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Master's Thesis

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## GENERAL INTRODUCTION

Many scientists and scholars hold the view that the imminent threat of climate change, which ‘occurs when long-term weather patterns are altered – for example, through human activity’<sup>1</sup>, cannot be disregarded any longer. We have seen the alterations in the Earth’s climate many times over the course of history. There are several factors contributing to the change of climate including (i) the sun’s output, (ii) Earth’s orbital position and tilt, and last, but not least, (iii) the amount of greenhouse gases (GHGs) such as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O) or fluorinated gases (HFCs, PFCs, SF<sub>6</sub>) in our atmosphere.<sup>2</sup> These amounts might elevate due to either natural or anthropogenic factors. Examples of a natural variable might be volcanic activity or forest fires. The anthropogenic factors, on the other hand, include particularly burning of fossil fuels.<sup>3</sup> The so-called greenhouse effect on our planet emerges especially due to the third factor on the list, i.e. the emission of greenhouse gases. The increased amount of such gases in our atmosphere prevents the heat from leaving the planet, which in turn leads to the phenomenon known as the global warming. Naturally, the greenhouse effect is necessary up to a certain degree, so that the Earth remains inhabitable.<sup>4</sup> Nevertheless, the volumes of the carbon in our atmosphere has increased to superfluous amounts over the past century, leading to harmful and detrimental impacts, such as the alteration in weather patterns, floods, erosion, droughts and others.

Among the majority of scholars nowadays, there is no doubt about the prevalence of anthropogenic causes of climate change. The Fifth Assessment Report published by the International Panel on Climate Change (IPCC), a United Nations body comprising a group of independent scientists, indicates that there is a 95% confidence level of climate change being partly caused by human activities.<sup>5</sup> Furthermore, the scientific consensus regarding the anthropogenic

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<sup>1</sup> DAVID SUZUKI FOUNDATION. *What is climate change?* [online]. [Accessed 13 December 2019]. Available from: <https://david Suzuki.org/what-you-can-do/what-is-climate-change/>.

<sup>2</sup> HUGHES, Evan. *Physics for Everyone: How Global Warming Happens* [online]. [Accessed 13 December 2019]. Available from: <http://www.deepeningwoods.net/PFEHGWH.html>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> 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* [online]. 2014, p. V [Accessed 13 December 2019]. Available from: [www.ipcc.ch/report/ar5/](http://www.ipcc.ch/report/ar5/).

cause of the climate change prevails in nearly 200 worldwide scientific organisations, including many academies of sciences, associations of physicists, etc.<sup>6</sup>

The legal framework for tackling climate change has its roots back in 1992 when the United Nations Framework Convention on Climate Change (UNFCCC) was adopted, followed by the Kyoto Protocol in 1997<sup>7</sup>. The Protocol works with the UNFCCC terminology regarding the differentiation between Annex I Parties (developed states – bearing the primary responsibility for mitigating climate change) and Non-Annex I Parties (developing countries). In accordance with the common but differentiated responsibility and respective capabilities principle it sets in its Annex B binding emission reduction targets only for 36 developed countries. Taking into consideration the industrial growth of countries as China and India, which fell into the category of developing countries, such an approach was unsustainable.<sup>8</sup> At the same time, some of the biggest producers of GHGs were either not taking part in the Kyoto Protocol, such as USA, or anticipated in the first commitment period (2008-2012), but withdrew just before its end, like Canada. After a series of political negotiations, the Paris Agreement, another instrument to combat the climate change was adopted in November 2015. The agreement abandoned the binary differentiation between the Parties and required all states to be engaged in the matter and prepare the so-called Nationally Determined Contributions (NDCs) that would contribute to the common objective of holding the increase in the global temperature well below 2°C above pre-industrial levels. NDCs would be submitted every five years, each one with more ambitious goals than the one preceding it.<sup>9</sup> The agreement which is based on a ‘*bottom-up approach*’<sup>10</sup> requiring gradually more demanding policies brought hope to some, but at the same time caused despair over the lengthiness of the changes in legal regulation.

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<sup>6</sup> GOVERNOR’S OFFICE OF PLANNING AND RESEARCH. *List of Worldwide Scientific Organizations* [online]. [Accessed 13 December 2019]. Available from: <http://opr.ca.gov/facts/list-of-scientific-organizations.html>.

<sup>7</sup> CONFERENCE OF THE PARTIES. *Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, in UNFCCC*. Decision 1/CP.3. 11 December 1997. FCCC/CP/1997/7/Add.1.

<sup>8</sup> INTERNATIONAL BAR ASSOCIATION. *Achieving Justice and Human Rights in an Era of Climate Disruption* [online]. July 2014, p. 63 [Accessed 1 March 2020]. Available from: <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.

<sup>9</sup> CONFERENCE OF THE PARTIES. *Adoption of the Paris Agreement, in UNFCCC*. Decision 1/CP.21. 12 December 2015. FCCC/CP/2015/10/Add, Annex, Art. 4.3.

<sup>10</sup> HUANG, Jennifer. *Climate Justice: Climate Justice and the Paris Agreement*. Journal of Animal & Environmental Law. 2017, Vol. 9, no. 1, p. 33 [Accessed 20 February 2020]. Available from: <https://drive.google.com/file/d/1tOGFjAaWNeC40INMB0KKfFSW5Y1oQIC/view>.

Regrettably, even with the persuasive scientific proof, the impact of climate change is often perceived as a matter of far future and many states, therefore, refuse to enact comprehensive climate policies based on the framework international instruments mentioned above.<sup>11</sup> The international climate governance based on the political agreements and compromises, which resulted in weak legal outcomes, has ceased to be sufficient for the urgency of the situation.<sup>12</sup>

In light of the above mentioned, it comes as no surprise that the main efforts of not only scientists but also legal scholars, are to find a way to combat these changes before they become irreversible. One of the options is a tool of climate litigation, supported by a growing number of national and international legislation,<sup>13</sup> which creates a set of rights and obligations for both private and public entities.

There is no time to waste and if politicians refuse to set more ambitious targets, people feeling the urgency of the threat (in particular those who suffered or are afraid of an immediate danger of the climate change) will take action and try to force governments to take necessary measures by means of a court trial. These climate actions had modest beginnings in the United States, but after an immense success of the *Urgenda* case<sup>14</sup> in the Netherlands, we can see a growing number of citizens in other countries trying to reach justice nowadays. Climate litigation has become a global phenomenon as cases are being medialised all over the world, no matter the result, raising the public awareness about the issue. Furthermore, it seems like there are no boundaries for lawyers' creativity. One of the latest trends in climate litigation is the employment of arguments related to human rights, with both positive and negative outcomes. Rights-based approach to climate litigation is the primary topic of this thesis, along with the research question as described below.

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<sup>11</sup> PEEL, J. *Issues in Climate Change Litigation*. Carbon & Climate Law Review [online]. 2011, Vol. 5, no. 1, p. 15 [Accessed 22 December 2019]. DOI 10.21552/CCLR/2011/1/162. Available from: <http://cclr.lexxion.eu/article/CCLR/2011/1/162>. ISSN 21908230.

<sup>12</sup> GUPTA, Joyeeta. *Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change*. Review of European Community & International Environmental Law [online]. April 2007, Vol. 16, no. 1, p. 76 [Accessed 13 December 2019]. DOI 10.1111/j.1467-9388.2007.00541.x. Available from: <http://doi.wiley.com/10.1111/j.1467-9388.2007.00541.x>. ISSN 1467-9388.

<sup>13</sup> NACHMANY, Michal and SETZER, Joana, 2018. *Policy brief: Global trends in climate change legislation and litigation: 2018 snapshot* [online]. May 2018, p. 1 [Accessed 13 December 2019]. Available from: <http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-legislation-and-litigation-2018-snapshot/>.

<sup>14</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague. 24 June 2015. ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396 (English translation). [Accessed 10 September 2019]. Available from: <https://www.urgenda.nl/en/themas/climate-case/>.

## **The research question and delimitations**

The main objective of this thesis is to critically assess the human rights argumentation in the latest case law, as used by both state and private actors. The aim is to determine what a hypothetical climate change lawsuit employing human rights argumentation should contain, in order to be successful. A strong emphasis will be placed on the drafters' role representing either individual or an NGO in a climate dispute. What does the legal representative have to be aware of and what should be avoided before bringing the action? One of the first questions, therefore, will concern the conditions and starting positions which are to be fulfilled.

My objective is not to produce a descriptive study of a single jurisdiction's experience, but on the example of eight cases from various jurisdictions provide an overview of the current challenges and struggles in climate change litigation worldwide. It should be noted from the outset that this thesis draws on a limited number of selected cases from different jurisdictions, all of them approaching the national courts or other authorities across various jurisdictions, united by the fact that human rights are being applied. The selected cases belong to the category of high-profile strategic litigation cases '*that aim to influence public and private climate accountability*'<sup>15</sup> mostly by attempts to increase insufficient mitigation efforts and enforce existing climate policies.<sup>16</sup> I will examine cases which had to overcome one of the following legal hurdles: standing, separation of powers, causation and the problem of proof; and at the same time used human rights either as a legal basis or as an interpretative tool. I will not discuss claims regarding the EU ETS, nor migration issues, since those go far beyond the scope of this thesis.

Naturally, the presented list of cases does not constitute an exhaustive list. Furthermore, even though I cover seven jurisdictions, by no means do I aspire to generalise my conclusions and provide a form-like lawsuit applicable worldwide. I want to pass on the lessons from each experience, help the potential claimants to understand its importance, so that they can make an informed decision about the structure of a future claim, taking into account possible struggles, pitfalls etc. I have decided to take this approach because I realise that it is impossible to simply reproduce the success of a lawsuit from one jurisdiction to another, as it was proved many times

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<sup>15</sup> BYRNES, Rebecca and SETZER, Joana. *Policy report: Global trends in climate change litigation: 2019 snapshot* [online]. July 2019. p. 2. [Accessed 13 December 2019]. Available from: <http://www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/>.

<sup>16</sup> *Ibid.*, p. 6.

after the success of *Urgenda* case, for instance in Switzerland<sup>17</sup>, where the attempts to replicate the lawsuit failed. Contrarily, my intention is to accentuate the gaps in the selected climate lawsuits and by the assessment of case law in this thesis contribute to connecting the dots, to set the direction and to help to prevent unsuccessful rights-based claims in the future. I have chosen this view instead of delving deeper into a specific jurisdiction, since I believe that by exploring as many options around the world as possible, we gain a better understanding of what might or might not go wrong during the proceedings. On the contrary, if we stay within one jurisdiction, we might end up having a limited view through the lens of that one specific country. Naturally, different countries have adopted different human rights treaties, some of them provide for a right to a healthy environment, some of them do not. What is more, the understanding of human rights themselves varies from one state to another. Lastly, the factual situation of each case will influence the final result. Even though the jurisdictions presented are overwhelmingly different, they carry some similarities stemming e.g. from their legal culture, understanding of legal doctrines, binding provisions of human rights conventions they ratified etc. Obviously, the claimant in France might be inspired by an American or a Pakistani decision to a very limited degree, but at the same time might see through the lens of these jurisdictions something in its own which remained omitted. Building on these similarities, sharing experience, widening our horizons and avoiding mistakes observed in the previous case-law can be a way forward.

Another question sparking the author's interest is whether human rights-based argumentation can be the sole basis of the climate litigation lawsuit, or if it may be beneficial just as a tool of interpretation used in support of the main arguments.

### **Methodology**

The methodology used in this thesis varies. Nevertheless, the core of this paper applies a comparative method, with a strong emphasis on the comparison of climate-related case law from different jurisdictions. A comparative method was employed in order to find a better solution for future climate lawsuit drafters and as an instrument of learning and knowledge, contributing to

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<sup>17</sup> *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*. Federal Administrative Court of Switzerland. 27 November 2018. A- 2992/2017 (English translation). [Accessed 11 October 2019]. Available from: <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>.

one's own legal system. A case-study approach was adopted to determine the factors that affect the result of a rights-based climate litigation. Within the comparative method, the author utilizes mainly the functional method based on the premise that '*rules and concepts may be different, but that most legal systems will eventually solve legal problems in a similar way.*'<sup>18</sup> The author focuses on similarities in basic concepts, doctrines, courts' approaches, and sharing the commonalities within legal families. Considering how multi-layered the problem of climate litigation is, the author decided to use a polycentric comparative method with the horizontal approach, focusing mainly on comparing cases at the same level, i.e. national courts (with the exception of People's Climate Case brought in front of the EU's General Court.).

### **Structure of the thesis**

The thesis is divided into three sections. The first section presents and discusses a link between human rights and the climate change. Furthermore, it gives a brief overview and outlines the history of climate change litigation in the world, analyses the current trends in climate litigation, and most importantly, examines the human rights' turn in climate litigation. At the same time, the main discourse of this section is to critically examine the power of human rights in climate litigation and the possibility of success of future cases based solely on the human rights argumentation, as well as advantages and disadvantages of this approach.

The second section attempts to analyse the necessary starting points for a successful rights-based climate litigation. In this part of the thesis, the author examines following questions: Who would be the most successful and the strongest applicant? Which forum would be the most feasible? How do you overcome the test of standing, causation and the separation of powers invoked in countless cases? The author also tries to answer the question on how to proceed in the initial steps of climate litigation, by the critical assessment of the scholarly literature and the case law, addressing both procedural and subject-matter challenges faced by the plaintiffs.

The third section focuses primarily on the comparison of current case law in the field of climate litigation. The thesis is an attempt to aggregate the knowledge of the case law to date and to present the varying approaches to climate litigation in connection to human rights. The attempts

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<sup>18</sup> VAN HOECKE, Mark. *Methodology of Comparative Legal Research*. Law and Method [online]. December 2015, p. 9 [Accessed 8 April 2020]. DOI 10.5553/REM/.000010. Available from: <http://www.bjutijdschriften.nl/doi/10.5553/REM/.000010>. ISSN 2352-7927.

to incorporate human rights into climate litigation are analysed and examined in depth. The final part of this chapter contains some reflections regarding the possibility of bringing a climate lawsuit in the Czech Republic.

The thesis strongly relies on the translation of individual cases into English, mostly by the plaintiffs themselves, and on the English translation of national statutes, which unavoidably influences the final understanding of the case. Moreover, the paper depends on interpretation of international legal regulations, EU legislation and the reports of international organizations such as the United Nations and other authorities. Finally, the author utilizes the structured and well-organised body of aggregated laws<sup>19</sup> and cases<sup>20</sup> assembled and maintained by Grantham Research Institute on Climate Change and the Environment and Sabin Center for Climate Change Law in Colombia Law School.

As a source of inspiration for some parts of this thesis, the author's synopsis from the year 2019 submitted at Aarhus University with the title '*Climate litigation in European countries*' was used. A part of the thesis was also enrolled in the XIII. Student Scientific Paper Competition (SVOČ) held by Faculty of Law of the Charles University.

