the *Urgenda* case, it was emphasised that a known, real, and 'imminent' threat existed.[238] Perceiving the 'immediate risk' highlighted by the ECtHR[239] as an 'imminent risk' as stated in the *Urgenda* case may be useful in establishing victimisation. Indeed, the term 'imminent' is not used here to mean that the risk will occur in a short time, but to mean that the risk in question directly threatens the individuals concerned; it is, therefore, a suitable concept for covering long-term risks.[240]

The public interest litigation approach adopted in the *Leghari* case is not suitable for evaluating the *ratione personae* requirement within ECtHR cases because applications which are *abstracto* or *actio popularis* have no chance of admission[241] as a result of the victim-centred approach of the Court[242].

2004.

236 *See* Section 1.3.3.

237 *See* Section 1.4.

238 *See* Section 1.3.1.

239 *See Mastromatteo v. Italy,* ECtHR [GC], App no. 37703/97, 24 October 2002, §68; also, *Paul and Audrey Edwards v. the United Kingdom*, ECtHR, App no.46477/99, 14 March 2002, §55.

240 Monica Feria-Tinta 'Climate Change Litigation in the European Court of Human Rights: Causation, de and Other Key Underlying Notions' 2021(1) 3, Europe of Rights & Liberties/ Europe des Droits & Libertés, pp.65-66.

241 *Klass and Others v. Germany*, ECtHR, App no. 5029/71, 6 September 1978, §33.

242 Evadne Grant 'International Human Rights Courts and Environmental Human Rights:

As a rule, individual applications brought by legal persons must consist of complaints with respect to their legal personality.[243] Litigants hoping to secure a merits-based review of their claim should note that non-governmental organisations, associations or companies whose applications are not clearly related to their own legal personality's rights may face a problem. Accordingly, it can be argued that the *Urgenda* case would have been found inadmissible on the basis that the applicant's lacked standing before the ECtHR. Indeed, in January 2023, the Court declared *Humane Being* case inadmissible as per Art35§3(a), stating that the applicant, Humane Being, an NGO, was not affected enough by the alleged breach of Art(s)2, 3, and 8 of the ECHR to claim a violation, within the meaning of Art 34.[244] The merits of the case concerned whether 'factory farming' violates human rights due to the risks of the climate crisis, future pandemics, and antibiotic resistance.[245] However, the case was dismissed on the ground that the complaints were incompatible *ratione personae,* meaning that the applicant did not demonstrate sufficient harm resulting from the alleged breaches to establish a claim of violation. *Plan B. Earth and Others v. the United Kingdom* case is another climate case that was found inadmissible by the Court on the same grounds.[246]

3.2. Ratione Loci: Territorial Jurisdiction

In terms of *ratione loci*, a state's jurisdiction is presumed to be exercised throughout the national territory and allegations of incidents and related violations must take place -as a rule- within the national borders of the relevant state.[247] However, there are various exceptions to this rule. For example, states may also be held liable for their attributable acts or omissions that cause impacts out of their territories.[248] Another exception the ECtHR has recognised

Re-Imagining Adjudicative Paradigms' (2015) 6(2) Journal of Human Rights and the Environment, p.161.

243 *Centre For Legal Resources on Behalf of Valentin Câmpeanu v. Romania* (n.233), §96. However, particular considerations may arise in applications concerning Art(s)2, 3 and 8, *see* Ibid, §§103-114.

244 *Humane Being v. the United Kingdom,* ECtHR, App no. 36959/22 (dismissed in January 2023) <http://climatecasechart.com/non-us-case/factory-farming-v-uk/> accessed 15 February 2023.

245 Ibid.

246 *Plan B. Earth and Others v. the United Kingdom*, ECtHR, App no. 35057/22 (dismissed in January 2023) <http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/> accessed 15 February 2023.

