MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Sara Strömberg

Transnational Legal Strategies in the Pursuit of Climate Justice – An Analysis of Current Climate Case Law in Europe

Master´s Thesis in Public International Law

Master´s Programme in International Law and Human Rights

Supervisor: Elina Pirjatanniemi

Åbo Akademi University

2022

ÅBO AKADEMI UNIVERSITY
Faculty of Social Sciences, Business and Economics
Abstract for Master's thesis

Subject: Public International Law, Master's Degree Programme in International Law and Human Rights	
Writer: Sara Strömberg	
Title: Transnational Legal Strategies in the Pursuit of Climate Justice – An Analysis of Current Climate Case Law in Europe	
Supervisor: Elina Pirjatanniemi	Supervisor:

Abstract:

Climate change litigation, or climate litigation, has increased exponentially in the past few years. While it is a global phenomenon, most climate litigation has thus far taken place in jurisdictions in the Global North in the form of strategic cases. As climate change is a phenomenon with wide-ranging consequences, there are plenty of sources to base a claim on. However, human rights-based litigation has become one of the most popular and, indeed, successful strategies. A decisive factor in this development was the decision in *Urgenda v. State of the Netherlands* in 2015, which has since influenced other plaintiffs in Europe and beyond. The current situation in Europe is interesting since plaintiffs commonly base their claims on articles of the European Convention on Human Rights, but as the European Court of Human Rights has not yet issued a decision on the issue of human rights and climate change that could be used as precedent, plaintiffs and judges in domestic courts are finding creative ways to interpret the Convention.

Using *Urgenda* as somewhat of a blueprint, other plaintiffs have achieved success in domestic courts applying similar strategies, indicating unilateral legal developments have the potential to create transnational strategies. This thesis identifies and analyzes the strategies used in five recently filed climate cases in Europe; *Urgenda v. State of the Netherlands, Friends of the Irish Environment v. Ireland, VZW Klimaatzaak v. Kingdom of Belgium and Others, Notre Affaire à Tous and Others v. France* and *Duarte Agostinho and Others v. Portugal and 32 Other States.* As climate change exacerbates existing vulnerabilities, the impacts of climate litigation on climate justice are also discussed.

The cases are compared on justiciability and the various legal bases they have chosen to invoke in order to identify the challenges most commonly encountered in climate litigation and the strategies used to overcome them. It is found that three distinct narratives have emerged; a narrative of urgency, human rights stories, and justice. The urgency narrative illustrates how science and law are intertwined and how knowledge in this way is co-produced. Despite high confidence in the science, plaintiffs and defendants view the need for action with contrasting urgency. The focus on human rights concretizes the effects of climate change and provides for the use of legal venues in an already well-established system to accommodate the new and rapid developments taking place as a result of climate change, and the discrepancy between the causation of and consequences suffered from climate change has led plaintiffs to invoke different concepts of justice. How these narratives will be interpreted by the European Court of Human Rights remains to be seen, but what is clear is that the decision will be influential regardless.

Keywords:
climate litigation, human rights, climate justice, rights-based litigation, strategic litigation, transnational law, European Convention on Human Rights, European Court of Human Rights

Date: 11 May 2022

Number of pages: 78 + xi
Number of words (excl. bibliography): 30810

Table of Contents

1. Introduction

1.1 Background

Climate change litigation, or climate litigation, can be defined as lawsuits brought before administrative, judicial and other investigatory bodies in domestic and international courts that directly and expressly raise a legal question regarding the science, policy, mitigation and adaptation efforts of climate change causes and impacts.[1] Climate litigation cases have increased exponentially in the past few years; scholars talk about a climate change litigation "explosion" in 2015 that has only gained more popularity since, and is now an established movement.[2] Between the years 2015 and 2021 over 1000 cases were filed, compared to just above 800 cases between 1986 and 2014.[3]

While climate litigation has become a global phenomenon, the vast majority of cases have been launched in only a few countries in the Global North.[4] The United States and Australia, both major greenhouse gas (GHG) emitters, are the two jurisdictions that have experienced the most climate claims,[5] with the number of cases in the US by far exceeding that in any other country.[6] Litigation in Europe has experienced an upswing especially since the 2015 decision in *Urgenda v. State of the Netherlands* (hereafter: *Urgenda*).[7] In addition, cases in the Global South are increasing both in quantity and importance, and cases filed in countries such as Colombia, South Africa, and Pakistan contribute to the development of climate change jurisprudence beyond their own borders.[8]

As cases have increased, so have the types of plaintiffs and defendants. Individuals, communities and groups consisting of indigenous peoples, women, farmers, and migrants,

[1] Setzer and Higham, 2021, p. 8-9; Markell and Ruhl, 2012, p. 27.
[2] Burgers, 2020, p. 55.
[3] Setzer and Higham, 2021, p. 4.
[4] Peel and Osofsky, 2019, p. 312.
[5] Saiger, 2020, p. 44.
[6] Peel and Osofsky, 2019, p. 312. More than 900 claims have been filed in the US alone.
[7] *Urgenda Foundation v The State of the Netherlands* C/09/456689/HA ZA 13-1396, 24 June 2015, ECLI:NL:RBDHA:2015:7196. (Hereafter: Hague District Court)
[8] Setzer and Benjamin, 2020, p. 78. See *Future Generations v. Ministry of the Environment and Others*, *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others*, and *Ashgar Leghari v. Federation of Pakistan*.

among others,[9] nongovernmental organizations (NGOs), corporations and subnational governments are all among the plaintiffs in climate cases.[10] Climate litigation has become a way for ordinary citizens to demand action on issues related to climate change, and has been encouraged by climate activists.[11] Governments are the most common defendants in climate litigation cases,[12] but cases have also been filed against private parties, such as corporations or so called carbon majors.[13]

But why are these plaintiffs turning to courts? The potential consequences of climate change and the urgency with which they might arrive have become clearer to both the public and decision makers in the past decade. As a result, there has been a proliferation in climate laws and policies enacted on domestic and regional levels worldwide.[14] As these laws have confirmed new rights and created new duties, litigation has become a way for citizens to hold governments accountable to their commitments. There are, however, considerable legal challenges specific to climate change as a phenomenon and as a subject to legal proceedings. Part of the reason for this is the very nature of climate change. Climate change has been described as a "super wicked"[15] and a "hot, legally disruptive"[16] problem. The countries that will be most affected by the changing climate are the ones who have contributed the least to global warming, whereas the countries that have contributed the most, continue to do so, and have the best resources to address the issue, have the least incentive to change their behavior.[17] Litigation can help to clarify the contents of laws and regulations,[18] and to determine whether certain actions are compatible with them.[19]

Litigation has also proven to be a critical tool for social change, especially if used strategically. Strategic litigation is not specific to the climate justice movement, but has a long tradition in particular in common law countries, and especially in the United States,[20] and has been used to

[9] Khan, 2019.
[10] United Nations Environment Programme, *Global Climate Litigation Report 2020 Status Review*, p. 4. (Hereafter: UNEP 2020).
[11] Setzer and Higham, 2021, p. 16.
[12] United Nations Environment Programme and Sabin Center for Climate Change Law, *Status of Climate Change Litigation, a Global Review*, 2017, p. 14. (Hereafter: UNEP 2017).
[13] Setzer and Higham, 2021, p. 12.
[14] Setzer and Vanhala, 2019, p. 7; UNEP 2017, p. 4.
[15] UNEP 2017, p. 8.
[16] Fisher et al. 2017, p. 190.
[17] UNEP 2017, p. 8.
[18] Averill, 2009, p. 141.
[19] UNEP 2017, p. 8.
[20] Peel and Osofsky, 2019, p. 322.

advance racial and gender equality, human rights, and labor protection, for example.[21] The fight for racial justice through desegregation is the most extensive litigation strategy to date.[22] Whether a case is strategic or not is of course a subjective assessment, but the general understanding is that the purpose of strategic litigation is to test a legal point that has effects beyond the individual plaintiff[23] whereas "non-strategic" cases apply to an isolated situation.[24] Litigants may want to enforce existing law, clarify the meaning of the law, challenge the law, or create new law,[25] and a successful case brings about lasting political, economic or social changes and develops the existing law.[26] In climate litigation this may entail seeking redress for direct and indirect injuries caused by climate change,[27] advancing climate policies, raising awareness and influencing the public discourse,[28] and changing the behavior of government or industry actors.[29] With the success of other social movements in mind, it is no surprise that climate activists have also turned to courts to try their luck.

1.2 Research Questions and Delimitations

Climate litigation is currently an interesting research subject as the developments taking place are happening rather rapidly and are, frankly, momentous. As the general public has become aware of the dangers climate change can lead to, and as scientists have confirmed we are nowhere near containing global warming to the threshold of "well below 2°C" considered necessary to avoid the absolute worst consequences of climate change,[30] litigation has become a well-used tool in the climate movement. The current situation can even be seen as constituting a breaking point of sorts, as plaintiffs are forcing courts to interpret the law in relation to new

[21] See, for example *Brown v. Board of Education* (1954) in which the Supreme Court of the United States ruled that racial segregation in public schools in the US was unconstitutional and *Allonby v. Accrington & Rossendale College* (2004) in which the European Court of Justice confirmed the right to equal pay for equal work for men and women under the Treaty of the European Community.

[22] Public Law Project, Guide to Strategic Litigation, 2014, p. 8.

[23] *Ibid*., p. 5.

[24] Setzer and Higham, 2021, p. 12-13.

[25] Public Law Project, Guide to Strategic Litigation, 2014, p. 5.

[26] European Center for Constitutional and Human Rights, available at: https://www.ecchr.eu/en/glossary/strategic-litigation/.

[27] Averill, 2009. p. 145.

[28] Saiger, 2020, p. 43.

[29] Setzer and Higham, 2021, p. 12-13.

[30] IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report".

types of claims and arguments. Irrespective of the conclusions reached by the courts, the consequences are undoubtedly significant.

As climate cases that would have seemed unlikely to succeed just a few years ago now have proven to be successful in courts all over the world and especially in Europe, the questions that arise and that will be explored in this thesis relate to the strategies plaintiffs have developed to overcome the main legal issues that usually recur in climate litigation, and their potential to transcend jurisdictions. The transnational character of climate change litigation, i.e., "the migration and impact of legal norms, rules and models across borders",[31] has largely been overlooked in earlier research,[32] which is precisely why this thesis approaches climate litigation with the purpose of identifying these aspects.

Likewise, research on climate litigation so far has not focused on the implications thereof, and even less so on the impacts on climate justice.[33] Although there is no unanimous definition of climate justice, there is significant consensus that already vulnerable communities are and will be the most adversely affected by a changing climate,[34] and that the impacts of climate change "will not be borne equally or fairly, between rich and poor, women and men, and older and younger generations".[35] While this inequality can and will be seen within all societies, the greatest discrepancy in the effects of climate change will be between the Global North and the Global South. This difference in impact is even more poignant considering that countries in the Global South have contributed considerably less to the emissions that are a major cause of the warming climate. Considering the dramatic increase in climate litigation in recent years and the impending inequality of the impacts of climate change, I will therefore also attempt to briefly review the consequences of climate litigation on global climate justice.

[31] Shaffer and Bodansky, 2012, p. 32.
[32] Paiement, 2020, p. 123. Research has instead focused on "methodological nationalism". See Paiement p. 123-125.
[33] Setzer and Vanhala, 2019, p. 11.
[34] IPCC, "Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report".
[35] United Nations, 'Climate Justice' (*Sustainable Development Goals*, 31 May 2019), available at: https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/. Discussion between former United Nations High Commissioner for Human Rights Mary Robinson and Namibian climate activist Deon Shekuza; IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report', Summary for Policymakers, p. 5.

Thus, the research questions this thesis aims to answer are:

1) What are the main legal problems plaintiffs in climate litigation cases face, and what are the strategies they have resorted to to overcome these?
2) Are these strategies recurring and thus part of a wider, transnational, narrative about climate change?
3) What are the effects of climate litigation on climate justice?

The purpose of this thesis is hence to analyze the strategic arguments in recent and currently pending cases in Europe in order to identify whether transnational legal strategies in the field are emerging and the possible effect these cases have on climate justice. Europe has been chosen as an area of focus for this thesis because of the drastic increase in climate cases filed in the region in recent years and their relative success, possibly indicating a regional judicial receptiveness to a specific climate change narrative. In the absence of a precedent from the European Court of Human Rights (ECtHR) on the issue of climate change and human rights, national courts are balancing to not overstep when it comes to the interpretation of the European Convention on Human Rights (ECHR), while at the same time deciding on issues and ensuring justice in the legal matters brought before them. Despite the absence of an ECtHR precedent and despite the national legal circumstances, traditions and systems that necessarily guide domestic proceedings, the outcomes of these legal proceedings have been astonishingly similar. This would suggest that it is worth researching whether there are elements of legal argumentation in climate cases that have the potential to move across jurisdictions.

1.3 Methodology and Sources

In order to answer the research questions, five cases recently filed in Europe will be analyzed and compared. These cases have been selected from the Global Climate Change Litigation Database of the Sabin Center for Climate Change Law at Columbia Law School, which is the most comprehensive collection of international climate change litigation cases available to date. While the Sabin Center's website states that the global database "includes *all* cases except those in the U.S.",[36] it also recognizes the limitations of the data collected. Data collection is

[36] Sabin Center for Climate Change Law, "Global Climate Change Litigation", available at: http://climatecasechart.com/climate-change-litigation/non-us-climate-change-litigation. Emphasis added.

limited by language barriers, levels of media coverage, and public availability of court documents, resulting in more coverage of some jurisdictions and less, or even none, of others. However, the Sabin Center emphasizes this is not an indication that climate litigation has not been filed or decided in such jurisdictions.[37] Despite these shortcomings, the database maintained by the Sabin Center constitutes a natural starting point for the selection of cases.

The cases selected for this thesis are *Urgenda v. State of the Netherlands*, *Friends of the Irish Environment v. Ireland*, *VZW Klimaatzaak v. Kingdom of Belgium and Others*, *Notre Affaire à Tous and Others v. France*, and *Duarte Agostinho and Others v. Portugal and 32 Other States*. They have been selected based on the criteria that they are 1) cases against governments, 2) seeking to determine whether the states are doing enough to prevent dangerous climate change, 3) and they all make at least some ECHR claims. An additional limitation is made based on linguistic availability. Many of the cases are so recent that translations have not been made at the time of writing, which means that otherwise relevant cases from Italy, Poland, and the Czech Republic will be excluded.[38] Even in cases where translations have been made available, many of them are unofficial, and the only authentic and formal version of the text is the one in the national language.[39] At the time of writing,[40] these were all the cases in Europe that met the above criteria and that had primary sources available in a language the author understands.[41]

The cases were selected precisely because they share common traits, which makes it interesting to compare the strategies used and arguments made to see if they share similarities, despite having been brought in different jurisdictions. Even though the litigants have encountered many of the problems most commonly faced in climate litigations, primarily related to justiciability, through the strategies employed and the development of each other's arguments, they have largely succeeded in convincing the judges in court.

In examining the cases, special attention will be placed on the role of rights-based arguments, as they have been crucial to the advancement and success of climate litigation. In Europe, the

[37] Sabin Center for Climate Change Law, 'About', available at: http://climatecasechart.com/climate-change-litigation/about/.
[38] See *A Sud et al. v. Italy*, *Górska et al. v. Poland* and *Klimatická žaloba ČR v. Czech Republic.*
[39] This is the case in *Urgenda v. State of the Netherlands*.
[40] Cases were selected in October of 2021.
[41] When it comes to *VZW Klimaatzaak v. Kingdom of Belgium and Others* and *Notre Affaire à Tous and Others v. France* I have read the authentic French texts in conjunction with the unofficial English translations in order to gain as great of an understanding as possible.

ECHR has been central in providing a common framework plaintiffs can establish their claims and develop their arguments based on. However, other sources of international law,[42] especially international environmental law, will also be of great importance, as will domestic law to some extent. Further, due to the special nature of climate change and the role science undoubtedly plays in our understanding thereof, the interplay between science and law, known as co–production, and its effect on the legal proceedings will be noted. To deepen the analysis and expand the understanding of climate change litigation in Europe today, academic literature on the subject will be utilized.

All the cases chosen can be viewed as examples of strategic litigation, and together they provide an interesting insight into the current state of climate litigation in Europe. The strategic cases have been chosen precisely because of their potential and possible ambition to bring about greater societal change, such as the pursuit of climate justice. Strategic cases have a tremendous potential to shape, influence and create transnational legal strategies, as evident in the wake of the landmark case *Urgenda* and the precedent it has set for the other cases. The cases will be presented in order starting from the oldest, and so far most significant, decision in *Urgenda v. Kingdom of the Netherlands*, to the most recent case of *Duarte Agostinho and Others v. Portugal and 32 Other States* currently pending before the ECtHR. Due to its galvanizing effect on climate litigation in Europe and the scholarly attention it has received, *Urgenda* will serve as a starting point for the comparison and analysis of the other cases.

[42] Statute of the International Court of Justice (hereafter Statute of the ICJ), 24.10.1945, 33 UNTS 993, Article 38 (1).

2. Legal Problems in Climate Change Litigation

2.1 A Brief Overview of the Cases

The case *Urgenda v. State of the Netherlands* has gained a great deal of attention since the first judgment was delivered by the Hague District Court in 2015. While some might argue the significance attributed to this case has grown out of proportion, it is difficult to deny the influence the case has had on climate litigation globally, and especially in Europe, where it was both unprecedented and unexpected.[43] Later climate litigation has, at least partly, been ascribed to the "Urgenda effect".[44]

In 2015, the Dutch environmental group Urgenda Foundation[45] and 886 Dutch citizen co-plaintiffs filed a claim with the Hague District Court on behalf of both current and future generations of Dutch citizens, as well as current and future generations in other countries, challenging the newly elected Dutch government not to follow the previous government's climate change mitigation policy, which it saw as inadequate.[46] Urgenda argued the state failed to meet its duty of care, thus acting unlawfully,[47] and further, that the government's climate policy constituted an infringement of the rights protected under Article 2 (right to life) and Article 8 (right to respect for private and family life) of the ECHR.[48]

The case was the result of a thoroughly planned and carefully timed process in a thoughtfully chosen jurisdiction: it was deliberate and strategic.[49] The CEO of the Urgenda Foundation, Marjan Minnesma, said that they would not have tried to bring the case ten years ago, but that things have now changed as "it's more clear to a broad group we are heading to a catastrophe."[50] The case was first tried in the Hague District Court, whose decision in favor of the applicants gained a lot of attention. The decision was later upheld, albeit with an important

[43] van Zeben, 2015, p. 341.
[44] Paiement, 2020, p. 130.
[45] Urgenda is a contraction of "urgent agenda".
[46] UNEP 2017, p. 15.
[47] Hague District Court, para. 4.1.
[48] *Ibid.*, para. 3.2.
[49] Bouwer, 2020, p. 24.
[50] King, Ed, "Dutch government heads to court on climate change charges", Climate Home News, 7 April 2015. Available at: https://www.climatechangenews.com/2015/04/07/dutch-government-heads-to-court-on-climate-change-charges/

addition which will be explored more carefully later, by both the Hague Court of Appeal and the Supreme Court of the Netherlands.

The court(s) developed the Dutch legal doctrine, relying on international, EU and Dutch law, as well as climate science and ECHR case law.[51] This led to a striking legal result, making Urgenda the "first" in many areas; it was the first substantial climate action based in tort law which proceeded to a substantive hearing and, consequently, the first time such a case succeeded,[52] the first case in which a court has ordered a government to reduce its greenhouse gas emissions for reasons other than a statutory mandate,[53] and the first time a national court expressly used the principle of common but differentiated responsibilities as a complementary tool to define the scope of the state's climate obligations under domestic law.[54]

In the second case, *Friends of the Irish Environment v. Ireland* (hereafter: *Friends of the Irish Environment*), the NGO Friends of the Irish Environment (FIE) sued the Irish government over its approval of the National Mitigation Plan in 2017 (the Plan), arguing it violated Ireland's 2015 Climate Action and Low Carbon Development Act (the Act), the Irish Constitution, and the ECHR, and asked the High Court to quash the government's decision to approve the Plan and possibly order that a new plan be written.[55]

In September of 2019 the High Court ruled against the applicants. Friends of the Irish Environment then appealed the decision directly to the Supreme Court. The Supreme Court judge interpreted the lawfulness of the plan differently than the trial judge and found that the Plan did not in fact comply with the requirements of the Act, and therefore held that the plan should be quashed.[56]

In *VZW Klimaatzaak v. Kingdom of Belgium and Others* (hereafter: *Klimaatzaak*) the nonprofit organization VZW Klimaatzaak[57] and 58, 000 concerned citizen co-plaintiffs sued the Belgian

[51] Fisher et al. 2017, p. 190.
[52] Bouwer, 2020, p. 24.
[53] van Zeben, 2015, p. 347.
[54] Galvão Ferreira, 2016, p. 331.
[55] *Friends of the Irish Environment v Ireland* [2019] High Court IEHC 747, No 793 JR, para 12. (Hereafter: High Court of Ireland)
[56] *Friends of the Irish Environment v Ireland, Appeal* [2020] Supreme Court of Ireland 205/19, para. 6.48. (Hereafter: Supreme Court of Ireland)
[57] VZW is an abbreviation of *vereniging zonder winstoogmerk*, or Dutch for the legal form of nonprofit organizations in Belgium. In French sources, however, the organization is referred to as ASBL Klimaatzaak,

State, the Walloon Region, the Flemish Region and the Brussels-Capital Region over their inadequate action on climate change, arguing Belgian law requires the government to reduce greenhouse gas emissions more aggressively. The plaintiffs specifically asked that emissions be reduced by 40% below 1990 levels by 2020 and 87.5% below 1990 by 2050.[58]

While the case was filed in early 2014, it was not until June of 2021 that the Brussels Court of First Instance delivered its judgment. The court established that the defendants had breached their duty of care, but it denied the plaintiffs' request with regard to ordering the Belgian state to reduce its emissions by a specific amount.[59] As a response, the plaintiffs partially appealed the decision in November of 2021, asking the court to order the Belgian state to reduce its emissions by at least 48% by 2025 and by at least 65% by 2030 compared to 1990 levels.[60]

The case of *Notre Affaire à Tous and Others v. France* (hereafter: *Notre Affaire à Tous*) began in December of 2018 when the four nonprofits (Fondation pour la Nature et l'Homme, Greenpeace France, Notre Affaire à Tous and Oxfam France) sent a letter of formal notice[61] to France's then PM Edouard Philippe and 12 members of the French government. This initiated legal proceedings against the French government for its alleged inadequate action on climate change, with the plaintiffs arguing that the government's failure to implement proper measures to effectively address climate change violated a statutory duty to act.[62] The applicants sought compensation for damages suffered as a result of the state's inaction, and asked the state to cease its insufficient efforts and implement new, adequate, measures.[63] The NGOs themselves referred to this case as "*L'affaire du siècle*" or the "Trial of the century".[64]

---

an abbreviation of *association sans but lucratif*. *Klimaatzaak* is Dutch for "climate case".

[58] VZW Klimaatzaak v. Kingdom of Belgium and Others, 2014, "Summons", para. 14. (Hereafter: Klimaatzaak: Summons)

[59] *VZW Klimaatzaak v Kingdom of Belgium and Others* [2021] Court of First Instance of Brussels 2015/4585/A, p. 80. (Hereafter: Court of First Instance of Brussels)

[60] VZW Klimaatzaak v. Kingdom of Belgium and Others, "Request for Appeal", 17 November 2021, p. 67, Demand 2°. (Hereafter: Klimaatzaak: Request for Appeal)

[61] A letter of formal notice (*lettre préalable indemnitaire*) is part of a legal proceeding known as action for failure to act (*recours en carence fautive*) generally used in French law to target public authorities' failure to intervene when the law requires a duty to act.

