Climate Change Litigation with a Human Face

*Adriana Šefčíková**

Abstract

Climate change has been acknowledged as a threat to human rights. As a result, the potential of human rights argumentation in climate change litigation has been explored by legal scholars and litigants over the past couple of years. Currently, we have entered the period when a considerable part of high-profile climate change cases across the world is based on human rights argumentation. More domestic cases relying on human rights are getting to the highest judicial instances with positive outcomes, while litigants are gradually reaching out also to international human rights bodies. However, far from all the cases bring satisfying results, and there are persisting legal hurdles which claimants have been struggling with. Many of these complications are an indirect result of the plurality of actors on both sides, plaintiffs on the one side, and culprits on the other. This article aims at looking into how cases cope with legal difficulties connected to multiplicity of actors, such as the question of extraterritoriality, exhaustion of remedies, standing, and causation.

I Introduction

Climate change (CC) debuted in the field of law as an environmental issue. Nevertheless, a growing number of scholars have noticed implications of CC for human rights over the past decade.[1] The environmental dimension of human rights was firstly acknowledged in 1972 by the Stockholm Declaration[2] and was later confirmed, e.g. by the Vice-President Weeramantry of the International Court of Justice who noticed in the *Gabcikovo-Nagymaros* case: '*The protection of the environment is likewise a vital part of contemporary human rights doctrine*'.[3] The concrete relationship between human rights and CC was later examined by the United Nations (UN) through a series of studies and resolutions.[4]

Human rights might be affected by the CC both in a direct and an indirect way. Firstly, the most severe violations of human rights

* Adriana Šefčíková, Research Assistant, Aarhus University. For correspondence: <adriana.sefcikova@gmail.com>.

[1] Setzer Joana and Vanhala Lisa C., 'Climate change litigation: A review of research on courts and litigants in climate governance' (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change <https://onlinelibrary.wiley.com/doi/abs/10.1002/wcc.580> accessed 13 December 2019 1, at 10.

[2] Declaration of the United Nations Conference on the Human Environment (15 December 1972) UNGA A/RES/2994 (Stockholm declaration), para 1.

[3] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Sep. Op. Weeramantry) [1997] ICJ <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf> accessed 10 April 2020, 88, at 91.

[4] UN Human Rights Council (UNHRC), 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (2009) UN Doc A/HRC/10/61 (OHCHR Report); UNHRC, 'HRC Resolution 10/4: Human Rights and Climate Change' (2009) UN Doc A/HRC/RES/10/4; UNHRC, 'HRC Resolution 18/22: Human Rights and the Environment' (2011) UN Doc A/HRC/RES/18/22; UNHRC, 'HRC Resolution 26/27: Human Rights and the Environment' (2014) UN Doc A/HRC/RES/26/27; UNHRC, 'HRC Resolution 29/15: Human Rights and the Environment' (2015) UN Doc A/HRC/RES/29/15; UNHRC, 'HRC Resolution 32/33: Human Rights and the Environment' (2016) UN Doc A/HRC/RES/32/33; etc.

are caused by the adverse effects of CC itself.[5] Extreme weather events and other CC impacts – such as floods or droughts – can potentially threaten the right to life, right to food, right to health, right to water, and right to adequate housing.[6] The aftermath of CC may affect particularly civil, political, economic, social, and cultural rights,[7] anchored internationally and regionally. Having low or no capacity to combat the consequences of CC, children, women, elderly, and indigenous peoples belong among the most vulnerable groups.[8] Extreme weather events, but also increased temperatures are a risk factor connected to premature deaths, especially among certain vulnerable groups.[9] The life and health of the population might be further endangered by infectious vector, water, or foodborne diseases such as malaria, diarrhoea, and other diseases spreading in warmer conditions.[10] Moreover, growing amounts of CO_2 emissions might lead to crop degradation, and subsequently to food scarcity.[11] Furthermore, coastal settlements and inhabitants of small islands might be endangered by the rising sea levels, resulting in violations of their rights to housing as we can already observe in the case of several villages and settlements in the Arctic.[12]

Indirect human rights violations in the context of CC take place when climate policies and projects created for the improvement of climate conditions lead to human rights violations.[13] While having a CC mitigating effect, climate projects and policies may endanger local communities. Violations of human rights appear especially if people are not consulted in regard to mitigation and adaptation plans.[14] The most important rights in peril are procedural rights, i.e. access to information and participation in decision-making.[15]

Attempts to link human rights and impacts of CC in climate lawsuits have been rising. Plaintiffs' legal advisors around the world have understood that human rights may, to a certain extent, fill in the gaps of international environmental law. The human rights argumentation has further been supported as it can provide some advantages compared to international environmental law, such as a wider choice of avenues and an increased moral authority of the judgment.[16]

Moreover, as CC has long been perceived as a scientific issue distant from humanity, framing the impacts as human rights issue may break down this conception and make people under-

[5] Schapper Andrea and Lederer Markus, 'Introduction: Human rights and climate change: mapping institutional inter-linkages' (2014) 27(4) Cambridge Review of International Affairs <http://www.tandfonline.com/doi/abs/10.1080/09557571.2014.961806> accessed 13 December 2019 666, at 668.

[6] IPCC, 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2014), at 7–8; Bodansky Daniel, Brunnée Jutta and Rajamani Lavanya, 'Intersections between International Climate Change Law and Other Areas of International Law', in Bodansky Daniel, Brunnée Jutta and Rajamani Lavanya, *International climate change law* (1 st. edn, Oxford University Press 2017), at 301.

[7] Schapper Andrea and Lederer Markus (n 5), at 669.

[8] Atapattu Sumudu A. and Schapper Andrea, *Human rights and the environment: key issues* (Key issues in environment and sustainability, 1 st. edn, Routledge 2019), 249.

[9] IPCC, 'Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change' (2014), at 69.

[10] World Health Organisation, 'Climate change and heath' (1 February 2018) <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> accessed 25 June 2020.

[11] IPCC (n 6) 51.

[12] Ibid., at 67.

[13] Schapper Andrea, 'Climate justice and human rights' (2018) 32(3) International Relations <http://journals.sagepub.com/doi/10.1177/0047117818782595> accessed 28 February 2020 275, at 278.

[14] Schapper Andrea and Lederer Markus (n 5) 671–672.

[15] UNHRC 'OHCHR Report' (n 4) 25–26.

[16] Bodansky et al. (n 6) at 299–300.

stand the impacts CC has on our lives.[17] To account for all the impacts of CC on human rights, we need to abandon the purely scientific perception of CC and focus also on the social side of the problem. Rights-based CC litigation has had such an effect, gradually leading to establishment of a whole social movement,[18] bringing an intensive media attention, and eventually raising public awareness about CC.[19]

II Multiplicity Factor and Its Challenges in Rights-Based Lawsuits

Although rights-based climate litigation appears promising, it entails many legal obstacles on different levels. Many of these hurdles are connected to the multiplicity of actors in CC litigation. On the one hand, lawsuits are gradually brought on behalf of multiple plaintiffs in order to strengthen the relevance of the claim. On the other hand, character of greenhouse gases (GHGs) leads to plurality of culprits responsible for CC impacts. While the multiplicity of claimants brings some advantages, such as cost savings, it for example hinders standing in some jurisdictions or before international courts. Moreover, plurality of culprits affects the possibility to draw a causal relationship between the emission of GHGs (culprits' actions) and human rights violations and accentuates the issue of exported emissions and extraterritoriality. On the example of selected case law, this article analyses the above-presented legal challenges to illustrate how the challenges can or cannot be overcome.