247 ECHR, Art1; *Banković and Others v. Belgium and Others*, ECtHR [GC], App no.52207/99, 12 December 2001, §§61-67.

248 See *Ilaşcu and Others v. Moldova and Russia* ECtHR [GC] App no. 48787, 8 July 2004, §311; *Al-Skeini and Others v. the United Kingdom*, ECtHR [GC] App no. 55721/07, 7 July 2011, §130.

is the 'effective control' of a state over territory outside its borders, as seen in the well-known case of Turkey's conduct in Northern Cyprus.[249] Considering that jurisdiction is an aspect of sovereignty, and thus encompasses the activities of all organs of the state,[250] it should be possible to file a complaint against states before the Strasbourg Court for their contribution to the emission of extraterritorial GHGs.

In certain instances, involving climate-related matters, discerning the *ratione loci* of states to assert responsibilities within their territorial boundaries may prove to be a rather uncomplicated task.[251] As such, NDCs mandated under the Paris Agreement could furnish a pertinent foundation for each state to uphold human rights under its jurisdiction. Nevertheless, as exemplified by the *Duarte Agostinho and Others* case, petitioners contended that they suffered the impact of states' actions outside of their domicile, and that these actions contravened their human rights;[252] an inquiry that poses a considerably more arduous challenge.

The ECtHR has emphasised that 'jurisdiction' in Art1 refers states' rulemaking and enforcement powers in the public international law sense.[253] This type of jurisdiction is understood to be an instantiation of traditional sovereignty. However, there may be geographical areas of international common use that states have not yet regulated in detail.[254] In climate cases, 'diagonal' obligations arising from these unregulated areas have been highlighted.[255]

Hartmann and Willers claim that there is no obstacle for states seeking to regulate incidents outside their borders as long as they do not adversely affect the rights of other states.[256] The main problem here is how to determine the obligations that arise when a government acts or fails to act in a way that creates a transboundary impact.[257] For this purpose, it is important to determine the proper extent of the jurisdiction in question. In order to be able to overcome this hurdle, the reasoning of the Court in previous decisions may

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249 *Loizidou v. Turkey*, ECtHR [GC], App no. 15318/89, 23 March 1995, §62; also see *Cyprus v. Turkey*, ECtHR [GC], App no. 25781/94, 10 May 2001.

250 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th edn, 2019), p. 441.

251 See *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (n.171).

252 *Duarte Agostinho and Others v. Portugal and Others* (n.198)

253 Jacques Hartmann and Marc Willers, 'Protecting Rights in Climate Change Litigation before European Courts' (SSRN, 2021), p.14 <https://ssrn.com/abstract=3832674 or http://dx.doi.org/10.2139/ssrn.3832674> accessed 18 September 2021. Also *see Banković and Others v. Belgium and Others* (n.247), §59.

254 Feria-Tinta (n.240), p.54.

255 Ibid.

256 Hartmann and Willers (n.244), p.14.

257 Ibid.

be useful. In the *Banković* case, the Court's approach to the interpretation of jurisdiction was generally quite narrow.[258] Nevertheless, it is noteworthy that the Court found that actions taken by a state, and their consequences, should be evaluated as if they had occurred within the scope of the national territory, regardless of where they actually occurred or were felt by the victim.[259] Even though it was emphasised that the jurisdiction could not be adapted to the changing conditions of each case, the Court was inspired by international law in its acceptance of the 'effective control' criterion,[260] which, in turn, softened its strict stance.

Focusing in on IHRL, it is clear that relevant rules of international law and interpretations of other human rights mechanisms can be useful in determining the jurisdiction of extraterritorial climate cases, as in fact demonstrated by the case-law of the ECtHR.[261] Indeed, it is submitted that this is the right course of action in 'hard cases' involving issues such as the global effects of the climate crisis. For instance, as Feria-Tinta suggests, the successful jurisdictional position of the Advisory Opinion on Environment and Human Rights of the IACtHR could be adopted by the Strasbourg Court[262] given that it has adopted the most flexible stance on jurisdiction of all working papers and judicial decisions issued to date.[263] According to the IACtHR's opinion, individuals whose rights under the Inter-American Convention on Human Rights have been violated owing to transboundary harm, are subject to the jurisdiction of the state from which the harm originated, due to the state's effective control over the activities.[264] The jurisdictional issue to be determined is whether the perpetrator state has effective control over the activities that produce GHGs, not territorial control over the country where the victims are located.[265] Taking the second option in a formalist approach to jurisdiction, would have caused the 'unconscionable' result of allowing a state to violate victim's rights so long as they are located outside of its physical or traditional jurisdiction.[266] Utilising international law as a backdrop for interpretation is eminently reasonable,

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258 *Banković and Others v. Belgium and Others* (n.247), §§59-61.