[62] Notre Affaire à Tous and Others v. France, "Letter of Formal Notice", 17 December 2018 , p. 1. (Hereafter: Letter of Formal Notice).

[63] *Ibid.*, p. 1.

[64] L'affaire du siècle, "Qui Sommes-Nous ?". Available at: https://laffairedusiecle.net/qui-sommes-nous/.

The French government rejected the plaintiffs' request, and in March of 2019 the plaintiffs thus initiated a lawsuit by filing a "summary request" before the Administrative Court of Paris. The plaintiffs asked the court to enjoin the state to halt its failures to meet its general and specific climate obligations, and in February 2021 the Administrative Court of Paris issued its decision. The court acknowledged that the state of France through its insufficient actions to fight climate change had caused ecological damage,[65] and found that France could be held accountable for its failure to meet its own objectives with regard to the reduction of greenhouse gas emissions.[66] After a further investigation into whether the state should be ordered to take stronger climate measures, in October of 2021 the court finally ordered the state to take all necessary measures to comply with its national and international commitments in relation to greenhouse gas emissions, and to repair the ecological damage caused by its inaction.[67]

Duarte Agostinho and Others v. Portugal and 32 Other States (hereafter: *Duarte Agostinho*) refers to the historic complaint filed with the European Court of Human Rights on September 2, 2020, by six Portuguese youth, alleging that all of the respondent states have violated the plaintiffs' human rights through their contributions to climate change.[68] This is the first ever climate change case before the ECtHR.[69] The respondents are all of the European Union (EU) member states as well as Norway, Russia,[70] Switzerland, Turkey, Ukraine and the United Kingdom.[71] The plaintiffs argue none of the respondents have adopted adequate legislative or administrative measures to contain global warming to 1.5°C, the goal articulated in the Paris Agreement to which all of the states are parties. In addition, the plaintiffs state that all the respondents will continue to contribute to global greenhouse gas emissions in the future both through emissions from their own territories and through international trade.[72]

---

[65] *Notre Affaire à Tous and Others v France* [2021] Administrative Court of Paris 44-008 60-01-02-02 R 6, p. 6. (Hereafter: Administrative Court of Paris, First Decision).

[66] *Ibid.*, Article 4 of the decision.

[67] *Notre Affaire à Tous and Others v France* [2021] Administrative Court of Paris 44-008 60-01-02-02 54-07-03 R, Article 2 of the decision. (Hereafter: Administrative Court of Paris, Final Decision).

[68] *Duarte Agostinho and Others v Portugal and 32 Other States*, "Complaint", 2 September 2020. (Hereafter: Duarte Agostinho: Complaint)

[69] ESCR-Net, "'Amicus Reaffirms States' Human Rights Obligations to Adequately and Effectively Address the Climate Crisis", 12 May 2021. Available at: https://www.escr-net.org/news/2021/amicus-reaffirms-states-human-rights-obligations-adequately-and-effectively-address.

[70] Following its invasion of Ukraine and the subsequent international condemnation, Russia withdrew from the Council of Europe on the 15th of March 2022, and was formally excluded from the Council the following day.

[71] Duarte Agostinho: Complaint, p. 2.

[72] *Ibid.*, para. 13, 12 and 10.

The ECtHR fast-tracked and communicated the case to the defendant countries on November 30, 2020, which is an action rarely taken by the court,[73] and the defendant countries were required to respond by the end of February 2021. The defendant governments asked the court to overturn the priority treatment of the case and only hear the arguments on the admissibility criteria, but the court rejected this motion on February 4, 2021, stating it had not found any change in circumstances that would justify a reconsideration of its decision, and instead gave the defendants until late May 2021 to submit defenses on both the admissibility and the merits of the case.[74] The claimants received the respondent governments' defenses in August 2021, but have decided not to make them public. The claimants themselves had until January 12 2022 to respond to these defenses.

This case is groundbreaking in many ways and has many hoping for a landmark decision in the same way *Urgenda* was, but this time with the added authority of an international court. As of May 2022 the court has not yet announced when proceedings will continue. What is clear, though, is that the implications of the decision will be consequential and influence rights-based climate litigation in Europe and beyond.

While these cases largely can be thought of as successful in the realm of rights-based climate litigation, there are also considerable risks in pursuing strategic (climate) litigation that the plaintiffs had to take into consideration. In addition to risks related to a specific outcome of a case – simply put, either a win or a loss – the plaintiffs faced significant challenges before the courts even considered the merits of their cases.

[73] European Court of Human Rights, "Court Communication of Case to Defendant Countries", 30 November 2020.

[74] European Court of Human Rights, "Requête no 39371/20 Duarte Agostinho et autres c. Portugal et autres", 4 February 2021. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_3937120_decision.pdf.

2.2 Justiciability

2.2.1 Standing

While the plaintiffs in the cases derived their argumentation from a multitude of legal bases that later will be explored in more detail, the most central and defining arguments were based on human rights claims. The following review of legal problems frequently arising in climate claims will therefore be focused on the special problems applicants making rights-based claims encounter.

The mere acknowledgement of the effects of climate change on the realization of human rights is not enough to build a strong legal claim of an actionable rights violation;[75] plaintiffs also must prove their case is justiciable. Justiciability entails both formal and legal dimensions, as well as practical questions for courts, and a case is said to be justiciable if the court has the authority to hear and decide the matter and considers it appropriate to do so.[76] That is, if the court approached is the appropriate mechanism to address the issue and seek remedy.[77] Even though the doctrine of justiciability varies depending on jurisdiction, there are two main components of justiciability that have to be evaluated in each case that are common in many jurisdictions, the first being standing.[78]

Standing, or *locus standi*, refers to the criteria that plaintiffs must meet in order to have their matter considered by a court. How restricted a country's doctrine of standing is may depend on various things, such as which legal system the country employs.[79] Despite the differences, the intention of the legal criteria of standing is to ensure that the parties in a legal proceeding have a sufficient stake in the outcome of the case,[80] and that a remedy ordered by the court would help the plaintiffs.[81] In many jurisdictions, this means that plaintiffs have to prove that they have been or will be negatively affected by the unlawful actions of the defendants.[82]

[75] Peel and Osofsky, 2018, p. 46, 50.
[76] UNEP 2020, p. 37; p. 5.
[77] Bílková, 2022, [1].
[78] UNEP 2017, p. 27.
[79] *Ibid*., p. 28.
[80] Bílková, 2022, [4].
[81] UNEP 2020, p. 37.
[82] UNEP 2017, p. 28.

Some jurisdictions, however, have a more liberal view on standing, allowing for a so called *actio popularis*, or a case brought in the interest of the general public. In practice, this means that any citizen can sue the government for its failure to uphold the law.[83] Such public interest litigation is especially well suited for climate change problems, as climate change as a phenomenon has community-wide, intergenerational, direct and indirect effects.[84] The ECtHR, however, does not allow for *actio popularis* claims, as Article 34 of the ECHR states that "The Court may receive applications from any person, nongovernmental organisation or group of individuals *claiming to be the victim of a violation* by one of the High Contracting Parties of the rights set forth in the Convention".[85] Such a strict requirement and interpretation of personal injury can, for many reasons, be difficult to prove in climate change litigation, as will become apparent from these cases.

In *Urgenda*, the Urgenda Foundation and the 886 co-plaintiffs filed the claim on behalf of the Foundation itself, as well as on behalf of current and future generations of Dutch citizens and citizens in other countries,[86] arguing the state was breaching its duty of care towards Urgenda and and the parties it represents, including, more generally speaking, Dutch society.[87] Urgenda stated that this breach of the duty of care constituted an infringement of Articles 2 and 8 of the ECHR, which both the Foundation itself, but also the parties it represents relied on.[88] The state, for its part, argued that Urgenda had no cause of action when it came to defending the rights and interest of current and future generations in other countries, and that Urgenda could not rely on Articles 2 and 8 of the ECHR as it is not a natural person.[89]

The Hague District Court found that, according to the Dutch Civil Code, an individual or legal person is entitled to bring an action to the civil court if he has sufficient personal interest in the claim, and that "a foundation or association with full legal capacity may also bring an action to the court pertaining to the protection of general interests or the collective interests of other persons, in so far as the foundation or association represents these general or collective interests

[83] Curry, 2019, p. 322. 2
[84] Fisher et al. 2017, p. 185.
[85] European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 34. (Hereafter: ECHR). Emphasis added.
[86] Hague District Court, para. 2.3- 2.4.
[87] *Ibid*., para. 4.1.
[88] *Ibid*., para. 3.2.
[89] *Ibid*., para. 3.3.

based on the objectives formulated in its by-laws".[90] The court then found that Article 2 of Urgenda's by-laws stipulate that "The purpose of the Foundation is to stimulate and accelerate the transition processes to a more sustainable society, beginning in the Netherlands."[91] Urgenda refers to the definition of sustainability established in the 1987 Brundtland Report, i.e. that sustainable development "is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[92] As the court held that Urgenda strives to primarily but not solely defend the interests of Dutch citizens, and that the term "sustainability" doubtlessly entails an international dimension, the court found that Urgenda partially can base its claims on the fact that emissions from the Netherlands also affect people living in other countries.[93] Further, the court found that Urgenda's claims are admissible under the Dutch Civil Code, as it has been set out that an environmental organization pursuing a case to protect the environment without an identifiable group of persons needing protection is allowed.[94] The court thus found that Urgenda's claims are allowable to the fullest extent, so far as it acts on its own behalf.[95] However, the court denied the human rights claims made by Urgenda, stating that Urgenda as a legal person cannot be seen as a direct or indirect victim within the meaning of Article 34 of the ECHR, and therefore cannot rely on violations of the ECHR in its claim.[96] It also found that the individual claimants did not have sufficient interest.[97] However, it argued that the obligations under the ECHR can still serve as a source of interpretation.[98]

The Hague Court of Appeal interpreted the questions of standing differently. The Court of Appeal held that the victim requirement in Article 34 of the ECHR only concerns access to the ECtHR, and whereas according to the ECtHR NGOs can only represent individual interests if their members have been or are the potential victims of human rights infringements,[99] the ECtHR has not given a definite answer about access to Dutch courts, and indeed it is not within its scope to do so.[100] The Court of Appeal thus concluded that Article 34 cannot be used as a

[90] Hague District Court, para. 4.4.
[91] *Ibid*., para. 4.7, 2.2.
[92] *Ibid*., para. 2.3; Report of the World Commission on Environment and Development: Our Common Future, 1987 (Hereafter: Brundtland Report), Article IV. 1.
[93] *Ibid*., para. 4.7.
[94] *Ibid*., para 4.6.
[95] *Ibid*., para. 4.9.
[96] *Ibid*. para. 4.45.
[97] *Ibid*. para. 4.109.
[98] *Ibid*. para. 4.46.
[99] Verschuuren, 2019, p. 96.
[100] *Urgenda Foundation v State of the Netherlands*, HAZA C/09/00456689, 9 October 2018, para. 35.

reason to deny Urgenda the possibility to rely on Articles 2 and 8 of the ECHR.[101] The court reasoned that since individuals who fall under the state's jurisdiction may rely on Articles 2 and 8 of the ECHR, the interest group Urgenda, which based on the Dutch Civil Code has the right to bring actions, may rely on the same articles on behalf of the affected individuals.[102] The court also argued that the protection afforded by the mentioned articles of the ECHR is not limited to specific persons, but to society or the population as a whole as well,[103] and that pooling interests that are "sufficiently similar" may promote efficient and effective legal protection, especially in environmental matters.[104] The court then went on to confirm that the state has a positive obligation towards both Urgenda and Dutch society to ensure the rights enshrined in Articles 2 and 8 in relation to Urgenda.[105]

Also an NGO, Friends of the Irish Environment faced similar arguments about its standing, or lack thereof. However, in this case the reasoning of the courts was opposite to that in *Urgenda*, as the lower court granted FIE standing with regard to its rights-based claims, but the Supreme Court did not.

The government argued that FIE, as a legal person, does not enjoy sufficient standing to advance rights claims based on the constitution and the ECHR, which guarantee personal rights that FIE itself does not enjoy, and pointed out that neither Ireland nor the ECHR allow for *actio popularis* claims.[106] FIE's standing with regard to pursuing a claim about the decision to approve the Plan was not challenged.[107] In exploring whether FIE enjoyed standing to pursue rights-based claims or not, the judge in the High Court referred to domestic case law[108] which had found that a plaintiff should not be prevented from bringing proceedings to protect the rights of others if it has a *bona fide* concern and interest and certain criteria are met.[109] An example of where such a proceeding might be allowed is if a public act has an adverse effect on the plaintiff's constitutional or ECHR rights, or on society as a whole.[110] Based on this and

(Hereafter: Hague Court of Appeal).
[101] *Ibid*., para. 35.
[102] Supreme Court of the Netherlands, State of the Netherlands v. Urgenda Foundation, 20 December 2019, ECLI:NL:HR:2019:2007, No. 19/00135, para. 2.3.3. (Hereafter: Supreme Court of the Netherlands).
[103] *Ibid*., para. 5.3.1.
[104] *Ibid*., para. 5.9.2.
[105] Hague Court of Appeal, para. 43.
[106] High Court of Ireland, para. 11, para. 38.
[107] *Ibid*., para. 77.
[108] *Ibid*., para. 131, referring to *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251.
[109] *Ibid*., para. 131.
[110] High Court of Ireland, para. 131.

the clear public interest in the environment, the judge found that FIE had established that it had standing.[111] The judge in the Supreme Court was, however, not satisfied with this reasoning and did not find that this case constituted an exception where a third party may have standing to bring rights-based claims on behalf of others,[112] neither based on the constitution nor on the ECHR.[113]

The case of *Klimaatzaak* is similar to that of *Urgenda* in that it was also brought by an environmental NGO, VZW Klimaatzaak, and by additional citizen co-plaintiffs. Likewise, the defendants held that the case was inadmissible because of a lack of real and present personal interest on the part of the plaintiffs.[114] The court nevertheless found that Klimaatzaak, as an environmental organization, has a privileged status under the Aarhus Convention[115] and as the statutory aim of the organization is "to protect current and future generations from anthropogenic climate change and biodiversity loss"[116] through legal action, among other things, the court found that Klimaatzaak could claim an interest of its own.[117]

Regarding the 58,000 citizen co-plaintiffs the court also found that their claims were admissible, as they had a personal interest to hold the Belgian state responsible for the current and future consequences of climate change in their daily lives. The existence of personal interest does not presume the presence of damage.[118] The court found that the fact that other Belgian citizens may have the same interest was not enough to reclassify the personal interest of the co-plaintiffs as an attempted *actio popularis*.[119]

In *Notre Affaire à Tous* the matter of standing was only dealt with briefly with regard to the admissibility of the action for compensation for ecological damage. The court began by stating

---

[111] *Ibid*., para. 132.
[112] Supreme Court of Ireland, para. 7.5.
[113] *Ibid*., para. 9.4.
[114] Court of First Instance of Brussels, p. 55.
[115] *Ibid*., p. 51. Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, Article 2(5). (Hereafter: Aarhus Convention) "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."
[116] Klimaatzaak: Summons, p. 1. *"L'objet statutaire de l'asbl Klimaatzaak: "Art. 3. L'association a pour objet de protéger les générations actuelles et futures contre le changement climatique et la réduction de la biodiversité causés par l'homme"*. Author's translation.
[117] Court of First Instance of Brussels, p. 51-55.
[118] *Ibid*., p. 51.
[119] *Ibid.,* p. 50-51.

that according to Article 1248 of the French Civil Code, "[t]he action for compensation for ecological damage is open to any person with standing and interest (...) as well as public institutions and associations approved or created at least five years before the date of the institution of proceedings and whose purpose is the protection of nature and the defence of the environment."[120] It also referred to Article R. 142-1 of the Environmental Code which also provides that "Any association whose object is the protection of nature and the environment may bring proceedings before the administrative courts for any grievance relating to it."[121] As references to environmental protection can be found in the statutory purpose of all of the four plaintiff organizations,[122] the court concluded that they were entitled to bring the action before the court for compensation for ecological damage.[123]

As the case of *Duarte Agostinho* has not yet been heard by the ECtHR, there is no way to provide a definite answer to the question of standing. It is, however, evident that the plaintiffs face various challenges. To begin with, the applicants filed the complaint directly with the ECtHR, without exhausting any domestic remedies beforehand. Article 35 of the ECHR clearly stipulates that all domestic remedies shall have been exhausted before a matter meets the admissibility criteria and can be heard before the court.[124] However, the applicants argue there is no adequate domestic remedy that is reasonably available to them in this case, referring to the fact that the violations of their rights are cumulatively caused by the respondent states through their contributions to climate change, and thus a Portuguese court could not determine the complaint against the other responding states, nor could it impose an enforceable remedy on the other respondents.[125] They also emphasize the urgency of the matter and the fact that pursuing proceedings in all of the respondent states, assuming the applicants would have standing to do so, would take a long time and likely would exceed the timeframe for attaining the 1.5°C goal, in addition to being very costly for the applicants who are of modest means.[126] The applicants thus argue that requiring them to exhaust domestic remedies would impose an unreasonable and disproportionate burden on them.[127] Therefore, the applicants argued there is an exceptional need for the court to absolve the applicants from the requirement to exhaust

[120] Administrative Court of Paris, para. 10; France: *Code civil*, Article 1248.
[121] Administrative Court of Paris, para. 10; France: *Code de l'environnement*, Article R. 142-1.
[122] Administrative Court of Paris, para. 12-15.
[123] *Ibid.*, para. 11.
[124] ECHR, Article 35.
[125] Duarte Agostinho: Complaint, para. 32.
[126] *Ibid.*
[127] Duarte Agostinho: Complaint, para. 32.

domestic remedies, as the likelihood of the respondents providing a remedy in time to limit global warming to 1.5°C is greater if the court would recognize that the respondents share presumptive responsibility for climate change.[128]

Secondly, the plaintiffs are arguing for extra-territorial responsibility for the effects of climate change,[129] a question which has never been answered by the ECtHR.[130] In its communication to the defendant countries the court therefore asked them to consider if the applicants are subject to the jurisdiction of the defendant states, within the meaning of Article 1 of the Convention, and if the applicants' allegations are of such a nature that they would engage the liability of the defendant States individually or collectively.[131] If so, can the applicant's, within the meaning of Article 34 of the Convention, be considered to be current or potential victims of a violation of the rights invoked, as a result of the insufficient action or inaction by the defendant states?[132] Here these plaintiffs differ from the plaintiffs in the other cases, as they are all natural persons and their complaint contains comprehensive explanations of the risks to their lives and wellbeing they are already experiencing and are expected to experience in the future.[133]

As apparent from the above, it is clear that one of the main problems the plaintiffs faced was establishing sufficient personal interest in order to be granted victim status. Here, however, environmental organizations have found success by relying on Article 2(5) of the Aarhus Convention or on similar provisions in domestic law.

2.2.2 Separation of Powers

The second main component of justiciability that needs to be evaluated is whether the court is in a position to address the issue, which is where the principle of the separation or balance of

[128] *Ibid*.
[129] *Ibid*. para 14-16.
[130] Sandvig et al. "Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?", 23 June 2021, EJIL:Talk!. Available at: https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/.
[131] European Court of Human Rights, "Court Communication of Case to Defendant Countries", 30 November 2020, Question 1.
[132] *Ibid*., Question 2.
[133] Duarte Agostinho: Complaint, para. 20-23.

powers emerges. The principle of the separation of powers refers to the system of distribution of power between the branches of a state's government, all with independent powers and responsibilities.[134] The most common model is the *trias politica* model, where government is divided in a legislative, an executive and a judicial branch, and is generally ascribed to the French philosopher Montesquieu. The purpose of such a division is to limit the possibility of an excessive concentration of power in one branch or person, so that one branch of government cannot act beyond the authority granted to it in a constitution or in other laws, and thus intrude on the authority of another branch.[135] What the rights and obligations of each branch are may vary across jurisdictions.[136]

The question of separation or balance of powers is regularly raised in climate change litigation cases, as some argue courts are not appropriate forums to hear and resolve issues related to climate change[137] as they are considered political matters and there is thus a risk that judges would engage in quasi-legislative work.[138] Such questions should instead be left to the political sphere. This argument is especially prevalent when it comes to cases where the question at stake is related to government inaction or policy review, and when plaintiffs are asking courts to apply provisions that are not specific to climate change.[139] While climate change indeed cannot be defined as a strictly legal problem, the fact that it is an all-encompassing problem with the potential to affect every aspect of life as we know it places it at an intersection between politics, science and law. There are certainly climate matters that are up for judicial review, but courts must specify what authority entitles them to hear and resolve a case.[140]

An issue that might be raised in climate change litigation and that is undoubtedly a question before the courts is that of rights and obligations, which was raised in all the current cases. The state in *Urgenda* argued it had no legal obligation to act according to Urgenda's requests, as it stated that allowing the claim would interfere with the system of separation of powers entrenched in the constitution.[141] According to the constitution, the state has a wide discretion of power when it comes to determining the national climate policy, but the court argued that

[134] Encyclopaedia Britannica, "Separation of Powers". Available at: https://www.britannica.com/topic/separation-of-powers.
[135] *Ibid*.,; UNEP 2020, p. 40. 0
[136] van Zeben, 2015, p. 352.
[137] UNEP 2017, p. 30.
[138] UNEP 2020, p. 40.
[139] UNEP 2017, p. 5.
[140] *Ibid*., p. 5. I.e. evaluate whether the plaintiffs have standing.
[141] Hague District Court, para. 3.3.

this discretionary power is not unlimited, especially when taking the nature of the hazard – dangerous climate change with severe and life-threatening consequences – into consideration.[142] The state's actions may not be below the standard of due care.[143] Further, the court stated that there is not a full separation of powers in Dutch law, but rather a balance, and that that balance entails that the actions of political bodies, such as the government and the parliament, can be assessed by a court.[144] What more, the court argued that such a judicial review is an important aspect of democratic legitimacy, and therefore found the case to be within the court's domain.[145]

In its appeal, the state challenged various grounds of the court's decision, among them the question of separation of powers. The state argued that the order to limit the volume of Dutch emissions can only be done through adopting legislation, i.e. through an inherently political process, and that the court cannot impose such an order on the state.[146] The Hague Court of Appeal, however, dismissed this argument as it stated that Urgenda's claim was not intended to create legislation, and that the state has complete freedom to determine how it will comply with the order.[147] In addition, should the state find that compliance with the order can only be achieved through legislation, the court has in no way prescribed the contents of such legislation.[148] Moreover, as the Hague Court of Appeal found the state to be violating human rights which give rise to positive obligations, this is no longer just a question about climate policy.[149] The Supreme Court of the Netherlands further developed this reasoning by stating that if a government is obliged to do something, a court may order it to do so,[150] and the court may also determine whether the measures taken by a state are reasonable and suitable to meet these obligations.[151] Thus, the state's separation of powers arguments were struck down in all instances.