1. Extraterritoriality

The plurality of actors operating across the borders involved in carbon emissions production gives rise to a variety of extraterritorial problems. Looking at the issue through human rights CC perspective, we can distinguish three main extraterritorial problems. Firstly, we can speak about the extraterritorial character of GHGs, where emissions from one country can affect the situation in another country. Although the world is artificially divided into regions, from a CC angle, political borders are not relevant as GHGs move freely around our globe's atmosphere, diffuse effects of CC can therefore be most perceptible in other countries than the one where they were produced.[20] The distance between the emitter and the consequences of its actions in another country is clearly illustrated in the *Lliuya v RWE AG* case.[21] Mr. Liuya, a farmer and a mountain guide from Peru, filed a lawsuit in Germany against the German company RWE AG – responsible for 0.47 per cent of global emissions,[22] which allegedly contributed to glacier flood risk in Peru.[23]

The second conception of extraterritoriality is connected to the first example in the sense that the emission of GHGs can be perceived as a harmful act of the state or a corporation which can have transboundary effects on foreign citi-

[17] Burns William C. G. and Osofsky Hari M., *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009), at 360. *See also*: Bodansky et al. (n 6) at 300.

[18] Averill Marilyn, 'Linking Climate Litigation and Human Rights' (2009) 18(2) Review of European Community & International Environmental Law <http://doi.wiley.com/10.1111/j.1467-9388.2009.00636.x> accessed 13 December 2019, 139, at 144.

[19] Drugmand Dana, 'Pacific Islands Group Pushes for International Court Ruling on Climate and Human Rights' (*The Climate Docket*, 13 August 2019) <https://www.climatedocket.com/2019/08/13/pacific-islands-climate-change-human-rights/> accessed 20 September 2020.

[20] Bodansky et al. (n 6) 308.

[21] *Lliuya v RWE AG*, 2 O 285/15 (Essen Regional Court, 15 December 2016) <https://germanwatch.org/en/14198> accessed 14 February 2020.

[22] Heede Richard, 'Carbon Majors: Accounting for carbon and methane emissions 1854-2010 Methods & Results Report' (2014) <http://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf> accessed 20 February 2020, at 27.

[23] *Lliuya v RWE AG* (n 21).

zens' rights.[24] Considering the historical background, we note that human rights treaties were adopted in times when states did not count with phenomena such as transboundary harm on human rights.[25] Most of the human rights treaties work territorially and vertically, i.e. from citizens (rights-holders) to states (duty-bearers).[26] This territorial approach is not viable in the CC context.[27] Despite that some international human rights treaties call for cooperation[28] and several human rights authorities asserted that states have an obligation to address extraterritorial effects of CC, many states stay reluctant towards legal obligations of responsibility outside of their territory.[29] Moreover, approach of some regional human rights authorities still appears to be more or less cautious, and for instance in case of the European Court of Human Rights (ECtHR) rather inconsistent as it to date does not provide a clear answer, in which concrete situations the jurisdiction can function extraterritorially. ECtHR has been gradually developing the understanding of jurisdiction, starting from the premiss that the rule of territoriality is primary, while the extraterritorial jurisdiction should be only exceptional. Over time, some cases, such as *Soering v. the United Kingdom* confirmed that states may be held responsible for acts of their authorities, which produce effects outside their own territory.[30] This approach was, however, undermined by a subsequent *Banković* decision, which returned to a very restrictive interpretation of jurisdiction under international law that allows only for handful of exceptions which need to be justified in particular case.[31] One of the most influential landmark cases in context of exceptions became *Loizidou v Turkey*, where the ECtHR introduced the notion of an 'effective control' over an area outside of state's territory.[32] If state enjoys such power over an area – irrespective of whether such control is lawful or unlawful (e.g. occupation) – this can lead to confirmation of jurisdiction of the state in question over the respective area.[33] Except from territorial control, state may also be held accountable for violations of rights of persons who are in the territory of another state, so-called 'personal control' – most commonly through a state agent control or a state authority.[34]

In contrast to ECtHR case law stands a new position of Inter-American Court of Human Rights, which asserts in its 2017 Advisory Opinion that the notion of effective control should not be limited to control over area or persons, but

[24] Setzer Joana and Vanhala Lisa C. (n 1), at 10.

[25] Shelton D and Robinson M, 'Equitable Utilization of the Atmosphere: a Rights-Based Approach to Climate Change?' in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2009) 91, at 92.

[26] Atapattu Sumudu A. and Schapper Andrea (n 8) 289.

[27] Ibid. 290.

[28] See notes (n 41) – (n 45).

[29] UNHRC, 'OHCHR Report' (n 4) paras 84–88; UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, para 14.

[30] *Soering v. the United Kingdom* App. No 14038/88 (ECtHR, 1989), paras 86 and 91; Directorate of the Jurisconsult, 'Practical Guide on Admissibility Criteria' (updated 21 February 2021) <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 31 March 2021, at 56.

[31] *Banković v. Belgium and others* App. No 52207/9 (ECtHR, 12 December 2001), para 61.

[32] *Loizidou v Turkey* App. No 15318/89 (ECtHR, 18 December 1996).

[33] Ibid., p. 17.

[34] *Al-Skeini v. United Kingdom* App. No 55721/07 (ECtHR, 7 July 2011). *See more*: Besson, Samantha, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To.' (2012) 25(4) Leiden Journal of International Law, 857, at 871; Directorate of the Jurisconsult, 'Practical Guide on Admissibility Criteria' (updated 21 February 2021) <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 31 March 2021, at 56.

should be extended to actions of states that cause transboundary harm.[35] Such approach is innovative and may facilitate claimants' future position in rights-based climate change litigation.