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<sup>19</sup> GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND SABIN CENTER FOR CLIMATE CHANGE LAW. *Climate Change Laws of the World database* [online]. [Accessed 22 December 2019]. Available from: [climate-laws.org](https://climate-laws.org).

<sup>20</sup> GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND SABIN CENTER FOR CLIMATE CHANGE LAW. *Climate Change Litigation of the World database* [online]. [Accessed 22 December 2019]. Available from: <https://climate-laws.org/>; SABIN CENTER FOR CLIMATE CHANGE LAW and ARNOLD & PORTER KAYE SCHOLER LLP. *Climate Case Chart* [online]. [Accessed 16 February 2020]. Available from: <http://climatecasechart.com/>.

# 1. HUMAN RIGHTS' TURN IN CLIMATE LITIGATION

## 1.1 Climate change as a human rights crisis

*'Climate change, human-induced climate change, is obviously an assault on the ecosystem that we all share, but it also has the added feature of undercutting rights, important rights like the right to health, the right to food, to water and sanitation, to adequate housing, and, in a number of small island States and coastal communities, the very right to self-determination and existence.'*

Flavia Pansieri, former United Nations Deputy High Commissioner for Human Rights<sup>21</sup>

### 1.1.1 Which human rights are in danger?

Climate change debuted in the field of law initially as an environmental issue. Nevertheless, a growing number of scholars have noticed implications of climate change for human rights over the past decade.<sup>22</sup> The general environmental dimension of human rights has been for the first time acknowledged in 1972 by the Stockholm Declaration<sup>23</sup> and later confirmed e.g. by the Vice-President Weeramantry of the International Court of Justice (ICJ) who noticed in the *Gabčíkovo-Nagymaros* case: *'The protection of the environment is likewise a vital part of contemporary human rights doctrine'*<sup>24</sup>. The concrete relationship between human rights and climate change was later examined in its depth and complexity by United Nations through a series of studies and resolutions described below in detail.

The Intergovernmental Panel on Climate Change (IPCC), a scientific authority, aggregating the knowledge in the field of climate science, has recognised in its report from 2014 a number of

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<sup>21</sup> *As cited in:* OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. *Understanding Human Rights and Climate Change. Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change* [online]. p. 13 [Accessed 21 May 2020]. Available from: <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

<sup>22</sup> SETZER, Joana and VANHALA, Lisa C. *Climate change litigation: A review of research on courts and litigants in climate governance*. Wiley Interdisciplinary Reviews: Climate Change [online]. May 2019, Vol. 10, no. 3, p. 10 [Accessed 13 December 2019]. DOI 10.1002/wcc.580. Available from: <https://onlinelibrary.wiley.com/doi/abs/10.1002/wcc.580>. ISSN 1757-7799.

<sup>23</sup> UN GENERAL ASSEMBLY. *Declaration of the United Nations Conference on the Human Environment*. 15 December 1972. A/RES/2994, Preamble, Point 1.

<sup>24</sup> WEERAMANTRY, Christopher Gregory. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) – separate opinion of vice-president Weeramantry*, International Court of Justice. 25 September 1997, p. 91 [Accessed 10 January 2020]. Available from: <https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf>.

risks which are believed to arise due to climate change.<sup>25</sup> Through a series of expected and unexpected extreme weather events<sup>26</sup> and other threats such as wildfires, desertification or floods, many of which are believed to be a result of climate change, some people's right to life, health, water, food, and housing are already critically endangered.<sup>27</sup> Among the most vulnerable groups belong children, women<sup>28</sup>, elderly, indigenous peoples, and last but not least, future generations, all of them having low or no capacity to combat the consequences of climate change.<sup>29</sup>

The human rights of these groups might be affected by the climate change both in a direct and an indirect way. Firstly, and most evidently, the most severe violations of human rights are caused by the adverse effects of climate change itself.<sup>30</sup> We can easily imagine floods and droughts threatening the right to life, right to food, right to health, right to water, and right to adequate housing. Such effects are having impact particularly on civil, political, economic, social, and cultural rights<sup>31</sup> anchored internationally, for instance<sup>32</sup>, in the Universal Declaration of Human Rights (UDHR)<sup>32</sup>, International Covenant on Civil and Political Rights (ICCPR)<sup>33</sup>, International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>34</sup>, and many other treaties on a

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<sup>25</sup> 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* [online]. 2014, p. 13-16 [Accessed 13 December 2019]. Available from: [www.ipcc.ch/report/ar5/](http://www.ipcc.ch/report/ar5/).

<sup>26</sup> *Ibid.*, p. 7-8.

<sup>27</sup> HUMAN RIGHTS COUNCIL. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. 15 January 2009. A/HRC/10/61.

<sup>28</sup> Even though it might seem surprising, women belong to the most vulnerable groups. Women still have been discriminated around the world, labelled a lower status in society and restricted by gender roles. All these factors contribute to their vulnerability e.g. in case of natural disasters, or migration. Women from rural areas bearing the burden of impacts on agriculture constitute specific group in this sense. *See more* in HUMAN RIGHTS COUNCIL. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. 15 January 2009, p. 15-16. A/HRC/10/61.

<sup>29</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online]. Key issues in environment and sustainability. Abingdon, Oxon; New York, NY: Routledge, 2019, p. 249 [Accessed 28 February 2020]. 1st Edition. DOI 10.4324/9781315193397. ISBN 9781315193397.

<sup>30</sup> SCHAPPER, Andrea and LEDERER, Markus. *Introduction: Human rights and climate change: mapping institutional inter-linkages*. Cambridge Review of International Affairs [online]. 2 October 2014, Vol. 27, no. 4, p. 668 [Accessed 13 December 2019]. DOI 10.1080/09557571.2014.961806. Available from: <http://www.tandfonline.com/doi/abs/10.1080/09557571.2014.961806>. ISSN 1474-449X.

<sup>31</sup> *Ibid.*, p. 669.

<sup>32</sup> UN GENERAL ASSEMBLY. *Universal Declaration of Human Rights*. 10 December 1948. 217 A (III).

<sup>33</sup> UN GENERAL ASSEMBLY. *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*. 16 December 1966. A/RES/2200 (XXI).

<sup>34</sup> *Ibid.*

regional level. Extreme weather events, but also increased temperatures and heatwaves are a risk factor connected to premature deaths, especially among the vulnerable groups such as elderly.<sup>35</sup> The life and the health of the population might be further endangered by infectious vector and water or food-borne diseases such as malaria, diarrhoea, and other diseases spreading uncontrollably in warmer conditions.<sup>36</sup> The World Health Organisation (WHO) estimates that between 2030 and 2050 climate change will be the underlying reason of approximately 250 000 deaths caused by these diseases as well as malnutrition.<sup>37</sup> Moreover, the droughts, fires, floods, and growing amounts of CO<sub>2</sub> might lead to crop degradation, and subsequently to food and water scarcity.<sup>38</sup> Furthermore, coastal urban settlements and inhabitants of small islands like Kiribati 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, which might be soon re-located due to the growing erosion.<sup>39</sup> Large scale migration for the climate-related reasons is also one of the main concerns of international society nowadays. The table enclosed in Annex I of this thesis summarises the most common examples of human rights violations connected to climate change.

The second type of the human rights violations in the context of climate change takes place when climate policies and projects created for the improvement of climate conditions lead to violations of particular human rights of vulnerable groups in some areas.<sup>40</sup> While some of the climate projects and policies have mitigating effect, the local communities are in danger. The violations of human rights appear especially if people are not consulted in regard to mitigation and

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<sup>35</sup> 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*, p. 69.

<sup>36</sup> WORLD HEALTH ORGANISATION, *Climate change and health* [online]. 1 February 2018 [Accessed 13 December 2019]. Available from: <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>. See also 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*.

<sup>37</sup> *Ibid.*

<sup>38</sup> 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* [online]. 2014, p. 51.

<sup>39</sup> *Ibid.*, p. 16, 67.

<sup>40</sup> SCHAPPER, Andrea. *Climate justice and human rights*. International Relations [online]. September 2018, Vol. 32, no. 3, p. 278 [Accessed 13 December 2019]. DOI 10.1177/0047117818782595. Available from: <http://journals.sagepub.com/doi/10.1177/0047117818782595>. ISSN 1741-2862.

adaptation plans.<sup>41</sup> The most important rights in peril are procedural rights, i.e. access to information, and participation in decision-making.<sup>42</sup> Apart from procedural rights a right to self-determination is commonly endangered.<sup>43</sup> Indigenous peoples are, in this context, most commonly at risk of being deprived of their rights as they represent a vulnerable group which is immensely dependent on their surroundings (they are inextricably tight to local fauna and flora are their primary means of subsistence), in order to preserve and sustain their traditional way of living. The most common example of policies which might, even unintentionally, lead to human rights abuse, are Reducing Emissions from Deforestation and Forest Degradation programs (REDD+), which are based on the scientifically ascertained fact that around 17% of climate change is caused by deforestation.<sup>44</sup> States are therefore encouraged to its reduction. Nevertheless, those projects developed under the REDD+ often infringe on the rights of local communities, especially when it comes to their participatory rights.<sup>45</sup> The point might be illustrated on an example of a government establishing a protected area over a forest inhabited by indigenous peoples without a free and prior informed consent of the concerned local communities.<sup>46</sup> Yet another type of measures having impact on human rights are those adopted within the Clean Development Mechanism<sup>47</sup> (CDM), which is one of the flexibility mechanisms developed under the Kyoto Protocol. The main objective of the CDM is to create a project in a developing country which would help with the emission reductions and at the same time the developed country financing it would be able to subtract a portion of its own emissions by acquiring carbon credits.<sup>48</sup> However, similarly to

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<sup>41</sup> SCHAPPER, Andrea and LEDERER, Markus. *Introduction: Human rights and climate change: mapping institutional inter-linkages*, p. 671-672.

<sup>42</sup> HUMAN RIGHTS COUNCIL. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, p. 25-26.

<sup>43</sup> *Ibid.*, p. 14-15.

<sup>44</sup> IPCC. *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [online]. 2007, p. 5 [Accessed 13 December 2019]. Available from: [https://www.ipcc.ch/site/assets/uploads/2018/02/ar4\\_syr\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/02/ar4_syr_full_report.pdf).

<sup>45</sup> THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW. *Climate Change & Human Rights: A Primer*. [online]. July 2013, p. 10 [Accessed 16 February 2020]. Available from: <https://www.ciel.org/reports/climate-change-and-human-rights-a-primer-orellana-johl-revised-july-2013summary-of-how-climate-change-impacts-and-response-measures-are-affecting-the-full-and-effective-enjoyment-of-human-ri-4/>.

<sup>46</sup> *Ibid.*

<sup>47</sup> SCHAPPER, Andrea. *Climate justice and human rights*, p. 278 - 279.

<sup>48</sup> THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW. *Climate Change & Human Rights: A Primer*, p. 10.

REDD+, the nature of some projects is raising concerns. For instance, the Barro Blanco hydropower project in Panama was investigated for a violation of indigenous peoples' rights and the impacts on their land, water, and natural resources.<sup>49</sup> Mindful of these facts, parties of Paris Agreement abandoned this flexibility mechanism and transitioned to new sustainable development mechanisms defined in Art. 6.4. which will be protected against human rights infractions. After 2020, the CDM cannot be used for meeting a NDC anymore.<sup>50</sup>

Even though the whole world will be globally affected by the climate change, some states, areas, and people will or already do suffer more than others. According to the IPCC report, '[p]eople who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.'<sup>51</sup> Newell designates this situation as the 'double discrimination'<sup>52</sup>. What is more, the individuals most vulnerable to climate change-related harm are most likely to have limited resources and the lowest adaptation capacities,<sup>53</sup> which might lead to the so-called 'adaptation apartheid'<sup>54</sup>. Violations of human rights will make the most vulnerable individuals further vulnerable to climate change, causing a vicious circle for the poorest countries and their environment. With the further deterioration of the environment, more human rights violations may be expected (resulting for

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<sup>49</sup> THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL). *Barro Blanco Hydroelectric Dam Threatens Indigenous Communities, Panama*. [online]. December 2016 [Accessed 16 February 2020]. Available from: <https://www.ciel.org/project-update/barro-blanco/>.

<sup>50</sup> WORLD WIDE FUND FOR NATURE. *Phasing out Kyoto Protocol flexible mechanisms and shifting to the sustainable development mechanism*. November 2018, p. 1, 4 [Accessed 24 March 2020]. Available from: [http://awsassets.panda.org/downloads/wwf\\_briefing\\_paper\\_cop24\\_phasing\\_out\\_kyoto\\_protocol.pdf](http://awsassets.panda.org/downloads/wwf_briefing_paper_cop24_phasing_out_kyoto_protocol.pdf).

<sup>51</sup> 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*, p. 54.

<sup>52</sup> NEWELL, Peter. *Race, Class and the Global Politics of Environmental Inequality*. *Global Environmental Politics* [online]. August 2005, Vol. 5, no. 3, p. 87 [Accessed 16 February 2020]. DOI 10.1162/1526380054794835. Available from: <http://www.mitpressjournals.org/doi/10.1162/1526380054794835>. ISSN 1536-0091.

<sup>53</sup> HUMAN RIGHTS COUNCIL, 2008. *HRC Resolution 7/23: Human Rights and Climate Change*. March 2008. A/HRC/7/78. See also ADELMAN, Sam and LEWIS, Bridget. *Symposium Foreword: Rights-Based Approaches to Climate Change*. *Transnational Environmental Law* [online]. March 2018, Vol. 7, no. 1, p. 9 [Accessed 13 December 2019]. DOI 10.1017/S2047102518000067. Available from: [https://www.cambridge.org/core/product/identifier/S2047102518000067/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S2047102518000067/type/journal_article). ISSN 2047-1033.

<sup>54</sup> HALL, Margaux Janine and WEISS, David C. *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law* [online]. *Yale Journal of International Law*. 16 June 2012, Vol. 37, no. 2., p. 335-336 [Accessed 13 December 2019]. Available from: <http://digitalcommons.law.yale.edu/yjil/vol37/iss2/3>. ISSN 0889-7743.

example from conflicts for food or water).<sup>55</sup> Paradoxically, individuals and states most threatened and exposed to the disastrous impacts of climate change have been historically the least responsible for the GHGs emissions.<sup>56</sup> The world as we know it today is, therefore, strongly imbalanced. Taking into account the cumulative factors of poverty and more severe effects of climate change in developing countries, the position of these countries with regard to human rights is worsening. The most vulnerable regions, which feel the far-reaching consequences and adverse effects of climate change, are in particular Arctic regions, the Global South, low-lying and coastal areas, and small island developing states (SIDS) such as the Maldives.<sup>57</sup>

In the light of the above mentioned, it comes as no surprise that the first countries to fight for the inclusion of human rights aspects to climate regulation were the SIDS, namely in The Malé Declaration on the Human Dimension of Global Climate Change from 2007.<sup>58</sup> As showed further below, people from vulnerable regions have become the climate movement leaders, as they are exposed yet to another threat, a threat that they will be forced to relocate from their homes and lands, which will not be further inhabitable. According to the UN Special Rapporteur on Human Rights, by 2050, 150 million people will be forced to relocate.<sup>59</sup>

### 1.1.2 A long way to formal recognition of human rights in climate-related negotiations

The UN in its Human Rights Council (HRC) Resolution 7/23 from 2008 implies that '*climate change poses an immediate and far-reaching threat to people and communities around the world*

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<sup>55</sup> LEWIS, Bridget. *Environmental human rights and climate change: current status and future prospects* [online]. Singapore: Springer Singapore, 2018, p. 16 [Accessed 28 February 2020] DOI 10.1007/978-981-13-1960-0. Available from: <https://link-springer-com.ez.statsbiblioteket.dk:12048/book/10.1007%2F978-981-13-1960-0>. ISBN 9789811319600. See also 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*, p. 16.