259 Ibid, §75.

260 See supra note 249.

261 Ibid. For the Court's changed approach, see *Pad and Others v. Turkey,* ECtHR App no.60167/00, 28 June 2007; Also see Clark *et al.* (n.227).

262 *The Environment and Human Rights*, IACtHR Advisory Opinion OC-23/17, 15 November 2017 (English translation) <https://www.elaw.org/IACHR_CO2317> accessed 18 September 2021. Also see Feria-Tinta (n.240), pp. 56-58.

263 Ibid.

264 Advisory Opinion (n.262), §§95-103.

265 *See* Feria-Tinta (n.240), p.57.

266 *Sergio Euben Lopez Burgos v. Uruguay*, UN Human Rights Committee (1981), Communication No. R.12/52, U.N. Doc Supp. No. 40 (A/36/40) at 176, §12.3.

encompassing not only legal instruments but also judicial determinations.

Lastly, in all jurisdiction matters, there is a moral imperative to adopt such flexibility, and in dealing with the severity of the climate crisis, this should not be considered as an extraordinary legal turn. This moral approach has been touched on before in establishing the link between human rights and climate change.[267] In applying this moral perspective to the issue of jurisdiction, it is argued that courts must not be merely huge, formalistic comparison machines that make narrow and mechanical interpretations.[268] Judges taking the narrower approach simply are little more than the spokespersons of previously adopted rules. With this in mind, climate litigation needs some legal realism advocacy, given that law is not a value in itself, being fed by many other disciplines, and being shaped by ideologies, public opinion and even the personal preferences of legal practitioners.[269] In other words, it is important for the ECtHR to learn from some of the more persuasive insights from the field of American Legal Realism in order to overcome the jurisdiction hurdle and examine rights substantively in climate cases.

It should also be noted that in examining *ratione loci* in climate cases, *ratione personae* and positive obligations should also be taken into consideration under the relevant right[270] to make the rule of jurisdiction a little more flexible.[271] In the next section we shall consider how deeper arguments regarding causation might be invoked in dealing with the jurisdiction and attribution of harm by states.

4. Causation

A major challenge in climate litigation is to establish the factual basis of causation.[272] In order to reveal the harm caused by climate change in the trial process, reliable evidence must be put forward.[273] Reliability is crucial in terms of both admissibility and proving one's substantive case in judicial processes in general.[274] Climate science has a significant role in providing this reliability.

In the context of climate-related tort claims, establishing a causal nexus between the tortious conduct and resulting harm is a key objective. That

267 *See* Section 1.1.

268 Vitalius Tumonis, 'Legal Realism & Judicial Decision-Making' (2012) 19(4) Jurisprudence, p.1363.

269 Ibid, pp. 1366-1367.

270 Admissibility (n.207), p.59.

271 See applicants' arguments *Banković and Others v. Belgium and Others* (n.247), §52.

272 See *City of Oakland v. BP*, United States District Court for the District of Northern California, 25 June 2018; *Lliuya v RWE*, District Court Essen, 15 December 2016.

273 Tobias Pfrommer et al., 'Establishing causation in climate litigation: admissibility and reliability' (2019) 152 Climatic Change, p. 69.