To move closer to an extraterritorial conception of human rights, a group of experts formulated the non-binding soft law Maastricht Principles on Extraterritorial State Obligations of States in the Area of Economic, Social and Cultural Rights.[36] Those Principles anchor that a state has to prevent actions or omissions which would result in violations of human rights both inside and outside of its territory.[37]

While human rights law struggles with the extraterritoriality, international environmental law is equipped to function across boundaries and states are under an obligation to refrain from engaging in activities that could cause transboundary harm.[38] This principle was first mentioned in 1938/1941 in the Trail Smelter arbitration[39] and confirmed in Principle 21 of the Stockholm Declaration.[40] Since the Maastricht Principles are a soft law instrument, it is complicated to enforce. Therefore, according to some, one of the options for how to hold states accountable to their violations of human rights abroad is based on the premises that states have an obligation to cooperate embedded in several human rights treaties, such as ICESCR,[41] ICCPR,[42] UDHR,[43] and, in broader terms, in the UN Charter.[44] Moreover, states are bound by the 'common but differentiated responsibilities' principle as well as other provisions regarding cooperation defined under the UNFCCC.[45] An extensive interpretation of the above-mentioned cooperation provisions in the light of aforementioned Principle 21 of the Stockholm Declaration might according some scholars lead us to extraterritorial interpretation of human rights obligations in the CC context.[46]

Finally, the last concept of extraterritoriality is linked to so-called exported emissions, where the product (coal, petroleum etc.) extracted in one country can be used in other countries and thereby influence the health of citizens in various locations outside of exporting state's territory. Norway can be used to illustrate this issue. Norway's petroleum industry can have impacts in other countries, and eventually, indirectly influence the environment of the whole globe. David Boyd, current Special Rapporteur on human rights and the environment, described this phenomenon as the 'Norwegian paradox'-

[35] Inter-American Court of Human Rights, The Environment and Human Rights, (Advisory Opinion OC-23/17, 15 November 2017), para 104(h); *See also*: Monica Feria-Tinta, 'Climate Change Litigation in the European Court of Human Rights: Causation, Imminence and other Key Underlying Notions' (2021) (1) 3 Europe of Rights & Liberties/Europe des Droits & Libertés, 52, at 56–57.

[36] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (28 September 2011) <https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf> accessed 2 April 2020.

[37] Ibid. Principle 8.

[38] Atapattu Sumudu A. and Schapper Andrea (n 8) 289.

[39] *Trail Smelter (USA v Canada)*, III *RIAA* 1905 (16 April 1938 and 11 March 1941).

[40] Stockholm declaration (n 2).

[41] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Art. 2(1).

[42] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Preamble.

[43] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR), Preamble.

[44] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), Art. 56.; See in: United Nations Environment Programme (UNEP), 'Climate Change and Human Rights' (2015), <https://www.unep.org/resources/report/climate-change-and-human-rights> accessed 15 October 2021.

[45] UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), Art. 4.

[46] Atapattu Sumudu A. and Schapper Andrea (n 8) 303-304.

while Norway is an environmentally oriented country, it is predominantly the wealth from its oil and gas extraction which allows it.[47] The importance of acknowledging emissions caused by Norwegian fuels transpired in the *Natur og Ungdom v. Norway* case dealing with the granting of licences for oil extraction in the Arctic. One of the questions raised before the court was whether CO_2 emissions abroad from the use of Norwegian oil and gas should be taken into consideration when assessing the potential violation of the right to a healthy environment under the Art. 112 of Norwegian constitution.[48] After the first instance answered this question in the negative, the Court of Appeal concluded that exported emissions should also be taken into account while citing Art. 112, first paragraph, second sentence, '*regarding the need for comprehensive consideration out of concern for future generations*.'[49] Nevertheless, the Borgarting Court of Appeal did not consider the concrete licence approval in question to be in breach of the Norwegian Constitution. In 2020, the case reached the highest instance – the Supreme Court of Norway – which took a step back and concluded that only acts outside of Norwegian territory which have harmful impacts in Norway – where Norwegian authorities have direct influence over such activities or where they could take measures against them,[50] might fall under the scope of Art. 112 of the Norwegian constitution.

2. Access to Justice

a. Procedural Barriers at International and Regional Level

Climate litigation can proceed at both national and international level. While looking at CC through human rights lenses seemingly opens access to a wide range of tribunals, this access is often conditional. Beginning with the general international authority, the International Court of Justice (ICJ), plaintiffs are firstly limited by the consensual character of its jurisdiction in contentious proceedings. Disputes before the ICJ can be initiated for example if the state expresses its consent by prior acceptance of the ICJ's jurisdiction in the optional clause,[51] or if one of the treaties confers the ICJ's jurisdiction on parties.[52] Furthermore, the ICJ is restricted only to state-against-state disputes, where states can seek redress for human rights violations on behalf of victims (their citizens) but individuals cannot approach the ICJ themselves. Moreover,

[47] Boyd David, 'Norway End of Mission Statement' (2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25032&LangID=E> accessed 8 October 2020.

[48] *Natur og Ungdom v Norway*, 16-166674TVI-OTIR/06 (District Court in Oslo, 4 January 2018) <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/> accessed 10 June 2020.

[49] *Natur og Ungdom v Norway*, 18-060499ASD-BORG/03 (Borgarting Court of Appeal, 23 January 2020), <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/> accessed 10 June 2020, at 21.

[50] *Natur og Ungdom v Norway*, HR-2020-2472-P (The Norwegian Supreme Court, 22 December 2020). Unofficial translation available at <https://www.klimasøksmål.no/wp-content/uploads/2021/01/judgement_translated.pdf> accessed 17 March 2021, para 149.

[51] UN, 'Statute of the International Court of Justice' (24 October 1945), Art. 36 (2).

[52] UN, 'Statute of the International Court of Justice' (24 October 1945), Art. 36 (1). A list of treaties on the ICJ's website: <https://www.icj-cij.org/en/treaties> accessed 9 October 2020. Those two options are not the only basis of the ICJ's jurisdiction, states can for instance also enter into a special ad hoc agreement regarding the specific dispute (Art. 36 (1) Statute of the ICJ), or parties can subsequently accept the ICJ's jurisdiction after the dispute arises (forum prorogatum). *See more in*: Swiss Federal Department of Foreign Affairs, 'Handbook on accepting the jurisdiction of the International Court of Justice – Model clauses and templates' (2014) <https://legal.un-.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf> accessed 25 March 2021.

experience shows that for different economic, political and other reasons, states are reluctant to sue one another, and rely rather on diplomatic means when searching for a dispute resolution.[53] Despite these barriers, individuals are gradually exploring new ways to enter international courts. For instance, a group of Pacific Islands has pleaded for an advisory proceeding at the ICJ under the patronage of the UN General Assembly (UNGA), which would clarify the legal question of human rights and CC.[54] Despite the non-binding character of the advisory opinion of the ICJ, the litigants are convinced that – if granted a positive opinion – the shift in international law would strengthen their position in litigating Australia's inadequate CC action at both international and national level.[55]

When adjudicating on human rights, the most obvious choice of international forums seems to be well-established international human rights bodies, such as the UN Human Rights Committee or the UN Committee on the Rights of the Child. The former gained momentum in January 2020 and ruled on the first climate refugees related case, *Teitiota v New Zealand*.[56] The international community is awaiting another decision of the UN Human Rights Committee on a petition of eight Torres Straight Islanders, alleging that Australia by its ignorance of CC violated Article – 6, 17 and 27 of the ICCPR.[57] In addition, the scholarly public eagerly expects a decision on Greta Thunberg and others' petition[58] under the UN Convention on the Rights of the Child.[59]

Along the ICJ and UN human rights bodies, the regional level offers a number of tribunals suitable for ruling on human rights issues, providing higher authority than in the field of international environmental law.[60] The main advantage is that individuals can claim redress directly against states and that some of the regional treaties even contain a free-standing right to a healthy and clean environment, which has not yet been defined at international level.[61] Furthermore, claimants do not have to deal with the often noted problem of the separation of powers, political question doctrine, or the issue of democratic legitimacy which are often discussed at national level. The most suitable forums for dealing with human rights violations can be regional tribunals such as the ECtHR, which has continuously acknowledged that degradation of the environment impacts the possibility of hu-

---

[53] Margaretha Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) 9(3) Climate Law <https://brill.com/view/journals/clla/9/3/article-p.224_224.xml> accessed 10 September 2020 224, at 234.