<sup>56</sup> ADELMAN, Sam and LEWIS, Bridget. *Symposium Foreword: Rights-Based Approaches to Climate Change*. Transnational Environmental Law [online]. March 2018, Vol. 7, no. 1, p. 9 [Accessed 13 December 2019]. DOI 10.1017/S2047102518000067. Available from: [https://www.cambridge.org/core/product/identifier/S2047102518000067/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S2047102518000067/type/journal_article). ISSN 2047-1033.

<sup>57</sup> 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*, p. 14, 67.

<sup>58</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online]. Key issues in environment and sustainability. Abingdon, Oxon; New York, NY: Routledge, 2019. p. 208. See also DUYCK, Sébastien, JODOIN, Sébastien and JOHL, Alyssa. *Routledge handbook of human rights and climate governance* [online]. Abingdon, Oxon; New York, NY: Routledge, 2018, p. 5 [Accessed 28 February 2020]. DOI 10.4324/9781315312576. Available from: <https://www.routledgehandbooks.com/doi/10.4324/9781315312576>. ISBN 978-1-315-31257-6.

<sup>59</sup> BOYD, David R. *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment relating to the enjoyment of a safe, clean, healthy and sustainable environment*. 15 July 2019, p. 11 [Accessed 7 April 2020]. A/74/161. Available from: <https://www.ohchr.org/en/issues/environment/srenvironment/pages/annualreports.aspx>.

*and has implications for the full enjoyment of human rights*<sup>60</sup>. The concern expressed in the Resolution 7/23 was confirmed in a study conducted by the UN Office of the High Commissioner on Human Rights (OHCHR) on the relationship between climate change and human rights.<sup>61</sup> The study highlighted the direct and indirect nature of climate change implications for human rights and brought attention to the fact that impacts of climate change will be more likely felt *'most acutely by those segments of the population who are already in vulnerable situations due to the factors such as poverty, gender, age, minority, status, and disability.*<sup>62</sup> Moreover, UN confirmed that even without a universal specific right to safe and healthy environment, the UN bodies *'recognize the intrinsic link between the environment and realization of a range of human rights*<sup>63</sup>. The results of the study were summarized in HRC Resolution 10/4 from 2009<sup>64</sup>, which was followed by a series of resolutions requiring especially international cooperation and enhancing the importance of human rights obligations and instruments.<sup>65</sup> Even though the United Nations have repeatedly brought attention to the human rights problematics and revolved around this topic, the first clear connection between global climate policy and human rights was made in Cancún in 2010. Inspired by the aforementioned Resolution 10/4, the Cancún Agreements state that *'Parties*

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<sup>60</sup> HUMAN RIGHTS COUNCIL. *HRC Resolution 7/23: Human Rights and Climate Change*. March 2008. A/HRC/7/78.

<sup>61</sup> HUMAN RIGHTS COUNCIL. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. 15 January 2009. A/HRC/10/61.

<sup>62</sup> HUMAN RIGHTS COUNCIL. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. 15 January 2009. A/HRC/10/61. § 42.

<sup>63</sup> HUMAN RIGHTS COUNCIL. *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*. 15 January 2009. A/HRC/10/61. § 18.

<sup>64</sup> HUMAN RIGHTS COUNCIL. *HRC Resolution 10/4: Human Rights and Climate Change*. 2009. A/HRC/RES/10/4.

<sup>65</sup> HUMAN RIGHTS COUNCIL. *HRC Resolution 28/11: Human Rights and the Environment*. 2015. A/HRC/RES/28/11. HUMAN RIGHTS COUNCIL. *HRC Resolution 18/22: Human Rights and the Environment*. 2011. A/HRC/RES/18/22. HUMAN RIGHTS COUNCIL. *HRC Resolution 26/27: Human Rights and the Environment*. 2014. A/HRC/RES/26/27. HUMAN RIGHTS COUNCIL. *HRC Resolution 29/15: Human Rights and the Environment*. 2015. A/HRC/RES/29/15. HUMAN RIGHTS COUNCIL. *HRC Resolution 32/33: Human Rights and the Environment*. 2016. A/HRC/RES/32/33.

*should in all climate change related actions, fully respect human rights*<sup>66</sup>, besides that, according to the agreements: *'Adaptation must be addressed with the same priority as mitigation'*<sup>67</sup>.

Aside from the work of the UN, in 2015 leading-up to COP21 (Conference of Parties), a group of eighteen states signed a voluntary, non-binding Geneva Pledge on Human Rights in Climate Action<sup>68</sup> and thereby supported the UN's efforts to promote the necessary acknowledgment of the link between the climate change and human rights. The signatory states including, among others, France, Sweden, Peru or Ireland, pledged to *'enable a meaningful collaboration between their national representatives in these two processes [ - UNCCC and HRC - ] to increase our understanding of how human rights obligations inform better climate action.'*<sup>69</sup> Geneva Pledge at the same time rooted for cooperation and the exchange of knowledge among the states.<sup>70</sup>

Another important milestone took place in December 2015 when the Paris Agreement was adopted during the COP21, under the auspices of UNFCCC. The intense lobbying at that time attempted to incorporate the human rights operative clause into the body of the Agreement. The final version of the Paris Agreement, however, mentions human rights only partially, in the paragraph 11 of the preamble. The preamble to the Paris Agreement acknowledges *'that climate change is a common concern of humankind'*, and that: *'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.'*<sup>71</sup> The draft of the Paris

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<sup>66</sup> CONFERENCE OF THE PARTIES. *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, in UNFCCC. Decision 1/CP.16. 10-11 December 2010. FCCC/CP/2010/7/Add.1. § 8.

<sup>67</sup> CONFERENCE OF THE PARTIES. *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, in UNFCCC. § 2 (a).

<sup>68</sup> *The Geneva Pledge on Human Rights in Climate Action*, February 2015. [Accessed 20 December 2019]. Available from: <https://www.rree.go.cr/files/includes/files.php?id=453&tipo=contenido>.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Adoption of the Paris Agreement, in UNFCCC, Decision 1/CP.21. 29 January 2016. FCCC/CP/2015/10/Add. § 11 Preamble. See also BOYLE, Alan. *Climate Change, The Paris Agreement and Human Rights*. International and Comparative Law Quarterly [online]. October 2018, Vol. 67, no. 4, p. 769 [Accessed 13 December 2019]. DOI 10.1017/S0020589318000222. Available from: [https://www.cambridge.org/core/product/identifier/S0020589318000222/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S0020589318000222/type/journal_article).

Agreement initially contained human rights provision in its Art. 2, owing to the pressure from the lobbyists (mainly civil society actors, NGOs – e. g. Climate Action Network) and support from the OHCHR.<sup>72</sup> Nevertheless, drafters were afraid, that putting pressure on states concerning the inclusion of human rights provision might jeopardize adoption of the agreement. After countries like Norway, Saudi Arabia and the US explicitly disapproved of any reference to human rights in the text, it was decided to leave out the operative clause and keep only a human rights annotation in the preamble.<sup>73</sup>

According to Boyle, attention given to human rights in the Paris Agreement was insufficient. The whole text on human rights is a part of the preamble, which indicates that its purpose is just interpretational and there are no strict legal obligations for the parties stemming from this provision.<sup>74</sup> Furthermore, the word *should* instead of *shall* is used throughout the text.<sup>75</sup> Cassotta echoes Boyle's arguments, moreover, she is sceptical about the agreement being enforceable, despite the fact that it is 'legally binding'.<sup>76</sup> In spite of the piecemeal approach (only some rights are mentioned) and the vague language of the agreement, it is the first legally binding treaty directly anchoring human rights in its text.<sup>77</sup>

## 1.2 Climate litigation as a global tendency and a phenomenon of our age

According to the generally accepted definition of climate (change) litigation, the phenomenon can be explained as '*a process in which the applicants seek to obtain legal outcomes*

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<sup>72</sup> DUYCK, Sébastien, JODOIN, Sébastien and JOHL, Alyssa. *Routledge handbook of human rights and climate governance*, p. 44.

<sup>73</sup> TSO, Phoenix, 2015. *How a disagreement over human rights language almost derailed the climate change treaty*. *Upworthy* [online]. 16 December 2015. [Accessed 13 December 2019]. Available from: <https://www.upworthy.com/how-a-disagreement-over-human-rights-language-almost-derailed-the-climate-change-treaty>.

<sup>74</sup> BOYLE, Alan. *Climate Change, The Paris Agreement and Human Rights*, p. 769–770.

<sup>75</sup> *Ibid.*

<sup>76</sup> CASSOTTA, Sandra. *The Paris Agreement in logic of multi-regulatory governance: A step forward to a new concept of "global progressive adaptive-mitigation"?* in *European Energy and Environmental Law Review* [online]. 2016. Vol. 25. no. 2. p. 200. [Accessed 16 February 2020]. Available from: [https://www.researchgate.net/publication/316253398\\_The\\_paris\\_agreement\\_in\\_logic\\_of\\_multi-regulatory\\_governance\\_A\\_step\\_forward\\_to\\_a\\_new\\_concept\\_of\\_global\\_progressive\\_adaptive-mitigation](https://www.researchgate.net/publication/316253398_The_paris_agreement_in_logic_of_multi-regulatory_governance_A_step_forward_to_a_new_concept_of_global_progressive_adaptive-mitigation). See also ADELMAN, Sam. *Human Rights in the Paris Agreement: Too Little, Too Late?* *Transnational Environmental Law* [online]. March 2018, Vol. 7, no. 1, p. 25 [Accessed 13 December 2019]. DOI 10.1017/S2047102517000280. Available from: [https://www.cambridge.org/core/product/identifier/S2047102517000280/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S2047102517000280/type/journal_article). ISSN 2047-1033.

<sup>77</sup> ADELMAN, Sam. *Human Rights in the Paris Agreement: Too Little, Too Late?*, p. 23.

from the court either to redress the harm caused by climate change impact or to support the actions of climate in some manner.<sup>78</sup> The lion's share of such actions is mostly directed at governments or city administrations, but they are also increasingly targeting the biggest greenhouse-gas-emitting companies, otherwise known as Carbon Majors, including companies such as Shell, Exxon, and CEMEX - responsible for the majority of the GHGs emissions in the world.<sup>79</sup> The plaintiffs are not only individuals, groups of individuals, NGOs, but also cities already feeling the impacts of climate change and forced to adopt adaptation measures. Climate change litigation belongs to the multi-level climate governance created in the situation where there is no central authority at the global level for enforcement of the climate obligations.<sup>80</sup> At the same time, it provides a complement to climate treaties, legislative and executive action, since 'it fosters the needed interaction across levels of government'.<sup>81</sup>

Determining what kind of case constitutes a climate litigation might be challenging due to the complexity and the scale of the problem. If we look at the issue of climate litigation in a more simplified way, from a strictly academic perspective, we can differentiate between three types of cases. The first one, called mitigation-related litigation<sup>82</sup>, tries to solve the problem through eliminating the factors causing the climate change, and prevent the detrimental impacts, i.e. reducing the amount of greenhouse gas emissions in the atmosphere. The second type, the

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<sup>78</sup> OKONKWO, Theodore. *Protecting the Environment and People from Climate Change through Climate Change Litigation*. Journal of Politics and Law [online]. 29 November 2017, Vol. 10, no. 5, p. 67 [Accessed 13 December 2019]. DOI 10.5539/jpl.v10n5p66. Available from: <http://www.ccsenet.org/journal/index.php/jpl/article/view/72144>. ISSN 1913-9055.

<sup>79</sup> HEEDE, Richard, 2014. *Carbon Majors: Accounting for carbon and methane emissions 1854-2010 Methods & Results Report* [online]. 7 April 2014. Snowmass, Colorado, Climate Mitigation Services. Commissioned by Climate Justice Programme (Sydney), Greenpeace International (Amsterdam). [Accessed 16 February 2020]. Available from: <http://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf>. See also *Greenpeace Southeast Asia and Others*. Commission on Human Rights. 19 September 2019. CHR-NI-2016-0001. [Accessed 2 February 2020]. Available from: <https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/>.

<sup>80</sup> JAGERS, Sverker C. and STRIPPLE, Johannes. *Climate Governance Beyond the State*. Global Governance: A Review of Multilateralism and International Organizations [online]. 28 July 2003, Vol. 9, no. 3, p. 386 [Accessed 13 December 2019]. DOI 10.1163/19426720-00903009. Available from: [https://brill.com/view/journals/gg/9/3/article-p385\\_9.xml](https://brill.com/view/journals/gg/9/3/article-p385_9.xml). ISSN 1942-6720.

<sup>81</sup> BURNS, William C. G. and OSOFSKY, Hari M. (eds.). *Adjudicating climate change: state, national, and international approaches* [online]. Cambridge: Cambridge University Press, 2009, p. 377 [Accessed 28 February 2020]. DOI 10.1017/CBO9780511596766. Available from: <http://ebooks.cambridge.org/ref/id/CBO9780511596766>. ISBN 978-1-107-63866.

<sup>82</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide* [online]. 10 December 2018. p. 31. [Accessed 22 December 2019]. Available from: <https://www.greenpeace.org/international/publication/19818/holding-your-government-accountable-for-climate-change-a-peoples-guide/>.

adaptation-related litigation<sup>83</sup>, reflects the fact that the climate change has been already happening and what we can do is to develop resilience to its effects.<sup>84</sup> Sometimes the scholarly literature delimits a third type, the procedural litigation<sup>85</sup>, which is concerned with allowing certain activities and giving permits only if the procedural rights of local inhabitants are taken into account.<sup>86</sup>

### 1.2.1 USA – a cradle of climate litigation

The first wave of climate change litigation started in 1990s, mainly in the USA, under the rule of president George H. W. Bush administration, followed by the climate litigation against the private actors in mid-2000s.<sup>87</sup> The reason behind this stems from one important factor. The American legal culture is greatly in favour of litigation, in all different fields and areas of people's lives.<sup>88</sup> Another trigger for a series of cases was the failure of US administration to ratify the Kyoto Protocol and people's frustration over the state of the current legislation framework and the first noticeable impacts of the climate change in the USA, such as Hurricane Katrina,<sup>89</sup> when people could for the first time feel the consequences of the global warming and at the same time realised that the state had not been doing enough to regulate on the climate change. Regrettably, this first generation of cases was mostly unsuccessful, owing to the unsatisfactory proof of the causal nexus.<sup>90</sup> The first ever landmark decision on climate change litigation in the USA was the U.S. Supreme Court judgement in case of *Massachusetts v. EPA (USA Environmental Protection*

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<sup>83</sup> *Ibid.*, p. 32.