The main question to be answered in *Friends of the Irish Environment* was whether the Plan was amenable to judicial review or not. The government, similarly to the state in *Urgenda*,

[142] *Ibid*., para. 4.55, 4.74.
[143] *Ibid*., para. 5.53.
[144] *Ibid*., para. 4.95.
[145] *Ibid*., para. 4.97-98.
[146] Hague Court of Appeal, para. 68.
[147] *Ibid*., para. 68.
[148] *Ibid*., para. 68
[149] *Ibid*., para. 67.
[150] Supreme Court of the Netherlands, para. 8.2.1.
[151] Supreme Court of the Netherlands, para. 5.3.3.

argued that the Plan is a product of government policy and that neither the decision to approve the Plan nor the Plan itself are subject to judicial review, as it would infringe on the doctrine of the separation of powers.[152] However, even if the Plan would be justiciable, the government emphasized that a wide measure of discretion and deference must be conferred to the executive branch, i.e. the government and the Oireachtas, the Irish parliament.[153] FIE argued that it did not request the court to order the creation of any particular policy, but rather to quash an unlawful policy.[154] This is not an infringement of the separation of powers.

While the High Court accepted that the Plan was justiciable,[155] and did recognize that courts may determine whether the policy of the state is compatible with the law,[156] and that they have both a right and a duty to interfere with the activities of the political branches in order to protect constitutional and human rights of individual litigants,[157] it found that the state had not exceeded its margin of discretion in the creation and adoption of the Plan.[158] On the contrary, the Supreme Court judge found that the Plan did not in fact comply with the requirements of the Act, and hence held that the Plan was unlawful and that it therefore should be quashed.[159]

In *Klimaatzaak*, the court took a more conservative approach to the separation of powers doctrine. The defendants held that an injunction by the court of the plaintiffs' request would infringe on the principle of separation of powers.[160] The plaintiffs, however, stated that the court does have the power to exercise control over the legality of the actions adopted by a public authority, i.e., to establish that the state and the three regions have engaged in wrongful conduct through implementing an inadequate climate policy.[161]

While the court established that the defendants had breached their duty of care, it denied the plaintiffs' request with regard to ordering the Belgian state to reduce its emissions by a specific amount, referring to the principle of separation of powers.[162] The court found that the plaintiffs

[152] High Court of Ireland, para. 38.
[153] *Ibid*., para. 41-42.
[154] *Ibid*., para. 65.
[155] *Ibid*., para. 97.
[156] *Ibid*., para. 89.
[157] *Ibid*., para. 88.
[158] *Ibid*., para. 143.
[159] Supreme Court of Ireland, para. 6.48
[160] Court of First Instance of Brussels, p. 43, p. 45.
[161] Court of First Instance of Brussels, p. 45.
[162] *Ibid*., p. 80.

primarily had based the specified amount of emissions reductions on a, no doubt highly regarded, scientific report by a Belgian expert group (the Expert Group on Climate and Sustainable Development), but that this report does not constitute a legally binding source of obligation for the public authorities.[163] The court further argued that since there is no international or European law that requires the state to reduce its emissions by the specific percentages demanded by the plaintiffs, it is up to the legislative and executive bodies of Belgium to decide in what way the country will participate in order to reach the global GHG emissions reductions target.[164]Therefore, the court did not consider itself to be in a position to rule in favor of the applicants in this matter.[165] The plaintiffs have now challenged this part of the decision in their appeal.[166]

The principle of the separation of powers was never explicitly raised in *Notre Affaire à Tous*, even though the French government rejected the plaintiffs' claims, arguing, among other things, that France has adopted more ambitious climate goals than those arising from its European and international commitments, that ecological damage is not applicable before the administrative jurisdiction,[167] and that even if negligence of the state would be established, the plaintiffs have not proven there to be a causal link between the negligence and the invoked damages.[168] The court disagreed, and found that the state of France through its insufficient actions to fight climate change had caused ecological damage[169] and found that France could be held accountable for its failure to meet its own objectives with regard to the reduction of greenhouse gas emissions,[170] and ordered it to cease its wrongful behavior or to mitigate its effects.[171] However, the court found that the state could only be held liable to the extent that its failure to comply with the first carbon budget contributed to the aggravation of GHG emissions, but not for future ecological damage.[172] The court also recognized that because of "the state of the investigation" it could not determine what measures should be taken in order to mitigate

[163] *Ibid*., p. 82.
[164] *Ibid*., p. 82.
[165] *Ibid*., p. 82.
[166] Klimaatzaak: Request for Appeal, para. 3.
[167] Administrative Court of Paris, First Decision, p. 6.
[168] French Minister of Ecological Transition, "State's Reply", 23 June 2020. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200623_NA_reply-1.pdf.
[169] Administrative Court of Paris, First Decision, p. 6.
[170] Administrative Court of Paris, First Decision, Article 4 of the decision.
[171] *Ibid*., para. 38.
[172] *Ibid*., para. 39. The plaintiffs show that France exceeded the GHG emissions limit set in the National Low Carbon Strategy in both 2016 and 2017.

the effects.[173]An additional investigation on whether to issue an injunction to order the state to take stronger climate measures was thus ordered.[174] In its later decision, the court ordered the state to take all necessary measures to comply with its national and international commitments in relation to greenhouse gas emissions, and to repair the ecological damage caused by its inaction.[175]

As the case of *Duarte Agostinho* has been brought directly before an international court, the ECtHR, and not before a national court, the principle of the separation of powers as it stands in a domestic context is not directly applicable. In the European context, it is the margin of appreciation awarded to states in the implementation of the ECHR that serves as something alike to a transnational separation of powers principle,[176] allowing for different ways of implementing the ECHR as long as they are based on democratic decision making.[177] As the states' replies to the court communication have not been made available to the public, their views on the admissibility of the case is not clear yet.

Based on these cases, it appears as if domestic courts are highly aware of the principle of the separation of powers and are conscious about not overstepping on the authority of the political branches. However, it is widely recognized that disputes concerning constitutional or human rights by definition are matters within the judicial branch's domain,[178] and, courts have no choice but to adjudicate when confronted with a legal claim such as that of rights violations, even if climate change policy in itself would be considered a political matter.[179] This is an additional reason for plaintiffs to make strong legal arguments regarding the causal link between climate change and alleged rights violations.

While the courts found the matters at hand to be justiciable and amenable to judicial review, and also found violations of rights to have occurred, the way in which they ordered the state to take action varied depending on their interpretation of the scope of the doctrine of separation of powers. While some found that the principle of separation of powers limited them to only

[173] *Ibid*., para .39.
[174] *Ibid*., Article 4 of the decision.
[175] *Ibid*., Article 2 of the decision.
[176] Ulfstein, 2017, p. 3.
[177] *Ibid*., 2017,p. 12.
[178] UNEP 2017, p. 30.
[179] Burgers, 2020, p. 59; Fisher et al, 2017, p. 196.

order that further measures be taken, others found there to be no infringement of the principle of the separation of powers, even when they ordered specific emissions reductions to be taken at the plaintiffs request. The legal bases on which these reductions were ordered, or the merits of the cases, will be discussed in the following chapter.

3. Legal Bases in Climate Litigation

3.1 Climate Change and the Law

Climate change poses an especially difficult challenge to current legal systems. Law regarding climate change, and environmental law more generally, is set apart from other areas of law because of its considerable reliance on science and economics. Development of the law is influenced by, mainly, the scientific consensus about a problem, the economic consequences of action or inaction, as well as public concern and political perceptions.[180] The developments that take place at this intersection can be thought of as processes of co-production. The concept of co-production was developed by Sheila Jasanoff [181] and "embraces the mutually constructive relationship between descriptive science and the normative ordering of society"[182] through institutional processes.[183] Climate change litigation provides a site where science and law can be challenged,[184] and where dialogues between scientists and lawyers can be facilitated through the use of co-production,[185] as scientific and the legal views are sometimes mutually incompatible.[186] Nevertheless, legal action against climate change clearly is possible, though it requires a thorough understanding of sources of legal authority, their interpretation, and ensuing obligations.

Since the effects of climate change are felt in so many areas, the alternatives to pursue legal action are also multiple. This chapter will explore some of the most common sources of legal authority in climate litigations. These are; statutory and policy commitments, common law and tort theories, international environmental law, and constitutional and human rights law.[187] The

[180] Sands and Peel, 2018, p. 6.
[181] See, e.g. Jasanoff, Sheila, States of Knowledge: The Co-Production of Science and the Social Order, Oxford: Taylor & Francis, 2004.
[182] Paiement, 2020, p. 127.
[183] Etty & Heyvaert et al., 2020, p. 203.
[184] Paiement, 2020, p. 129.
[185] Etty & Heyvaert et al., 2020, p. 203.
[186] Paiement , 2020, p. 129.
[187] UNEP 2017, p. 5. *5*

claims made against national governments can generally be identified as claims arguing for governments to meet their current national and international obligations, and claims arguing for governments to adopt more ambitious climate goals. Which options are available to the plaintiffs and which strategy they eventually end up pursuing depend, naturally, on the matter at hand, but also on aspects in the domestic legal environment, such as which legal system is employed (e.g. common law or civil law),[188] which treaties the state is a party to and how that treaty is interpreted, more broadly the way international law is applied in domestic law (i.e. if the state is monist or dualist), and customary law obligations. However, as will be evident from the analysis in this chapter, most plaintiffs will tailor a claim based on a combination of sources of legal authority in a manner that is most likely to serve their purposes and interests.[189]

3.2 Statutory and Policy Commitments

In order to establish the grounds for a claim, plaintiffs need to point to a breach of a legal obligation. As estimations of the irreversible damage to the environment expected on the current trajectory have become increasingly sophisticated,[190] national governments have declared commitments to climate change mitigation and adaptation through the adoption of national legislation, regulation, and policy statements, in addition to international agreements. Through the enactment of new laws, new rights and duties have arisen. In situations where states have adopted laws specific to climate change, codifying climate change mitigation obligations for private and public actors in statutory provisions, basing a claim on national laws and policies is relatively straightforward,[191] and statutory provisions are in fact the most cited bases for climate litigation.[192] This trend can be seen in the selected cases as well.

All of the cases, except for *Duarte Agostinho* which is exclusively based on ECHR claims, ground part of their argumentation in the statutory commitments and policies the defendant governments themselves have legislated, approved and committed to. In *Urgenda* the basis of the claim was that the Urgenda Foundation saw the Dutch government's climate policy as inadequate, which in turn resulted in additional violations which will be discussed later in this

[188] Other legal systems exist, and many countries do in fact use a combination of different systems. For the purpose of this thesis, though, only common and civil law jurisdictions are of relevance.
[189] Averill, 2009, p. 140.
[190] Brownlie, 2003, p. 273.
[191] UNEP 2017, p. 5, 36. *6*
[192] UNEP 2020, p. 41.

chapter. The plaintiffs referred to the fact that until 2011 the objective of the Netherlands' climate policy was to achieve a 30% emissions reduction in 2020, compared to 1990 levels.[193] This goal had been articulated in the "New Energy for the Climate Work Programme of the Clean and Sustainable Project" in 2007.[194] The state had determined this objective was necessary in order to "stay on a credible pathway"[195] to limit global warming to 2°C. The plaintiffs also made reference to statements by previous government officials speaking in official capacity, such as the then Dutch Minister of Housing, Spatial Planning and the Environment, Jacqueline Cramer, who during the 13th Conference of the Parties to the United Nations Framework Convention on Climate Change in 2007 called on rich countries, thus including the Netherlands, to reduce their GHG emissions by 25 to 40% by 2020.[196] These goals and statements clearly stated an intention and understanding of the need to significantly reduce emissions.

However, in 2011 the Netherlands adjusted its reduction target to align with the common EU reduction target, i.e. a 20% reduction of emissions for the whole region.[197] At the hearing in the Hague District Court, the state representatives confirmed that, for the Netherlands, this change in policy translated into a 14 to 17% reduction of GHG emissions in 2020 compared to 1990.[198] The state argued that reducing GHG emissions by 24 to 40% by 2020 was not necessary because it would be possible to achieve the same result by accelerating the reduction of GHG emissions in the Netherlands after 2020.[199] The state also argued that it was prevented from adopting more stringent emissions reduction policies than those agreed upon at the EU level.[200] In response, the Hague District Court cited Article 193 of the Treaty on the Functioning of the European Union (TFEU) which states that member states are free to maintain or introduce more stringent protective measures when it comes to environmental protection.[201]

---

[193] Hague Court of Appeal, para.19.
[194] Hague District Court, para. 2.71. (*Werkprogramma Nieuwe energie voor het klimaat van het project Schoon en Zuinig*)
[195] Supreme Court of the Netherlands, p. 5.
[196] Hague District Court, para. 2.72.
[197] European Environment Agency, "EU Achieves 20-20-20 Climate Targets, 55 % Emissions Cut by 2030 Reachable with More Efforts and Policies", 26 October 2021. Available at: https://www.eea.europa.eu/highlights/eu-achieves-20-20-20; Hague Court of Appeal, para. 20.
[198] Hague District Court, para. 4.26.
[199] Supreme Court of the Netherlands, para. 7.4.2.
[200] Hague District Court, para. 30.
[201] Treaty on the Functioning of the European Union 2007 (2008/C 115/01), (Hereafter: TFEU). Article 193; Hague District Court, para. 2.55.

The plaintiffs as well as the court(s) held that the state had not explained how this new reduction policy could be considered responsible, as it clearly contradicted previous ambitions and statements by the government of the Netherlands.[202] The state had not provided any insights into how it aimed to accelerate its emissions reduction, but merely stated that there "are certainly possibilities"[203] to do so, and the court(s) challenged whether this new approach to emissions reduction could indeed achieve the same result as was the objective of the pre-2011 policy[204] and, by extension, contribute to the prevention of dangerous climate change.[205] The court(s) therefore dismissed the state's arguments and ruled in favor of the plaintiffs, confirming that the state does not in fact pursue an adequate climate policy,[206] and ordered a 25% reduction of GHG emissions by 2020.[207]

Statutory commitments and government policies also played a central role in *Friends of the Irish Environment*, where FIE argued that the Irish government's approval of the 2017 National Mitigation Plan violated an earlier statute, namely Ireland's Climate Action and Low Carbon Development Act from 2015. FIE stated that the Plan, in fact, was *ultra vires* the Act, and thus asked the court to quash the Plan.[208] *Friends of the Irish Environment* is interesting in the aspect that the trial judge in the High Court and the Supreme Court judge came to vastly different conclusions based on the same facts.

The applicant's main issue with the Plan was that, according to them, it did not meet the requirements of the Act.[209] The goal of the Act is to enable the state to "pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050".[210] This is referred to as the National Transition Objective (NTO). In order to reach this NTO, the Act stipulates that the Minister for the Environment, Community and Local Government "shall make and submit to the Government for approval"[211] a national mitigation plan every five years, and that that plan shall specify the

[202] Supreme Court of the Netherlands p. 6, para 7.4.6.
[203] *Ibid*., para. 7.4.6.
[204] *Ibid*., para. 7.4.2.
[205] *Ibid*., para. 7.4.6.
[206] Hague District Court, para. 4.1.
[207] *Ibid*., para. 5.1.
[208] High Court of Ireland, para. 12.
[209] High Court of Ireland, para. 12.
[210] Climate Action and Low Carbon Development Act (2015), Section 3(1).
[211] *Ibid*.

manner in which the NTO is to be achieved.[212] The applicant, however, contended that the Plan does not specify any or any adequate measures for the reduction of GHG emissions that would lead to the achievement of the NTO.[213] The applicant particularly emphasize the lack of action to ensure short and medium-term reduction of emissions,[214] stating that last minute reductions will not achieve the desired targets, as GHG emissions stay in the atmosphere and increase the global temperature even decades after they have been emitted, contributing to excess warming.[215] Instead, FIE would like to see interim emission reduction targets.[216] Thus, the applicant stated that the Plan, as it fails to provide a detailed description of how the NTO established in the Act is to be reached, is unlawful.[217] In addition, the applicant also claims that the state has failed to comply with its National Climate Policy from 2014.[218]

The state argued that FIE's case relied on a fundamental misconception of the purpose of the Act and the role of National Mitigation Plans.[219] The state emphasized that the Plan should be seen as a living document.[220] It will be revised at least six times until 2050, and in this way new developments in science and technology will be taken into account.[221] This first Plan is thus only an initial step towards the NTO.[222] In addition, the state argued a very wide measure of discretion and deference must be conferred to the executive branch, i.e. the government and the Oireachtas, the Irish parliament when it comes to the adoption of the Plan.[223] Further, it argued that it was impossible that each individual mitigation plan would contain a complete road map to the achievement of the NTO.[224]

In the High Court the judge ruled in favor of the government, basing its decision on the argument made by the government, that it indeed enjoys a wide margin of discretion when it comes to implementation, and the Plan in question must be interpreted as being a living document and is just an initial step in achieving the NTO of a low-carbon, climate resilient and

[212] *Ibid*., Section 4(1)-(2).
[213] High Court of Ireland, para. 12.
[214] *Ibid.*, para. 13.
[215] *Ibid.*, para. 8.
[216] *Ibid*., para. 20.
[217] *Ibid*., para. 10.
[218] *Ibid*., para. 23.
[219] *Ibid*., para. 41.
[220] *Ibid*., para 46.
[221] *Ibid*., para. 41, 46.
[222] *Ibid*., para. 41.
[223] High Court of Ireland,para. 41-42.
[224] *Ibid*., para. 41.

environmentally sustainable economy by 2050.[225] The judge also stated that, in his opinion, it would be inappropriate to view the Plan in isolation from what is the intention of the Act, i.e. to renew and update the Plan every five years.[226] Thus, the judge emphasized the malleability of the Plan, and dismissed the claim that the Plan, because of its lack of precision, was in breach of the Act.[227] The court continued to argue that if the applicant views the Plan as being inadequate, that is not a legal deficiency of the Plan, due to it merely being one step on the way, but of the provisions and objectives of the Act, a question which was not challenged before the court in this case.[228]

The Supreme Court judge interpreted the lawfulness of the plan differently than the trial judge, and found that the Plan did not in fact comply with the requirements of the Act and therefore held that the plan should be quashed.[229] The judge referred to the Act, which stated that the overriding requirement of a national mitigation plan is to specify the policy measures of how the national transition objective of a "low carbon, climate resilient and environmentally sustainable economy" by 2050 is to be achieved.[230] The judge considered that a "reasonable and interested observer" would not know, based on the Plan in question, how the government really intends to achieve the NTO.[231]

Whereas the trial judge emphasized that the Plan of 2017 was not the definitive solution and that the government had a wide margin of appreciation when it came to its implementation, the Supreme Court judge saw that significant parts of the policies were excessively vague or aspirational,[232] and that it would be wrong to view the legislation as a series of five year plans, constituting separate entities.[233] Rather, the judge argued, the five-year provision exists so that adjustments can be made continuously as to the details of the plans as scientific knowledge and technology develop, but the plan in question and all future plans should nevertheless specify how the national transition objective will be met over the whole period until 2050, and not just provide details for the first five years.[234] The judge also considered a report by the Advisory

[225] *Ibid*., para. 97, 108, 117.
[226] *Ibid*., para. 117.
[227] *Ibid*., para. 118.
[228] *Ibid*., para .141.
[229] Supreme Court of Ireland, para 6.48.
[230] *Ibid*., para. 6.18 - 6.19.
[231] *Ibid*., para. 6.46.
[232] Supreme Court of Ireland, para. 6.43.
[233] *Ibid*., para. 6.20.
[234] *Ibid*.

Council, according to which Ireland is "completely off course in terms of its commitments to addressing the challenge of climate change".[235]

In *Klimaatzaak*, statutory and policy commitments were not as central to the argument as in the two previous cases. While the plaintiffs did state that the defendants' climate policies were insufficient and directly contributed to dangerous climate change,[236] they anchored their argument in the concept of negligence, a concept which will be discussed in more detail in the following subchapter.

In contrast, the plaintiffs in *Notre Affaire à Tous* relied heavily on France's statutory and policy commitments, stating, like the plaintiffs in the previous cases, that the government was pursuing an inadequate climate policy in contradiction with French domestic policies and obligations.[237] The discussion centered on the moral and ecological damage of this inadequacy. The NGOs argued the climate policy violated a statutory duty to act,[238] which could be incurred from the French Charter for the Environment, among other sources.[239] The applicants brought attention to the fact that France did not have a national program for the fight against climate change before the year 2000, when the international community had been aware of the dangers of climate change for decades already, and it was not until 2015 that the French state identified climate objectives and developed political tools to reach them.[240] They also stated that not only did the French state act late, but it has failed to adopt and implement a coherent strategy.[241] Not only has the French state not limited its greenhouse gas emissions enough, greenhouse gas emissions have in fact increased since 2016.[242] In light of this, the NGOs argued it was obvious the French government's actions were both inadequate and inefficient, especially when it came to its short-term objectives on reducing emissions of greenhouse gasses, developing renewable energies and increasing energy efficiency,[243] and that France was in fact breaching its

[235] *Ibid*., para. 6.42; Climate Change Advisory Council (Ireland), Annual Report, 2018, p. iii. Available at: https://www.climatecouncil.ie/media/climatechangeadvisorycouncil/contentassets/publications/CCAC_AnnualReview2018.pdf.
[236] Klimaatzaak: Summons, para. 34.
[237] Letter of Formal Notice, p. 1.
[238] *Ibid*., p. 1.
[239] *Ibid*., p. 15.
[240] *Ibid*., p. 28.
[241] Letter of Formal Notice, p. 28.
[242] VZW Klimaatzaak v. Kingdom of Belgium and Others, "Summary of the arguments pur forward", 16 December 2019, para. 14.
[243] Letter of Formal Notice, p. 1.

obligations under French, European and international law.[244] The plaintiffs made specific reference to national laws such as the "Grenelle Law",[245] which determines the government's environmental objectives, the "Energy Transition Law for Green Growth",[246] which defines tools for management and planning of enhancing the transition to greener energy, including the "National Low Carbon Strategy".[247] For example, the plaintiffs show that France exceeded the GHG emissions limit set in the National Low Carbon Strategy in both 2016 and 2017.[248] Since France's GHG emissions have begun increasing since 2016,[249] which the plaintiffs suggest this is an indication that France will not reach its long-term emissions reduction objectives either.[250] In fact, the French state itself has acknowledged that, on this trajectory, it is unable to reach its 2020 and 2050 objectives.[251] Thus, the applicants sought compensation for the ecological and moral damages suffered as a result of the state's failures and asked the court to order the state to actively and effectively implement and respect new, adequate measures that honor France's short-term objectives under French domestic legislation, EU and international law.[252]

The Administrative Court of Paris noted that the state had failed to carry out the policies and commitments it had set out for itself,[253] and acknowledged that the fact that the state could possibly achieve its objectives of reducing GHG emissions by 40% in 2030 and achieve carbon neutrality in 2050 does not exempt it from its responsibility to comply with its current commitments.[254] Thus, the court found that the state had caused the applicants ecological damage,[255] and after the further investigation, the court ordered the state to repair this damage caused by its inaction, and to take all necessary measures to comply with its national and international commitments in relation to greenhouse gas emissions.[256] In addition, the court

[244] *Ibid*., p. 36-38
[245] Loi Grenelle I, Grenelle de l'environnement 2007.
[246] Loi de transition énergétique pour la croissance verte, LTECV
[247] Stratégie Nationale Bas-Carbone (SNBC); Letter of formal notice, p. 20.
[248] Letter of formal notice, p. 23.
[249] *Ibid*., p. 23.
[250] *Ibid*., p. 24.
[251] *Ibid*., p. 27.
[252] *Ibid*., p. 1.
[253] Administrative Court of Paris, First Decision, para. 30.
[254] Administrative Court of Paris, First Decision, para. 31.
[255] *Ibid*., p. 6.
[256] *Ibid*., Article 2 of the decision.

decided to order the state to compensate the applicants with 1 euro each for their moral damage.[257]

As evident from the cases given account for above, governments that have set the targets of their mitigation and adaptation policies based on political feasibility rather than the available science are prone to become defendants in climate litigations.[258] Since there is no international environmental court, addressing these concerns with government compliance with climate commitments has mainly become an issue that takes place in domestic courts. Since it is up to the public authorities of a state to ensure that obligations are complied with by everyone within its jurisdiction and control,[259] plaintiffs are increasingly taking legal proceedings against the state to enforcement of these obligations.