274 Ibid.

is, scientific certainty may be necessary in tortious claims to determine the identity of the perpetrator and the extent to which the defendant is responsible. In the *Luciano Lliuya* case, the plaintiff, a Peruvian farmer living in the Andes, filed a lawsuit against a major electricity producer, claiming that his home and livelihood were at risk of flooding from a glacial lake, and requesting declaratory and injunctive relief as well as damages.[275] The source of the problem in such cases is that the perpetrators' emission contributions that cause harm and damage cannot be accurately calculated.[276] Therefore, particular technical legal solutions are typically sought in such cases, due to the difficulty of reaching the aforementioned scientific certainty.[277] Nevertheless, the gap-filler function of human rights-based arguments and interpretive techniques in human rights law, as employed in rights-based litigation, may serve as a catalyst for overcoming the hurdle of causation.[278] In cases where only human rights law is in question, especially in climate applications within the ECtHR, such certainty may be a supporting factor when identifying a violation, rather than a *sine qua non.* If it were otherwise, an absurd situation would arise in which contributors are not held responsible due to the cumulative nature of the GHGs that are causing the climate crisis.[279]

Art47 of The Internationally Wrongful Act of a State of the ILC, which regards the plurality of responsible states, clearly explains that each state can be held responsible for the same wrongful act.[280] The Article's commentary refers to the *Corfu Channel* case and gives an example of multiple states contributing to the pollution of a shared river.[281] According to the instrument, each state's responsibilities must be determined individually, and one can see

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275 *Luciano Lliuya v. RWE AG*, District Court of Essen [Germany] File no. 2 O 285/15 [English translation] <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision-1.pdf> accessed 20 September 2021; similarly, see *City of Oakland v. BP*, US District Court for the District of Northern California, 25 June 2018.

276 Petra Minnerop and Friederike Otto, 'Climate Change and Causation Joining Law and Climate Science on the basis of Formal Logic' (2020) SSRN Electronic Journal, p. 51.

277 For the suggestion of *Daubert standard*, see Pfrommer et al. (n.264) pp. 67-84.

278 See Third Runway at Vienna International Airport case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017; also *Earthlife Africa Johannesburg v. Ministry of Environmental Affairs and Others*, Hight Court of South Africa, no. 65662/16, 8 March 2017.

279 Feria-Tinta (n.240), p.61.

280 UN ILM, 'Report of the Commission to the General Assembly on the work of its fifty-third session' Yearbook of the International Law Commission 2001(2)2, A/CN.4/SER.A/2001/Add.1 (Part 2) (2007), p. 124.

281 Ibid, p.125. For *Corfu Channel* case, see *United Kingdom v. Albania,* [Merits], International Court of Justice, 9 April 1949.

how this principle could be applied to extraterritorial claims filed at the ECtHR. *Savaresi* suggests that the aforementioned 'river' example may be equated with the states' contributions to global GHGs. [282] Indeed, this point has also been highlighted in the *Urgenda* case as mentioned before.[283] In that case, every state was found to have a duty of care on the basis of the need for mitigation and adaptation measures due to GHGs regardless of their specific emission rate. If one takes this approach, the only remaining function of causation is to determine attribution which is a hurdle to be overcome at the admissibility stage.[284]

The ECtHR has acknowledged its intention to scrutinise whether a state has taken adequate measures to mitigate the detrimental impacts of uncontrollable natural occurrences such as earthquakes.[285] In this regard, the duty to forestall necessitates the implementation of strategies to enhance resilience towards unforeseen and tumultuous natural events. This paradigm is not only applicable to ecological events occurring independently of human activity, but also extends to environmental phenomena resulting from or anticipated to arise due to anthropogenic GHGs.

The case under consideration, *Humane Being v. the United Kingdom*, also pertains to causation as it introduced novel climate arguments emphasising the risks associated with agricultural methane emissions and underscoring the role of soy feed consumption in UK factory farming as the primary contributor to deforestation in the Amazon basin.[286] Nonetheless, as the case has been deemed incompatible in terms of the *ratione personae* criterion, it is still unclear how the ECtHR would have approached the link between the adverse effects on the Amazon and soy feed consumption in UK factory farms.

5. Margin of Appreciation (MoA)

In individual applications filed within the scope of Art8 and based on climate action failure, the MoA doctrine is seen as one of a number of potential hurdles.[287] The issue is that the Court has repeatedly stressed that, with regard to environmental risks, it is not duty-bound to second-guess policy choices in the difficult social and technical field of environmental law.[288] Pedersen argues

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282 Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in Ivano Alogna, Christine Bakker, Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (BRILL, 2021), pp. 366-392.