<sup>84</sup> PEEL, Jacqueline and OSOFSKY, Hari M. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, p. 5.

<sup>85</sup> *Ibid.*, p. 33.

<sup>86</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 33.

<sup>87</sup> GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*. Oxford Journal of Legal Studies [online]. 20 October 2018, Vol. 38, no. 4, p. 846. [Accessed 13 December 2019]. DOI 10.1093/ojls/gqy029. Available from: <https://academic.oup.com/ojls/article/38/4/841/5140101>. ISSN 1464-3820.

<sup>88</sup> AVERILL, Marilyn. *Linking Climate Litigation and Human Rights*. Review of European Community & International Environmental Law [online]. July 2009, Vol. 18, no. 2, p. 140 [Accessed 13 December 2019]. DOI 10.1111/j.1467-9388.2009.00636.x. Available from: <http://doi.wiley.com/10.1111/j.1467-9388.2009.00636.x>. ISSN 0962 8797.

<sup>89</sup> BOUWER, Kim. *The Unsexy Future of Climate Change Litigation*. Journal of Environmental Law [online]. 1 November 2018. Vol. 30, no. 3, p. 489. [Accessed 13 December 2019]. DOI 10.1093/jel/eqy017. Available from: <https://academic.oup.com/jel/article/30/3/483/5055379>.

<sup>90</sup> GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*, p. 867.

Agency).<sup>91</sup> The State of Massachusetts government along with a group of environmental organisations brought the US federal government to court. Subsequently, the U.S. Supreme Court had the opportunity to decide about the climate change issue for the very first time in the US history.<sup>92</sup> The result of this case was a turning point in climate change litigation. The court adjudicated that the EPA had the authority under the Clean Air Act to regulate GHGs and that under this act the broad definition of ‘air pollutants’ includes also GHGs, thereby preventing the EPA to give up on regulating the GHGs emissions from the transport as it initially intended to.<sup>93</sup> The Clean Air Act has later on become one of the main sources of climate rights in the US climate litigation.<sup>94</sup> Regrettably, the United States have not passed any comprehensive climate change regulations to date. On the contrary, president Trump’s announcement about the intention of the USA to withdraw from the Paris Agreement and an intentional massive deregulation in this area triggered even more significant portion of filed climate lawsuits caused by the dissatisfaction of the citizens with the way the climate policies are managed in the USA. Thus, the climate litigation still remains an essential tool to combat the issue of climate change.<sup>95</sup>

### 1.2.2 Slow expansion of climate litigation to the rest of the world

Outside of the United States, a worldwide turning point in climate change litigation was the adoption of Paris Agreement in 2015. The agreement brought more hope and potential into the area of climate litigation, but also symbolized a disappointment due to a weak inclusion of human rights into the new treaty and non-ambitious NDCs adopted by states. After the adoption of Paris Agreement, the signatory states were required to adopt mitigation measures under their domestic law consistent with NDCs. This inspired many individuals to bring a case against their governments. This way, the vague international framework obligations were finally brought to life through courts’ supervision and legislators’ action and endeavour.<sup>96</sup> According to Climate Change

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<sup>91</sup> *Massachusetts v. EPA*. Supreme Court of the United States. 2 April 2007. No. 05–1120. [Accessed 30 November 2019]. Available from: <https://www.supremecourt.gov/opinions/06pdf/05-1120.pdf>.

<sup>92</sup> PEEL, Jacqueline and OSOFSKY, Hari M. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, p. 2.

<sup>93</sup> *Massachusetts v. EPA*. Supreme Court of the United States. 2 April 2007. No. 05–1120. p. 29-30.

<sup>94</sup> MÜLLEROVÁ, Hana Ph.D. *Klimatická změna jako nový typ výzvy pro mezinárodní i vnitrostátní právo* [lecture]. Prague: Ústav státu a práva AV ČR, 13 November 2019.

<sup>95</sup> BYRNES, Rebecca and SETZER, Joana. *Policy report: Global trends in climate change litigation: 2019 snapshot*, p. 6.

<sup>96</sup> BOUWER, Kim. *The Unsexy Future of Climate Change Litigation*. *Journal of Environmental Law* [online]. p. 492.

Laws of the World database, nowadays, there are more than 1,800 climate laws and policies worldwide, circa 400 of which have been introduced since the Paris Agreement was adopted.<sup>97</sup> These rules provide a basis for climate litigation together with international law, human rights, environmental principles, tort law, public nuisance etc.<sup>98</sup> Governments are more often held accountable in courts thanks to the increase in number of climate laws, policies and commitments after the adoption of the Paris Agreement.

According to The Climate Change Litigation of the World database, to date, over 1000 cases have been filed in the US and over 300 cases in all other countries combined.<sup>99</sup> The second largest share of litigations in the world appears in Australia, which plays a significant role as the world's second largest coal exporter running a number of coal fired power stations and managing extraction in coal mines.<sup>100</sup> Furthermore, Australia is a country which can already feel the impacts of climate change such as droughts, or wildfires which it experienced last year. For this reason, claimants in Australia were also one of the first to introduce climate adaptation into the climate litigation.<sup>101</sup> European countries lag behind with only a marginal number of cases (if we disregard the numerous cases in the field of EU ETS). However, Europe has noted a gradual growth of these cases over the past couple of years, in particular, in response to the success of the landmark case in the field of climate litigation, *Urgenda Foundation v. The State of the Netherlands*, where the District Court in The Hague ordered the Netherlands to reduce emissions by 25% compared to 1990 levels, finding the current goal of 17 % insufficient in respect to Dutch's international

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<sup>97</sup> GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND SABIN CENTER FOR CLIMATE CHANGE LAW. *Climate Change Laws of the World database* [online].

<sup>98</sup> GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review* [online]. United Nations Environment Programme in cooperation with the Sabin Centre for Climate Change Law at Columbia University. May 2017, p. 34-38 [Accessed 13 December 2019]. Available from: <http://columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envnt-CC-Litigation.pdf>. ISBN 978-92-807-3656-4.

<sup>99</sup> GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT AND SABIN CENTER FOR CLIMATE CHANGE LAW. *Climate Change Litigation of the World database* [online]. [Accessed 22 December 2019]. Available from: <https://climate-laws.org/>. See also SABIN CENTER FOR CLIMATE CHANGE LAW and ARNOLD & PORTER KAYE SCHOLER LLP. *Climate Case Chart*. [online]. [Accessed 16 February 2020]. Available from: <http://climatecasechart.com/>.

<sup>100</sup> PEEL, Jacqueline and OSOFSKY, Hari M. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, p. 18.

<sup>101</sup> *Ibid.*, p. 21.

obligations.<sup>102</sup> The case survived the appeal by the Dutch government at the end of 2018<sup>103</sup> and was further confirmed by the Supreme Court of Netherlands in December 2019.<sup>104</sup> The Czech Republic has not yet experienced any case of climate litigation. Nevertheless, in autumn of 2020, we might anticipate a lawsuit by Greenpeace which announced its intention to force Czech Republic to recognize a necessity to act on climate change and adopt legislation.<sup>105</sup> Greenpeace claimed that they have been discussing their options under the Czech law with legal advisors and only vaguely indicated how the lawsuit should work.

Overall, the expansion of climate litigation is remarkable on all continents, as the Annex 2 map shows. The recent trend includes human rights cases in the Global South (Philippines, South Africa, Pakistan or India) as discussed below.<sup>106</sup> Among the most significant impacts of climate litigation belongs above all, compensation for victims, adoption of necessary new regulation or policies, signals to other states and private actors and a stimulation of the public debate.<sup>107</sup>

### 1.2.3 Current trends in climate litigation

According to the United Nations Environmental Programme (UNEP) Report from 2017, there have been several trends in recent judicial decisions, such as: holding governments accountable for their legislative and policy commitments; establishing that particular emissions are the proximate cause of particular adverse climate change impacts; establishing liability for failures (or efforts) to adapt to climate change<sup>108</sup> etc. Moreover, from the corporate point of view,

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<sup>102</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague. 24 June 2015. § 4.84, § 5.1.

<sup>103</sup> *Urgenda Foundation v. The State of the Netherlands*. The Hague Court of Appeal. 9 October 2018. ECLI:NL:GHDHA:2018:2610, 200.178.245/01 (English translation). [Accessed 20 December 2019]. Available from: <https://www.urgenda.nl/en/themas/climate-case/>.

<sup>104</sup> *Urgenda Foundation v. The State of the Netherlands*. Supreme Court of the Netherlands. 20 December 2019. 19/00135 (English translation). [Accessed 2 April 2020]. Available from: <https://www.urgenda.nl/en/themas/climate-case/>.

<sup>105</sup> KERLES, Marek. Greenpeace připravuje žalobu na Česko. Podle ekologů podceňuje hrozbu globálního oteplování. *INFO.CZ* [online]. 4 July 2019. [Accessed 16 February 2020]. Available from: <https://www.info.cz/svet/greenpeace-pripravuje-zalobu-na-cesko-podle-ekologu-podcenuje-hrozbu-globalniho-oteplovani-42185.html>.

<sup>106</sup> PEEL, Jacqueline and LIN, Jolene. *Transnational Climate Litigation: The Contribution of the Global South*. *American Journal of International Law* [online]. October 2019, Vol. 113, no. 04, p. 684 [Accessed 8 March 2020]. DOI 10.1017/ajil.2019.48. Available from: [https://www.cambridge.org/core/product/identifier/S0002930019000484/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S0002930019000484/type/journal_article). ISSN 2161-7953.

<sup>107</sup> MÜLLEROVÁ, Hana Ph.D. *Klimatická změna jako nový typ výzvy pro mezinárodní i vnitrostátní právo* [lecture]. Prague: Ústav státu a práva AV ČR, 13 November 2019.

<sup>108</sup> GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p. 14.

we can see a raising number of fraud and consumer protection claims (such as false green advertising) as well as litigation concerning planning and permitting.<sup>109</sup> Both governments and private entities are also more frequently held liable for the violations of human rights through available international instruments and human rights tribunals.<sup>110</sup>

### **1.3 Rights' turn in climate litigation**

#### **1.3.1 Pros and cons of the rights-based approach, a story of imperfection, which might be our best option**

As we mentioned in the previous section, one of the most recent trends in climate change litigation have been attempts to find a link between human rights and devastating impacts of climate change. Lawyers representing plaintiffs around the world soon understood that human rights might be, to a certain extent, capable of filling in the gaps of insufficient international environmental law and thus bring the claimant closer to a favourable ruling. Above all, the rights' approach can ensure broader opportunities for the claimants, compared to international environmental law, when trying to achieve the justice, such as a wider choice of avenues, an increased authority of the judgement etc.

Furthermore, international (environmental) law, except for a couple of treaties, is based on the concept that one state owes a duty to another state or a group of states, and the whole process works on the basis of political compromises, moving the topic away from individuals. The Paris Agreement is not an exception, it does not allocate any specific rights to individuals but works with the inter-state concept. If we add to the equation the fact that states are usually reluctant to sue one another (there has not been a climate-related case between states yet), it puts individuals into a very difficult position with regards to enforcing the instruments. One of the main advantages of human rights, therefore, might be that they are established more of an individual basis, where the harm is caused to individuals as a result of an environmental problem.<sup>111</sup> Individuals can, consequently, more easily gain power to claim their rights, based on the suffered harm or harm which is imminently threatening them. Moreover, if the claim is drafted strategically, it may have

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<sup>109</sup> HUSSAIN, Tallat and CLARKE, Mark. *Climate change litigation: A new class of action*, p. 4.

<sup>110</sup> *Ibid.*, p. 4.

<sup>111</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*. In: International climate change law. Oxford, United Kingdom: Oxford University Press, 2017, p. 298. First edition. ISBN 978-0-19-966429-0. See also INTERNATIONAL BAR ASSOCIATION. *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 66.

impact beyond the individual's life. Especially in common law jurisdictions, a well-prepared action can influence future climate policies. As one research shows, the litigants' motivation in most of the cases in the US and Australia proved to be strategic, meaning they are trying to achieve some regulatory changes either in the positive (pro-regulatory) or negative (anti-regulatory) fashion.<sup>112</sup>

Lastly, the climate change has been for a long time perceived as something distant from the humanity, something only scientists are concerned about, but something that does not impact individuals. Giving the problem a human rights' label might break down this conception and make people understand real impacts of climate change on their lives. As noticed by Hunter, people need a story they can identify with rather than abstract numbers and scientific research.<sup>113</sup> It is evident that human rights cases' side effect is an attraction of attention to the problem through the media. What is more, climate change litigation helped to establish a whole social movement raising public awareness about the climate change.<sup>114</sup> We need to, at least partially, abandon the scientific view on the climate change and start to see it more as a problem of humankind survival.

On the other side of the coin, human rights bring many challenges concerning the protection of the environment itself, regardless of the human interest. We cannot forget that environmentalists and human rights legal scholars have different objects of protection in mind<sup>115</sup> and thus, necessarily, their opinions do not always find a common ground on how to define the climate policies in regard to some burning questions (such as economic growth) where interests of humans and the environment are in direct opposition.<sup>116</sup> If we divert too much from the environmental view on the climate problem, we might end up selfishly protecting humans and forgetting that other species might face extinction due to our actions.

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<sup>112</sup> PEEL, Jacqueline and OSOFSKY, Hari M. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, p. 5.

<sup>113</sup> BURNS, William C. G. and OSOFSKY, Hari M. (eds.). *Adjudicating climate change: state, national, and international approaches*, p. 360. See also BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 300.

<sup>114</sup> AVERILL, Marilyn. *Linking Climate Litigation and Human Rights*, p. 144.

<sup>115</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 300.

<sup>116</sup> SCHAPPER, Andrea. *Climate justice and human rights*, p. 289.