[54] Drugmand Dana (n 19).

[55] Ibid.

[56] *Ioane Teitiota v New Zealand (advance unedited version)*, CCPR/C/127/D/2728/2016 (2020, UN Human Rights Committee).

[57] The claim has not been published, for more information see here: <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/#:~:text=Summary%3A,United%20Nations%20Human%20Rights%20Committee.&text=It%20also%20constitutes%20the%20first,for%20inaction%20on%20climate%20change.> accessed 12 March 2021.

[58] Sacchi et al., 'Communication to the Committee on the Rights of the Child' (Committee on the Rights of the Child, 23 September 2019) <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/> accessed 12 October 2020.

[59] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 3 (CROC).

[60] Bodansky et al. (n 6) 299-300.

[61] UN Human Rights Office of the High Commissioner, 'UN expert calls for global recognition of the right to safe and healthy environment' (2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22755&LangID=E> accessed 31 May 2021; *See also*: International Bar Association (IBA), 'Achieving Justice and Human Rights in an Era of Climate Disruption' (2014)<https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> accessed 1 March 2020, 68.

man rights enjoyment;[62] and has recently been confronted with the first climate case as described below.[63] Other examples include the African Court on Human and Peoples' Rights, ruling based on the African Charter of Human and Peoples' Rights,[64] encompassing an explicit right to a healthy environment;[65] and Inter-American Commission and Court of Human Rights which so far has been the only one which has ruled on a climate rights-based petition.[66] September 2020 witnessed the first rights-based claim before the ECtHR, symbolizing on the one hand a significant progress in the human rights field, but whose actual reception by the Court, on the other hand, was veiled with concerns as plaintiffs have not exhausted domestic remedies.[67] The plaintiffs, six children and young adults from Portugal, lodged a claim against most of the member states of the Council of Europe (33 countries), invoking Articles 2, 8, and 14 of ECHR.[68] In this respect, claimants' focal point revolved around positive obligations of states stemming from the ECHR, which are triggered by states' contributions to global GHG emissions. These positive obligations encompass among others obligation of states '*to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life*'[69] and other measures protecting the right to a private life and a home in context of degradation of the environment.[70] In contrast to other national cases against domestic governments, the plaintiffs were not requiring an order to implement concrete emission cuts, but a declaration that the states are in breach of the ECHR through their respective contributions to CC.[71] According to the claimants, states should be held accountable for: (i) allowing the release of emission within their territory, (ii) permitting the export of fossil fuels extracted on their territory, (iii) permitting the import of carbon-burdened products, and finally (iv) permitting entities within their jurisdiction to contribute to overseas emissions.[72]

---

[62] E.g.: *López Ostra v. Spain* App. No 16798/90 (ECtHR, 9 December 1994); *Taşkin and Others v. Turkey* App. No 46117/99 (ECtHR, 3 March 2005); *See also*: Peel Jacqueline and Osofsky Hari M., 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law <https://www.cambridge.org/core/product/identifier/S2047102517000292/type/journal_article> accessed 28 February 37, at 64.

[63] Youth for Climate Justice, 'Application to the European Court of Human Rights' (European Court of Human Rights, 3 September 2020) <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 10 October 2020. *See also*: Watts Jonathan, 'Portuguese children sue 33 countries over climate change at European court' (The Guardian, 3 September 2020) <https://www.theguardian.com/law/2020/sep/03/portuguese-children-sue-33-countries-over-climate-change-at-european-court> accessed 10 September 2020.

[64] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 I.L.M. 58.

[65] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 I.L.M. 58, Art 24. *See also*: IBA, 'Achieving Justice and Human Rights in an Era of Climate Disruption' (n 61) 68.

[66] Watt-Cloutier Sheila, 'Petition to the Inter American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States' (Inter-American Commission on Human Rights, 7 December 2005).

[67] Watts Jonathan (n 63).

[68] European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5.

[69] *Öneryildiz v Turkey*, App. No 48939/99 (ECtHR, 30 November 2004), para 89.

[70] *Tătar v. Romania* App. No 67021/01 (ECtHR, 17 March 2009), para 107. Regarding positive obligations, to legislate or take other practical measures, under Articles 2 and 8 see ECtHR case law: *Brincat and Others v Malta*, App Nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 July 2014), para 116.

[71] Clark Paul, Liston Gerry, Kalpouzos Ioannis, 'Climate change and the European Court of Human Rights: The Portuguese Youth Case' (6 October 2020) <https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/> accessed 10 March 2021.

[72] Youth for Climate Justice, 'Application to the European Court of Human Rights' (European Court of Human Rights, 3 September 2020) <http://climatecasechart.com/

Plaintiffs further determined that the sustained harm is a result of cumulative contributions of all culprits, and thereby it constitutes an indivisible injury.[73] In November 2020, ECtHR asked the 33 countries to respond to the complaint and further announced in line with Art. 41 of the Rules of Court[74] (order of dealing with cases) that the matter of this case will be urgently examined.[75] Such a response from the ECtHR might indicate that the Court is treating its first CC related action very carefully. If ECtHR decides in favour of shared responsibility of states, the authority of this judgment may eventually influence the way domestic courts in Europe decide on their own national climate cases and thereby increase the possibility to obtain an adequate remedy.[76] Moreover, the case has potential of becoming a pioneer in interpreting exported emissions obligations of states.

Overall, both UN human rights bodies and regional human rights courts might seem to be suitable avenues for climate-related claims. However, the access to these forums is not free of procedural hindrances. Firstly, similarly to the case of the ICJ, it is necessary that the concerned authority asserts jurisdiction over the parties involved in a dispute.[77] In addition, authorities can admit the case only if defendants are parties to both substantive international obligations (e.g. the ICESCR), as well as corresponding procedural rules (e.g. the Optional Protocol to the ICESCR).[78] This is problematic, taking into consideration the fact that only a limited number of countries acceded to the latter.[79] Moreover, even if parties fulfil the above conditions, strict admissibility standards might stand in the way as these are not adjusted to the nature of CC issue. One of the most common admissibility conditions, the exhaustion of remedies,[80] is entirely unfitting for large-scale claims with multiple defendants. The underlying reason is that lodging parallel actions in multiple states is costly and stalls the action on this urgent issue as well as postpones the feasibility of success, and overall discourages the litigants. According to the claimant of the first CC application to ECtHR, it is impossible to achieve domestic remedies, given the extraterritorial character of the claim in connection with the limited timeframe within which emission cuts must be mitigated. In addition, they reason (in the same way as Greta Thunberg's petition) on grounds of children's particular vulnerability and dependent position in relation to access to justice.[81] As ECtHR's granting of exemption to this procedural rule is rare, Pedersen suggests overcoming the exhaustion of remedies problem through an initiation of an advisory proceedings under Protocol 16 of the ECHR by one of the national courts, which would ensure engagement of the ECtHR with

non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 10 October 2020, para 9.