3.3 Common and Tort Law Theories

Common law and tort claims are a form of statutory claims, but compared to other types of bases of climate obligations, plaintiffs grounding their claims on common law and tort theories are relatively rare.[260] Such arguments are, however, increasing, and in three of the cases above, *Urgenda*, *Klimaatzaak* and *Notre Affaire à Tous*, reference to common and tort law theories made relevant contributions to the utility of private law in climate cases.

While tort causes of action generally are more prevalent in common law jurisdictions such as the United States,[261] the United Kingdom and some countries in the former British Commonwealth, theories of tort, nuisance and negligence typically are not available in civil law jurisdictions as a way to seek remedy for damage caused by climate change.[262] Of the cases examined in this thesis, *Friends of the Irish Environment* is the only one set in an altogether common law system while the others have been brought in civil law jurisdictions. Nevertheless, some civil law jurisdictions recognize comparable statutory causes of action.[263] In addition, theories such as the public trust doctrine and duty of care can be thought of as hybrid

[257] *Ibid*., Article 3 of the decision.
[258] UNEP 2017, p. 4. *4*
[259] Sands and Peel, 2018, p. 148.
[260] UNEP 2020, p. 42.
[261] With the exception of the state of Louisiana, which practices a mixed system.
[262] UNEP 2017, p. 34.
[263] UNEP 2020, p. 42.

approaches, combining elements of common law, constitutional rights, and statutory provisions in order to seek accountability.[264]

The definition of nuisance is that the defendant's actions are causing substantial and unreasonable interference with the claimant's land or his/ her use or enjoyment of that land,[265] or materially affects the reasonable comfort and convenience of life of a wider public.[266] Negligence refers to a failure on the side of the defendant to exercise a reasonable level of care, not having taken potential, foreseeable harm into account in their actions and thus having acted carelessly and without an appropriate duty of care.[267] Negligence is hence the opposite of acting with due diligence or due care. According to the public trust doctrine, the state has a responsibility to protect and maintain certain natural and cultural resources for the public's use.[268] In the context of climate change, "the public" includes both present and future generations.[269]

As already mentioned, *Urgenda* was the first substantial climate action based in tort law that proceeded to a substantive hearing and, consequently, also the first time such a case succeeded.[270] The focus on tort law, which more specifically was based on Book 5, Section 37 of the Dutch Civil Code which relates to nuisance,[271] was of greater importance in the first instance, the Hague District Court, as the focus in the higher courts later shifted to the rights-based arguments.

The Urgenda Foundation argued that the state's inadequate climate policy, a GHG emissions reduction target lower than 25-40% by 2020, compared to 1990 levels, was contrary to its duty of care towards the foundation, the additional applicants it represented, and more generally, towards Dutch society.[272] The question of whether the state was in breach of its duty of care for taking insufficient measures to prevent dangerous climate change had never before been

[264] *Ibid*., p. 43.
[265] Bermingham and Brennan, 2008, p. 225.
[266] *Ibid*., 2008, p. 241.
[267] Feinman, 2010.
[268] Cornell Law School, Legal Information Institute, "Public Trust Doctrine". Available at: https://www.law.cornell.edu/wex/public_trust_doctrine.
[269] UNEP 2017, p. 5, 23.
[270] Bouwer, 2020, p. 24.
[271] Hague District Court, para. 4:51.
[272] Hague District Court, para 4.1.

answered in Dutch proceedings.[273] Thus, when the Hague District Court ordered the state to limit its greenhouse gas emissions by at least 25% below 1990 levels by the end of 2020,[274] having concluded its climate policy accounted for unlawful hazardous negligence,[275] this was the first decision by any court in the world where a state was ordered to limit its greenhouse gas emissions for reasons other than statutory mandates.[276]

The plaintiffs in *Klimaatzaak* argued the government's failure to reduce emissions to meet the goals Belgium has committed itself to constituted negligence within the meaning of Article 1382 of the Belgian Civil Code.[277] Article 1382 obliges the one who, by fault, caused damage to another to repair it.[278] According to the plaintiffs, this includes future damage.[279] For the obligation to repair damage to arise, the actor must have deviated from what a "normally prudent and informed" person would have done in the same situation,[280] i.e. not acted with an adequate standard of care. The Belgian Civil Code likens this to the behavior of a "good father".[281]

In order to repair the damage caused by a violation of the standard of care, victims, in this case VZW Klimaatzaak, have the right to claim compensation in kind instead of monetary compensation.[282] The purpose of reparation in kind is to restore the situation to what it was before the damage occurred, and Belgian jurisprudence has concluded authorities can also be ordered to provide compensation in kind.[283] This includes preventive measures.[284] Thus, since the applicants stated the current Belgian climate policy causes damage both now and in the future,[285] the applicants asked the court to order the state to right these wrongs through

[273] *Ibid*., para. 4.53.
[274] *Ibid.*, para. 5.1.
[275] *Ibid.,* para. 4.53.
[276] Sabin Center for Climate Change Law, Urgenda Foundation v. State of the Netherlands, "Summary". Available at: http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.
[277] Klimaatzaak: Summons, p. 26, para. 85, Belgium is not even on track to meet the emissions reductions goal set by the EU (p. 16, para .42).
[278] Belgian Civil Code, Article 1382.
[279] Klimaatzaak: Summons, para. 1.
[280] Belgian Civil Code, Article 1382.
[281] *Ibid*.
[282] Klimaatzaak: Summons, para. 46.
[283] Klimaatzaak: Summons, para. 46.
[284] *Ibid*., para. 47.
[285] *Ibid*., para. 49.

compensation in kind for the current damages, as well as the taking of preventive measures, i.e. reduction of greenhouse gasses, to avoid future damage.[286]

The Court of First Instance of Brussels agreed with the plaintiffs in that the defendants did not "behave like good fathers in pursuing their climate policy".[287] The court viewed that in the light of the scientific knowledge available on climate change,[288] the defendants did not behave as "normally prudent and diligent authorities",[289] thus constituting conscious negligence.[290] While the court established that the defendants had breached their duty of care, it denied the plaintiffs' request with regard to ordering the Belgian state to reduce its emissions by a specific amount, stating that doing so would infringe on the principle of separation of powers.[291]

The plaintiffs appealed, among others, this part of the decision,[292] asking the court to answer the question of what kind of behavior should be expected from a public authority with this knowledge, acting in a normally prudent and diligent manner.[293] VZW Klimaatzaak argues that the standard of care the defendants should take should be based on the available science, which they argue translates into emissions reductions by 48% below 1990 levels by 2025 and 65% below 1990 by 2030 for Belgium.[294] This question is yet to be determined by the court.

As in the cases above, the plaintiffs in *Notre Affaire à Tous* argued the government's behavior constituted a violation of its duty of care. The plaintiffs argued that the duty of care entails an obligation on the government to take all necessary measures to "identify, avoid, reduce and compensate the consequences of climate change", or in other words, "to implement all necessary measures to efficiently fight against climate change".[295] While the plaintiffs in *Klimaatzaak* specifically asked for compensation in kind, the NGOs acting as plaintiffs in *Notre Affaire à Tous* asked for "the symbolic sum of 1 euro" as compensation for their moral

[286] *Ibid*., para 49-50.
[287] Court of First Instance of Brussels, para. 2 of the Decision, p. 42.
[288] *Ibid*., p. 59.
[289] *Ibid*., p. 83.
[290] Klimaatzaak: Summons, para. 85.)
[291] Court of First Instance of Brussels, p. 80.
[292] Klimaatzaak: Request for Appeal, para .3.
[293] *Ibid*., para. 81.
[294] *Ibid*., request 5°.
[295] Notre Affaire à Tous and Others v. France, "Summary request", 14 March 2019, p. 10, para. 10. (Hereafter: Notre Affaire à Tous: Summary request)

and ecological damage respectively.[296] This request was partially rejected by the court, which did order the state to pay the plaintiffs 1 euro each for their moral damage and acknowledged that ecological damage had in fact been caused through the actions of the state,[297] but denied monetary compensation for the ecological damage.[298] This was because, like in Belgium, ecological damage is primarily repaired in kind, according to article 1249 of the French Civil Code.[299] Monetary compensation shall only be ordered when it is impossible or insufficient to remedy the damage in kind.[300] The court argued, firstly, that the applicants had not shown that the ecological damage could not be repaired in kind and, secondly, that the symbolic sum of 1 euro each would be apparently insufficient to compensate for the extent of the damage.[301]

In the period between the decisions, in their briefs submitted to the court, the NGOs once again emphasized the importance of the state to adopt all necessary means to repair the ecological damage caused by the excessive emission of greenhouse gasses, and requested the court to issue a penalty payment of 78,537,500 euros to the government for every six months it fails to do so.[302] The court rejected this penalty payment but ordered the government to take all necessary measures to repair the ecological damage already caused and to prevent the aggravation of damage caused thereby.[303]

As has become apparent through the analysis above, the basis of these common and tort law theories is that the claimants, in these cases civil society organizations and private citizens, are seeking compensation for climate damage from the defendant, in these cases governments, because of their unlawful behavior.[304] Applicants seem to be facing trouble when it comes to asking for monetary compensation for environmental damage, as many domestic laws consider this to be a damage that should primarily be repaired in kind. In fact, no court has yet ordered a defendant to pay damages for climate harms as a result of the defendant's contributions to

[296] Klimaatzaak: Request for Appeal, para .3 p. 1.
[297] Administrative Court of Paris, First Decision, Article 3 of the decision, para. 16.
[298] *Ibid*., para. 37.
[299] France: *Code Civil,* Article 1249; Administrative Court of Paris, First Decision, para. 35.
[300] France: *Code Civil,* Article 1249, "Repairing ecological damage is primarily done in kind. In the event of legal or de facto impossibility or inadequacy of remedial measures, the court shall order the person responsible to pay damages, earmarked for restoring ecology, to the plaintiff or, if the defendant is unable to take appropriate measures to this end, to the State. The assessment of the damage takes into account, where appropriate, the remedial measures already taken, in particular in the context of the implementation of Title VI of Book I of the Environment Code."
[301] Administrative Court of Paris, First Decision, para. 37.
[302] *Ibid*., para. I 2° p. 3.
[303] *Ibid*., Article 2 of the decision.
[304] Bouwer, 2020, p. 35.

climate change.[305] However, as claims based on common law and tort theories are increasing,[306] their impact and importance are likely to evolve over time.[307]

3.4 International Environmental Law

3.4.1 Characteristics of International Environmental Law

Whereas the invocation of specific statutory and policy commitments as well as common law and tort theories naturally is highly dependent on and determined by domestic laws, the widespread adoption and recognition of international environmental treaties and principles make them popular to use in climate litigations, and argumentation developed in one case can more easily be applied in other jurisdictions.

As already mentioned, international environmental law, and especially climate change law, is an especially challenging area of public international law. This is primarily due to two reasons: the rapidly and continuously changing conditions of the environment itself and, consequently, the scientific and technological developments, as well as the difficulty for states to agree on uniform, global environmental law norms.[308] Fisher, Scotford and Barritt describe climate change as legally disruptive, as it "gives rise to situations that are at odds with legal stability, coherence and knowability"[309] and that "cannot be addressed through the conventional application of legal doctrine".[310] This has influenced the treaties concluded in the field.

A characteristic particularly prominent in the field of international environmental law is the adoption of framework treaties or conventions. A framework treaty "sets out general obligations, creates the basic institutional arrangements, and provides procedures for the adoption of detailed obligations in a subsequent protocol(s)".[311] Because of divergent circumstances, interests and political agendas between countries, agreeing on more specific details is difficult.[312] Framework conventions and protocols often have one or more annexes or appendices which may include scientific or technical information, and this three-tiered composition of framework agreement, protocol, and annex/ appendices enables legal

[305] UNEP 2020, p. 10, 42.
[306] *Ibid*., p. 42.
[307] Fisher et al., 2017, p. 190.
[308] Linderfalk, 2020, p. 135.
[309] Fisher et al. 2017, p. 177.
[310] *Ibid*.
[311] Sands and Peel, 2018, p. 106. 6
[312] Linderfalk, 2020, p. 139.

amendments and other changes to be made in accordance with political, scientific or economic developments[313] at subsequent conferences, so-called Conferences of the Parties (COP).[314] When it comes to climate change, perhaps the most important and well-known framework convention is the United Nations Framework Convention on Climate Change (UNFCCC) adopted in 1992.[315] While conferences to this convention are held annually,[316] some have been of greater importance than others, such as COP 3 which resulted in the Kyoto Protocol and COP 21 which resulted in the Paris Agreement.[317]

The ground principle in international law is that states, as sovereign entities, only are bound by obligations they have voluntarily agreed to be bound by,[318] and states tend to be more careful in negotiating and accepting legally binding commitments, as they consider them to impose greater constraint on their behavior.[319] This is because legally binding agreements usually have a more considerable effect in domestic politics,[320] especially if compliance with the norm requires domestic implementation through a legislative process,[321] as is the case in dualist systems. Thus, committing to a legally binding instrument can be assumed to indicates a stronger willingness by a state to commit to the obligations therein.[322] As the defendants in the cases voluntarily have ratified treaties such as the UNFCCC, the Kyoto Protocol and the Paris Agreement, plaintiffs are asking governments to fulfill the ensuing obligations. The court in *Urgenda* also argued a state can be supposed to want to meet its international law obligations.[323] However, determining the extent of state obligations is where the parties disagree.

The most prominent way plaintiffs in all the cases chosen for this thesis made reference to international climate agreements was through arguing that states are bound by certain emissions reductions. The objective of the UNFCCC, which the parties have committed to, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that

[313] Sands and Peel, 2018, p. 106.
[314] Linderfalk, 2020, p. 139.
[315] United Nations Framework Convention on Climate Change, 9.5.1992, 1771 UNTS 107. (Hereafter: UNFCCC).
[316] An exception was made in 2020 due to the COVID-19 pandemic.
[317] COP 3 was held in 1997, the Kyoto Protocol entered into force in 2005. COP 21 was held in 2015 and the Paris Agreement entered into force in 2016.
[318] Linderfalk, 2020, p. 92.
[319] Bodansky, 2015, p. 161.
[320] *Ibid*.
[321] *Ibid*., p. 155.
[322] *Ibid*.
[323] Hague District Court, para. 4.43.

would prevent dangerous climate change,"[324] and plaintiffs argue that, in line with current scientific knowledge, this entails a reduction of GHG emissions by 25% to 40% by 2020, compared to 1990 levels.[325] This reduction goal is based on the 2007 Assessment Report 4 by the Intergovernmental Panel on Climate Change (IPCC) which then set the responsible global warming limit to 2°C.

In this context it is important to understand the connection between the UNFCCC and the IPCC. The IPCC was established in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) and is an intergovernmental organization that provides scientific information on climate change. The reports by the IPCC are comprised of research conducted by hundreds of scientists and are largely viewed as the authority on current climate science.[326] The reports serve as a starting point for UNFCCC COP decisions and for decision-making processes at both European and domestic levels,[327] and the contents of the reports were held as facts by the parties in all the selected cases.

The court in *Urgenda* concluded that there is a high degree of consensus in the international community on the need for Annex I countries, i.e. industrialized countries and countries in transition, to reduce their emissions by 25 to 40% by 2020 compared to 1990, [328] and that this target also applied to the Netherlands as an individual country, thus giving rise to an obligation for the state to reduce emissions by that amount.[329] The court also referred to the fact that the temperature reduction target has been adjusted to 1.5°C since 2007, as the science now points to the need for even greater reduction of GHG emissions in order to prevent dangerous climate change,[330] and that emissions therefore should be reduced by "at least" 25-40%.[331]

Similar arguments and reasoning can be found by both plaintiffs and judges in the other cases. FIE alleged that the Plan approved by the government failed to have regard for the objective of the UNFCCC,[332] and the court agreed that there is a general consensus that states are obliged to pursue efforts that are adequate in relation to current climate science.[333] The plaintiffs in

[324] UNFCCC, Article 2.
[325] Hague District Court, para 3.2
[326] *Ibid*., para 4.12.
[327] *Ibid*.
[328] Supreme Court of the Netherlands, para 7.2.7.
[329] *Ibid*., 7.2.11.
[330] Supreme Court of the Netherlands, para 7.2.8.
[331] *Ibid*., para 7.2.11.
[332] High Court of Ireland, para. 68.
[333] Supreme Court of Ireland, para. 3.4.

Klimaatzaak also stated that Belgium has committed to the prevention of dangerous climate change through the ratification of the UNFCCC,[334] and in *Notre Affaire à Tous* the plaintiffs stated that the French state has disregarded its international obligations stemming from, among others, the UNFCCC through its inadequate climate policy.[335] Likewise, the plaintiffs in *Duarte Agostinho* pointed out that all the defendants are parties to the UNFCCC, meaning they have committed to the prevention of dangerous climate change.[336] Thus, in all of the cases, similar arguments were made referring to the objective of the UNFCCC. In addition, the scientific consensus surrounding specific emissions reductions was invoked and served as an interpretative tool in order to determine the scope of the state's obligations.

3.4.2 The Paris Agreement

As briefly mentioned, the temperature goal has been adjusted to 1.5°C since the fourth IPCC Assessment Report. This new target has been enshrined in the Paris Agreement,[337] and cases filed after its entry into force in 2016 have emphasized this as a reason for even greater emissions reductions. Even though COP decisions, like the Paris Agreement is, in general are not legally binding,[338] the Paris Agreement is a legally binding treaty.[339] The Paris Agreement attracted the largest number of countries ever to sign a treaty in a single day,[340] and it has, as of May 2022, attracted 193 ratifications.

While few elements in the Paris Agreement directly constitute actionable obligations, breaches of which would give rise to state responsibility and directly could be invoked before a court,[341] the Agreement has paved the way for new prospects in climate litigation. The parties to the Agreement agreed to enhance progress towards temperature stabilization through "pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels",[342] opting for climate resilient financial flows,[343] global peaking of greenhouse gas emissions followed by a

[334] Court of First Instance of Brussels, para. 35.
[335] Administrative Court of Paris, First Decision.
[336] Duarte Agostinho: Complaint, para. 20 (v).
[337] Paris Agreement of the UNFCCC, 12.12.2015, Article 2(1)(a). (Hereafter: Paris Agreement).
[338] Bodansky, 2015, p. 157.
[339] United Nations Climate Change, Process and Meetings, "The Paris Agreement". Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.
[340] Winter, 2019, p. 199.
[341] Winter, 2019, p. 195; Wegener, 2020, p. 23.
[342] Paris Agreement, Article 2(1) (a).
[343] *Ibid*., Article 2(1) (c).

rapid reduction,[344] and net zero emissions in the second half of the century,[345] all based on the best available science and in the context of sustainable development.[346] While these standards do not constitute legal obligations in themselves they contribute to the crystallization of the core legal obligations in the agreement, and inform the interpretation and implementation of the obligations of the Paris Agreement.[347]

This is important, because while some courts succeeded in determining a minimum percentage of emissions reductions based on the UNFCCC, determining the scope of a specific state's obligations originating from an international treaty can be a complicated feat. Therefore, the perhaps most important mechanism of the Paris Agreement is the establishment of nationally determined contributions, NDCs.[348] This integration of national commitments into an international instrument was a significant advancement in the attempt to coordinate the problem of international action on greenhouse gas emissions.[349]

The NDCs provide new possibilities to establish breaches of state responsibility,[350] as they enable litigants to place the actions or inactions of governments or private corporations into a larger, international climate policy context by providing a blueprint for the deduction of an adequate national commitment to greenhouse gas reductions.[351] While the Paris Agreement does not specify a distinct reduction goal for each party, it does, however, provide guiding principles.[352] It is then up to each party to implement and interpret these guidelines into domestic laws and policies. The assessment of the adequacy of a state's NDC, of course, has to be done on a case-by-case basis, taking into account economic and demographic circumstances of the state at hand.[353]

[344] *Ibid*., Article 4(1).
[345] *Ibid*.
[346] *Ibid*., & Article 2(1)(a).
[347] Winter, 2019, p. 195-196.
[348] Paris Agreement art 4(2)
[349] UNEP 2017, p. 17, 8.
[350] Winter, 2019, p. 198.
[351] UNEP 2017, p. 9.
[352] Paris Agreement, Article 4(3).The NDCs also reflect the principle of common but differentiated responsibilities.
[353] Winter, 2019, p. 198.

The NDCs in themselves and the fact that they require regular updating make them valuable in the context of domestic litigation.[354] Once a party has incorporated the goals of the Paris Agreement into its national legal system, enforcement of the Paris Agreement can take place in domestic courts.[355] Indeed, the strength of the Paris Agreement can be found in its impact on domestic enforcement.

As *Urgenda* was filed before the Paris Agreement, references to the Agreement are not found until in the Hague Court of Appeal. Noteworthy, though, is that the case has been credited for having had a signaling effect, contributing to the adoption of the Paris Agreement.[356] In the appeal, the applicants referred to a statement by the government, in which it mentions that it is the duty of the Netherlands to do everything in its power to achieve the Paris goal.[357] The Supreme Court later referred to the Paris Agreement when it argued that the state had an individual responsibility to reduce its emissions.[358]

In *Friends of the Irish Environment* the judge also recognized that "Ireland's commitment to the Paris Agreement requires the State to take action at home while acknowledging the scale of the challenge overall".[359] Likewise, the plaintiffs in *Notre Affaire à Tous* stated that they only invoke the Paris Agreement "in support of a broader argument on France's international commitments".[360] Similarly, neither the plaintiffs nor the defendants or the judge based any crucial point of the argument on the Paris Agreement in *Klimaatzaak*, but simply acknowledged that Belgium is party to the Paris Agreement and that that should inform its climate policy.[361] In *Duarte Agostinho,* however, the applicants are using the Paris Agreement as a tool to argue for states to do their "fair share" of global emissions reductions.[362] In relation to this, the applicants in this case argue that the ECtHR should rely on the Climate Action Tracker (CAT), which is "an independent scientific analysis that tracks government climate action and

[354] Wegener, 2020, p. 23.
[355] Saiger, 2020, p. 50.
[356] van Zeben, 2015, p. 356; Bouwer, 2020, p. 24.
[357] Hague Court of Appeal, para. 25.
[358] Supreme Court of the Netherlands, para.. 7.3.2
[359] High Court of Ireland, para. 101.
[360] Administrative Court of Paris, First Decision, p. 6.
[361] Court of First Instance of Brussels, p. 82.
[362] Duarte Agostinho: Complaint, para. 29.

measures it against the globally agreed [goal of the] Paris Agreement",[363] as they argue it would determine the "correct" measure of global burden-sharing.[364]

The Paris Agreement and the NDCs are only just starting to be used extensively in climate litigation, and there is significant potential for future developments. As the guidelines for the NDCs state that governments continuously shall adopt more stringent mitigation commitments that shall reflect the state's "highest possible ambition",[365] thus makes it clear that regression is not allowed.[366] It also undermines the "drop in the ocean" argument governments frequently resort to,[367] i.e. that "one nation's contributions are immaterial to global mitigation and so are not legally cognizable."[368] In addition, the NDCs arguably impose new and strengthen states' existing due diligence obligations under international environmental law in order to achieve the objective of the agreement, making reference to the best available science.[369]

3.4.3 Principles of International Environmental Law

The plaintiffs in the cases also relied significantly on various principles of international environmental law, a characteristic of this area of law. Whereas traditionally in international law, state responsibility only arises after an internationally wrongful act has been committed, this is not necessarily a reasonable approach when it comes to environmental damage which, potentially, is irreparable.[370] This has led to a shift in the legal discussion regarding the environment, emphasizing prevention instead of reparation.[371]

The change in perception and the realization of the relationship between economic development and environmental protection[372] has given rise to various principles in international environmental law. These principles have broad, but not necessarily universal

[363] *Ibid*., para. 31.
[364] *Ibid*., para. 32.
[365] Paris Agreement, Article 4(3).
[366] UNEP 2017, p. 17.
[367] Verschuuren, 2019, p. 96-97.
[368] UNEP 2017, p. 17.
[369] Winter, 2019, p. 207.
[370] Linderfalk, 2020, p. 136.
[371] *Ibid*.
[372] Yudhoyono, Susilo Bambang, "Economic growth can complement environmental conservation", OECD. Available at: https://www.oecd.org/greengrowth/economic-growth-can-complement-environmental-conservation.htm.

support, which places them in a precarious area legally speaking.[373] Some of them reflect customary international law, others indicate emerging legal obligations, and some might have an even less developed legal status.[374] They can be found in sources ranging from treaties, binding acts of international organizations and state practice to judicial decisions and soft law commitments.[375] Thus, they can be thought of as "general" rules, which means that they potentially apply to all members of the international community, as well as to all activities affecting the environment.[376] Each principle, however, has broad approval and is supported by state practice.[377]

Some of the most common principles recognized to date are 1) the precautionary principle , 2) the principle of preventive action, 3) the principle of sustainable development, 4) the principle of common but differentiated responsibilities, 5) the principle of sovereignty and responsibility, also known as the no-harm principle, and 6) the polluter pays principle.[378] The application of each principle must naturally be reviewed on a case by case basis,[379] and some principles have gained more traction than others, as illustrated by their use in these cases, for example.