Another troubling and acute issue concerns the character of the environment, which does not know political borders and GHGs are free to move around our globe. In a nutshell, the effects of climate change are diffuse and not always the most perceptible in the places of its origin.<sup>117</sup> As a result, we cannot efficiently achieve the global goals in case one state refuses to conform with climate objectives, which might lead to further deterioration of the environment around the globe. One of the pitfalls of human rights approach in this context is that human rights treaties were created in a situation in which states did not count with phenomena such as transboundary pollution where one state might endanger citizens of another state, who live outside both its territory and jurisdiction.<sup>118</sup> Most of the human rights treaties, therefore, work territorially and vertically, i.e. from citizens (rights-holders) to states (duty-bearers).<sup>119</sup> As the world has become more globalized, territorial character of some human rights treaties has ceased to be sufficient.<sup>120</sup> International environmental law, on the other hand, is equipped to function across the boundaries and states are under obligation to refrain from engaging in activities that could cause transboundary harm.<sup>121</sup> This approach was first mentioned in 1938/1941 in Trail Smelter<sup>122</sup> case and was later confirmed in Principle 21 of Stockholm Declaration. In order to move closer to an extraterritorial conception of protection of human rights, a group of experts formulated non-binding Maastricht Principles on Extraterritorial State Obligations<sup>123</sup> (ETO). Those Principles among others anchor that state has to prevent actions or omissions which would result in violations of human rights both inside and outside of its territory.<sup>124</sup> Since the Principles are non-binding, one of the options how to hold

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<sup>117</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 308.

<sup>118</sup> HUMPHREYS, Stephen. *Human rights and climate change* [online]. Cambridge; New York: Cambridge University Press, 2010, p. 92 [Accessed 4 March 2020]. Available from: <https://www-cambridge-org.kuleuven.ezproxy.kuleuven.be/core/books/human-rights-and-climate-change/0DE0FEA15924871E7BAE310E93B2139D>. ISBN 9780511770722.

<sup>119</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online]. Key issues in environment and sustainability. Abingdon, Oxon; New York, NY: Routledge, 2019. p. 289.

<sup>120</sup> *Ibid.*, p. 290.

<sup>121</sup> *Ibid.*, p. 289.

<sup>122</sup> *Trail Smelter (USA v Canada)*. 16 April 1938 and 11 March 1941 (2006). III *RIAA* 1905.

<sup>123</sup> EXPERT GROUP ON INTERNATIONAL LAW AND HUMAN RIGHTS. *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*. 28 September 2011 [Accessed 2 April 2020]. Available from: [https://www.ciel.org/wp-content/uploads/2015/05/Maastricht\\_ETO\\_Principles\\_21Oct11.pdf](https://www.ciel.org/wp-content/uploads/2015/05/Maastricht_ETO_Principles_21Oct11.pdf).

<sup>124</sup> *Ibid.* Principle 8.

states and private actors accountable is application of states' obligation to cooperate under the UNFCCC, in the light of aforementioned Principle 21 of the Stockholm Declaration and human rights obligations.<sup>125</sup> The question remains, however, whether such and extensive interpretation would stand.

Finally, we have to keep in mind that the enforcement of human rights as itself might be often problematic even if we have a relevant forum to turn to.<sup>126</sup> Moreover, most human rights obligations apply to states, but not to individuals and corporations, which belong to main emitters of GHGs. Another problem is also causation (further addressed in Chapter 2), which is connected to a cross-temporal nature of climate change, signifying the fact that GHGs exist in the atmosphere in a latent version while the actual impacts might not materialize themselves until several decades after emission of GHGs.<sup>127</sup>

Naturally, the rights-based approach is not infallible, and the human rights arguments are not waterproof nor insurmountable. Besides, we should not forget that the success of the lawsuit oftentimes depends on the societal and legal characteristics of each state and the level of receptivity of the particular judge to rule on the climate change. These factors are, obviously, very difficult to influence. Additionally, it is risky to base your claim solely on the human rights arguments, and therefore, the claimants often combine those with other areas of law, such as tort law, civil liability, public nuisance, administrative law etc.<sup>128</sup>

### **1.3.2 The first rights-based case, what and why went wrong**

The first attempt to connect climate change and human rights goes back to 2005, when the Inuit Petition to the Inter-American Commission on Human Rights (IACHR) was filed.<sup>129</sup> According to the petition, US is one of the biggest contributors to atmospheric concentrations of

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<sup>125</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online]. Key issues in environment and sustainability. Abingdon, Oxon; New York, NY: Routledge, 2019, p. 303-304.

<sup>126</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 300.

<sup>127</sup> SETZER, Joana and VANHALA, Lisa C. *Climate change litigation: A review of research on courts and litigants in climate governance*, p. 10.

<sup>128</sup> GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p. 34-38.

<sup>129</sup> 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*. 7 December 2005.

GHGs and yet it has been omitting the regulation of its emission.<sup>130</sup> According to applicants, in this sense, the US federal government violated the rights of Inuit people protected by the American Declaration of the Rights and Duties of Man.<sup>131</sup> The case was dismissed by the IACHR which contended that the information provided by the applicants was not sufficient to proceed to the merits stage. Despite this fact, IACHR convened a hearing about the general relationship between human rights and climate change.<sup>132</sup>

Despite the initial hurdles, we can see nowadays a growing number of claimants from different social backgrounds, from a group of elderly women to law students, children or farmers, who try to reach the justice through the litigation. In recent years we have seen even more courage among climate litigants, who bring not only states, but also private entities to court or other authorities. The glowing example is a petition of citizens of Philippines together with Greenpeace Southeast Asia to the Philippines Commission on Human Rights, who after the Super Typhoon Haiyan sued 50 world's largest fossil fuel companies (producers of crude oil, coal or natural gas) responsible for the major part of GHGs emissions in our atmosphere.<sup>133</sup>

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<sup>130</sup> *Ibid.*, p. 7.

<sup>131</sup> *Ibid.*, p. 5.6.

<sup>132</sup> *More information about the proceedings are available here:* <http://climatecasechart.com/non-us-case/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/>.

<sup>133</sup> *Greenpeace Southeast Asia and Others*. Commission on Human Rights. 19 September 2019. CHR-NI-2016-0001. [Accessed 2 February 2020]. Available from: <https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/>. See also: ADELMAN, Sam and LEWIS, Bridget. *Symposium Foreword: Rights-Based Approaches to Climate Change*. p. 11.

## 2. STARTING POINTS TO A SUCCESSFUL RIGHTS - BASED LAWSUIT

Even though climate litigation may appear as a ground-breaking concept in our attempts to tackle the thorny issue of climate change, it entails many problems on different levels, which we are going to address below. Firstly, and most importantly, in order to prepare a high-quality lawsuit, it is necessary to consider the following questions. Who can most likely qualify as a strong plaintiff? What is the most suitable forum? How can we overcome all procedural legal hurdles such as the problem of justiciability at the very beginning of the case? In case that we fail to address these issues, no matter how convincing our subject-matter arguments are, they will be useless once the court dismisses our claim on the procedural grounds. The experience from past case law speaks for itself. As we have already witnessed in many countries, it is not rare that defendants, mostly the governments, bring procedural counterarguments listed below, and plaintiffs must be prepared to confront them in order to succeed.

### 2.1 Who should be sued?

#### 2.1.1 States as defendants

As we will see in the case law in Chapter 3, many individuals turn to courts to help them solve the effects climate change has on their lives. But who should claimants take to court to achieve the best possible outcome? Thanks to an emerging range of international and from them stemming national obligations, a relevant state seems to be the most obvious option. Nevertheless, the drafter of the lawsuit should not forget that as a first step, it is necessary to discover what the exact obligations of the state are.

In general, states' obligations in respect to human rights are derived from the triad of duties, i.e. the duty to *respect-protect-fulfill*.<sup>134</sup> The duty to respect is usually the least problematic. This negative, traditionally liberal duty requires states to refrain from particular actions,<sup>135</sup> i.e. states are not allowed to do anything which is in direct contrast to the protected right (such as the right to a healthy environment or the right to life). The duty to protect, on the other hand, serves as an

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<sup>134</sup> KNOX, John H. *Climate Change and Human Rights Law*. *Virginia Journal of International Law* [online]. 2009, Vol 50, no. 1., p. 179-180 [Accessed 25 March 2020]. Available from: <https://heinonline.org/HOL/P?h=hein.journals/vajint50&i=1>. ISSN 0042-6571.

<sup>135</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 304.

insurance against the non-state actors under the state's jurisdiction. Under this duty, states are required to protect their citizens against third parties, whose actions might lead to violations of human rights.<sup>136</sup> It is evident from the character of this duty, that it is usually breached by omission of the state.<sup>137</sup> The last one in the triad of duties is the duty to fulfill.<sup>138</sup> The duty requires active steps from the state, in order to ensure the full enjoyment of human rights.<sup>139</sup> This type of duty may require states to adopt measures, legislation or national policies. Such a duty is not recognized under all human rights instruments. All three types of duties derive from international obligations anchored in several human rights instruments, many of them adopted under the United Nations. We can mention the Universal Declaration of Human Rights (UDHR)<sup>140</sup>, International Covenant on Civil and Political Rights (ICCPR)<sup>141</sup> or International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>142</sup>, to name a few. Further obligations often arise from the regional human rights treaties.

### **2.1.2 Society accusing private actors. 'Guilty because they knew?'**

Even though the climate litigation cases are usually brought against governments, we can see a rising movement of climate lawsuits brought against private actors. One of the very important steps towards the private climate litigation was the release of Richard Heede's study in 2013 which for the first time calculated the overall emissions of the 90 largest carbon producers (oil, gas, cement), collectively also known as Carbon Majors, which include Chevron, ExxonMobil, BP and Shell.<sup>143</sup> The study triggered an avalanche of climate litigation cases thanks to its potency to finally help solving the ever-present problem of causation. According to Setzer, another factor has been

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<sup>136</sup> KNOX, John H. *Climate Change and Human Rights Law*, p. 179-180.

<sup>137</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 305.

<sup>138</sup> KNOX, John H. *Climate Change and Human Rights Law*, p. 179-180.

<sup>139</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 43.

<sup>140</sup> UN GENERAL ASSEMBLY. *Universal Declaration of Human Rights*. 10 December 1948. 217 A (III).

<sup>141</sup> UN GENERAL ASSEMBLY. *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*. 16 December 1966. A/RES/2200.

<sup>142</sup> *Ibid.*

<sup>143</sup> HEEDE, Richard, 2014. *Carbon Majors: Accounting for carbon and methane emissions 1854-2010 Methods & Results Report* [online]. 7 April 2014. Snowmass, Colorado, Climate Mitigation Services. Commissioned by Climate Justice Programme (Sydney), Greenpeace International (Amsterdam). p. 8 [Accessed 16 February 2020]. Available from: <http://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf>.

progress in climate science which is able to prove that a particular harming event can be attributed to climate change or even a certain emitter.<sup>144</sup>

Data available concerning the corporate contribution to climate change are alarming. One hundred major companies contributed to over 70% of global CO<sub>2</sub> emissions since 1988.<sup>145</sup> What is more, already in 1980s most of these companies have known or could foresee that by continuing in their activities they are causing the alternation of climate of our planet. Yet they continued misleading and misinforming the public about the impacts of their activities.<sup>146</sup> They did not disclose the results of their scientific studies and continued marketing the fuels so dangerous to our environment.<sup>147</sup> The litigation against the fossil fuel companies is often compared to two other historical experiences - asbestos and tobacco litigations.<sup>148</sup> Examining the cases more closely, it seems like the story was written according to the same script.<sup>149</sup> Analogously to fossil fuel companies, tobacco companies manufactured products which consumers believed were safe, while companies kept silent on the actual human health impact.<sup>150</sup> Eventually, tobacco litigation resulted in the regulation of tobacco marketing.<sup>151</sup> Time will tell if a similar outcome is achieved in the climate litigation.

Noticing the similarities above, many lawyers dealing with climate litigation were inspired by the strategies used against the tobacco companies. Tobacco companies, as well as fossil fuel

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<sup>144</sup> GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*, p. 854-855.

<sup>145</sup> CDP WORLDWIDE. *The Carbon Majors Database, CDP Carbon Majors Report 2017* [online]. July 2017, p. 14 [Accessed 6 April 2020]. Available from: <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions>. See also BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. *Turning up the heat: Corporate legal accountability for climate change* [online]. 2018, p. 1 [Accessed 16 February 2020]. Available from: <https://www.business-humanrights.org/en/turning-up-the-heat-corporate-legal-accountability-for-climate-change>.

<sup>146</sup> FOERSTER, Anita. *Climate Justice and Corporations*. King's Law Journal [online]. 4 May 2019, Vol. 30, no. 2, p. 307 [Accessed 8 February 2020]. DOI 10.1080/09615768.2019.1645447. Available from: <https://www.tandfonline.com/doi/full/10.1080/09615768.2019.1645447>.

<sup>147</sup> BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. *Turning up the heat: Corporate legal accountability for climate change*, p. 6.

<sup>148</sup> *Ibid.*, p. 6. See also GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*, p. 856-858.

<sup>149</sup> *Ibid.*, p. 6.

<sup>150</sup> GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*, p. 857.

<sup>151</sup> *Ibid.*, p. 858.

companies, were and still are known for their aggressive responses to claims, and for having resources higher than the GDP of some smaller countries.<sup>152</sup> That might be one of the reasons, why the plaintiffs are so reluctant to take steps against the Carbon Majors. The companies have a control over extensive assets, and unlike many of the victims of the climate change, they can afford the best legal services.<sup>153</sup> The lack of power and money can easily disarm plaintiffs. The solution might be providing a legitimacy to a lawsuit through uniting more individuals. We can already see this happening for example in the case of *Milieudefensie et al. v. Royal Dutch Shell plc* which started as a petition of 11,000 people involved.<sup>154</sup>, where not only the citizens, but also a number of NGOs, and individual experts supported the climate litigation.

In a globalized world with a growing number of transnational corporations holding immense power, it might be disturbing that it is generally states and not corporations that international law imposes obligations on.<sup>155</sup> We are living in a world without enforceable human rights obligations which would be directly applicable to transnational corporations.<sup>156</sup> Momentarily, it is primarily the states' duty to enforce the adherence to human rights instruments on private companies acting under their jurisdiction.<sup>157</sup> This way, a state might find itself in a position where it has to balance two contradictory interests; the economic prosperity of its citizens and development on the one side, protection of the environment on the other.<sup>158</sup> Moreover, this issue is oftentimes connected with extraterritoriality, where the company residing in state A might easily violate human rights of citizens of the country B. UN Guiding Principles on Business and Human Rights from 2011<sup>159</sup>

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<sup>152</sup> BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. *Turning up the heat: Corporate legal accountability for climate change* [online], p. 18.

<sup>153</sup> *Ibid.*, p. 18.

<sup>154</sup> *Summons Milieudefensie et al. v. Royal Dutch Shell plc*. District Court of Hague. 5 April 2019. File no. 90046903 (English translation). [Accessed 4 April 2020]. Available from: <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>. See also BUSINESS & HUMAN RIGHTS RESOURCE CENTRE. *Turning up the heat: Corporate legal accountability for climate change* [online], p. 7.

<sup>155</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 307.

<sup>156</sup> INTERNATIONAL BAR ASSOCIATION. *Achieving Justice and Human Rights in an Era of Climate Disruption* [online], p. 68.

<sup>157</sup> KNOX, John H. *Climate Change and Human Rights Law*, p. 179-180.