[73] Ibid., Annex paras 10–12.

[74] Rules of Court (European Court of Human Rights, 1 January 2020) <https://www.echr.coe.int/documents/rules_court_eng.pdf> accessed 10 March 2021.

[75] Request No. 39371/20 Cláudia Duarte Agostinho and others against Portugal and 32 other States (European Court of Human Rights, 30 November 2020) <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/> accessed 11 March 2021.

[76] Therese Karlsson Niska, 'Climate Change Litigation and the European Court of Human Rights – A Strategic Next Step?' (2020) 13(4) The Journal of World Energy Law & Business, 331, at 339.

[77] Averill Marilyn (n 18).

[78] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UNGA A/63/435.

[79] Ibid.

[80] For example, according to Art. 35 (1) of ECHR (n 68).

[81] Youth for Climate Justice (n 63), Annex paras 38–40; Sacchi et al. (n 58), para 309–311.

the climate change question.[82] Another burning issue before the human rights authorities is related to the fact that the threat of CC to human rights is tangible only with difficulties, and therefore, it is not an easy task to prove the imminent danger for litigants who are not highly vulnerable at this very moment. In general, the closer the threat, or the more visible, the more possible for plaintiffs it is to claim their rights. Opposite, the further or less possible the actual harm, the harder it is for the judge to assess the claim. This was obvious in the case of *Teitiota*, the case which was refused on grounds of the lack of real, personal and reasonably foreseeable risk to life of a petitioner.[83] Considering the hardship of Mr. Teitiota in demonstrating the individual specific risk of harm, we can draw a parallel to ECtHR case law which provided alteration of the victim status in one of its mass-surveillance rulings *Zakharov v Russia*.[84] In this case, ECtHR asserted that in order to be granted a victim status under Art. 34 ECHR, it is not decisive how many other individuals sustain similar effects of mass-surveillance. ECtHR further contended that the applicant does not have to prove that secret surveillance measures had been applied directly to him and as a consequence he sustained harm.[85] The mere fact that the secret surveillance measures exist and are allowed for by a legislation is sufficient.[86] This ruling demonstrate that the victim status could be possibly tailored to circumstances of CC in future cases. A distinct approach to *Teitiota* case was also implemented by the national Supreme Court in the *Urgenda* judgment determining that the threat of CC is of a real and an imminent character and requires an immediate action now.[87] Finally, one of the main hurdles connected to international climate litigation involves a character of the final decisions, which might be binding, non-binding, or advisory, and of limited enforceability.[88]

International forums and international bodies are, overall, not well-prepared for the CC challenge, even though they seem, at the first glance, like suitable avenues. Nevertheless, they can give strong signals, e.g. by approving the exemptions from the strict procedural rules in CC cases or clarifying their view on the legal question of human rights and CC – thereby the doors may open for more litigants. However, the question whether a sudden access for a large number of plaintiffs will not, eventually, be detrimental, remains yet unanswered.

b. Standing: 'Gate to the Merits'

The fundamental problem identified in not only large-scale rights-based climate cases is the matter of standing, i.e. '*the criteria one must satisfy in order to be a party to a legal proceeding*'.[89] In most cases it represents the sieve, which the plaintiff must come through to get to the merits stage. The standing conditions under different jurisdictions vary from restrictive to quite lenient approach. If the standing conditions are too rigorous it may create unwanted situations where

[82] Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (*EJIL:Talk!*, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 13 October 2020.

[83] *Ioane Teitiota v New Zealand* (n 56) para 9.7.

[84] *Zakharov v. Russia* App. No 47143/06 (ECtHR, 4 December 2015).

[85] Ibid., para 170–179.

[86] Ibid.

[87] *Urgenda Foundation v The State of the Netherlands*, ECLI:NL:HR:2019:2007, 19/00135 (20 December 2019, Supreme Court of the Netherlands) <https://www.urgenda.nl/en/themas/climate-case/> accessed 14 April 2020, at 19, para 5.2.2.

[88] Margaretha Wewerinke-Singh (n 53) 229, 231.

[89] Gundlach Justin and Burger Michal, 'The Status of Climate Change Litigation – A Global Review' (UNEP in cooperation with the Sabin Centre for Climate Change Law at Columbia University, 2017) <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf> accessed 1 September 2020, at 28.

the individual whose rights have been violated is left without protection from the court. However, strict standing remains an important tool of legal certainty and a way to discourage plaintiffs from bringing marginal cases and overloading the courts' capacity. The matter of standing usually contains more elements. In context of CC litigation, the most common requirement is the necessity to prove CC has affected the claimant in a way different from the general public and that the claimant has a special interest in the matter which is not only of a hypothetical nature.[90]

Standing conditions may predetermine the success of a climate case. Usually, it constitutes a significant barrier to climate litigation, and a replication of any success in overcoming this barrier from one country to another is not always feasible. This is evident from attempts following the landmark success of the *Urgenda* case in the Netherlands as various countries failed trying to duplicate the *Urgenda* case into their own jurisdiction.[91] Recent case law, such as the *Friends of the Irish Environment v Ireland*,[92] where the National Mitigation Plan was rendered inconsistent with the Irish climate law, shows that litigants are still struggling with some aspects of rigorous standing conditions in climate cases. The grand success of the Irish case was stained as the Supreme Court denied standing to the NGO to litigate personal regress since the NGO did not itself enjoy personal rights and bodily integrity. Moreover, it suggested that individual plaintiffs should have commenced the proceeding, potentially with a support from the NGO.[93] Consequently, the Court squandered the opportunity to analyse human rights violations claimed by the plaintiffs. Another example of hurdles regarding strict standing is the *People's Climate Case* against the EU.[94] The case began in 2018 when 10 families of various origins, working pre-eminently in agriculture and tourism sector, sued the EU before the General Court. According to the plaintiffs, EU's insufficient emissions reduction targets contributed to the acceleration of global warming and endangerment of plaintiffs' rights to life, health, occupation and property.[95] Each family was affected in a different way. For example, the Carvalho family endured harm due to heatwaves and droughts in Portugal, when in 2017 fires caused by the heat destroyed the forest and the trees owned by Carvalho's family in its entirety, while the Guyo's family from Kenya was endangered because the main source of the family's livelihood was jeopardized due to higher temperatures and droughts.[96] Without getting to the merits, the General Court dismissed the case after a thorough discussion upon the so-called *Plaumann formula* – standing requirements

[90] See e.g.: *Verein KlimaSeniorinnen Schweiz v Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, A-2992/2017 (Federal Administrative Court of Switzerland, 27 November 2018) <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/> accessed 10 September 2020; *Friends of Earth, Inc. v Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167 (2000).