Two of the principles most commonly relied on in the cases were the precautionary principle and the principle of prevention. While there is no uniform understanding of the exact meaning of the precautionary principle, the general objective is that states should act with precaution in instances where there is scientific uncertainty.[380] The Rio Declaration states more specifically that "lack of full scientific certainty shall not be used to prevent action".[381] The precautionary principle is well established enough in order to be the basis of a claim, particularly in the

[373] Sands and Peel, 2018, p. 198.
[374] *Ibid*.
[375] *Ibid*., p. 197.
[376] *Ibid*., p. 197.
[377] *Ibid*., p. 198.
[378] *Ibid*., p. 198.
[379] Sands and Peel, 2018, p. 198.
[380] Kriebel, 2001, p. 871.
[381] Rio Declaration on Environment and Development, 14.6.1992, 21 ILM 874, Principle 15. (Hereafter: Rio Declaration). What remains open is the level of scientific uncertainty sufficient to override arguments for postponing measures, or at which measures might even be required as a matter of international law. In addition, Principle 15 of the Rio declaration provides that the precautionary approach shall be widely applied by states according to their capabilities. Sands and Peel, 2018, p. 234.

European context,[382] where it prior to appearing in international environmental instruments could be found in domestic legal systems.[383]

The principle of prevention is also well established in customary international law, and can, for example, be found in the 1972 Stockholm declaration.[384] The principle of prevention or preventive action requires states to take action at an early stage, ideally before damage has occurred.[385] The principle of prevention is thus connected to the exercise of due diligence.[386] The objective is, obviously, to reduce, limit or control activities that might cause environmental risk or damage.[387] Through imposing an obligation on states to take preventive action, failure to take such measures gives rise to international responsibility even in a case where environmental damage eventually does not occur,[388] ultimately leading to greater environmental protection or the prevention of environmental damage altogether.

In *Urgenda*, the plaintiffs stressed that the precautionary principle and the principle of prevention can be found in various agreements that the Netherlands is a party to, such as the UNFCCC[389] and the TFEU,[390] which led to the Hague District Court holding that the state should provide sufficient justification in case it wanted to deviate from these principles.[391] The Supreme Court held that the principle of precaution meant that the state should take "more far-reaching measures, rather than less far-reaching measures",[392] thus requiring the state to increase its emissions reductions.

The claimants in *Klimaatzaak* stated that the defendants were in breach of the principle of precaution through their inadequate climate policies,[393] and they referred to the fact that the State Council (*Conseil d'Etat*) of Belgium considers the principle of precaution to be an

[382] Sands and Peel, 2018, p. 198.
[383] EUR-Lex, "The Precautionary Principle". Available at: https://eur-lex.europa.eu/EN/legal-content/summary/the-precautionary-principle.html.
[384] Stockholm Declaration on the Human Environment, 16.6.1972, 11 ILM 1416, Principle 7, (Hereafter: Stockholm Declaration). See also Rio Declaration, Principle 14.
[385] Linderfalk, 2020, p. 147.
[386] Sands and Peel, 2018, p. 211.
[387] *Ibid*., p. 211.
[388] Linderfalk, 2020, p. 146.
[389] Hague District Court, para 4.56, UNFCCC, Article 3.
[390] Hague District Court, para 4.60, TFEU, Article 19, para 1.
[391] Hague District Court, para 4.77 .
[392] Supreme Court of the Netherlands, para 7.2.10.
[393] Klimaatzaak: Summons, para. 43.

integrated part of Belgian law,[394] as well as to earlier jurisprudence. The principle of precaution played a central role in the decision the court came to, namely that the Belgian authorities are not acting with due care.[395] The precautionary principle can also be found in international agreements France has committed to, as well as in domestic law in the Charter for the Environment, which is why the NGOs standing as plaintiffs in *Notre Affaire à Tous* argued the government was obliged to impose adequate, positive measures in order to prevent potential risks.[396] Plaintiffs in *Duarte Agostinh*o are also urging the ECtHR to bear the precautionary principle in mind when it makes its decision.[397] Neither the principle of precaution nor the principle of prevention were mentioned in *Friends of the Irish Environment*.

Two other principles that were of great importance, and that are somewhat interrelated and thus will be discussed simultaneously, are the principle of sustainable development and the principle of common but differentiated responsibilities (CBDR). Sustainable development has emerged as a buzzword in everyday discourse, but it was first coined as a principle of international environmental law in the 1987 Brundtland report. The report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[398] This represented a fundamental change in the approach to the rights of both living and future generations, as it obliges living generations to take the interests of future generations into account.[399] The UNFCCC not only includes a right to sustainable development, but obliges state parties to promote sustainable development.[400] The principle of sustainable development requires states to accommodate economic development with environmental protection,[401] and consists of various components, one of which is the principle of intergenerational equity.

The principle of intergenerational equity refers to the duty to preserve natural resources for the benefit of future generations, which means that the exploitation of natural resources should take place in a manner that is "sustainable".[402] The concept of intergenerational equity was

[394] Klimaatzaak: Summons, para. 61.
[395] *Ibid*., para. 81; Court of First Instance of Brussels, p. 83.
[396] Letter of Formal Notice, p. 16-17.
[397] Duarte Agostinho: Complaint, para. 8.
[398] Brundtland Report, Principle 27.
[399] Cottier, 2019, p. 12-13.
[400] UNFCCC art. 3(4). Lawrence, 2016, p. 34.
[401] Rio Declaration, Principle 4.
[402] Sands and Peel, 2018, p. 218.

developed by professor Edith Brown Weiss in her book *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*.[403] The fundamental theory is that as humans, we have the natural environment in common with all members of our species, and as ”members of the present generation, we hold the earth in trust for future generations”.[404] The Paris Agreement recognizes that parties should take intergenerational equity into consideration when taking action to address climate change, but it does not provide a definition. References to the rights of future generations can also be found in the UN Sustainable Development Goals,[405] and in some national constitutions.[406]

Sustainable development also includes consideration of the needs of the present generation, with a focus on equitable use of natural resources, i.e. the principle of intragenerational equity.[407] The concept of equity in itself can also be considered as a general principle of international law, taking the ideas of justice and fairness into consideration in the application of a particular rule.[408] Including the concept of equity in environmental instruments provides for a flexible way to interpret rights and obligations in order to reach an equitable result.[409] This is where the principle of sustainable development and CBDR are interlinked.

The CBDR principle consists of two elements: firstly, it refers to a shared responsibility of states to protect the environment, but secondly, this responsibility needs to take into consideration the discrepancy in states' contribution to environmental degradation as well as their actual abilities to mitigate the problem.[410] Developed countries have historically contributed significantly more to the causation of environmental problems, and considering the wealth they have accumulated as a result of their environmental exploitation, they are also better equipped to take climate mitigation action. Developing countries, especially the least developed, however, have contributed far less to the problem but tend to be in the most vulnerable position when it comes to environmental degradation. There is thus a disparity

[403] Brown Weiss, 1989.
[404] Brown Weiss, 1992, p. 395.
[405] United Nations, "Transforming our world: the 2030 Agenda for Sustainable Development", 2015. Available at: https://sdgs.un.org/2030agenda.
[406] Gosseries, 2008, p. 32. Examples include Japan, Norway and Bolivia.
[407] Sands and Peel, 2018, p. 219.
[408] *Ibid*., p. 126-127.
[409] In the Continental Shelf case the ICJ described the concept of equity as being a "direct emanation of the idea of justice" and a "general principle directly applicable as law" which should be applied as part of international law "to balance up the various considerations which it regards as relevant in order to produce an equitable result". Sands and Peel, 2018, p. 126.
[410] Jolly and Trivedi, 2021, p. 316.

between the needs of developing countries and their capacity to meet those needs on their own. In practice, application of the CBDR principle can lead to the imposition of different legal obligations on states, such as accepting periods of delaying implementation or imposing less stringent commitments, taking into account the future economic development of developing countries.[411] The principle is supported by state practice at the regional and global levels and can, for example, be found in both the Rio Declaration[412] and in the Paris Agreement.[413]

The organization Urgenda Foundation states in its by-laws that it strives for a more sustainable society,[414] referring to "sustainable" within the meaning of the Brundtland Report, i.e. including the rights of future generations as well. It is therefore not surprising that the principles of sustainability and CBDR are frequently relied upon in its argumentation.[415] The organization accused the state of pursuing an unlawful climate policy, as it argued the policy failed to sufficiently take into account the needs of future generations.[416] The plaintiffs also referred to the principle of fairness, arguing that industrialized countries such as the Netherlands have to take the lead in mitigation efforts.[417] In its decision, the court in *Urgenda* agreed with the plaintiffs on the importance of fairness, and ordered the state to do its fair share.

As the whole case in *Friends of the Irish Environment* was centered around whether the Plan was *ultra vires* the Act, and the goal of the Act is for Ireland to transition into a sustainable economy where future generations can live sustainably,[418] there is no surprise sustainability was a key concept in the legal proceedings in this case. Climate justice is also explicitly mentioned as something that should be considered when the Plans are being made.[419] The plaintiff thus argued that the state had not taken adequate regard to climate justice in the formulation of the emissions reductions in the Plan.[420]

---

411 Sands and Peel, 2018, p. 246-247.
412 Rio declaration, Principle 7.
413 Paris Agreement, Article 2(2). "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".
414 Hague Distric Court, para. 2.2.
415 *Ibid*., para .4.7-4.8.
416 *Ibid*., para. 4.35.
417 *Ibid*., para. 4. 57.
418 High Court of Ireland, para. 5.
419 Climate Action and Low Carbon Development Act (2015), Section 3(2)(c).
420 High Court of Ireland, para. 23.

The plaintiffs in *Klimaatzaak* and *Notre Affaire à Tous* both briefly referred to sustainable development in their argumentation.[421] The NGOs in the latter case also claimed that the state has a duty to reduce its GHG emissions in proportion to global emissions and in regard to the CBDR principle.[422] No further mentions of equity or intergenerational justice were made in these cases. Contrariwise, the notion of intergenerational equity plays a significant role in *Duarte Agostinho*,[423] not least because the plaintiffs are children and young adults. The applicants even invoke that Article 3(1) of the Convention of the Rights of the Child (CRC), the best interest of the child,[424] must be a primary consideration when the court assesses the issue.[425] The concepts of fair share and fair balance are also emphasized, and the applicants suggest how to determine the contents of these concepts in the context of global emissions reductions.[426] The applicants also stress that the court needs to consider the impacts climate change will have on people "throughout Europe and beyond".[427]

These four principles were the ones most frequently cited and relied on in the cases chosen for this thesis, but brief mentions were also made of the no-harm principle, which guarantees states a sovereign right to exploit their own natural resources in accordance with their own environmental and developmental policies, but has a duty to prevent, reduce and control the risk of environmental harm to other states as a result of these practices,[428] and the, rather self-explanatory, polluter pays principle.[429]

3.5 Human Rights and Constitutional Claims

3.5.1 The Connection between Human Rights and Climate Change

In recent years, a successful approach to climate change litigation has proven to be claims based on provisions that are not specific to climate change, but rather based on alleged violations of constitutional and human rights. While these climate rights cases constitute a relatively small part of the total amount of all climate litigation cases,[430] they have gained a considerable deal

[421] Klimaatzaak: Summons, para. 58, Letter of Formal Notice, p. 15.
[422] Administrative Court of Paris, First Decision, p.1-2.
[423] Duarte Agostinho: Complaint, para. 8.
[424] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Article 3(1).
[425] Duarte Agostinho: Complaint, para. 8.
[426] *Ibid*., para. 29.
[427] *Ibid*., para. 33.
[428] United Nations Environment Programme, "No harm rule". Available at: https://leap.unep.org/knowledge/glossary/no-harm-rule. Birnie et al. 2009, p. 137.
[429] Hague District Court, para 3.2. (no-harm principle); Letter of Formal Notice, p. 15, (polluter pays principle).
[430] UNEP 2020, p. 41. Of nearly 1,600 cases in the Sabin Center's database, just over 100 are based on

of attention precisely because they have been so successful. This subchapter will explore and explain the ways in which the plaintiffs in the cases have made use of international human rights law, more specifically the ECHR, as well as constitutional arguments in their claims.

The connection between climate change and human rights was officially made by the Human Rights Council in 2008.[431] Because of the extent of the problem and its far-reaching consequences, virtually every protected right is at risk of being undermined.[432] The High Commissioner for Human Rights, Michelle Bachelet, has even stated that climate change is the "greatest ever threat to human rights".[433] Phenomena such as flooding, heat stress, droughts and increased exposure to certain diseases will jeopardize the realization of fundamental human rights, such as the right to life,[434] health,[435] food,[436] adequate housing,[437] and the collective right to self-determination.[438]

While it is widely accepted that climate change impacts the realization of human rights, demonstrating that the effects of climate change constitute actionable rights violations is more difficult, especially when it comes to social, economic, and political types of harm.[439] Climate change exacerbates existing vulnerabilities, and so disentangling which injuries are caused by climate change and which are caused by other stresses, such as poverty or resource depletion, provides an additional challenge.[440] However, demonstrating the link between greenhouse gas emissions and injuries to human beings as a consequence of extreme weather events is crucial in order to establish responsibility for threats to human rights.[441] Connecting the physical effects of climate change with peoples' rights and freedoms on the one hand, and with the

constitutional and human rights, and the public trust doctrine.

[431] United Nations Human Rights Council, Human Rights and Climate Change, RES/7/23 2008.

[432] Atapattu, 2016, p. 76.

[433] The Guardian, Climate crisis is greatest ever threat to human rights, UN warns, 9 September 2019. Available at: https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations.

[434] International Covenant on Civil and Political Rights, 1966, UNTS 999, Article 6.

[435] International Covenant on Economic, Social and Cultural Rights, 1966, UNTS 993, Article 12.

[436] *Ibid*., Article 11.

[437] *Ibid*.

[438] International Covenant on Civil and Political Rights, 1966, UNTS 999, Article 1; International Covenant on Economic, Social and Cultural Rights, 1966, UNTS 993, Article 1.

[439] Peel and Osofsly, 2018, p. 46.

[440] Averill, 2009, p. 141.

[441] *Ibid*., p. 144.

responsibility of states on the other is essential,[442] as the issue at stake in any litigation is confined to the rights and obligations of the parties to the dispute.[443]

Before asserting that a rights violation has taken place, agreement first has to be reached on what exactly a certain right entails and determining who is responsible for its protection and to what extent.[444] International and national commitments give rise to both negative and positive obligations for states.[445] Negative obligations require states to refrain from actions that are harmful or actions that are contrary to the commitments made, whereas positive obligations require states to take action and, if need be, adopt necessary and suitable measures in order to protect and ensure the realization of the commitments made.[446] There is extensive case law from the ECtHR on the extent of states' positive obligations in relation to the environment, and the plaintiffs in all of the cases made use of some central cases in their argumentation. Worth noting is also that states have a margin of appreciation, i.e. some flexibility when it comes to the manner in which states are fulfilling their obligations under the ECHR.[447] This is something that governments have invoked when the effect their climate policies have on human rights have been questioned.[448] However, the ECtHR has stated that the obligations rising from Articles 2 and 8 of the ECHR should not be interpreted in a way that places an impossible or disproportionate burden on the state.[449]

While the application of the ECHR in climate cases currently may cause domestic judges headaches, similar rights can be found in national constitutions, the application of which judges may be both more familiar with, and more comfortable with developing jurisprudence on. In addition, what the ECHR lacks in this case, but that can be found in some constitutions, is a right to a healthy environment, a provision that is well suited to be used in human rights-based climate litigation. Despite the fact that the ECHR does not provide for an explicit right to a healthy environment or to a stable climate,[450] and although domestic courts currently are

[442] McInerney-Lankford, 2009, p. 433.
[443] Mayer, 2019, p. 176.
[444] Averill, 2009, p. 142.
[445] Linderfalk p. 142
[446] United Nations Office on Drugs and Crime, "Positive and negative obligations of the state". Available at: https://www.unodc.org/e4j/en/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html.
[447] Greer, 2000.
[448] See, for example Hague District Court, para. 3.3 and para. 4.55. 5
[449] Hague Court of Appeal, para. 42.
[450] Voigt, 2019, p. 9.

applying the law without authoritative guidance on the matter, plaintiffs have extensively made reference to and based their claims on the convention in climate litigation cases, and succeeded in domestic courts.

3.5.2 Dynamic Interpretation of the ECHR

In the European context, and as will be seen in the cases, the right to life (Article 2 of the ECHR) and the right to private and family life (Article 8 of the ECHR) are the ones most frequently cited in climate cases. In fact, these two rights were raised in all the cases and contributed to the outcomes of the decisions in varying degrees. In addition, the right to an effective remedy (Article 13) was raised in *Klimaatzaak*, and the prohibition of discrimination (Article 14), the prohibition of torture (Article 3), and the right to property (Article 1 of Protocol No. 1) were raised in *Duarte Agostinho*, Article 3 and Article 1 of the Protocol notably by the court itself.

When discussing the ECHR and climate change litigation, it is of course important to remember that there currently is no ECtHR ruling that can be used as precedent by domestic courts when dealing with these cases. Both the plaintiffs and the judges therefore must rely on earlier ECtHR case law relating to the environment more broadly and transfer the established principles to this new context. The ECtHR has described the ECHR as a "living instrument"[451] and has stated that "it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement".[452] The "effectiveness principle" emanates from the object and purpose of the ECHR, which is to protect individual human beings.[453] This interpretation follows from the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties.[454] Previous ECtHR case law also makes clear that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.[455] Interpretation and application of the ECHR must also take scientific

[451] Manual on Human Rights and the Environment, Council of Europe publishing, Strasbourg, 2012, p. 31.
[452] *Christine Goodwin v. United Kingdom*, European Court of Human Rights, 11 July 2002, 28957/95, § 74.
[453] Supreme Court of the Netherlands, para. 5.4.1.
[454] Vienna Convention on the Law of Treaties, 23.5.1969, 1155 UNTS 331, Article 31 (1).
[455] *Nada v. Switzerland*, European Court of Human Rights, 12 September 2012, No. 10593/08, § 169.

insights and generally accepted standards into account.[456] Applying existing human rights norms to environmental issues thus requires a dynamic interpretation of the convention and an acknowledgement of the effects on the enjoyment of human rights environmental harm as a result of climate change can have.[457]

As the ECHR does not contain a right to a healthy environment, applicants relying on the Convention have to be able to point to a violation of the rights guaranteed by the ECHR, and not just a general deterioration of the environment.[458] Thus, plaintiffs pointed to previous ECtHR case law in relation to Article 2 and 8 of the ECHR, which has found that the protection of life and health implies the protection of the environment.[459]

3.5.3 Challenges in Rights-Based Climate Litigation

Previous case law and creative argumentation were also used in order to overcome some of the main challenges plaintiffs face when making human rights claims in climate change litigation. These can be referred to as the causality challenge, the cross-temporal challenge, and the extra-territorial challenge.[460] As *Urgenda* mostly succeeded in overcoming these challenges, and as the other cases directly referenced that case when faced with the same challenges, the argumentation in *Urgenda* in relation to these will be analyzed in more detail below.

The causality challenge refers to the need to establish a causal relationship between an actor's greenhouse gas emissions or a state's failure to implement adaptation policies, the impacts thereof, and the subsequent effects on human rights.[461] This may prove challenging, as greenhouse gas emissions are just one of many contributing factors to climate change related events, such as hurricanes, flooding, and sea-level rise.[462] Thus, establishing a causal

[456] *Öneryildiz v. Turkey*, European Court of Human Rights, 30 November 2004, no. 48939/99, § 59, 71, 90 and 93.
[457] Voigt, 2019, p. 9.
[458] Court of First Instance of Brussels, p. 61.
[459] Notre Affaire à Tous: Summary request, p. 10, para. 11.
[460] Setzer and Vanhala, 2019, p. 10.
[461] *Ibid*.
[462] 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, 15 Jan. 2009, para. 70.

connection between the actions of the defendants and the injuries suffered by the plaintiffs can prove to be very difficult.

For a causal connection to be established, many jurisdictions require a direct link between the behavior of an actor and the subsequent harm to another,[463] i.e. that the plaintiffs private interests have been adversely affected by the actions of the defendants.[464] This may constitute a significant challenge due to the nature of climate change and the consequences thereof, where greenhouse gas emissions from multiple emitters have accumulated in the atmosphere since the industrial revolution,[465] and the effects of them are spatially and temporally distant from their origins.[466]

The causality argument was frequently raised by states, as they argued they, as individual states, cannot be held responsible for specific events and adverse impacts on human rights, as their emissions separately only constitute a fraction of the total amount of emissions. In *Urgenda*, the state argued that it cannot be seen as a causer of climate change, as it is not the state itself that emits greenhouse gasses,[467] and that therefore, there are no unlawful actions that can be attributed to the state.[468] The state also argued that the threat is global in nature and relates to the environment, which as established is not explicitly protected by the ECHR.[469] In this context, however, Urgenda Foundation emphasized that per capita emissions in the Netherlands are among the highest in the world, that the joint volume of GHG emissions is unlawful, and that the state is liable for the joint volume.[470] The plaintiffs stated that GHG emissions, and thus contribution to climate change, from the Netherlands is disproportionate and thus contrary to the principle of fairness, both in relation to current and future generations.[471] They further motivated their claims with the no-harm principle,[472] and argued that under the duty of care derived from Articles 2 and 8 of the ECHR, and Article 21 of the Dutch Constitution, the state has a positive obligation to take protective measures.[473]

[463] Galvão Ferreira, 2016, p. 338.
[464] Fisher et al., 2017, p. 185.
[465] Lin, 2012, p. 44.
[466] Averill, 2009, p. 141.
[467] Hague District Court, para. 4.66.
[468] *Ibid*., para. 3.3.
[469] Supreme Court of the Netherlands, para. 5.1.
[470] Hague District Court, para. 3.1 (3)-(5).
[471] *Ibid*., para. 4.1.
[472] *Ibid*., para 3.2.
[473] *Ibid*., para 4.35.