<sup>158</sup> MÜLLEROVÁ, Hana Ph.D. *Klimatická změna jako nový typ výzvy pro mezinárodní i vnitrostátní právo* [lecture]. Prague: Ústav státu a práva AV ČR. 13 November 2019. See also LEWIS, Bridget. *Environmental human rights and climate change: current status and future*, p. 16.

<sup>159</sup> UNITED NATIONS. *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework*. 2011.

(the ‘Principles’ or ‘UNGP’) might provide guidance regarding human rights obligations. The Principles were drafted by the Special Representative of the UN Secretary General on Business and Human Rights, John Ruggie;<sup>160</sup> and are based on three pillars; (i) state’s *duty* to protect, obliging states to pass relevant laws and implementing them (ii) the corporate *responsibility* to respect human rights: ‘*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved*’<sup>161</sup>, and finally, the Principles grant (iii) access to remedies.<sup>162</sup> Despite the fact that the Principles are of a soft law nature, they ‘*elaborate on the implications of relevant provisions of existing international human rights standards, some of which are legally binding on States, and provide guidance on how to put them into operation*’<sup>163</sup>. Furthermore, the Principles might be voluntarily adopted by businesses as a part of their self-regulation. The guidelines can be therefore seen as part of a Corporate Social Responsibility (CSR).<sup>164</sup>

Even though the majority of cases are, for obvious reasons, using either tort law or the public nuisance as their main argument<sup>165</sup>, we can still see some cases with at least supporting human rights arguments or involving intriguing human stories. Even if not successful, they have a social relevance and send signals to private actors.

## 2.2 A strong plaintiff

From a hypothetical perspective, we can start out assessing what kind of plaintiff is most likely to succeed in a climate change litigation based on human rights arguments. One of the aspects which should be taken into account is the level of vulnerability of a particular claimant,

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<sup>160</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online], p. 318.

<sup>161</sup> UNITED NATIONS. *Guiding principles on business and human rights: implementing the United Nations “Protect, Respect and Remedy” framework*. 2011, Principle 11.

<sup>162</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online], p. 318.

<sup>163</sup> UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER. *Frequently asked questions about the guiding principles on business and human rights* [online]. New York: United Nations, 2014, p. 8 [Accessed 25 March 2020]. Available from: <https://doi.org/10.18356/79c110b0-en>. ISBN 978-92-1-056839-5.

<sup>164</sup> ATAPATTU, Sumudu A. and SCHAPPER, Andrea. *Human rights and the environment: key issues* [online]. Key issues in environment and sustainability. Abingdon, Oxon; New York, NY: Routledge, 2019. p. 308, 312.

<sup>165</sup> GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p. 34-38.

whether he/she has already been feeling the impacts of climate change and whether the results are foreseeable and likely to occur in the near future.<sup>166</sup> As Hsu points out in his work, the ideal applicants in this sense might be from the Arctic regions.<sup>167</sup> The underlying logic is undeniable as the Arctic regions are the ones which already suffer from climate change impacts and where the threats are most visible and imminent. Those impacts are at the same time more harsh than elsewhere, and therefore also more concrete and comprehensible for the court.<sup>168</sup> As scientists discovered, climate change in the Arctic regions proceeds twice as fast compared to the rest of the world.<sup>169</sup> Most of the inhabitants of the Arctic are dependent on its fauna and in case the erosion continues, sea ice melts and the permafrost keeps thawing. Thus, it is highly likely, that those communities will be forced to relocate and therefore will lose some of their cultural rights. All of these consequences were confirmed by the Arctic Council and by the International Arctic Science Committee in Arctic Climate Impact Assessment.<sup>170</sup> Naturally, it is not possible to generalize who should be the strongest plaintiff based only on the information above. The climate change might affect people all around the world in very different ways. Apart from the factor of vulnerability of the claimant, other questions come into place, such as which concrete rights were infringed, etc.

### 2.3 A suitable forum

One of the first steps to consider before bringing the action is to inspect which forum would be the most suitable. In human rights based climate change litigation, there are options on the international, regional and domestic level, all having their pros and cons depending on what the plaintiff wants to achieve.

If we consider establishing the particular state's liability for harms caused by climate change (i.e. also for the human rights implications of climate change) at the international level, according

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<sup>166</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 100.

<sup>167</sup> HSU, Shi-Ling. *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit* [online]. University of Colorado Review Forthcoming. 21 September 2007, Vol. 79, p. 720-722 [Accessed 13 December 2019]. Available from: <https://heinonline.org/HOL/P?h=hein.journals/ucollr79&i=708>. ISSN 0041-9516.

<sup>168</sup> *Ibid.*, p. 720-722.

<sup>169</sup> HASSOL, Susan Joy. *Impacts of a warming Arctic: Arctic Climate Impact Assessment* [online]. 2004. Cambridge, U.K.; New York, N.Y: Cambridge University Press. p. 8. [Accessed 22 December 2019]. Available from: <https://www.amap.no/documents/doc/impacts-of-a-warming-arctic-2004/786>. ISBN 978-0-521-61778-9.

<sup>170</sup> HASSOL, Susan Joy. *Impacts of a warming Arctic: Arctic Climate Impact Assessment* [online]. p. 8, 11, 26.

to general international law, our options are quite limited. Neither the UNFCCC nor the Paris Agreement designate a specific authority or tribunal for a dispute concerning climate change. This leaves us with the general authority, namely the International Court of Justice (ICJ). Nevertheless, under international law, individuals themselves do not have the right to bring claims against the states. Therefore, ICJ is restricted only to state-against-state disputes, or alternatively to initiation of an advisory proceedings through the request of the UN General Assembly and other agencies. A group of Pacific Islands took this approach against Australia last year when they were seeking an advisory opinion through the UN General Assembly.<sup>171</sup> As long ago as in 1997, a vice-president of ICJ Weeramantry recognized the ICJ's limitations in his separate opinion and suggested that international law should gradually abandon strictly *inter partes* litigation serving interests of individual states. Instead international law should address '*greater interests of humanity and planetary welfare*'.<sup>172</sup> Even though several concepts of an international court of environment that would deal exclusively with these matters have been advocated since then, none of them were persuasive enough to make states proceed to their establishment.<sup>173</sup>

However, looking at climate change through the lenses of human rights might open access to more international and regional forums. There is a number of tribunals suitable to rule on human rights issues, providing higher authority than in the field of international environmental law.<sup>174</sup> Hereby, the victim who would be otherwise be left with a limited legal protection on the international level, might approach those authorities with his/her claim. Nevertheless, it is necessary that the concerned authority has jurisdiction over the parties involved in a dispute.<sup>175</sup> The main advantages of this approach is fact that individuals can claim redress directly against the states and some of the regional treaties even contain a free-standing right to a healthy and clean

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<sup>171</sup> DRUGMAND, Dana. *Pacific islands group seeks international court ruling on climate, human rights*. In: *Climate Liability News* [online]. 13 August 2019. [Accessed 23 March 2020]. Available from: <https://www.climateliabilitynews.org/2019/08/13/pacific-islands-climate-change-human-rights/>.

<sup>172</sup> WEERAMANTRY, Christopher Gregory. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) – separate opinion of vice-president Weeramantry*. International Court of Justice. 25 September 1997, p. 118.

<sup>173</sup> INTERNATIONAL BAR ASSOCIATION. *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 85 – 86.

<sup>174</sup> BODANSKY, Daniel, BRUNNÉE, Jutta and RAJAMANI, Lavanya. *Intersections between International Climate Change Law and Other Areas of International Law*, p. 299-300.

<sup>175</sup> AVERILL, Marilyn. *Linking Climate Litigation and Human Rights*, p. 141.

environment, which has not been yet defined on the international level<sup>176</sup>. Furthermore, the claimants do not have to deal with the often spelled out problem of the separation of powers or the issue of democratic legitimacy. The most suitable avenues for dealing with human rights violations have showed to be regional tribunals such as the European Court on Human Rights (ECtHR), which continuously acknowledged that degradation of the environment has impacts on the possibility of enjoyment of human rights.<sup>177</sup> Other examples include the African Court on Human and Peoples' Rights (ACHPR) deciding based on the African Charter of Human and Peoples' Rights encompassing an explicit right to a healthy environment<sup>178</sup>; and Inter-American Commission and Court on Human Rights (IACHR) which so far has been the only one facing a climate rights-based claim.<sup>179</sup>

Domestic courts, which is the last option, seem to be the most convenient alternative to international litigation. The main advantage of accessing the domestic courts first is that we can rely on domestic climate policy and constitutional rights which often include human rights provisions. Furthermore, many states have regional international treaties as a part of their domestic law. Human rights law in particular is often directly applicable and enforceable before the national courts.<sup>180</sup> Moreover, many regional and international tribunals require the claimants to address their national authorities first before they decide to bring the action before them (e. g. ECtHR).<sup>181</sup> The role of the domestic courts varies from jurisdiction to jurisdiction. Under common law legal tradition, they often fill in the gaps in climate policies and fulfil the regulation function of the climate litigation.<sup>182</sup> The main drawback of the domestic jurisdiction might be the complexity of

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<sup>176</sup> INTERNATIONAL BAR ASSOCIATION. *Achieving Justice and Human Rights in an Era of Climate Disruption*, p. 68.

<sup>177</sup> PEEL, Jacqueline and OSOFSKY, Hari M. *A Rights Turn in Climate Change Litigation?* *Transnational Environmental Law* [online]. March 2018, Vol. 7, no. 1, p. 64 [Accessed 13 December 2019]. DOI 10.1017/S2047102517000292. Available from: [https://www.cambridge.org/core/product/identifier/S2047102517000292/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S2047102517000292/type/journal_article). ISSN 2047-1033.

<sup>178</sup> INTERNATIONAL BAR ASSOCIATION. *Achieving Justice and Human Rights in an Era of Climate Disruption* [online], p. 68.

<sup>179</sup> 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*. 7 December 2005.

<sup>180</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 72, 75.

<sup>181</sup> *Ibid.*, p. 71.

<sup>182</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 23.

the issue when the national courts do not possess a complex technical expertise necessary to assess the climate claim and can be easily persuaded by the party that brings the most convincing study.<sup>183</sup>

## 2.4 Justiciability

The most important factor one must examine before the actual lawsuit is filed is matter of justiciability, which in general refers to a *'person's ability to claim a remedy before a judicial body when a violation of a right has either occurred or is likely to occur'*<sup>184</sup> and whether the court has a competence to adjudicate on the issue.<sup>185</sup> Justiciability includes primarily the matter of standing and separation of powers as discussed below and in most of the cases it represents the gate and the sieve, which the plaintiff must come through to get to the merits stage.

### 2.4.1 Standing (*locus standi*)

The fundamental problem identified in many cases is the matter of standing, i.e. *'the criteria the person must satisfy to be a party to proceeding.'*<sup>186</sup> There are several possibilities of how the question of standing might be designed. The conditions to be fulfilled in order to acquire standing under different jurisdictions vary from a very restrictive to quite a lenient approach. In the first case, if conditions for the standing are too rigorous, it may create unwanted situations where the individual whose rights have been violated is left without any protection from the court. On the other hand, it remains one of the most important tools to discourage people bringing marginal cases.

The matter of standing contains more elements. The most common one is the necessity to prove that climate change 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.<sup>187</sup> Albeit, in most of the cases, it is very problematic to show that a plaintiff suffered differently from

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<sup>183</sup> BERGKAMP, Lucas and HANEKAMP, Jaap C. *Climate Change Litigation against States: The Perils of Court-made Climate Policies*. European Energy and Environmental Law Review [online]. October 2015, Vol. 24, no. 5, p. 102, 108 [Accessed 7 April 2020]. Available from: <https://www.deepdyve.com/lp/kluwer-law-international/climate-change-litigation-against-states-the-perils-of-court-made-7bmP7gi07h>.

<sup>184</sup> GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p.27.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*, p.28.

<sup>187</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 78-79.

everybody else. Regarding this issue, Hsu provided an example of the coastal cities endangered by the rising sea levels. If e.g. Boston decided to file a lawsuit, it would not be able to prove that it suffered particular harm, because the same harm concerns thousands of other coastal places in the world.<sup>188</sup> The US case law provides us with a three-part test, according to which a plaintiff must show that: (1) it 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.<sup>189</sup> In contrast to the US' strictness, some countries allow bringing an action even in cases of mere possibility of the violation of human rights, under the condition that the violation is foreseeable and close.<sup>190</sup> Particularly relaxed standing conditions are applied in countries such as India or Pakistan.<sup>191</sup>

Furthermore, in some countries such as Canada, it is allowed to bring the claim in the public interest (*actio popularis*)<sup>192</sup>, whereas in other countries, Switzerland for example<sup>193</sup>, it is strictly banned. The so-called public interest litigation is a way to bring rights of affected groups to court (usually on their behalf by an NGO). As the name indicates, the litigation's purpose is to serve a broader group or general public, while it is not necessary to have a specific victim who would

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<sup>188</sup> HSU, Shi-Ling. *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, p. 745.

<sup>189</sup> *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167 (2000). See also HSU, Shi-Ling. *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, p. 744.

<sup>190</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 80.

<sup>191</sup> BHAVNA MISHRA ANN, Jacob and RISHAV, Ambastha, 2018. *Climate Change Litigation and Human Rights* [online]. 22 March 2018. [Accessed 13 December 2019]. p. 3. Available from: <https://www.lawasia.asn.au/sites/default/files/2018-05/Academic-Paper-Climate-Change-Litigation-and-Human-Rights-22Mar2018.pdf>.

<sup>192</sup> *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*. 21 September 2012. SCC 45 (CanLII), [2012] 2 SCR 524, I. § 2 [Accessed 1 April 2020]. Available from: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/10006/index.do>. As set out by the Supreme Court of Canada in the above case law: 'In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors.'

<sup>193</sup> *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, § 8.1.

approach authorities on his own in order to obtain a judgement.<sup>194</sup> The boost of public interest litigation was fuelled in particular thanks to the adoption of the Aarhus Convention.<sup>195</sup> The Convention strengthened the position of NGOs promoting environmental protection and 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*’<sup>196</sup>.

Another positive trend in climate change litigation is the fact that in some countries, such as Colombia, it is possible to bring the action on behalf of future (and unborn) generations.<sup>197</sup> 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.<sup>198</sup>

As we could observe above, the conditions on standing might predetermine the success of the climate change litigation. Usually, the matter of standing constitutes a significant barrier to initiate a climate litigation in many jurisdictions, and a replication of the success from one country to another is, therefore, not always feasible. This is evident from the attempts of the attorney Cox, who appeared in the *Urgenda* case. The attorney, following the landmark success of the *Urgenda* case in Netherlands, released a book called *Revolution Justified*,<sup>199</sup> which attempts to introduce a manual on how to proceed in other European countries based on the success of the Dutch case. Nevertheless, as we could see from the failure in the *KlimaSeniorinnen*,<sup>200</sup> an action brought by a

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<sup>194</sup> EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS E.V. *Public interest litigation* [online]. In: ECCHR.eu [Accessed 16 February 2020]. Available from: <https://www.ecchr.eu/en/glossary/public-interest-litigation/>.