[91] *Verein KlimaSeniorinnen Schweiz v Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, (n 90); *Natur og Ungdom v Norway*, HR-2020-2472-P (The Norwegian Supreme Court, 22 December 2020). Unofficial translation available at <https://www.klimasøksmål.no/wp-content/uploads/2021/01/judgement_translated.pdf> accessed 17 March 2021.

[92] *Friends of the Irish Environment v Ireland*, Appeal No: 205/19 (The Supreme Court of Ireland, 31 July 2020) <http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/> accessed 10 September 2020.

[93] The question of standing: *Friends of the Irish Environment v Ireland*, paras 7.1–7.24.

[94] Case T-330/18 *Carvalho and Others v Parliament and Council* [2019] ECR II-324.

[95] Ibid., para 30.

[96] Carvalho and Others, 'Application Carvalho and Others v Parliament and Council' (General Court, 23 May 2018) <http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/> accessed 19 June 2020, Section D.

developed in the CJEU case law.[97] These conditions are satisfied only if the contested act affects persons by reason of certain attributes that are '*peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually*.'[98] Applicants in the *People's Climate Case* challenged the up-to-datedness of the formula. Claimants believed that the application of the formula on environmental matters would lead to paradoxical situations when they contend that: '[t]*he more widespread the harmful effects of an act, the more restricted the access to the courts*.'[99] They reasoned that this interpretation of standing conditions might lead to impingement of the judicial protection.[100] Despite the failure of the case, this argumentation might be essential in the future in challenging old standing provisions and persuading legislators to establish a relaxed interpretation of standing in environmental matters. Most of the CC cases indicate that a broader definition of standing in climate cases might be a way forward. On the other hand, adoption of e. g. the so-called 'open-standing provision' that grants the standing irrespective of whether an actual harm to an individual can be proven, may lead to legal uncertainty and courts' overload.[101] Yet, we can see several changing trends in some countries. For instance Colombia allows bringing an action on behalf of future (and unborn) generations.[102,103] Furthermore, in some countries – Canada for instance – it is allowed to bring the claim in the public interest (*actio popularis*).[104] As the name indicates, the public litigation's purpose is to serve the interests of a broader group or general public, while it is not necessary to have a specific victim who would approach authorities in order to obtain a judgement.[105] The boost of public interest litigation has been fuelled by the Aarhus Convention.[106] The Convention strengthened the position of environmental NGOs meeting requirements under national law to bring the claims in environmental matters as they are '*deemed to have an interest*' under the definition of '*public concerned*'.[107] However, this interpretation is not accepted by all

[97] Case 25-62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 95.

[98] Ibid., at 107.

[99] *Carvalho and Others v Parliament and Council* (n 94) para 32.

[100] Ibid.

[101] IBA, 'Model Statute for Proceedings Challenging Government Failure to Act on Climate Change. An International Bar Association Climate Change Justice and Human Rights Task Force Report' (2020) <https://www.ibanet.org/Climate-Change-Model-Statute.aspx> accessed 20 April 2020, at 8–9.

[102] *Future Generations v Ministry of the Environment and Others*, no. 11001-22-03-000-2018-00319-01, STC4360-2018 (Supreme Court of Colombia, 5 April 2018). <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/> accessed 12 September 2020.

[103] There are, however, still some objections related to granting standing to future generations. One of them might be uncertainty about what will be the actual interests of future generations or who should represent them. *See*: Allen Ted, 'The Philippine Children's Case: Recognizing Legal Standing for Future Generations Note' (1994) 6(3) Georgetown International Environmental Law Review <https://heinonline.org/HOL/P?h=hein.journals/gintenlr6&i=721> accessed 24 March 2020 713, at 729–730.

[104] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, SCC 45 (CanLII), [2012] 2 SCR (Supreme Court of Canada, 21 September 2012) <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10006/index.do> accessed 12 August 2020, at I. para 2.

[105] Ginnivan, Eliza, 'Public interest litigation: Mitigating adverse costs order risk.' (2020) 136 Precedent, at 22; Otto Spijkers, 'The Urgenda Case: a Successful Example of Public Interest Litigation for the Protection of the Environment?' in Christina Voigt and Zen Makuch (eds), *Courts and the Environment* (Edward Elgar Publishing, 2018) 305, at 309.

[106] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) (Aarhus Convention).

[107] Ibid., Art. 2, Section 5.

countries. In addition, many of them purposely pose significant barriers on NGOs, such as demanding national requirements, so that NGOs can enjoy the privileged position of the public concerned only with difficulties.[108]

In contrast to European case law, US case law provides a three-part test, derived from Article III of the US Constitution. According to this test, a plaintiff must show that: (1) he/she has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favourable decision.[109] A high-profile *Juliana case*, where young plaintiffs sued the US federal government for active promotion of fossil fuels and for subsidizing it, showed us, how challenging, yet not insurmountable, it can be to overcome the test in climate-related cases.[110] After successfully passing the first two conditions, the case wrecked when trying to surmount the redressability requirement. The main issue for the Court was the fact that the plaintiffs sought both declaratory and injunction relief.[111] In essence, the plaintiffs, if given the injunction relief, could force the US government not only to cease the above-mentioned activities, but also to prepare a plan of its further action. As a consequence of the remedial plan demand, the US Court of Appeals contended that it goes beyond Article III of the US Constitution '*to order, design, supervise, or implement plaintiffs' remedial plan*',[112] even if the details of implementation are left to the government.[113] This sharply opposes the decision of the Supreme Court of Netherlands, which determined that courts are not permitted to order the state to create legislation with a specific content, however, they can make such an order under the condition that the state is free to choose the measures to be taken in order to achieve a 25% reduction in greenhouse gas emissions by 2020.[114]

In contrast to the EU and US strictness, some countries allow bringing an action even in cases of the mere possibility of a violation of human rights under the condition that the violation is foreseeable and close.[115] Particularly relaxed standing conditions are applied in Global South countries such as India and Pakistan.[116]

3. The Causation Challenge: 'The Problem of All or the Problem of None'

The question of causal nexus between GHG emissions and human rights violation constitute another major difficulty for climate lawsuits.[117]

---

[108] Rosvig Sørensen, Sine, and Mitkidis Peterková Kateřina, 'The (Limits of) Transferability of Climate Change Litigation to Denmark.' (2020) 1 Nordisk Miljörättslig Tidskrift <https://nordiskmiljoratt.se/onewebmedia/Sorensen.pdf> 7, at 23–24.

[109] *Friends of Earth, Inc. v Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167 (2000).

[110] *Juliana v United States*, No. 18-36082 (17 January 2020, United States Court of Appeals for the Ninth Circuit).

[111] Ibid., 4, 22.

[112] Ibid., 25.

[113] Ibid., 25–26.

[114] *Urgenda Foundation v The State of the Netherlands*, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396 (2015, District Court of The Hague, Netherlands) <https://www.urgenda.nl/en/themas/climate-case/> accessed 14 April 2020, paras 8.2.6. – 8.2.7.