All three courts in *Urgenda* dismissed the state's claims, albeit on different grounds. While the judge in the Hague District Court came to the conclusion that Urgenda could not directly invoke Articles 2 and 8 of the ECHR, Article 21 of the Constitution, or the no-harm principle, as this principle only involves obligations towards other state and the court was to determine whether the state was acting unlawfully against Urgenda,[474] the judge still used these articles and the obligations arising from them as an interpretative tool in answering the question of whether the state had failed to meet its duty of care towards Urgenda, as they establish the minimum degree of care the state can be expected to observe.[475] The court argued that a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects on the Dutch living climate.[476] The court also explicitly concluded that the fact that Dutch emissions only constitute a minor contribution to global emissions does not alter the state's obligation to exercise care towards third parties.[477] The court based this argument on the principle of fairness, arguing the Netherlands has a responsibility towards current and future generations, but also a historical responsibility as an industrialized country.[478] The court also stated that the state indeed exercises control over Dutch emissions.[479] Moreover, the court concluded that the state had not given a reason as to why reducing GHG emissions by the amount requested by Urgenda would be unreasonable – on the contrary, the state had put forward that a higher reduction target was possible.[480] The court thus found that the state was in breach of its duty of care.[481]

In contrast to the judge in the District Court, the judge in the Hague Court of Appeal explicitly based the decision on the failure of the state to fulfill its duty of care as arising from Articles 2 and 8 of the ECHR if emissions were not reduced by at least 25% by end-2020.[482] This was again backed up with references to fairness, as the court stated that the Netherlands has profited from fossil fuels for a long time and that its per capita emissions are among the highest in the

[474] Hague District Court, para 4.42.
[475] *Ibid*., para 4.52.
[476] *Ibid*., para 4.90.
[477] *Ibid*., para 7.79.
[478] *Ibid*., para 4.79, 4.57.
[479] *Ibid*., para 4.66.
[480] *Ibid*.,para 4.86.
[481] *Ibid*.
[482] Hague Court of Appeal, para. 73.

world.[483] This argumentation was upheld by the Supreme Court, arguing that Articles 2 and 8 of the ECHR oblige the Netherlands to do "its part",[484] and stressing that no reduction is negligible.[485] The Supreme Court also referred to ECtHR case law regarding activities that are hazardous to the environment, stating that in such cases, obligations implied by Article 8 of the ECHR largely overlap with those implied by Article 2 of the ECHR, which by extension means that case law regarding the former also applies to the latter.[486] For example has Article 2 of the ECHR, the right to life, been found by the ECtHR in *Budayeva v. Russia* to entail a positive obligation of the state to protect the lives of citizens applies to "any activity, public or otherwise, likely to jeopardize the right to life ",[487] and in *Öneryildiz v. Turkey* that the positive obligation applies to all risks that may affect life, including environmental risks.[488] Article 8, which protects the right to private and family life, including home and correspondence, has been found to be applicable in environment-related situations if 1) an act or omission has an adverse effect on the home and/or private life of a citizen and 2) if that adverse effect has reached a certain minimum level of severity.[489]

When discussing the level of severity and risk, plaintiffs may be faced by the second main challenge in human rights-based climate litigation: the cross-temporal challenge. The cross-temporal challenge refers to the difficulty of using future projections of impacts of climate change on human rights to found claims of human rights violations.[490] Consequences of climate change rarely materialize immediately, and while the precautionary principle in environmental law enables taking future harms and impacts into consideration,[491] violations of human rights are normally not established until after the harm has occurred.[492] Not only does this raise

[483] Hague Court of Appeal, para. 66.
[484] Supreme Court of the Netherlands, para 5.7.1.
[485] *Ibid*., para. 5.7.8.
[486] *Ibid*., para 5.2.4.
[487] *Budayeva and Others v. Russia*, European Court of Human Rights, 29 September 2008, No.1 15339/02, 21166/02, 20058/02,11673/02 ans 15343/02, § 130.
[488] *Öneryildiz v. Turkey*, European Court of Human Rights, 30 November 2004, no. 48939/99, §59-94.
[489] Hague Court of Appeal, para. 40.
[490] 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, 15 Jan. 2009, para. 70; Peel and Osofsky, 2018, p. 46.
[491] Setzer and Vanhala, 2019, p. 10.
[492] 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, 15 Jan. 2009, para. 70.

questions about expected events in the near future, but also about violations of rights of future generations.[493]

The plaintiffs in *Urgenda* argued that the Dutch state was not doing enough in light of current scientific knowledge,[494] and that it was unreasonable that the state was postponing taking precautionary measures because of a lack of total scientific certainty about the effects of such measures.[495] The court(s) found that, in line with the precautionary principle, the duty of care pursuant to Articles 2 and 8 of the ECHR encompasses an obligation on the state to take preventive measures, even in situations when the materialization and the extent of the danger is uncertain.[496] In the event of a real and immediate risk, states are even obliged to take appropriate measures without regard for a margin of appreciation.[497] States do, however, have discretion in choosing whether the measures will be mitigative or adaptive in nature.[498]

The Supreme Court of the Netherlands found that a "real and immediate risk" should be understood as referring to a risk that is both genuine and imminent, and where the term "immediate" rather should be understood as a risk that is directly threatening the persons involved than as a risk materializing in a short period of time.[499] It found that the case law of the ECtHR[500] on positive obligations stemming from Article 2 in this context applies to hazardous industrial activities, whether these are conducted by the government or not, to natural disasters, and to risks that may only materialize in the long term.[501] The court drew similar conclusions based on case law related to Article 8, arguing that serious environmental risks to the enjoyment of private or family life need not exist in the short term for the state to have an obligation to take preventive measures.[502] Under Article 8, protection from the materialization of an environmental threat does not require the existence of danger for a person's health either, but rather a possible serious damage to their environment.[503] The court

[493] Peel and Osofsky, 2018, p. 46.
[494] Hague District Court, para 4.35.
[495] *Ibid*., para. 4.76.
[496] Supreme Court of the Netherlands, para 5.3.2.
[497] *Ibid*.
[498] *Ibid*.
[499] *Ibid*.
[500] *Öneryildiz v. Turkey*, paras. 98-101, *Budayeva and Others v. Russia*, paras. 147-158.
[501] Supreme Court of the Netherlands, para. 5.2.2.
[502] *Ibid*., para .5.2.3.
[503] *Ibid*.

also found that the state has both positive and negative obligations to prevent future violations of the interests protected by Article 2 and 8 of the ECHR.[504] A future infringement is deemed to exist even if the interest has not yet been affected, but is in danger of being affected as a result of an activity or a natural event.[505] The court(s) found that climate change constitutes such a real and immediate risk jeopardizing the lives and welfare of Dutch citizens requiring preventive measures to be taken, mentioning for example sea-level rise as a potential threat.[506]

This finding, emphasizing the lives and welfare of Dutch citizens expressly, relates to the third main challenge in human rights-based climate litigation, i.e., the extra-territorial challenge. This challenge refers to the difficulty in holding individuals, corporations, and governments to account for activities they perform that cause harmful effects in other states.[507] Considering the discrepancy in where most emissions have occurred and where the effects of climate change are most severe, this is a tangible challenge raising questions about climate justice. It raises questions about state responsibility in relation to persons residing outside of the jurisdiction of an emitting state,[508] and the scope of state obligations.

The plaintiffs in *Urgenda* stated they filed the claim on behalf of the Urgenda Foundation, and current and future citizens of the Netherlands as well as citizens of other countries. While the plaintiffs argued the Dutch state "wrongly exposes the international community to the risk of dangerous climate change",[509] the state argued Urgenda Foundation did not have standing to do so,[510] and the court finally came to the conclusion that the Foundation only had standing when it came to acting on its own behalf.[511] This illustrates the problems of the extra-territorial challenge. However, while current and future generations abroad were not explicitly granted full standing,[512] the courts implicitly considered the effects of dangerous climate change on them and recognized that the Netherlands, as a contributor to climate change, has a moral

[504] Hague Court of Appeal, para. 41.
[505] *Ibid*.
[506] Supreme Court of the Netherlands, para 5.6.2
[507] Setzer and Vanhala, 2019, p. 10.
[508] McInerney-Lankford, 2009, p. 433.
[509] Hague District Court, para. 4.1.
[510] *Ibid*., para. 3.3.
[511] *Ibid*., para 5.1. Supreme Court of the Netherlands, para. 2.3.2.
[512] Hague Court of Appeal, para. 4.7, "Therefore, Urgenda can *partially* base its claims on the fact that the Dutch emissions also have consequences for persons outside the Dutch national borders, since these claims are directed at such emissions". Emphasis added.

responsibility to mitigate these effects by referring to an obligation of the Netherlands to "do its part,"[513] or a fair share, of emissions reductions and exercise care towards third parties.[514]

3.5.4 Urgenda as a Blueprint

As *Urgenda* was extraordinary in that it succeeded in overcoming many of the challenges typically associated with human rights-based claims in climate litigations, it inspired many other to pursue similar claims. References to the decision(s) were made by plaintiffs, courts, or both in all of the cases analyzed in this thesis. This is interesting, as it illustrates that unilateral legal developments may very well affect legal norms, rules, and models in other jurisdictions, thus creating transnational law.[515] Domestic courts have thus become notable actors in the field of transnational climate law,[516] as judges in different countries may even cross-reference each other's judgments.[517] This development has created a need for domestic lawyers to be more informed by international law, and international lawyers to be more informed by national systems, as they are no longer completely separated spheres.[518]

The plaintiff in *Friends of the Irish Environment* directly referenced the court's decision in *Urgenda*, and argued that the fact that no country alone, and particularly a country the size of Ireland, can tackle the global problem of climate change alone, but that that does not exempt the state from doing what is necessary based on the available science.[519] The plaintiff also pointed out Ireland's contribution to historical cumulative emissions and disproportionately high per capita emissions,[520] and highlighted that the NTO, which the Plan strives towards, contains a reference to climate justice, but that the Plan, as it was formulated, did not take this sufficiently into consideration.[521]

---

[513] Supreme Court of the Netherlands, para. 5.7.1.
[514] Hague District Court, par 4.79
[515] Bodansky and Shaffer, 2012, p. 32.
[516] Saiger, 2020, p. 37.
[517] Wegener, 2020, p. 22.
[518] Yang, 2012, p. 53.
[519] High Court of Ireland, para. 5.
[520] *Ibid.*, para. 7, para. 31.
[521] *Ibid.*, para. 23.

FIE claimed the Plan would impinge on and threaten the right to life, the right to liberty and security, the right to the integrity of the person, the right to respect for family and private life and home, the right to property, the rights of the child, the rights of the elderly, equality between men and women, environmental protection and/or the unenumerated constitutional right to a reasonable environment.[522] Further, the plaintiff claimed the Plan would breach an unenumerated constitutional commitment to intergenerational solidarity and/ or unenumerated constitutional obligation to vigilantly and effectively protect the environment.[523]

In the first instance, both the government and the trial judge in this case argued the state should be awarded a very wide measure of discretion when it comes to the state's climate policy.[524] However, the court noted the use of the precautionary principle in the decision by the Hague Court of Appeal in *Urgenda*, and agreed with its reasoning when it came to causality and the recognition of dangerous climate change as a real risk.[525] It also recognized that the matter at hand involved very difficult issues of law and science.[526]

For the purpose of the case, the trial judge accepted that the constitutional right to bodily integrity was engaged, and further, that there was an unenumerated right to an environment consistent with human dignity.[527] The judge, however, did not recognize that the Plan was breaching these rights,[528] but held that the adopted Plan was lawful and within the scope of the government's margin of appreciation,[529] and cited the case of *Budayeva v. Russia* in support of this argument.[530]

The judge in the Supreme Court also devoted a significant part of the discussion to if, how, and in that case to what degree, the decision in *Urgenda* should be considered. FIE placed significant reliance on the decision in *Urgenda*, and argued the Irish court should consider this decision as being persuasive as to the proper application of the ECHR to climate change.[531]

---

[522] High Court of Ireland, para. 26.
[523] *Ibid.*, para 26.
[524] *Ibid.*, para 41
[525] *Ibid.*, para 137; Supreme court of Ireland, para. 2.4.
[526] High Court of Ireland, para. 76.
[527] *Ibid.*, para. 133.
[528] *Ibid.*
[529] *Ibid.*, para. 143-144.
[530] *Ibid.*, para 143.
[531] Supreme Court of Ireland, para. 5.13.

The government, on the contrary, had argued that national courts should wait for a decision and follow the ECtHR on this issue, rather than anticipate what such a judgment might look like or view decisions by other national courts as persuasive on the matter. Nonetheless, the Supreme Court judge found that the Plan did not in fact comply with the requirements of the Act and therefore held that the plan should be quashed,[532] referencing that studies show that climate change is already having a profound environmental and societal impact in Ireland, and that predictions indicate that Ireland will be exposed to risks in the future as well.[533] The judge thus argued that precautionary measures should be taken.[534]

The judge in the Supreme Court deviated from the opinion of the trial judge in another crucial question, namely in that of the rights-based claims. The judge of the appeal concluded that FIE lacks standing in both the constitutional claims as well as the ECHR based claims.[535] In addition, the Supreme Court argued that a right to a healthy environment cannot be derived from the Irish constitution on the basis that it is either superfluous if it does not extend beyond the right to life and the right to bodily integrity, or insufficiently defined if it should extend beyond the aforementioned rights.[536] The judge did, however, state that constitutional rights and state obligations may well have significance in environmental issues.[537]

The plaintiffs in *Klimaatzaak* argued that climate change, to which the defendants are contributing, is violating rights guaranteed to them in paragraphs 2 and 4 of Article 23 of the Belgian constitution,[538] and Article 2, 8 and 13 of the ECHR.[539] With regard to Articles 2 and 8 of the ECHR, the plaintiffs stated that the ECtHR has found that the protection of life and health implies the protection of the environment, thus incurring a positive obligation on the state in this matter,[540] and that this case law[541] implies that the authorities of a state have to take

[532] Supreme Court of Ireland, para. 6.48.
[533] *Ibid.*, para. 3.3.
[534] *Ibid.*, para 6.46.
[535] *Ibid.*, para 7.22-7.24.
[536] *Ibid.*, para. 9.5, 8.11.
[537] *Ibid.*, para 8.14.
[538] Belgian Constitution, Article 2 the right to social security, to health care and to social, medical and legal aid, Aricle 4 the right to the protection of a healthy environment, Article 23, the right to lead a life in keeping with human dignity.
[539] Article 2 right to life, Article 8 right to respect for private and family life, Article 23 right to an effective remedy.
[540] Notre Affaire à Tous: Summary request, p. 10, para 11.
[541] See e.g., *Öneryildiz v. Turkey* and *Budayeva and Others v. Russia*.

all measures which can be deemed as reasonable in order to prevent the realization of infringements of Articles 2 and 8 of the ECHR, regardless of whether the infringements are caused by the actions of the authorities or third parties.[542] They argued the state has an even broader duty to protect if the applicants realistically cannot avoid the harm, e.g. pollution.[543]As the emission of greenhouse gasses increases the likelihood of dangerous climate change, but mitigation of the effects thereof is possible with the reduction of GHG emissions, the plaintiffs in *Klimaatzaak* argued the state's positive obligations includes emissions reductions.[544] Further, basing their argumentation on the judgments of *Tătar v. Romania*[545] and *Öneryildiz v. Turkey*,[546] the plaintiffs held that the obligation to take such measures arises as soon as there is an increased risk of infringement of the right to life or the right to respect for private life.[547] The court relied on the same case law in its decision.[548] The plaintiffs also held that there is no doubt that there is a causal link between the negligence of the defendants and the damage that already is visible and that is expected to occur,[549] and that that damage poses a real threat with direct negative effects on the daily lives of current and future generations of the inhabitants of Belgium.[550]

Regarding Article 13 of the ECHR, the applicants argued the state is the only entity that has the power to offer protection from climate change. As a consequence of this, they argued that their right to an effective remedy, granted in Article 13 of the ECHR, is violated if they cannot challenge the defendants in court in the current question.[551] While Article 23 (4) of the Belgian constitution, which establishes a right to a healthy environment, was invoked, this article, perhaps surprisingly, was given relatively little attention and was not of crucial importance when it came to the decision.

As the complaint in *Klimaatzaak* was filed before the decision, and indeed even before the complaint in *Urgenda*, there are obviously no references to the decisions made by the Dutch in

[542] Klimaatzaak: Summons, para. 53.
[543] *Ibid*., para 65.
[544] *Ibid*., para. 55.
[545] *Tătar v. Romania*, European Court of Human Rights, 21 January 2009, No. 67021/01, *§ 107.*
[546] *Öneryildiz v. Turkey,* paras. 98-101.
[547] Klimaatzaak: Summons, para. 61.
[548] Court of First Instance of Brussels, p. 60-61.
[549] Klimaatzaak: Summons, para. 111.
[550] Court of First Instance of Brussels, p.61.
[551] Klimaatzaak: Summons, para. 62, p. 21.

the plaintiffs' requests. However, as the decision in *Urgenda* came before the decision in *Klimaatzaak*, the Belgian court did make reference to and agree with the court in *Urgenda* in that the state has an obligation under Articles 2 and 8 of the ECHR to do its part, even though climate change is a problem of global dimensions.[552] Consequently, the court found that the state of Belgium had not acted with due diligence as it had failed to take the necessary measures obliged to it under Articles 2 and 8 of the ECHR.[553]

Since the court did not determine the defendants in *Klimaatzaak* should reduce their emissions by a specific amount, the plaintiffs in their appeal stated this constitutes an infringement of Article 13 of the ECHR.[554] The plaintiffs further argue that the standard of care which the defendants should observe should be based on the scientifically recognized limit of dangerous global warming and the defendant's knowledge thereof and the danger it poses to their populations.[555] This is in line with the precautionary principle. Thus, the main question the applicants want answered in the appeal is "what can be expected of a public authority that has knowledge of a danger that seriously threatens the life and living environment of its population, and of the measures to be taken to help avoid or limit it?"[556] The plaintiffs argue an adequate standard of conduct imposed by Articles 2 and 8 of the ECHR entails reduction of GHG emissions from Belgian territory by at least 48% by 2025 and by at least 65% by 2030, compared to the 1990 level.[557] Interestingly, the plaintiffs also argued the margin of appreciation awarded to states in implementing the ECHR does not apply to national judges.[558]

The proceedings in *Notre Affaire à Tous* followed a similar pattern of reasoning as the other cases with regard to positive obligations emanating from Articles 2 and 8 of the ECHR, as well as in relation to the taking into account of future damage and risks,[559] emphasizing that public authorities have an obligation to act if it knows or ought to know about the existence of a real

[552] Brussels Court of First Instance, p. 61.
[553] *Ibid*., p. 79.
[554] Klimaatzaak: Request for Appeal, para. 3.
[555] *Ibid*., para. 5.
[556] *Ibid*., para 81.
[557] Klimaatzaak: Request for Appeal, demand 5°.
[558] *Ibid*., para. 156. "The theory of the margin of appreciation has always been seen as a means of defining the relationship between the domestic authorities and the Court. This theory does not apply in the same way to the relationship between the organs of the State at the domestic level".
[559] Letter of Formal Notice, p. 18.

and immediate risk to life, including environmental risks,[560] referring to the same case law as mentioned earlier.[561]

The plaintiffs referred to the decisions in *Urgenda* when arguing for the obligation of the French state to do its part,[562] even if the defendants held that France is only responsible for 1% of global emissions.[563] The defendants argued that this was not enough to establish a causal link, but the plaintiffs stated that the causal link can be established, as the state's faults and omissions directly contribute to the aggravation of environmental damage linked to climate change.[564] What more, the plaintiffs argued that the French state has been aware of the insufficient character of its measures and thus acted negligently.[565] In this respect, the court agreed with the plaintiffs, as it ordered the State to take all necessary measures to comply with its national and international commitments in relation to greenhouse gas emissions, and to repair the ecological damage caused by its inaction.[566]

The plaintiffs also stated that based on the constitution, every person has the right to live in a healthy and ecologically balanced environment, and that the state has a duty of care to guarantee this.[567] The plaintiffs argued this duty of care entails an obligation on the government to take all necessary measures to "identify, avoid, reduce and compensate the consequences of climate change", or in other words, "to implement all necessary measures to efficiently fight against climate change".[568] However, as in *Klimaatzaak*, this explicit invocation of a right to a healthy environment was not decisive in the argumentation or in the decision reached by the court, but rather served as an interpretative tool.