<sup>195</sup> THE UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. 25 June 1998.

<sup>196</sup> THE UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. 25 June 1998, Art. 2, Section 5.

<sup>197</sup> *Future Generations v. Ministry of the Environment and Others*. Supreme Court of Colombia. 5 April 2018. No. 11001-22-03-000-2018-00319-01, STC4360-2018. (English translation of excerpts). [Accessed 10 October 2019]. Available from: <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>.

<sup>198</sup> ALLEN, Ted. *The Philippine Children's Case: Recognizing Legal Standing for Future Generations*. *Georgetown International Environmental Law Review* [online]. 1994, Vol. 6, no. 3, p. 729-730 [Accessed 24 March 2020]. Available from: <https://heinonline.org/HOL/P?h=hein.journals/gintenlr6&i=721>. ISSN 1042-1858.

<sup>199</sup> COX, Roger H. J. *Revolution justified*. Maastricht: Planet Prosperity Foundation, 2012, 328 p. ISBN 978-90-817975-1-1.

<sup>200</sup> *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*.

group of elderly women in Switzerland inspired by *Urgenda*, such replication is often doomed to fail.

Regardless of all positive tendencies in the world mentioned in the section above, a broader definition of standing in environmental matters is indispensable and should be the ultimate destination of national legislative acts as a way to proceed forward. One of the options might be the so-called ‘open-standing provision’ that grants the standing independently of whether an actual harm to an individual took place.<sup>201</sup>

#### **2.4.2 Separation of powers (*trias politica*): ‘A difference between an active and an activist judge.’**

One of the key doctrines, namely the separation of powers within a state implies that there are some powers granted to each branch by the constitution and the authority of one branch should not interfere with the authority of other branches. The purpose is to prevent usurpation of power by one of the branches.<sup>202</sup> In climate lawsuits, namely those aimed at governments, courts are often required to rule on emission reductions or other unsatisfactory climate policies. The main question which usually arises is whether the court should hear the matter or if the topic is of more political nature and should be discussed in the parliament or other competent legislative body. It is highly relevant to address this issue in all climate change related claims, since ruling on the government’s policy might be recognized as a violation of *trias politica* and further impair political and policy freedom, thus leading to an undesirable judicial activism. Rightly so, some scholars argue that the a decision like this might further lead to a disruption of constitutional democracy and rule of law.<sup>203</sup> Other commentators such as Peel remind us that limiting judicial discretion in climate cases can be considered a refusal of justice.<sup>204</sup> Among other reasons, that is why many litigants choose the tool of climate litigation. Inaction on part of the court is, unlike in the case of a government,

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<sup>201</sup> INTERNATIONAL BAR ASSOCIATION. *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* [online]. February 2020, p. 8-9 [Accessed 6 April 2020]. Available from: <https://www.ibanet.org/Climate-Change-Model-Statute.aspx>.

<sup>202</sup> GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p.30.

<sup>203</sup> BERGKAMP, Lucas. *Urgenda judgment: a “victory” for the climate likely to backfire*. In: *Energy Post* [online]. 9 September 2015 [Accessed 13 December 2019]. Available from: <https://energypost.eu/urgenda-judgment-victory-climate-likely-backfire/>.

<sup>204</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 24.

unacceptable.<sup>205</sup> Here we find ourselves on thin ice when trying to recognize when the claimant is abusing the judicial power to enforce a policy supported by a minority, and when it is necessary for the judge to rule on climate change because the slow-paced action or inaction from the legislative or executive branch damages the claimant.

The model of separation of powers is different in every state, in some countries stricter than in others. Of course, the more lenient the separation of powers and stronger the judicial review, the smaller number of people bringing the claim can overrule the legislation passed by the elected legislative branch and thereby undermine democracy as it was designed from the outset – a rule by people.<sup>206</sup> As Waldron suggests: ‘*By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.*’<sup>207</sup> The question of judicial legitimacy often arises in common law countries, where the judicial decisions influence a content of national climate policy.<sup>208</sup> The litigators in the current situation, with the lack of sufficient climate change law, try to strategically bring in climate litigation as a regulatory tool.<sup>209</sup> Such an extension and reinterpretation of climate law might be also seen as a form of climate regulation.

Indeed, separation of powers is one of the invariable and repetitive arguments of governments. However, illustrated in the following case, the governments’ voice might be left unheard. An example of state’s unsuccessful argument regarding the separation of powers can be found in the ruling of the *High Court of New Zealand Thomson v. Minister of Climate Change Issues* where the court argues: ‘*The various domestic courts have held they have a proper role to play in Government decision making on this topic, while emphasizing that there are constitutional*

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<sup>205</sup> COX, Rhj. *The Liability of European States for Climate Change*. Utrecht Journal of International and European Law [online]. 28 February 2014, Vol. 30, no. 78, p. 134 [Accessed 13 December 2019]. DOI 10.5334/ujiel.ci. Available from: <http://www.utrechtjournal.org/articles/10.5334/ujiel.ci/>. ISSN 2053-5341. See also PEEL, J. *Issues in Climate Change Litigation*, p. 24.

<sup>206</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 23.

<sup>207</sup> WALDRON, Jeremy. *The Core of the Case against Judicial Review*. The Yale Law Journal [online]. 1 April 2006, Vol. 115, no. 6, p. 1353 [Accessed 24 March 2020]. DOI 10.2307/20455656. Available from: <https://www.jstor.org/stable/10.2307/20455656?origin=crossref>. ISSN 0044-0094. See also BERGKAMP, Lucas. *Urgenda judgment: a “victory” for the climate likely to backfire*.

<sup>208</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 23.

<sup>209</sup> PEEL, Jacqueline and OSOFSKY, Hari M. *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, p. 5.

*limits in how far that role may extend. The IPCC reports provide a factual basis on which decisions can be made. Remedies are fashioned to ensure appropriate action is taken while leaving the policy choices about the content of that action to the appropriate state body.*<sup>210</sup>

## **2.5 Causation and the problem of proof**

One of the major difficulties appearing in climate lawsuits concerns the question of causation and a closely related problem of proof. Climate change represents a global problem causing many challenges due to its nature. Different entities and states contribute to the causes of climate change to various extent. Moreover, other factors such as consumer behaviour or natural variables outside of human and states' reach come into play.<sup>211</sup> The emissions are being released every day by numerous actors. Proving that certain emissions caused a particular damage to a specific plaintiff seems to be impossible.<sup>212</sup> The truth is that none of the actors would be solely responsible for the climate change if there was not for the cumulative effect of other GHGs emissions.<sup>213</sup> This concept was described by Peel as a *death by a thousand cuts*<sup>214</sup>, when climate change appears mainly because the emissions work cumulatively. Many states try to take advantage of this fact and make efforts to avoid their accountability by claiming that their part of contribution compared to the world's overall emissions is insignificant. Peel refers to this concept as a *drop in the ocean problem*.<sup>215</sup>

Similarly to standing conditions, the process of proving causation may be regulated diversely by different states. The strictness across the jurisdictions varies. One of the most common features is the 'but for test' (*conditio sine qua non test*), where it needs to be proved that if it were not for the action A, consequence B would not come into existence.<sup>216</sup> However, as we previously

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<sup>210</sup> *Thomson v. Minister of Climate Change Issues*. High Court of New Zealand. 2015. [2017] NZHC 733. § 133.

<sup>211</sup> MÜLLEROVÁ, Hana Ph.D. *Klimatická změna jako nový typ výzvy pro mezinárodní i vnitrostátní právo* [lecture]. Prague: Ústav státu a práva AV ČR, 13 November 2019.

<sup>212</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 17-19.

<sup>213</sup> PFROMMER, Tobias, GOESCHL, Timo, PROELSS, Alexander, CARRIER, Martin, LENHARD, Johannes, MARTIN, Henrike, NIEMEIER, Ulrike and SCHMIDT, Hauke. *Establishing causation in climate litigation: admissibility and reliability*. Climatic Change [online]. January 2019, Vol. 152, no. 1, p. 68 [Accessed 22 December 2019]. DOI 10.1007/s10584-018-2362-4. Available from: <http://link.springer.com/10.1007/s10584-018-2362-4>. ISSN 1573-1480.

<sup>214</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 17-18.

<sup>215</sup> *Ibid.*, p. 16-17.

<sup>216</sup> LII / LEGAL INFORMATION INSTITUTE (CORNELL LAW SCHOOL). *But-for test* [online]. [Accessed 16 February 2020]. Available from: [https://www.law.cornell.edu/wex/but-for\\_test](https://www.law.cornell.edu/wex/but-for_test).

mentioned, none of the states would fulfil the causation conditions according to this test on its own.<sup>217</sup> Moreover, the question remains whether it is possible to apply some kind of apportionment of the responsibility of different entities for the climate change. One of the Dutch cases quoted in *Urgenda* concerning the pollution of the river Rhine by multiple states indicates that such an approach is possible.<sup>218</sup> Furthermore, in *Urgenda*, the court found a sufficient direct link between the Dutch GHGs emissions, global climate change, and the effects (now and in the future) on the Dutch environment. According to the court of a first instance, the sole fact that the current Dutch GHGs emissions are limited compared to emissions of other states does not alter the fact that they contribute to the climate change.<sup>219</sup> In this context, each country has a ‘*divisible share in the causation of global warming*’,<sup>220</sup> since the portion of its emissions may be identified and traced back. Additionally, the Netherlands’ portion of emissions *per capita* is actually the 9<sup>th</sup> largest in the world.<sup>221</sup> Nevertheless, the apportionment on the basis of historical contributions has some pitfalls. The success of this argument depends, among other things, on the type of relief demanded from the court. Naturally, 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. On the other hand, if the plaintiff requires injunction to stop specific actions, e.g. from one branch of industry in a concrete area (state), this action might be regarded disproportionate.<sup>222</sup>

Finally, how are judges supposed to deal with the question of establishing causation and sufficient proof question and how can claimants prevent failure of the claim for this reason? 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.<sup>223</sup> The source of the aggregated research and studies is mainly contained in reports of the International Panel on

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<sup>217</sup> COX, Rhj. *The Liability of European States for Climate Change*, p. 131.

<sup>218</sup> *Kalimijnen*. Supreme Court of the Netherlands. 23 September 1988. No. 13303. [Accessed 5 April 2020]. Available from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1988:AD5713>.

<sup>219</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague. 24 June 2015. ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396. § 4.90.

<sup>220</sup> COX, Rhj. *The Liability of European States for Climate Change*, p. 132.

<sup>221</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.79.

<sup>222</sup> HSU, Shi-Ling. *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, p. 747-748.

<sup>223</sup> BANDA, Maria L. and FULTON, Scott. *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*. Environmental Law Reporter [online]. January 2017, Vol. 47, no. 2, p. 2 Available from: <https://ssrn.com/abstract=3134517>.

Climate Change (IPCC), established by the United Nations Environment Program (UNEP), the World Health Organisation (WHO) and World Meteorological Organisation (WMO) in 1988. Climate science has, nevertheless, developed also at a state level.<sup>224</sup> Due to increasing volumes of scientific proof in this area, the courts are more willing to take over climate litigation cases, assess the IPCC reports as an evidence of climate change, and vindicate the claims not only against governments, but also against private entities.<sup>225</sup> One of the problems which remains on the local level is proving that a specific weather event was caused by the climate change.<sup>226</sup> Such a problem became apparent for example in the *KlimaSeniorinnen* case where there would be a potential need to prove not only that the Swiss GHGs emissions contributed to the climate change, but in addition that they had an impact on a concrete climate event, heatwaves in this case.<sup>227</sup> A solution for future cases might be found thanks to the extreme event attribution science 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.<sup>228</sup> The extreme weather attribution science 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. Event attribution does not mean stating that certain event happened as a result of climate change. It works more with a ‘risk based’ approach, evaluating how the probability of occurrence of certain weather pattern changes depending on the human factor in play.<sup>229</sup>

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<sup>224</sup> ALABI, Saheed A. *Using Litigation to Enforce Climate Obligations under Domestic and International Laws*. Carbon & Climate Law Review [online]. 2012, Vol. 6, no. 3, p. 212-213 [Accessed 27 February 2020]. Available from: [www.jstor.org/stable/24323907](http://www.jstor.org/stable/24323907). ISSN 21908230.

<sup>225</sup> GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*, p. 851-852.

<sup>226</sup> PEEL, J. *Issues in Climate Change Litigation*, p. 19. See also GANGULY, Geetanjali, SETZER, Joana and HEYVAERT, Veerle. *If at First You Don't Succeed: Suing Corporations for Climate Change*, p. 851-852.

<sup>227</sup> BÄHR, Cordelia Christiane, BRUNNER, Ursula, CASPER, Kristin and LUSTIG, Sandra H. *KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation*. Journal of Human Rights and the Environment [online]. September 2018, Vol. 9, no. 2, p. 211 [Accessed 22 December 2019]. DOI 10.4337/jhre.2018.02.04. Available from: <https://www.elgaronline.com/view/journals/jhre/9-2/jhre.2018.02.04.xml>. ISSN 17597196.

<sup>228</sup> BURGER, M., WENTZ, J. and HORTON R. *The Law and Science of Climate Change Attribution*. Columbia Journal of Environmental Law [online]. 2 February 2020, Vol. 45, no. 1, p. 88-89 [Accessed 28 March 2020]. DOI <https://doi.org/10.7916/cjel.v45i1.4730>. ISSN 0098-4582. See also GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People's Guide*, p. 96.

<sup>229</sup> *Ibid.*, p. 92.

As a last resort, plaintiffs can apply - in environmental law well-established - precautionary principle stipulating that the lack of scientific certainty should not be the reason for postponing measures preventing irreversible damage.<sup>230</sup>

## 2.6 Sources of rights

When drafting a human rights-based lawsuit, it is vital to identify the right violated by the defendant, which would be enforceable in front of either national or international authority.<sup>231</sup> As we have already described above, the national courts should offer a plaintiff the highest possibility to enforce his/hers rights. Access to other forums on regional and international level is often limited by the fact that the plaintiff has already tried to vindicate his/her right before a national court<sup>232</sup> or are reserved only for inter-states disputes. The legal basis generally recognised by the courts are constitutional rights, which are often overlapping with the human rights. The advantage of this approach stems from the fact that many countries anchor in their constitution a right to a healthy environment, which is not always regulated at the level of international human rights instruments. A 2012 survey shows that at least 92 countries directly grant constitutional rights to a clean or healthy environment<sup>233</sup>, moreover, 177 countries recognize such a right indirectly through their constitutions, legislation, court decisions, or an international agreement.<sup>234</sup> The right to a healthy and clean environment is not always expressly written in the constitution, but might be understood to be a part of other human rights, such as the right to life or the right to health. We call this phenomenon the ‘greening’ of existing human rights. Consequently, national courts have tangible tools to overrule law and policy violating human rights or at least interpret them in light

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<sup>230</sup> OMUKO, Lydia Akinyi. *Applying the Precautionary Principle to Address the “Proof Problem” in Climate Change Litigation*. *Tilburg Law Review* [online]. 24 March 2016, Vol. 21, no. 1, p. 60-61 [Accessed 22 December 2019]. DOI 10.1163/22112596-02101003. Available from: <http://booksandjournals.brillonline.com/content/journals/10.1163/22112596-0210100>. ISSN 2211-2545. See also GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People’s Guide*, p. 93-94.