[115] Greenpeace International, 'Holding your Government Accountable for Climate Change: A People's Guide' (2018) <https://www.greenpeace.org/international/publication/19818/holding-your-government-accountable-for-climate-change-a-peoples-guide/> accessed 22 December 2019, at 80.

[116] Bhavna Mishra Ann Jacob and Rishav Ambastha, 'Climate Change Litigation and Human Rights' (2018) <https://www.lawasia.asn.au/sites/default/files/2018-05/Academic-Paper-Climate-Change-Litigation-and-Human-Rights-22Mar2018.pdf> accessed 13 May 2020, at 3.

[117] Burger Michael, Wentz Jessica and Horton Radley, 'The Law and Science of Climate Change Attribution' (2020) 45(1) Columbia Journal of Environmental Law <https://journals.library.columbia.edu/index.php/cjel/article/view/4730> accessed 30 June 2020.

Emissions are being released every day by numerous actors and other factors, such as consumer behaviour or natural variables outside of human reach, come also into play.[118] Proving that certain emissions caused a particular human rights violation to a specific plaintiff is impossible,[119] as none of the actors would be solely responsible for the CC if it was not for the cumulative effect of all GHG emissions.[120] This concept was described by Peel as a '*death by a thousand cuts*'.[121] Many states try to take advantage of this fact and avoid their accountability by claiming that their part of contribution compared to the world's overall emissions is insignificant. The plurality of culprits substantially affects the possibility of claimants to prove a causal relationship between the harm and their actions. What is more, causation in this context consists of two inquiries. Firstly, the state's omission or action leading to environmental threat or degradation. Secondly, the environmental degradation leading to the specific impairment of a human right.[122]

Similarly to standing conditions, the process of proving causation may be regulated diversely in domestic law. One of the most common features in many countries is the 'but-for test', according to which it needs to be proved that if it were not for the action A, consequence B would not happen.[123] However, as mentioned previously, none of the states would fulfil the causation conditions according to this test on their own.[124] In the light of diffuse effects of CC, a traditional concept of causation ceases to be practicable. Thus, a question arises whether it is possible to apply some kind of apportionment of the responsibility of different entities for CC based on the gathered data. A study by Heede, which for the first time calculated the overall emissions traced to the 90 largest producers of oil, gas, and cement, collectively also known as Carbon Majors, can prove to be useful for this purpose.[125] Such study can trigger climate litigation cases against private entities thanks to its potency to finally help solving the problem of causation.[126]

Apportionment of responsibility is, however, not only a hypothetical concept. The Court of first instance in *Urgenda* found a sufficient direct link between the Dutch GHGs emissions, global CC, and the effects (now and in the future) on the Dutch environment. According to the Court, the sole fact that the current Dutch GHGs emissions are limited compared to emissions of other states does not change the fact that they contribute to the CC.[127] In this context, each country has a '*divisible share in the causation of global warm-*

[118] Müllerová Hana, 'Klimatická změna jako nový typ výzvy pro mezinárodní i vnitrostátní právo' (13 November 2019) <https://www.youtube.com/watch?v=mGoTy-KJIBKM> accessed 12 September 2020.

[119] Peel J., 'Issues in Climate Change Litigation' (2011) 5(1) Carbon & Climate Law Review <http://cclr.lexxion.eu/article/CCLR/2011/1/162> accessed 22 December 2019 15, at 17–19.

[120] Pfrommer Tobias and others, 'Establishing causation in climate litigation: admissibility and reliability' (2019) 152(1) Climatic Change <http://link.springer.com/10.1007/s. 10584-018-2362-4> accessed 22 January 2020 67, at 68.

[121] Peel J., 'Issues in Climate Change Litigation' (n 119) 17–18.

[122] Dupuy P-M and Viñuales JE, *International Environmental Law* (2nd edn Cambridge University Press 2018), at 396.

[123] 'But-for test' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/but-for_test> accessed 16 February 2020.

[124] Cox Rhj, 'The Liability of European States for Climate Change' (2014) 30(78) Utrecht Journal of International and European Law <http://www.utrechtjournal.org/articles/10.5334/ujiel.ci/> accessed 20 March 2020 125, at 131.

[125] Heede Richard (n 22).

[126] Use of the study in case law: Milieudefensie, 'Summons Milieudefensie et al. v. Royal Dutch Shell plc' (District Court of Hague, 5 April 2019) File no. 90046903 <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 17 June 2020; *Lliuya v RWE AG* (n 21).

[127] *Urgenda Foundation v The State of the Netherlands*, District Court of The Hague (n 114) para 4.90.

ing',[128] since the portion of its emissions may be identified and traced back. The Supreme Court's decision echoed this argument by stating that the state must, in the prospect of dangerous CC, do its 'part' to protect the people of Netherlands from sustaining harm and, therefore, it must above all reduce a 'fair share' of global emissions.[129] This shows that, if accepted by the Court, the shared responsibility might be one of the tools to overcome the problem of causation. Still, the apportionment on the basis of historical contributions fuels discussion. The success of this argument depends, among other things, on the type of relief demanded from the court. If the plaintiff requires damages, the amount may be calculated from the percentage by which the state or a private actor has contributed to the emission of the GHGs. However, if the plaintiff requires injunction to stop specific actions, e.g. from one branch of industry in a concrete area (state), this action may be regarded disproportionate.[130] The strategy of apportionment of responsibility is currently being applied in the *Lliuya case*, where after two initial struggles, a farmer from the region in Peru in risk of glacier flooding achieved a partial victory before the Higher Regional Court in Hamm.[131] The Court stated that even though the defendant's (RWE's) contribution is not a single cause of flooding risk in Peru, it might still be *partially* responsible for the risks of flooding in the region,[132] and appointed experts responsible for looking into the situation in Peru and inspecting the risk of impairment of the property of the claimant. Great importance was placed upon scientific evidence, especially attribution models which, according to the Court, might determine the responsibility of RWE for the situation in Peru.[133] The case has been on standby and the final decision is being awaited after the thorough assessment of the situation in Peru. Its result can potentially set an example due to the progressive approach to a causation problem by the Court and underline the role of science.

Since demonstrating the causal relationship requires an abundance of evidence, the problem of proof comes into this already complicated interplay of factors. As the current trend indicates, many courts are receptive to the scientific knowledge of climate science as a supporting evidence, especially as far as its anthropogenic causes are concerned.[134] In general, courts are more willing to take over climate litigation cases, assess the IPCC (Intergovernmental Panel on Climate Change) reports as an evidence of CC, and vindicate the claims not only against governments, but also private entities.[135] One of the problems which remains on the local level is proving that a specific weather event was caused by the

[128] Cox Rhj (n 124) 132.

[129] *Urgenda Foundation v The State of the Netherlands*, Supreme Court of the Netherlands (n 87) paras 5.7.1–5.7.9.

[130] Hsu Shi-Ling, 'A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit' (2007) 79(3) University of Colorado Review Forthcoming <https://heinonline.org/HOL/P?h=hein.journals/ucollr79&i=708> accessed 20 April 2020 701, at 747–748.