The complainants in *Duarte Agostinho* invoke Articles 2, 8 and 14 of the ECHR, i.e. the right to life, the right to respect for private and family life, and the prohibition of discrimination. The complainants state that they are already exposed to the harms of climate change, especially heat related consequences, and that the defendant states are contributing to climate change through

[560] Letter of Formal Notice, p. 18.
[561] *Öneryildiz v. Turkey* and *Budayeva and Others v. Russia.*
[562] Letter of Formal Notice, p. 41.
[563] Administrative Court of Paris, First Decision, p. 6.
[564] *Ibid*., p. 5,
[565] *Ibid*.
[566] Administrative Court of Paris, Final Decision, Article 2 of the decision
[567] Notre Affaire à Tous: Summary request, p. 9, para. 10.
[568] *Ibid*., p. 10, para 10.

their actions, which constitues a causal link.[569] The plaintiffs argue that the respondent's cannot assert that, individually, their emissions would not have caused such interferences with the plaintiffs' rights, and refer to the, by now familiar, conclusion in *Urgenda*, where the court found that each state has to do its part.[570] Worth noting is that while the plaintiffs naturally recognize the importance of the decision in *Urgenda*, they also stress that even if all domestic courts were to follow this approach and order a reduction by the lowest amount in the ranges applicable for both Annex I and non-Annex I countries, like the court in *Urgenda* did, this would not be sufficient to maintain global warming at the level.[571] In addition, they argue that there is a general principle of law which establishes "that where one or more of a number of potential wrongdoers must have caused a particular harm, but there is uncertainty as to which of them in fact caused that harm, then each of those potential wrongdoers is presumptively responsible in law for the harm in question, such that the onus is on those potential wrongdoers to show that they did not cause it".[572] The plaintiffs also emphasized that this "fair share" of emissions reductions should be read in the light of the "highest possible ambition"[573] of the Paris Agreement, which all the defendants have committed to.[574] Moreover, the plaintiffs argue that, according to this fair balance principle, the court must "take into account the impacts which climate change at its current trajectory stands to have on people throughout Europe and beyond when addressing the obligations of the Respondents towards the Applicants."[575]

In this way, the plaintiffs raise the question of extra-territoriality. They argue that while the fact that an act or omission attributable to a state has an effect outside its territory is not by itself sufficient to give rise to an exercise of jurisdiction, the applicants are within the extra-territorial jurisdiction of the 32 respondent states other than Portugal in the particular circumstances of the present case, and the other states are therefore obliged to secure for them their convention rights insofar as they are relevant to these particular circumstances.[576] In support of this argument, the plaintiffs make extensive references to previous ECtHR case law, such as *Loizidou v. Turkey*,[577] where the court held that "Acts which are 'performed within (…)

[569] Duarte Agostinho: Complaint, para. 9.
[570] *Ibid*., para. 9.
[571] *Ibid*., para. 37.
[572] *Ibid*., para. 26.
[573] Paris Agreement, Article 4(3).
[574] Duarte Agostinho: Complaint, para. 29-30.
[575] Duarte Agostinho: Complaint, para. 33.
[576] *Ibid*., para. 16.
[577] *Loizidou v. Turkey*, European Court of Human Rights, 23 March 1995, No. 15318/89, § 62.

national boundaries (but) which produce effects outside' those boundaries may give rise to jurisdiction in certain circumstances." [578] This is also in line with the no-harm principle. The examples show that states have previously been held to exercise extra-territorial jurisdiction even though they did not exercise state agent authority and control or effective control of an area,[579] and the plaintiffs argue that circumstances, such as the fact that "each of the 32 respondent states is or ought to be aware of the adverse impacts of climate change to which its emissions contribute on persons outside its territory",[580] and that "the impacts of climate change are felt both within and outside each of the 32 respondent states"[581] reinforce the states' obligations and ability to take further measures.[582]

The applicants argue that the threats to their Convention rights trigger the respondent's general duties, even if some of the risks may only materialize in the future and outside of their territory.[583] Given that the applicants are children and young adults, the impacts of climate change and its interference with their rights are likely to progressively intensify over their entire lifetimes.[584] The applicants invoke Article 14 in relation to this, stating that their age is an "other status" on which the grounds of discrimination is prohibited,[585] and climate change is projected to disproportionately affect younger generations.[586] The plaintiffs are asking the court to address this cross-temporal challenge by considering the concept of intergenerational equity and the precautionary principle when it assesses the complaint.[587]

While the plaintiffs in *Duarte Agostinho* have made compelling arguments, provided vivid examples of how climate change interferes and is anticipated to interfere with their lives and wellbeing both now and in the future, and supported their claims with previous case law, it remains to be seen if the plaintiffs will overcome the causality challenge, the cross-temporal

[578] Duarte Agostinho: Complaint, para. 17.
[579] See more examples in Duarte Agostinho: Complaint, para. 12.
[580] *Ibid*., para. 20 ii).
[581] *Ibid*., para. 20 iii).
[582] *Ibid*., para. 19.
[583] *Ibid*., para. 28.
[584] *Ibid*., para. 27.
[585] ECHR, Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*." Emphasis added.
[586] Duarte Agostinho: Complaint, para. 31.
[587] *Ibid*., para. 8.

challenge, and the extra-territorial challenge in court. Many interesting questions are yet to be answered, not least because the ECtHR invoked Article 3, the prohibition of torture, inhuman or degrading treatment or punishment, as well as Article 1 of Protocol No. 1, the right to property, *proprio motu*, or on its own initiative when it communicated the case to the defendant countries.[588] This is surprising, because Article 3 is not commonly invoked in climate litigation, and what is left to be determined is if the threshold of severity for the treatment covered by Article 3 has been met in this case.[589]

As evident from these cases, human rights arguments have played a significant role in climate litigation cases in Europe recently, and courts have responded to these rights-based claims mainly in two ways. The first is, naturally, using them as a basis for exploring whether the defendants' actions or omissions regarding climate change give rise to human rights violations.[590] The second use is as an interpretative tool to assist in finding breaches of other legal obligations,[591] the importance of which shall not be underestimated. Litigants have achieved success in cases where they ask courts to use rights as part of the interpretative process in evaluating other legal obligations relating to a duty of care.[592] The most noticeable impact of the "Urgenda effect" in these cases is the recognition that states have to do their part in the fight against climate change, no matter how futile their emissions contributions might seem as a percentage of the global amount of GHG emissions. *Urgenda* also shifted the focus from this way of viewing emissions to a way in which per capita emissions are to be seen as the starting point, thus resulting in a more equitable distribution. This reasoning has led, in the cases above, to the dismissal of states' "drop in the ocean" arguments. Some of the other, most prominent overarching patterns in the argumentation will be discussed in the following chapter.

[588] Heri, Corina, "The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?", EJIL: Talk!, 22 December 2020. Available at: https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/.
[589] *Ibid*.
[590] Peel and Osofsky, 2018, p. 41.
[591] *Ibid*.
[592] *Ibid*.

4. Emerging Narratives

4.1 Urgency

Evidently, all the cases analyzed in this thesis contain several similarities. The plaintiffs based their arguments on a combination of the sources of legal obligations discussed earlier, thus using hybrid strategies as to best suit their needs, but human rights arguments were among the most prominent and ultimately decisive in the courts' reasoning. Plaintiffs also faced the typical challenges relating to standing and separation of powers but succeeded in having their cases admitted,[593] and forced courts to discuss these disputed questions in more depth. In addition to the strictly legal questions at hand, the plaintiffs tell a similar, coherent story in which the narratives of urgency, human rights stories, and questions of fairness and justice are prominent. Key aspects of these narratives will briefly be explored below.

The parties in all the cases analyzed agreed on the facts of the cases, i.e., the climate science,[594] and ultimately commit to the same end goal, i.e., a significant reduction of greenhouse gas emissions in order to limit global warming. Where they disagreed is with what degree of urgency action should be taken.[595]

Before the Paris Agreement, the scientific and internationally recognized consensus on temperature increase in order to avoid dangerous global warming was 2°C above pre-industrial levels. However, by the time the Paris Agreement was concluded, scientific consensus had shifted to a new target of "well below 2°C", pursuing efforts to limit the temperature increase of 1.5°C above pre-industrial levels.[596] While plaintiffs do recognize that there are different reduction paths to reach net zero emissions by 2050, they also assert that these reduction paths have vastly different results. Emissions released today will contribute to rising temperatures decades into the future,[597] which means that last minute reductions will not prevent harm and a potential exceeding of the target temperature, even if emissions in 2050 are net zero.[598]

---

[593] Duarte Agostinho is, of course, still pending.

[594] See for example: Hague District Court, para. 3.3, 4.16; High Court of Ireland, para. 3.6, 43; Court of First Instance of Brussels, p. 61.

[595] High Court of Ireland, para. 13; Letter of Formal Notice, p. 1; Duarte Agostinho: Complaint, para. 8.

[596] Paris Agreement, Article 2(1)(a).

[597] Rood, Richard B., "How fast can we stop Earth from warming?, The Conversation, 29 March 2022. Available at: https://theconversation.com/how-fast-can-we-stop-earth-from-warming-178295. Administrative Court of Paris, First Decision, p. 5.

[598] High Court of Ireland, para. 8.

At the core of the narrative of urgency is the claim that any political community that has committed to the 1.5°C target has created an obligation of urgent climate action which includes substantial reductions in 2020 and 2030, as the science tells us urgent action is needed.[599] Plaintiffs argue this scientific knowledge should set the basis for the standard of care imposed on governments through which they should interpret their obligations under human rights law, international environmental law, and EU climate law.[600] Plaintiffs also argue, with support from the precautionary principle, that a lack of full scientific certainty is not a reason to postpone measures.[601]

In order to translate the 1.5°C goal into action, plaintiffs emphasize the need for and importance of short-term measures, setting timelines for short term goals.[602] In attempting to conceptualize this notion of urgency, reference is made to metaphors and symbols, such as milestones, crossroads and carbon budgets.[603] Metaphors aid in the clarification of perceptions, and narratives combine these perceptions into a coherent story.[604]

Plaintiffs in the earlier cases, Urgenda, FIE and VZW Klimaatzaak, emphasized the year 2020 as a key milestone for the reduction of greenhouse gas emissions,[605] in contrast to the year 2050 that their respective governments reiterated. The NGOs standing as plaintiffs in France also pressed for immediate, efficient action by the government in the short-term.[606] The emphasis on early and effective action, as opposed to more gradual and moderate reduction, creates the metaphor of a "crossroads" of sorts, from which the implications of choices made will be enhanced in one way or another.[607] The metaphor of a "carbon budget" helps to illustrate that there is a limit to how much carbon the atmosphere can hold (a maximum of 430 ppm according

[599] Paiement, 2020, p. 141, the science tells us we need urgent action to limit warming to 1.5°C above pre-industrial levels https://www.ipcc.ch/sr15/chapter/chapter-2/
[600] Paiment p. 141, Klimaatzaak French speaking court of first instance,p. 59, Klimaatzaak Appeal, para 5
[601] Hague Court of Appeal, para 8
[602] Paiement, 2020, p. 130.
[603] *Ibid*., p. 140-141; High Court of Ireland, para. 7.
[604] Bouwer, 2020, p. 19.
[605] Hague District Court, para 4.1; High Court of Ireland, para. 26; Court of First Instance of Brussels, para 14 p. 8.
[606] Notre Affaire à Tous: Summary request, p. 10, para 10; Letter of Formal Notice, p. 1.
[607] Paiement, 2020, p. 140.

to current science)[608] before "the balance is in the red",[609] i.e.. the temperature increase is estimated to be well over the Paris Agreement target and climate risks are aggravated. The later actions to reduce emissions are taken, the quicker the carbon budget will decrease.[610] This means that action at a later stage would have to be even more radical and stringent to stay within the budget.[611]

Apart from arguing for swift action by governments, the plaintiffs also maintained a need for procedural urgency. FIE, for example, argued they could not wait for a decision from the Court of Appeal because of the urgent nature of the matter, and therefore appealed directly to the Supreme Court. In its appeal, VZW Klimaatzaak stated that the climate emergency is here, and that therefore, it is "absolutely necessary for Your Court to rule on this case as soon as possible" due to the exceptional situation and the urgency.[612] Likewise, the plaintiffs in *Duarte Agostinho* argued the requirement to exhaust domestic remedies would be unreasonable, as it would decrease the "likelihood of the respondents providing a remedy in time to limit global warming to 1.5°C",[613] and that it is critical that the domestic courts in the respondent states "provide an adequate remedy, at the earliest possible time".[614]

Defendant governments, however, tend to emphasize the end goal, that is, net zero emissions by 2050.[615] Thus, they tend to focus on long-term emissions reductions. In addition, governments questioned the legal status of scientific reports, stating, for example like the state in *Friends of the Irish Environment,* that the fact that the state accepts the science does not mean that it must accept the legal consequences of that science.[616]

However, and perhaps a bit paradoxically, they also seem to have adopted another common narrative of their own – that of a high confidence in future technological innovations and economic developments that will mitigate the costs and challenges of climate change and its

[608] IPCC, "Global Warming of 1.5°C - Special Report". Available at: https://www.ipcc.ch/sr15/.
[609] Paiement, 2020, p. 140; Klimaatzaak: Request for Appeal, para. 40; High Court of Ireland, para. 31.
[610] Hague Court of Appeal, para. 71.
[611] Supreme Court of the Netherlands, para. 4.6.
[612] Klimaatzaak: Request for Appeal, para. 121, 74.
[613] Duarte Agostinho: Complaint, para. 32.
[614] *Ibid*., para. 39.
[615] United Nations, "For a livable climate: Net-zero commitments must be backed by credible action". Available at: https://www.un.org/en/climatechange/net-zero-coalition.
[616] Supreme Court of Ireland, para. 5.16.

impacts.[617] This confidence in technology is a variant of a model, the opulence model, that Edith Brown Weiss has identified as an approach to intergenerational equity.[618] She argues that placing such a high level of trust on technology and innovation leads to practices and policies without regard for environmental preservation for future generations.[619] As an alternative, Brown Weiss mentions the environmental economics model, which argues that current economic tools, should "green" economics be applied, would be sufficient to fulfill our obligations to future generations.[620] Plaintiffs in the cases also made economic arguments, stating that immediate and considerable reductions are not only necessary to limit dangerous climate change, they are also the most cost-effective.[621]

Based on the decisions reached by the courts, it does seem like the judges are more receptive to the plaintiffs' narrative of urgent action than to the defendants' optimistic expectations about the future, as courts have in fact emphasized the urgency of the matter when they have ruled in favor of the plaintiffs. Courts also used the metaphor of "tipping points" and the risks of irreversible consequences if action is not taken promptly.[622] The court in *Friends of the Irish Environment* also questioned the reasonableness of the government's reliance on future, currently untested, technology.[623] The fact that the ECtHR decided to fast-track the *Duarte Agostinho* case is also proof that climate change cases are handled with procedural urgency.

4.2 Human Rights Stories

As established, human rights arguments have proven to be one of the most compelling narratives in climate litigation and the choice to focus on human rights is strategic for many reasons. Apart from concretizing an occurrence that otherwise can be perceived as rather abstract, framing a climate case in human rights terms also opens up the possibility to use a wider range of venues.[624] Whereas there is no international environmental tribunal, human

[617] Webster and Mai, 2020, p. 10.
[618] Brown Weiss, 1992, p. 395.
[619] *Ibid*.
[620] *Ibid*.
[621] Hague District Court, para. 3.2
[622] *Ibid*., para. 44; Suprme Court of Ireland, para. 3.7.
[623] High Court of Ireland, para. 9.
[624] Setzer and Vanhala, 2020, p. 11.

rights tribunals are part of a well-established system of protection of human rights and have extensive jurisprudence that can provide guidance and that can be adapted to new circumstances, as evident from the frequent use of ECtHR jurisprudence in these cases. In general, the human rights regime is more robust compared to that of international environmental law.[625]

The role national courts have in the implementation and enforcement in the human rights system is also better established than actions based on principles of environmental protection.[626] Lawsuits identifying violations of human rights due to climate change stand in the way of a government adjusting the minimum threshold for mitigation downwardly.[627] Human rights arguments also add gravitas to a claim, and human rights violations are more likely to attract media attention and spark a debate about the consequences of climate change than environmental arguments alone.[628]

Focusing on stories about ordinary people whose human rights are being violated by the impact of climate change already, not in a distant future, has proven to be a way to shed light on the concrete consequences of climate change and the direction of developments,[629] and as evident from the many "concerned citizen" plaintiffs, human rights arguments also resonate with the wider public. Human rights stories in climate litigation also help to create clear narratives of responsibility, stressing that it is governments and the fossil fuel industry that are responsible for the climate crisis.[630] In addition, they have helped to establish a causal link between climate (in)actions and impacts thereof, which may explain why courts have been so receptive to these arguments.

All plaintiffs referred to the need to prevent dangerous or hazardous climate change, listing consequences like sea level rise, increases in extreme weather events and increased risks of mortality and morbidity, the emergence of new diseases and water shortages.[631] Based on this,

[625] Setzer and Vanhala, 2020, p. 11.
[626] Wegener, 2020, p. 22.
[627] Minnerop, 2019, p. 177.
[628] Averill, 2009, p. 141-142.
[629] *Ibid*., p. 144.
[630] Khan, 2019.
[631] Supreme Court of Ireland, para. 3.3; Supreme Court of the Netherlands, para. 5.6.2, Court of First Instance, p. 61.

they argued climate change will have concrete and adverse impacts on their right to life and/ or right to private and family life. While all the cases referred to the effects on human rights states' inadequate climate policies will have, this is where the plaintiffs in *Duarte Agostinho* make a particularly strong impression. The plaintiffs point to specific deteriorations in their everyday lives, such as having trouble sleeping, experiencing respiratory conditions and anxiety, undoubtedly illustrating the effects of climate change in a palpable manner.[632] The fact that the plaintiffs are children and young adults adds to the seriousness of the issue, as they point out that the harmful effects of climate change are likely to worsen over their lifetime.[633] The unreasonableness regarding the disproportionate effects of climate change younger generations are likely to bear is part of another narrative that appeared in the cases above, that is, a narrative of justice.

4.3 Climate Justice

Apart from plaintiffs arguing that measures need to be taken because of the risks dangerous climate change causes, there is also an underlying notion that action needs to be taken because that is the fair thing to do. Government actions can thus be seen as inadequate based on available scientific knowledge, but they can also be seen as inadequate in relation to doing their "fair share". A narrative of fairness or justice inevitably raises the question of what that entails and for whom. In the context of climate change, "fair" can primarily be understood to refer to intergenerational and intragenerational equity or justice.[634]

In the cases analyzed, both plaintiffs and courts made reference to notions of fairness and justice, such as the principle of common but differentiated responsibilities,[635] intergenerational justice,[636] and notions of fair share[637] and equity.[638] The plaintiffs in *Urgenda* stated that the Dutch state's emissions were excessive, both in "absolute terms and *per capita*"[639], thus

[632] Duarte Agostinho: Complaint, para. 21-22.
[633] *Ibid*., para 27.
[634] While there is a slight difference between equity and justice, there are interchangeably in this context.
[635] See Galvão Ferreira (2016) for more on how the court in *Urgenda* used the CBDR principle. Notre affaire à Tous: Summary request p.1.
[636] High Court of Ireland, para. 26, para. 73.
[637] Duarte Agostinho: Complaint, para. 29-31.
[638] High Court of Ireland, para. 31.
[639] Hague District Court, para 3.2, Emphasis added.

assuming that there is a certain amount of emissions that could be seen as reasonable, or fair, and that that amount is repeatedly exceeded in the case of the Netherlands. Since, according to the plaintiffs, acting now is cheaper than acting in the future, states are obliged to do so, as to guarantee a reasonable distribution of costs between current and future generations, and ensure intergenerational justice.[640] However, a prerequisite for intergenerational justice is intragenerational justice, and current emissions reductions in the Global North are of little help to people already grappling with the effects of centuries of emissions. Climate litigation in the Global North may thus not be the best way to address the climate concerns of those most vulnerable to climate change.[641]

The climate crisis is no different from other crises in that the ones who will be the most acutely affected are persons already in vulnerable positions due to factors such as poverty, gender, age, minority status, and disability. As much as the plaintiffs in the cases above and other citizens in their countries are likely to be affected by climate change, they will not be the people most adversely affected. The plaintiffs do acknowledge that the effects of climate change will be most severely felt in the Global South, in countries that have contributed the least to climate change.[642] They also highlight the role their countries have played in the causation of the current situation, acknowledging the disproportionate historical emissions and the benefits thereof that have placed countries in the Global North in a privileged position, and argue that this gives them an even greater responsibility to take action, which is in line with the CBDR principle.[643]

The inclusion of nationals of other countries, including future generations in these countries, in their arguments indicates that the plaintiffs have a willingness to take the unfair transnational effects of climate change into consideration in their cases, arguing that states have no right to expose the international community to the risk of dangerous climate change.[644] Nonetheless, plaintiffs are aware of the legal restrictions and opposition to this line of argument and have therefore primarily focused on domestic plaintiffs. However, and as concluded by the Hague District Court, the starting point must be that no emissions reduction is negligible. All cases

[640] Hague District Court, para. 4.76.
[641] Averill, 2009, p. 146.
[642] Supreme Court of Ireland, para. 3.3; Klimaatzaak: Request for Appeal, para. 72.
[643] Hague District Court, para 4.57; Administrative Court of Paris, First Decision, p. 1; Duarte Agostinho: Complaint, para. 29.
[644] *Ibid*., para 4.1.

ending in emissions reductions, are thus, *prima facie*, important, meaningful, and desirable, even if they only apply to a small jurisdiction. Arguing otherwise would mean agreeing with states in the "drop in the ocean" argument. In addition, the cases have attracted a lot of media attention and contributed to keeping climate change and climate justice on the agenda. This impact, in combination with the contributions to transnational legal argumentation should not be overlooked, as has been illustrated in this thesis.

5. Conclusions

Climate litigation has now, without a doubt, been firmly established as a tool in the fight against climate change, and a relatively successful one at that. Plaintiffs have succeeded in overcoming considerable challenges, in relation to both justiciability and specific rights-based challenges, by pursuing narratives of urgency, human rights stories, and justice. These narratives have proven to be crucial elements of the current transnational legal strategies in climate litigations, as they contribute to a notion that climate mitigation obligations are derived from a wider transnational conviction that postponing emissions reductions is unreasonable, and not just from provisions in legislation.[645] The narratives are used by ambitious petitioners in a growing number of systematic, carefully planned cases of strategic litigation to enhance their impact and establish a wider precedent. Petitioners have become very aware of the potential effects a climate case may have, and many see their work as contributing to the global climate justice movement.[646] The fact that many cases are now being translated into English to be available to a wider public is, in itself, an example of the ambition and influence many litigants hope to have.

Out of the narratives, the most influential has been the rights-based narrative. The recent transnational developments in Europe in this field can to a large extent be attributed to *Urgenda*, which has influenced litigants all over the region to pursue similar cases of their own. In addition to the tacit support and guidance the case law provides, a partner organization to the Urgenda Foundation, the Climate Litigation Network, provides legal assistance and

[645] Paiement, 2020, p. 141.
[646] Peel and Lin, 2019, p. 696.

grassroots political campaign support to plaintiffs throughout Europe.[647] It is even possible to identify specific influential lawyers that have worked on many of the recent high-profile cases, such as Roger Cox, who initiated the lawsuits in *Urgenda* and *Klimaatzaak*, and later was the lawyer in the case *Milieudefensie et al. v. Royal Dutch Shell plc*.[648]

Interestingly enough, the potential for similar impacts to that of *Urgenda* can already be seen as a reaction to *Duarte Agostinho* – even if the case is yet to be decided – as two Italian cases modeled on the complaint were filed in 2021.[649] Saying that the decision in *Duarte Agostinho* is anticipated and will be significant for the development of future rights-based climate litigation is an understatement.

Meanwhile, other significant developments are taking place. In September 2021, the Parliamentary Assembly of the Council of Europe passed a resolution urging for the Council's Committee of Ministers to adopt an additional protocol to the ECHR that would establish an enforceable right to a safe, clean, healthy, and sustainable environment,[650] and in October 2021, the United Nations Human Rights Council recognized for the first time that having a clean, healthy, and sustainable environment is a human right.[651] These developments will undoubtedly influence and impact climate litigation in the future.

However, there is also a danger in focusing solely on high-profile, groundbreaking cases, as concentrating on these, no doubt major achievements, might give the impression that the job is done when it most certainly is not.[652] Considering that the wealth of the Global North to a large extent has been built on the exploitation of resources, labor and people of the Global South for centuries,[653] and that countries in the Global North to this day count on the availability of consumer goods at a low cost, the production of which largely takes place in low and mid

[647] Paiement, 2020, p. 141. Urgenda, "Climate Litigation Network". Available at: https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/.
[648] In *Milieudefensie et al. v. Royal Dutch Shell plc*. the Hague District Court ordered Shell to reduce its emissions by 45% by 2030, relative to 2019, across all activities including both its own emissions and end-use emissions. See http://climatecasechart.com/climate-change-litigation/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/.
[649] *De Conto v. Italy and 32 Other States* and *Uricchio v. Italy and 32 Other States*.
[650] Parliamentary Assembly of the Council of Europe, "Combating inequalities in the right to a safe, healthy and clean environment", Resolution 2400, 29 September 2021
[651] United Nations General Assembly "The human right to a clean, healthy and sustainable environment ", UN HRC Res 48/13, 8 October 2021.
[652] Bouwer, 2018, p. 484.
[653] Chamberlain, 2019, p. 452.

income countries in the Global South, mitigation litigation in the Global North, while important, does not reduce all of the emissions that could, and should, be attributed to the Global North. Mitigation in the Global North is needed, but so is urgent adaptation in the Global South. In fact, climate change requires action everywhere and on all levels.