283 Section 1.3.1.

284 Feria-Tinta (n.240), p.61.

285 *M. Özel and Others v. Turkey*, ECtHR App no(s) 14350/05, 15245/05 and 16051/05, 17 November 2015, §173.

286 *Humane Being v. the United Kingdom* (n.244).

287 Pedersen (n.221).

288 *Powell and Rayner* (n.172), §44; *Hatton and Others v. the United Kingdom* (n.162), §100.

that this will happen in climate cases as well, emphasising that the Court typically recognises a wide MoA of states.[289] This argument alone, however, is not sufficient for a pessimistic prediction about pending climate cases.

There is no doubt that the adverse effects of climate change are 'environmental risks'. However, in the context of noise pollution in *Hatton and Others*,[290] it could not be assumed that the environmental risk to the residential area around the airport was the same as the risk posed by climate change, which had global consequences. Thus, it appears that states will not be automatically given a broad MoA in environmental risk complaints based on the rights of Art8. In any event, it is noted that environmental interests have occasionally prevailed in the Court despite the application of a broad MoA.[291] Additionally, in assessing MoA, the Court might take into account that states have positive obligations to remain under the temperature limits determined by the Paris Agreement. In doing so, it might note that the Agreement clearly states that - despite a preambular reference - human rights are one of the affected values due to the threat of climate change.

In any impact on human rights resulting from either action or inaction, states are obligated to weigh the interests of the public against those of individuals. An illustration of this can be found in the *Hatton and Others* case, where the state's consideration of economic interests was part of the balancing exercise. After conducting a balancing exercise of the competing interests at stake, the Court arrived at the conclusion that the state had carried out this evaluation with the advantage of a wide MoA.[292] The balancing exercise involved an assessment of the economic welfare of the nation, which is recognised as a legitimate aim under the §2 of the Art8, and it was deemed to be given greater weight than the right to respect for one's home.[293] Adopting the approach used in this case, an evaluation of a climate case would require the Court to determine if there existed an urgent 'social need' for the state's failure to meet its obligations on national emission contributions.[294] The Court would also need to assess if the measures or lack thereof undertaken by the state were effective in addressing that need and whether the response was proportionate to the situation at hand.[295] As Clark *et al.* emphasise, the threat of climate change as predicted by the best available science is highly unlikely to be seen as 'necessary in a

289 Pedersen (n.221).

290 See *Hatton and Others v. the United Kingdom* (n.162).

291 *Budayeva and Others v. Russia* (n.163); also see *Fredin v. Sweden*, ECtHR App no. 12033/86, 18 February 1991.

292 *Hatton and Others v. the United Kingdom* (n.162), §129.

293 Ibid, §98.

294 See, ECHR 'Guide on Article 8 of the Convention – Right to respect for private and family life' (CoE, Updated on 31 August 2022), §§ 29-31.

295 *Hatton and Others v. the United Kingdom* (n.162), §§116-130.

democratic society' in its interference with Art8 rights, especially in the light of the temperature limits and commitments stipulated in the Paris Agreement.[296]

In addition, the MoA has been interpreted narrowly where there was evidence of European consensus among the states party to the ECHR.[297] The Court's deference to European consensus is considered to be implemented in accordance with the MoA doctrine and the principle of dynamic interpretation.[298] Considering that the majority of CoE members are from EU member states, and that the climate change issue is among the political priorities of the current EU policymakers' agenda,[299] the existence of this consensus can be delineated quite easily. Ongoing efforts within the CoE to draft an additional protocol on the right to a healthy environment are also very helpful in demonstrating this shared ambition.[300]

The doctrine of MoA has been addressed in several cases, yet its inconsistent application by the Court has rendered the doctrine controversial. [301] Nonetheless, when used appropriately, it can be a valuable tool to fulfil the principle of subsidiarity. Although this doctrine typically favours the state rather than individuals, it holds the potential to make a positive contribution to legal pluralism. [302] However, it is submitted that the MoA is highly irrelevant in climate cases as the solution to the climate crisis requires national measures, while the impacts of the crisis are global. In addition, it is argued that the ECtHR is better positioned to tackle the climate crisis than national courts.[303] In this regard, the 'subsidiarity in action' argument, as mentioned before, may be relevant here as well. One suggestion is that climate-related legal disputes ought to be directed towards regional courts with jurisdiction, rather than domestic courts, for more effective resolution.