[131] *Lliuya v RWE AG* (n 21).

[132] 'Interesting facts: Background information on the decision of the higher regional court Hamm (*Germanwatch*, 12 December 2017) <https://germanwatch.org/en/14831> accessed 21 September 2020.

[133] ibid. *See also*: *Lliuya v RWE AG*, Indicative Court Order and Order for the Hearing of Evidence (Higher Regional Court of Hamm, 30 November 2017) <https://germanwatch.org/en/14198> accessed 20 February 2020.

[134] Banda Maria L. and Fulton Scott, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47(2) Environmental Law Reporter <https://ssrn.com/abstract=3134517> accessed 28 February 2020, 2.

[135] Ganguly Geetanjali, Setzer Joana and Heyvaert Veerle, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) Oxford Journal of Legal Studies <https://academic.oup.com/ojls/article/38/4/841/5140101> accessed 10 May 2020 841, at 851–852.

CC.[136] While we have an overwhelming body of research proving that GHGs emissions are the primary cause of CC (first causality inquiry), the concrete event attribution, which points at the second part of the causality inquiry, is still at its infancy.[137] A solution for future cases might be found using the 'extreme event attribution' science (EEA) that attempts to find a link between human activities and occurrence or gravity of extreme weather events which we have been experiencing, such as tropical cyclones, floods, etc.[138] The EEA might also help in proving that a local area and specific people are in danger of an extreme weather event due to the human-related emissions. The EEA works with a 'risk based' approach, evaluating how the probability of occurrence of a certain weather pattern changes depending on the human factor in play.[139] As a last resort, plaintiffs can alleviate the evidentiary requirements by applying – in environmental law well-established precautionary principle stipulating that the lack of full scientific certainty should not be the reason for postponing measures preventing irreversible damage.[140] Precautionary principle is a tool equipped to help policy makers deal with the scientific uncertainty and threats of irreversible risks before the damage stemming from these risks becomes a reality. It was developed in Germany in 1970s known as *Vorsorgeprinzip* ('foresight principle').[141] The international community later presented one of the most dominant formulations of the precautionary principle in 1992 in Principle 15 of the Rio Declaration on Environment and Development which stated that '*where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*'.[142] A similar wording was adopted in Art. 3 (3) UNFCCC which provides that: '*a lack of full scientific certainty should not be used as a reason for postponing measures to prevent serious or irreversible damage*'[143] and that '*parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects*.'[144] The use of precautionary principle however is not only a proclamation on paper, yet has an actual influence in climate litigation cases. The Supreme Court of Netherlands in *Urgenda* case, for instance, argued in several parts of its judgement that obligation of a state to take appropriate measure in accordance with Art. 2 and 8 ECHR applies equally to dangers which have not materialised yet.[145] According to the court, '[t]*he mere existence of a sufficiently gen-*

[136] Peel J., 'Issues in Climate Change Litigation' (n 119) 19. *See also*: Ganguly Geetanjali, Setzer Joana and Heyvaert Veerle (n 135) 851–852.

[137] Dupuy P-M and Viñuales JE (n 122) 397.

[138] Burger Michael et al. (n 117), at 88–89.

[139] Marjanac, Sophie, and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36(3) Journal of energy & natural resources law, 265, at 268. *See also*: Shepherd, T.G., 'A Common Framework for Approaches to Extreme Event Attribution.' (2016) 2 Curr Clim Change Rep, 28, at 29.

[140] Omuko Lydia Akinyi, 'Applying the Precautionary Principle to Address the "Proof Problem" in Climate Change Litigation' (2016) 2(1) Tilburg Law Review <http://booksandjournals.brillonline.com/content/journals/10.1163/22112596-02101003> accessed 28 February 2020, 52, at 60–61. *See also*: fn (n 142) (n 143).

[141] Bourguignon Didier (Directorate-General for Parliamentary Research Services: European Parliament), 'The precautionary principle: Definitions, applications and governance' (2016) <https://op.europa.eu/en/publication-detail/-/publication/166bad38-a2f9-11e5-b528-01aa75ed71a1/language-en> accessed 13 March 2021, at 4.

[142] Declaration of the United Nations Conference on Environment and Development (adopted 14 June 1992) UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992) (Rio Declaration), principle 15.

[143] UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC), Art. 3.

[144] Ibid.

[145] *Urgenda Foundation v The State of the Netherlands*, Supreme Court of the Netherlands (n 87) para 5.3.2.

uine possibility that this risk will materialise means that suitable measures must be taken.'[146]

III Conclusion

Climate litigation as a trend of the past years and an emerging tool of climate governance has been establishing itself on several fronts. The most recent creative lawyering has gravitated towards reframing CC as a human rights issue. When analysing so far limited, yet growing body of rights-based case law, we can observe a certain pattern grounded in plurality of actors. Firstly, as a way to gain more importance, many plaintiffs choose to join forces in CC litigation. Secondly, the character of CC presumes the plurality of actors on the side of emitters who indirectly influence the level of human rights. Such multiplicity leads to various barriers for cases in the rights-based arena. For instance, admissibility criteria at international level, such as exhaustion of domestic remedies, show to be incompatible with the extraterritorial character of harm caused by CC and multiplicity of culprits emitting the GHGs. At national and supranational level, hindrances connected to standing conditions might exacerbate if the claim entails multiple plaintiffs. Most evidently, the problem of proving a particularized harm becomes even more challenging. This article considered these challenges in the light of the selected decisions and demonstrated how some plaintiffs attempted to eliminate problems connected to plurality of actors. Several cases sketched possible solutions for some of the problematic aspects of multiplicity of actors. Nevertheless, the solutions seem to be limited by their use within the selected jurisdiction. For instance, the causation problem can, unless the science rapidly progresses, be overcome by acknowledging shared responsibility of States as indicated by the *Urgenda* decision. However, different case law often directly contradicts not only in the result, but also the reasoning. One, but not the only example of opposing views on the same matter, can be observed in *Juliana* and *Urgenda* in relation to ordering the state to enact legislation. Moreover, several issues accentuated through the article inhibiting the access to justice can be surmounted only through reforms of institutions at international level, or extensive legislative changes in domestic rules. Even then, results of such reforms are uncertain as unreasonable opening to thousands of litigants can have a damaging effect on courts' functioning. Finally, the question remains, whether an individually filed lawsuit, i.e. lawsuits with one subject on the plaintiff's side,[147] could possibly alleviate hindrances, which are a burden for multiple claimants. Further studies which would indicate more in-depth analyses of advantages of an individual claim before the particular forum would be a valuable contribution into this discussion.

Acknowledgements

The author would hereby like to acknowledge that parts of this article were based on her master's thesis titled Climate Litigation and Human Rights, which was defended at Charles University, Prague, in June 2020. Furthermore, the author would like to extend her sincere gratitude to Associate Professor Katerina Mitkidis for her valuable comments and support.

[146] *Urgenda Foundation v The State of the Netherlands*, para 5.6.2.

[147] The subject can either be a natural or a legal person.