While human rights have been argued to be a gap-filler in climate litigation in the absence of more specific and enforceable environmental provisions,[654] I am prepared to argue they should be considered a permanent and crucial feature of climate litigation. Looking at the climate crisis through a human rights lens is the key to advancing climate justice, and climate justice entails equal access to uphold these rights before the courts.[655] The current focus on human rights in climate litigation has nothing but demonstrated the very real and adverse impacts climate change will have on both current and future generations, making the issue more palpable, creating political debate, and spurring further action. There is also great potential and momentum to develop human rights arguments in climate litigation, especially with regard to extra-territorial responsibility for the impacts of climate change. This is where courts, and especially the ECtHR, could learn from developments in the Global South, particularly from South America.[656] A willingness on the part of the ECtHR to respond to transboundary harm, which it has the opportunity to do in *Duarte Agostinho*, would be a step forward for climate justice.[657]

[654] Savaresi and Auz, 2019, p. 1.

[655] Parliamentary Assembly of the Council of Europe, "Combating inequalities in the right to a safe, healthy and clean environment", Resolution 2400, 29 September 2021, Article 17.

[656] Banda, 2018.

[657] Murcott, Melanie, Tigre, Maria Antonia, Zimmermann, Nesa, "Climate Change Litigation: What the ECtHR Could Learn from Courts in the Global South", *Völkerrechtsblog,* 22 March 2022. Available at: https://voelkerrechtsblog.org/climate-change-litigation-what-the-ecthr-could-learn-from-courts-in-the-global-south/.

Bibliography

MONOGRAPHS AND ARTICLES

Atapattu, Sumudu, *Human rights approaches to climate change: challenges and opportunities*, New York: Routledge, 2016.

Averill, Marilyn, "Linking Climate Litigation and Human Rights", in *Review of European Community & International Environmental Law*, Vol. 18, No. 2, pp. 139–147, 2009.

Banda, Maria L., Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Right, *American Society of International Law*, Vol. 22, No. 6, 2018.

Bermingham, Vera & Brennan, Carol, *Tort Law*, Oxford: Oxford University Press, 2008.

Bílková, Veronika, "Justice of Human Rights, in Binder, Christina, Nowak, Manfred, Hofbauer, Jane A. and Janig, Phillipp (eds), *Elgar Encyclopedia of Human Rights*, Edwar Elgar Publishing, 2022.

Birnie, Patricia, Boyle, Alan and Redgwell, Catherine, *International Law and the Environment*, 3rd ed., Oxford, pp.143-152, 2009.

Bodansky, Daniel, "Legally binding versus non-legally binding instruments", in Barrett, Scott, Carraro, Carlo and de Melo, Jaime (eds), *Towards a Workable and Effective Climate Regime*, Clermont-Ferrand France: CEPR Press and Ferdi, pp. 155–165, 2015.

Bouwer, Kim, *Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation*, (author copy), 2020.

Bouwer, Kim, The Unsexy Future of Climate Change Litigation, in *Journal of Environmental Law*, Vol. 30, No. 3, pp. 483–506, 2018.

Brown Weiss, Edith, Environmental Change and International Law: New Challenges and Dimensions, United Nations University Press, Tokyo, 1992.

Brown Weiss, Edith, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity, United Nations University, Transnational Publishers, Tokyo 1989.

Brownlie, Ian, Principles of Public International Law, Oxford: Oxford University Press, 6th ed, 2003.

Burgers, Laura "Should Judges Make Climate Change Law?", in *Transnational Environmental Law*, Vol. 9, No.1, pp. 55–75, 2020.

Chamberlain, Lisa, "Beyond Litigation: the Need for Creativity in Working to Realise Environmental Rights", in Voigt, Christina (ed), *International Judicial Practice on the Environment*, Cambridge: Cambridge University Press, pp. 443–458, 2019.

Cottier, Thomas, “Equity in International Law”, in Cottier, Thomas, Lalani, Shaheeza, and Siziba, Clarence (eds), *Intergenerational Equity: Environmental and Cultural Concerns*, Leiden; Boston: Brill Nijhoff, pp. 11–31, 2019.

Curry, Ian R., “Establishing Climate Change Standing: A New Approach”, in *Pace Environmental Law Review*, Vol. 36, No. 2, 2019.

Feinman, Jay, Law 101, New York: Oxford University Press, 2010.

Fisher, Elizabeth & Scotford, Eloise, & Barritt, Emily, “The Legally Disruptive Nature of Climate Change”, in *The Modern Law Review*, Vol. 80, No. 2, pp. 173–201, 2017.

Galvão Ferreira, Patrícia, “ ‘Common But Differentiated Responsibilities’ in the National Courts: Lessons from Urgenda v. The Netherlands” in the National Courts: Lessons from Urgenda v. The Netherlands”, in *Transnational Environmental Law*, Vol. 5, No. 2, pp. 329–351, 2016.

Greer, Steven, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, in *Human rights files* No. 17, Strasbourg: Council of Europe Publishing, 2000.

Gosseries, Axel.P, Constitutions and Future Generations, in The Good Society, Vol. 17, No. 2, pp. 32–37, Penn State University Press, 2008.

Etty, Thijs, Heyvaert, Veerle, Carlarne, Cinnamon, Huber, Bruce, Peel, Jaqueline and van Zeben Josephine, “Transnational Environmental Law in a Transformed Environment”, in *Transnational Environmental Law*, Vol. 9, No. 2, pp. 197–209, 2020.

Jasanoff, Sheila, States of Knowledge: The Co-Production of Science and the Social Order, Oxford: Taylor & Francis, 2004.

Jolly, Stellina and Trivedi, Abhishek, “Principle of CBDR-RC: Its Interpretation and Implementation Through NDCS in the Context of Sustainable Development”, in *Washington Journal of Environmental Law & Policy*, Vol. 11, No. 3, 2019. pp. 309–348.

Kriebel, David et al., “The precautionary principle in environmental science”, in *Environmental Health Perspectives*, Vol. 109, No. 9, pp. 871–876, 2001.

Lawrence, Peter, “An Atmospheric Trust to Protect the Environment for Future Generations? Reform Options for Human Rights”, in Bos, Gerhard and Düwell Marcus, *Human Rights and Sustainability – Moral responsibilities for the future*, Routledge 2016.

Lin, Jolene, “Climate change and the courts”, Legal Studies, Vol. 32, No. 1, pp. 35–57, 2012.

Linderfalk, Ulf (ed.), Folkrätten i ett nötskal, Studentlitteratur, 3rd ed, 2020.

Markell, David & Ruhl, JB, "An Empirical Assessment of Climate Change in the courts: A New Jurisprudence or Business as Usual?", in *Florida Law Review*, Vol. 64, No. 1, pp. 15–68, 2012.

Mayer, Benoit, The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of the Hague, in *Transnational Environmental Law*, Vol. 8, No. 1, pp. 167–192, 2019.

McInerney-Lankford, Siobhán, Climate Change and Human Rights: An Introduction to Legal Issues, in Harvard Environmental Law Review, vol 33, pp. 431–437, 2009.

Minnerop, Petra, "Integrating the "duty of care" under the European Convention on Human Rights and the science and law of climate change: the decision of The Hague Court of Appeal in the Urgenda case", in *Journal of Energy & Natural Resources Law*, Vol. 37, No. 2, pp.149–179, 2019.

Paiement, Phillip, "Urgent agenda: how climate litigation builds transnational narratives", in *Transnational Legal Theory*, Vol. 11, No. 1–2, pp. 121–143, 2020.

Peel, Jacqueline, and Lin, Jolene, "Transnational climate litigation: the contribution of the Global South" in *The American Society of International Law*, Vol. 113, No. 4, pp. 679–726, 2019.

Peel, Jacqueline & Osofsky, Hari M., "A Rights Turn in Climate Change Litigation?", in *Transnational Environmental Law*, Vol. 7, No. 1, pp. 37–67, 2018.

Peel, Jacqueline & Osofsky, Hari M., Litigation as a Climate Regulatory Tool, in Voigt, Christina (ed.), *International Judicial Practice on the Environment*, Cambridge: Cambridge University Press, pp. 311–336, 2019.

Roberts, Anthea, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", in *International and Comparative Law Quarterly*, Vol. 60, pp. 57–92, 2011.

Saiger, Anna-Julia, "Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach", in *Transnational Environmental Law*, Vol. 9, No. 1, pp. 37–54, 2020.

Sands, Philippe and Peel, Jacqueline, Principles of International Environmental Law, Cambridge: Cambridge University Press, 4th edition, 2018.

Savaresi, Annalisa and Auz, Juan, "Climate Change Litigation and Human Rights: Pushing the Boundaries", in Climate Law, 2019. Available at SSRN: https://ssrn.com/abstract=3374730.

Setzer, Joana & Benjamin, Lisa, " Climate Change Litigation in the Global South: Constraints and Innovations", in *Transnational Environmental Law*, Vol. 9, No. 1, pp 77–101, 2020.

Setzer, Joana & Vanhala, Lisa C., "Climate change litigation: A review of research on courts and litigants in climate governance", in *WIREs Climate Change*, pp. 1–19, 2019.

Shaffer, Gregory & Bodansky, Daniel, "Transnationalism, Unilateralism and International Law", in *Transnational Environmental Law*, Vol. 1, No. 1, pp. 31–41, 2012.

Ulfstein, Geir, "A Transnational Separation of Powers?", *PluriCourts Research Paper*, No. 17-06, 2017.

van Zeben, Josephine, "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?", in *Transnational Environmental Law*, Vol. 4, No. 2, pp. 339–357, 2015.

Verschuuren, Jonathan, "The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions", in *Review of European, Comparative & International Environmental Law*, Vol. 28, No. 1, 94–98, 2019.

Voigt, Christina, "Introduction – International Courts and the Environment: The Quest for Legitimacy", in Voigt, Christina (ed), *International Judicial Practice on the Environment: Questions of Legitimacy,* Cambridge: Cambridge University Press, pp. 1–22 , 2019.

Webster, Emily, Mai, Laura, Transnational environmental law in the Anthropocene, *Transnational Legal Theory*, Vol. 11, No. 1–2, pp. 1–15, 2020.

Wegener, Lennart, "Can the Paris Agreement Help Climate Change Litigation and Vice Versa?", in *Transnational Environmental Law*, Vol. 9, No. 1, pp. 17–36, 2020.

Winter, Kurt, "The Paris Agreement: New Legal Avenues to Support a Transboundary Harm Claim on the Basis of Climate Change", in Voigt, Christina (ed), *International Judicial Practice on the Environment: Questions of Legitimacy,* Cambridge: Cambridge University Press, pp. 188–211, 2019.

Yang, Tseming, "The Emerging Practice of Global Environmental Law", *Transnational Environmental Law*, Vol. 1, No. 1, pp. 53–65, 2012.

TREATIES AND STATUTES

2015 Paris Agreement of the United Nations Framework Convention on Climate Change, Paris 12 December 2015, entry into force 4 November 2016, UNTS 3156.

2007 Treaty on the Functioning of the European Union 2007 (2008/C 115/01)

1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, entry into force 30 October 2001, 2161 UNTS 447.

1992 United Nations Framework Convention on Climate Change, New York 9 May 1992, entry into force 21 March 1994, 1771 UNTS 107.

1989 Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3.

1969 Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980,1155 UNTS 331.

1966 International Covenant on Civil and Political Rights, New York 16 December 1966, entry into force 23 March 1976, UNTS 999.

1966 International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, entry into force 3 January 1976, UNTS 993.

1950 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entry into force 3 September 1953, ETS5.

1945 Statute of the International Court of Justice, San Francisco 24 October 1945, entry into force 28 April 1946, 33 UNTS 993.

INTERNATIONAL CASE LAW

2021 *Notre Affaire à Tous and Others v. France*, Administrative Court of Paris, 14 October 2021, 44-008 60-01-02-02 54-07-03 R.

2021 *VZW Klimaatzaak v. Kingdom of Belgium and Others*, Court of First Instance of Brussels, 17 June 2021, 2015/4585/A.

2021 *Notre Affaire à Tous and Others v. France,* Administrative Court of Paris, 3 February 2021, 44-008 60-01-02-02 R 6.

2020 *Duarte Agostinho and Others v Portugal and 32 Other States*, "Complaint", European Court of Human Rights 2 September 2020.

2020 *Friends of the Irish Environment v. The Government of Ireland*, Supreme Court of Ireland, 31 July 2020, IESC 49.

2019 *State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2007, No. 19/00135.

2019 *Friends of the Irish Environment v. The Government of Ireland*, High Court of Ireland, 19 September 2019, IEHC 747, No 793 JR.

2018 *Urgenda Foundation v State of the Netherlands*, Hague Court of Appeal, 9 October 2018, HAZA C/09/00456689, No. 200.178.245/01.

2015 *Urgenda Foundation v. the State of the Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196, No. C/09/456689.

2012 *Nada v. Switzerland*, European Court of Human Rights, 12 September 2012, No. 10593/08.

2009 *Tătar v. Romania*, European Court of Human Rights, 21 January 2009, No. 67021/01.

2008 *Budayeva and Others v. Russia*, European Court of Human Rights, 29 September 2008, No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

2004 *Öneryildiz v. Turkey*, European Court of Human Rights, 30 November 2004, No. 48939/99.

2002 *Christine Goodwin v. United Kingdom*, European Court of Human Rights, 11 July 2002, No. 28957/95.

1995 *Loizidou v. Turkey*, European Court of Human Rights, 23 March 1995, No. 15318/89.

DOMESTIC LAW

2021 Belgian Constitution (English translation), updated 2021. Available at: https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf.

2015 Ireland: Climate Action and Low Carbon Development Act 2015. Available at: https://www.irishstatutebook.ie/eli/2015/act/46/enacted/en/print#sec2.

2015 France: Loi de transition énergétique pour la croissance verte. Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000031044385/.

2009 France: Grenelle de l'environnement. Available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000020949548/.

2007 Belgian Civil Code. Available at: https://vlex.be/vid/eacute-fond-article-code-civil-41427591

2000 France: Code de l'environnement. Available at: https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006074220/.

1999 France: Code Civil, 7 January 1999. Available at: https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070721/.

DECLARATIONS AND RESOLUTIONS

2009 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, 15 Jan. 2009

2008 United Nations Human Rights Council, Human Rights and Climate Change, RES/7/23, 2008.

1992 Rio Declaration on Environment and Development, 14.6.1992, 21 ILM 874.

1987 United Nations General Assembly, 'Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)', 1987, A/42/427.

1972 Stockholm Declaration on the Human Environment, 16.6.1972, 11 ILM 1416.

OTHER DOCUMENTS AND PUBLICATIONS

Climate Change Advisory Council (Ireland), Annual Report, 2018. Available at: https://www.climatecouncil.ie/media/climatechangeadvisorycouncil/contentassets/publications/CCAC_AnnualReview2018.pdf. Last accessed: 9 May 2022.

Council of Europe Publishing, Manual on Human Rights and the Environment, 2012. Available at: https://www.echr.coe.int/librarydocs/dh_dev_manual_environment_eng.pdf. Last accessed: 5 March 2022.

ESCR-Net, "'Amicus Reaffirms States' Human Rights Obligations to Adequately and Effectively Address the Climate Crisis", 12 May 2021. Available at: https://www.escr-net.org/news/2021/amicus-reaffirms-states-human-rights-obligations-adequately-and-effectively-address. Last accessed: 7 May 2022.

European Court of Human Rights, "Court Communication of Case to Defendant Countries", 30 November 2020. Available at:http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201130_3937120_na-2.pdf.

European Court of Human Rights, "Requête no 39371/20 Duarte Agostinho et autres c. Portugal et autres" (Rejecting a motion by the defendants asking the Court to overturn its fast-tracking decision), 4 February 2021. Available at:

http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210204_3937120_decision.pdf

French Minister of Ecological Transition, "State's Reply", 23 June 2020. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200623_NA_reply-1.pdf. Last accessed 28 October 2021.

IPCC, "Global Warming of 1.5°C - Special Report". Available at: https://www.ipcc.ch/sr15/. Last accessed: 9 May 2022.

IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report' (IPCC 2022). Available at: https://www.ipcc.ch/report/ar6/wg2/. Last accessed: 7 May 2022.

IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the IPCC Sixth Assessment Report', Summary for Policymakers, (IPCC 2022). Available at: https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf. Last accessed: May 11 2022.

Notre Affaire à Tous and Others v. France, "Letter of Formal Notice", 17 December 2018. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190204_NA_na-1.pdf. Last accessed: 16 April 2022.

Notre Affaire à Tous and Others v. France, "Summary request", 14 March 2019. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190314_NA_complaint-2.pdf. Last accessed: 22 October 2021.

Public Law Project, Guide to Strategic Litigation, 2014. Available at: https://publiclawproject.org.uk/content/uploads/data/resources/153/40108-Guide-to-Strategic-Litigation-linked-final_1_8_2016.pdf. Last accessed: 14 October 2021.

Sandvig, Jenny, Dawson, Peter and Tjelmeland, Marit, Can the ECHR Encompass the Transnational and Intertemporal Dimensions of Climate Harm?, EJIL: Talk!, 23 June 2021. Available at: https://www.ejiltalk.org/can-the-echr-encompass-the-transnational-and-intertemporal-dimensions-of-climate-harm/. Last accessed: 9 May 2022.

Setzer, Joana and Higham, Catherine, Global trends in climate change litigation: 2021 snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. Available at: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf. Last accessed: 8 May 2022.

United Nations Environment Programme and Sabin Center for Climate Change Law, *Status of Climate Change Litigation, a Global Review*, 2017. Available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllo%20wed=y%20%20p.%204. Last accessed: 5 March 2022.

United Nations Environment Programme, *Global Climate Litigation Report – 2020 Status Review*, 2020. Available at: https://www.unenvironment.org/resources/report/global-climate-litigation-report-2020-status-review Last accessed 8 March 2022.

United Nations, "Transforming our world: the 2030 Agenda for Sustainable Development", 2015. Available at: https://sdgs.un.org/2030agenda. Last accessed: 11 May 2022.

VZW Klimaatzaak v. Kingdom of Belgium and Others, "Request for Appeal", 17 November 2021. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20211117_2660_petition.pdf. Last accessed: 16 April 2022.

VZW Klimaatzaak v. Kingdom of Belgium and Others, "Summary of the arguments pur forward", 16 December 2019. http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191216_2660_na-2.pdf Last accessed: 16 April 2022.

VZW Klimaatzaak v. Kingdom of Belgium and Others, "Summons", 1 December 2014. Available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2014/20141201_2660_summons.pdf. Last accessed: 16 April 2022.

Parliamentary Assembly of the Council of Europe, "Combating inequalities in the right to a safe, healthy and clean environment", Resolution 2400, 29 September 2021. Available at: https://pace.coe.int/pdf/d73530f6a77b1ad1238ee2d7346423fa1a4960f6711e38012ab22f456247406f/resolution%202400.pdf. Last accessed: 11 May 2022.

United Nations General Assembly "The human right to a clean, healthy and sustainable environment ", UN HRC Res 48/13, 8 October 2021. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement. Last accessed: 10 May 2022.

NEWS ARTICLES AND OTHER INTERNET SOURCES

Cornell Law School, Legal Information Institute, "Public Trust Doctrine". Available at: https://www.law.cornell.edu/wex/public_trust_doctrine. Last accessed: 11 April 2022.

Encyclopaedia Britannica, "Separation of Powers". Available at: https://www.britannica.com/topic/separation-of-powers. Last accessed: 9 may 2022.

EUR-Lex, "The Precautionary Principle", summary. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/the-precautionary-principle.html. Last accessed: 9 May 2022.

European Center for Constitutional and Human Rights, definition of strategic litigation https://www.ecchr.eu/en/glossary/strategic-litigation/. Last accessed: 13 October 2021.

European Environment Agency, "EU Achieves 20-20-20 Climate Targets, 55 % Emissions Cut by 2030 Reachable with More Efforts and Policies", 26 October 2021. Available at: https://www.eea.europa.eu/highlights/eu-achieves-20-20-20. Last accessed: 4 May 2022.

Heri, Corina, "The ECtHR's Pending Climate Change Case: What's Ill-Treatment Got To Do With It?", EJIL: Talk!, 22 December 2020. Available at: https://www.ejiltalk.org/the-ecthrs-pending-climate-change-case-whats-ill-treatment-got-to-do-with-it/. Last accessed: 15 November 2021.

Khan, Tessa, Litigation is a Powerful Tool for Holding Those Responsible for the Climate Crisis to Account, Time Magazine, September 25, 2019. Available at: https://time.com/5686087/courtroom-climate-change-litigation/. Last accessed: 8 May 2022.

King, Ed, "Dutch government heads to court on climate change charges", Climate Home News, 7 April 2015. Available at: https://www.climatechangenews.com/2015/04/07/dutch-government-heads-to-court-on-climate-change-charges/Last accessed: 11 May 2022.

L'affaire du siècle, "Qui Sommes-Nous ?". Available at: https://laffairedusiecle.net/qui-sommes-nous/. Last accessed: 7 May 2022.

Murcott, Melanie, Tigre, Maria Antonia, Zimmermann, Nesa, "Climate Change Litigation: What the ECtHR Could Learn from Courts in the Global South", *Völkerrechtsblog,* 22 March 2022. Available at: https://voelkerrechtsblog.org/climate-change-litigation-what-the-ecthr-could-learn-from-courts-in-the-global-south/. Last accessed: 11 May 2022.

Rood, Richard B., "How fast can we stop Earth from warming?, The Conversation, 29 March 2022. Available at: https://theconversation.com/how-fast-can-we-stop-earth-from-warming-178295. Last accessed: 10 May 2022.

Sabin Center for Climate Change Law, 'About' http://climatecasechart.com/climate-change-litigation/about/. Last accessed: 6 May 2022.

Sabin Center for Climate Change Law, 'Global Climate Change Litigation' http://climatecasechart.com/climate-change-litigation/non-us-climate-change-litigation. Last accessed: 8 May 2022.

Sabin Center for Climate Change Law, Urgenda Foundation v. State of the Netherlands, "Summary". Available at: http://climatecasechart.com/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/. Last accessed: 12 October 2022.

The Guardian, Climate crisis is greatest ever threat to human rights, UN warns, 9 September 2019. Available at: https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations. Last accessed: 9 October 2021.

United Nations Climate Change, Process and Meetings, "The Paris Agreement". Available at: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement. Last accessed: 9 May 2022.

United Nations, “Climate Justice” (*Sustainable Development Goals*), May 31, 2019. Available at https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/. Last accessed: 14 April 2022.

United Nations Environment Programme, “No harm rule”. Available at: https://leap.unep.org/knowledge/glossary/no-harm-rule. Last accessed: 9 May 2022.

United Nations, “For a livable climate: Net-zero commitments must be backed by credible action”. Available at: https://www.un.org/en/climatechange/net-zero-coalition. Last accessed: 10 May 2022.

United Nations Office on Drugs and Crime, “Positive and negative obligations of the state”. Available at: https://www.unodc.org/e4j/en/tip-and-som/module-2/key-issues/positive-and-negative-obligations-of-the-state.html. Last accessed: 11 March 2022.

Urgenda, “Climate Litigation Network”. Available at: https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/. Last accessed: 8 May 2022.

Yudhoyono, Susilo Bambang, “Economic growth can complement environmental conservation”, OECD. Available at: https://www.oecd.org/greengrowth/economic-growth-can-complement-environmental-conservation.htm. Last accessed: 11 May 2022.