The Court's existing jurisprudence in environmental matters, particularly positive obligations within the scope of the right to life and the right to respect

296 Clark *et al.* (n.227).

297 Luzius Wildhaber et al. 'No Consensus on Consensus' (2013) 33 Human Rights Law Journal, p. 249.

298 Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015) p. 129.

299 'A European Green Deal' is listed as (number) one of the 6 Commission priorities for 2019-24, see <https://ec.europa.eu/info/strategy/priorities-2019-2024_en> accessed 25 September 2021.

300 See supra note 150.

301 *See* Paul Mahoney 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998)19(1) Human Rights Law Journal, pp.1-6.

302 *See* Chris Hilson 'The margin of appreciation, domestic irregularity and domestic court rulings in ECHR environmental jurisprudence: Global legal pluralism in action' (2013) 2(2) Global Constitutionalism, pp.262-286.

303 Similarly *see*, Clark *et al.* (n.227).

for private life, provides a solid foundation for invoking ECHR law to compel states to take political action on climate change issues. The precautionary principle, as one of the principles of international environmental law, could be practical, albeit rarely, to overcome the causation hurdle. The adoption of the position of other human rights mechanisms, such as the IACtHR, in matters of jurisdiction and attribution, and the consideration of successful interpretations from local courts, even if based on different legal systems, can also enable the barriers to climate cases before the ECtHR to be lifted.

CONCLUSION

This study has proposed that it may be feasible to link current human rights provisions with climate change through judicial interpretation. However, recognising the link between climate change and human rights is not enough to provide a sufficient legal basis for finding violations of such rights.

Several technical hurdles for the review of climate cases before the ECtHR have been considered, such as admissibility criteria, the doctrine of MoA and the principle of subsidiarity, and the rigid positivist approach of the Court. While the ECtHR's role is more limited than that of domestic authorities due to the principle of subsidiarity, a softened attitude is still needed for the sake of the fight against global and urgent issues such as the climate crisis.

The Court's prior actions regarding the application of environmental law principles could be revisited as a point of reference. For instance, the precautionary principle could be practical, albeit rarely, to overcome the causation hurdle. Apart from this, interpretations of other human rights mechanisms, including rights-based local court decisions across the world, provide important precedents to follow. The Court has previously considered the jurisprudence of other human rights mechanisms in accordance with its established practice. Adoption of the position of the IACtHR in this regard, particularly in matters of jurisdiction and attribution, can enable the barriers to climate cases before the ECtHR to be lifted.

Regarding the MoA doctrine, there is a prevailing inclination to prioritise state interests over individual rights in environmental matters, often stemming from a broad interpretation of the doctrine. Nevertheless, there exist functional methods of interpretation, such as the principle of dynamic interpretation, which empower the Court to continually evolve its jurisprudence and respond to the contemporary needs of the global community. This allows for the Court to update its understanding and strike a balance between individual rights and state discretion in environmental cases.

Since these hurdles are essentially interdependent, flexibility adopted in one might easily affect another. Overcoming *ratione personae* and causation hurdles could contribute to a re-definition of extraterritorial jurisdiction. These hurdles

are also vital in the merit review of climate applications before the ECtHR. It is possible that an interpretation taken to overcome a procedural barrier may also be utilised as a justification for decisions involving infringements.

In conclusion, the ECtHR certainly has the potential to tackle the climate crisis through its existing legal capacity. A legal revolution is unnecessary to address these issues. Rather, a flexible approach is required to complement the Court's formalistic attitude, particularly at the admissibility review stage. While formal procedures are necessary for the quick resolution of less serious complaints, a softened attitude is required to address global and urgent issues such as the climate crisis. The Court has significant potential to trigger a transformation that could be the subject of further research focused on states' legislation and conduct, regardless of which decision is taken by the Court. Therefore, it is important to continue researching ways to overcome the technical challenges associated with climate cases before the Court.

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