<sup>231</sup> GREENPEACE INTERNATIONAL. *Holding your Government Accountable for Climate Change: A People’s Guide*, p. 70-71.

<sup>232</sup> *Ibid.*

<sup>233</sup> BOYD, David R., 2012. *The Constitutional Right to a Healthy Environment*. *Environment: Science and Policy for Sustainable Development* [online]. 29 June 2012. Vol. 54, no. 4, p. 5. [Accessed 17 February 2020]. DOI 10.1080/00139157.2012.691392. Available from: <http://www.tandfonline.com/doi/abs/10.1080/00139157.2012.691392>. See also GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p. 32.

<sup>234</sup> BOYD, David R., 2012. *The Constitutional Right to a Healthy Environment*, p. 4. See also GUNDLACH, Justin and BURGER, Michal, 2017. *The Status of Climate Change Litigation - A Global Review*, p. 32.

of human rights law. National courts are often using international human rights instruments (UDHR, ICCPR or ICESCR, ECHR<sup>235</sup>) to a different degree. They either apply them directly or they interpret national laws in such a manner that they comply with international human rights standards.

The way a state proceeds will depend on a designated relationship between the international and national law, namely whether it is based on a monistic or a dualistic legal system. In the Czech Republic, for example, under the Art. 10 of the Constitution *'Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.'*<sup>236</sup> Courts might as a source of inspiration and mainly as a subsidiary source take advantage of the work of an expert group which drafted the non-binding Oslo Principles.<sup>237</sup> The Principles are setting out obligations regarding the climate. Also, a legal commentary is included helping with the best possible interpretation of international law together with human rights law, national environmental law and tort law.

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<sup>235</sup> COUNCIL OF EUROPE. *European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14*. 4 November 1950. ETS 5.

<sup>236</sup> THE CZECH NATIONAL COUNCIL. *Constitution of the Czech Republic*. 16 December 1992. No. 1/1993 Coll. [Accessed 3 April 2020]. Available from: <https://public.psp.cz/en/docs/laws/constitution.html> (English translation). Art. 10.

<sup>237</sup> EXPERT GROUP ON GLOBAL CLIMATE OBLIGATIONS. *Oslo principles on global climate change*. The Hague, The Netherlands: Eleven International Publishing. Legal perspectives for global challenges, 2015. Available from: <https://climateprinciplesforenterprises.files.wordpress.com/2017/12/osloprincipleswebpdf.pdf>. ISBN 978-94-6236-573-5.

### 3. A COMPARATIVE STUDY AND LESSONS FROM THE CASE LAW

This section introduces the latest climate case law from the world using the human rights arguments. According to the Sabin Center for Climate Change Law database<sup>238</sup>, the human rights perspective has been used at least in 31 cases. Some of them gained recognition as high-profile cases and positively affected acceleration of the climate movement in other countries. Other climate cases failed at a very early stage on the procedural grounds. There is a very limited number of claims based solely on the human-rights approach and this thesis' purpose, among others, is to ascertain whether it is possible to raise the number of successful cases and under which circumstances. The next section will unpack the argumentation of claimants from eight different jurisdictions, at the same time it will offer insight into the climate litigation not only against the states, but also against corporations.

#### 3.1 States which are not doing enough

##### 3.1.1 Urgenda Foundation v. The State of the Netherlands: '*A success, which no one expected.*'

I will start this section with the landmark case in the climate change litigation not just in Europe, but worldwide. The Dutch case *Urgenda* as briefly outlined in previous chapters provoked and at the same time encouraged a number of other litigants to pursue justice in the climate area, after the Dutch court stated that the state is acting unlawfully towards its citizens by not setting deeper emission reduction targets.<sup>239</sup>

Urgenda, an environmental group (combination of words 'urgent' and 'agenda')<sup>240</sup>, along with 886 Dutch citizens sued the government of the State of the Netherlands (represented by the Department of Infrastructure and Environment) for acting unlawfully, namely by acting in lethargy and not setting significantly ambitious emissions reduction targets. Urgenda sought an injunction from the court containing an order that the government must adopt policies with a goal of emissions reduction by 40% compared to 1990 levels, with a minimum of 25% by 2020, or

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<sup>238</sup> SABIN CENTER FOR CLIMATE CHANGE LAW and ARNOLD & PORTER KAYE SCHOLER LLP. *Climate Case Chart*. [online]. [Accessed 16 February 2020]. Available from: <http://climatecasechart.com/>.

<sup>239</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague.

<sup>240</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 2.1.

alternatively, a reduction order of at least 40% compared with 1990, by 2030. No damages were required.<sup>241</sup>

Unlike in many other climate litigation cases, Urgenda did not have to deal with difficulties when addressing the matter of standing. The main reason was that the Dutch Civil Code allows the associations to bring an action to protect the general interests or collective interests on behalf of other persons<sup>242</sup> (a typical example of public interest litigation<sup>243</sup>). The Dutch government claimed, nevertheless, that Urgenda lacks standing as it acts not only in the interest of Dutch citizens, but also on behalf of the rest of the world and future generations. The court did not accept the defendant's arguments and granted Urgenda standing to defend the rights of citizens of other countries as well as the current and the future generations.<sup>244</sup> Subsequently, the court stated the following in the matter of standing of the individual 886 Dutch citizens: *'Even if it is assumed that the individual claimants can rely on Articles 2 and 8 of the ECHR, their claims cannot lead to a decision other than the one on which Urgenda can rely for itself. In this situation, the court finds that the individual claimants do not have sufficient (own) interests besides Urgenda's interest.'*<sup>245</sup>

The claim was based especially on the breach of state's 'duty of care' enshrined in Art. 21 of Dutch Constitution<sup>246</sup> and the Section 162 of Book 6 of the Dutch Civil Code.<sup>247</sup> According to plaintiffs, the state breached its duty and acted unlawfully by not adopting ambitious reduction targets, which would help to prevent global warming and keep global temperature well below 2°C.<sup>248</sup> The Urgenda invoked in this context the state's obligations under international law documents, such as the UNFCCC, the Kyoto Protocol and other relevant treaties.<sup>249</sup> With the reference to General Assembly of the UN, plaintiffs also appealed to the no harm principle (as

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<sup>241</sup> *Ibid.*, § 4.1.

<sup>242</sup> THE KINGDOM OF NETHERLANDS. *Dutch Civil Code (Burgerlijk Wetboek)*. 1992 [Accessed 3 April 2020]. Available from <http://www.dutchcivillaw.com/civilcodegeneral.htm> (English translation) . Book 3, Section 305a.

<sup>243</sup> EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS E.V. *Public interest litigation*.

<sup>244</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.8-4.10.

<sup>245</sup> *Ibid.*, § 4.109.

<sup>246</sup> THE KINGDOM OF NETHERLANDS. *The Constitution of the Kingdom of Netherlands*. 1983 [Accessed 6 April 2020]. Available from: <https://www.government.nl/topics/constitution/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands> (English translation).

<sup>247</sup> THE KINGDOM OF NETHERLANDS. *Dutch Civil Code (Burgerlijk Wetboek)*. Book 6, Section 162.

<sup>248</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.35.

<sup>249</sup> *Ibid.*, § 4.38-4.39.

introduced in Trail Smelter case), according to which no state has the right to use its territory, or have it used, in a manner that would cause a significant damage to other states.<sup>250</sup> Even though the court did not accept the reasoning that Urgenda could directly rely on international law or no harm principle, it explained that provisions of international law might have the so-called ‘reflex effect’ into domestic law and the extent of standard of care might therefore be interpreted in the light of these provisions.<sup>251</sup>

Urgenda most significantly brought up the European Convention on Human Rights (ECHR), specifically Art. 2 (the right to life) and Art. 8 (the right to respect for private and family life) and referred to them as to directly binding provisions. Urgenda further invoked the European Court of Human Rights case of *Öneriyildiz v. Turkey*, concluding that Art. 2 includes the right to be protected against life-threatening environmental risks<sup>252</sup>, as well as the case of *Taskin v. Turkey* stating that Art. 8 ECHR includes the protection against the health risks which are yet to be realised.<sup>253</sup> These articles were invoked in connection with the above-mentioned duty of care towards the Dutch citizens. Regarding the application of Art. 2 and 8 ECHR court assessed: *‘that Urgenda itself cannot be designated as a direct or indirect victim within the meaning of Article 34 ECHR, of a violation of Articles 2 and 8. After all, unlike with a natural person, a legal person’s physical integrity cannot be violated nor can a legal person’s privacy be interfered with.’*<sup>254</sup> The court, in spite of the fact, that Urgenda cannot directly rely on the above-mentioned provisions, confirmed that both articles can serve as a source of interpretation of the state’s duty of care.<sup>255</sup> As we will see later in the decision of the court of appeal, such an argumentation showed to be wrong.

The court further addressed the state’s argument that the Netherlands’ contribution to global GHGs emissions is too small to have any global relevance. The court especially inferred that no matter the size of the country, the Netherlands is still liable for its emissions and is required to do as much as possible to prevent the climate change.<sup>256</sup> The applicants relied in this context on a

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<sup>250</sup> *Ibid.*, § 4.39.

<sup>251</sup> *Ibid.*, § 4.42-4.43, 4.52.

<sup>252</sup> *Öneriyildiz v Turkey*. European Court of Human Rights. 30 November 2004. Application no. 48939/99.

<sup>253</sup> *Taskin and Others v. Turkey*. European Court of Human Rights. 10 November 2004. Application no. 46117/99.

<sup>254</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.45.

<sup>255</sup> *Ibid.*, § 4.46.

<sup>256</sup> *Ibid.*, § 4.90.

national Dutch case concerning the transboundary pollution of the river Rhine (Kalimijnen<sup>257</sup>) due to the dumping of salt. The river pollution was coming from multiple sources (states), therefore the court concluded that each of the states was responsible for its part of the damage, and thereby resolved the ‘*problem of too many hands*’.<sup>258</sup> Furthermore, in *Urgenda*, the court found sufficient direct link between the Dutch GHGs emissions, global climate change and the effects (now and in the future) on the Dutch living climate. According to the court of a first instance, the sole fact that current Dutch GHGs emissions are limited compared to overall global emissions net does not alter the fact that they contribute to the climate change.<sup>259</sup> Each country has in this context a ‘*divisible share in the causation of global warming*’,<sup>260</sup> since the portion of its emissions may be identified and traced back. What is more, Netherlands’ portion of emissions *per capita* is actually the 9<sup>th</sup> largest in the world.<sup>261</sup>

Last, but not least, court had to overcome an anticipated argument from the state that argued that the question of climate policies is more suitable for the parliament chambers than for the court room, trying to make the separation of powers at stake.<sup>262</sup> Indeed, ordering state to change its policy regarding the GHGs emissions reduction target might be in some cases seen as a straight way towards judicial activism. Despite that, the court did not acquiesce to such argumentation and characterised the Dutch system as ‘balancing’ rather than ‘separating’ the powers.<sup>263</sup> Naturally, in the scholarly field, there are still disagreements regarding this topic. Some, such as Bergkamp, see this ruling as a potential threat to the rule of law and to constitutional democracy. According to him, an activist civil court receptive to making policy on behalf of interest groups could result in ‘*policies that are supported only by small minorities and involve high costs of compliance*’.<sup>264</sup> On the contrary, according to Warnock, *Urgenda* case shows us how courts have

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<sup>257</sup> *Kalimijnen*. Supreme Court of the Netherlands. 23 September 1988. See also: *Summons Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague. 25 June 2014, Section 6.2-6.3.

<sup>258</sup> LOTH, Marc (M.A.). *Climate Change Liability After All: A Dutch Landmark Case*. Tilburg Law Review [online]. 24 March 2016, Vol. 21, no. 1, p. 18-19 [Accessed 17 February 2020]. DOI 10.1163/22112596-02101001. Available from: <http://booksandjournals.brillonline.com/content/journals/10.1163/22112596-02101001>. ISSN 2211-2545.

<sup>259</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.90.

<sup>260</sup> COX, Rhj. *The Liability of European States for Climate Change*, p. 132.

<sup>261</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.79.

<sup>262</sup> *Ibid.*, § 4.94.

<sup>263</sup> *Ibid.*, § 4.95.

<sup>264</sup> BERGKAMP, Lucas. *Urgenda judgment: a “victory” for the climate likely to backfire*.

been taking over the work of other constitutional branches, which are unwilling to protect the fundamental rights.<sup>265</sup> However, does the mere possibility that the decision has policy implications mean that the court should refuse to provide judicial protection and automatically identify this question as a political case?<sup>266</sup> According to the plaintiffs in *Urgenda*, it is necessary to distinguish between a political question and a question of law with political implications. In their view, the sole fact that the decision might have political implications does not mean that the court is being asked to make a political decision.<sup>267</sup> This position was later confirmed in the judgement.<sup>268</sup>

In 2015, after the *Urgenda*'s victory before the first instance, the State of the Netherlands appealed, repeating its argumentation regarding the separation of powers and adding that the Netherlands' targets are in compliance with international commitments.<sup>269</sup> *Urgenda* filed a cross-appeal, since it did not agree with the way the court of the first instance interpreted Art. 34 ECHR.<sup>270</sup> According to *Urgenda*, the effect of ECHR should be direct, regardless of the conditions of access to the European Court of Human Rights. After a thorough assessment, The Hague Court upheld the decision, dismissed the defences of the state and agreed with *Urgenda* on interpretation of the Art. 34 of the ECHR.<sup>271</sup> Most importantly, at this stage of proceedings, *Urgenda* was given a human rights case label, after the court of second instance acknowledged the positive obligation of the state *'to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life.'*<sup>272</sup>

After the second success of *Urgenda*, the Dutch state eventually lodged an appeal in cassation to the Supreme Court, as the highest judicial instance. As the grounds for cassation are concerned, the State asserted that both courts of lower instances omitted the margin of appreciation given to the state when applying the ECHR provisions; that the reduction target of 25% in 2020 is

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<sup>265</sup> WARNOCK, Ceri. *The Urgenda Decision: Balanced Constitutionalism in the Face of Climate Change?* [online]. In: *OUPblog*. Oxford University Press, 22 July 2015 [Accessed 16 February 2020]. Available from: <https://blog.oup.com/2015/07/urgenda-netherlands-climate-change/>.

<sup>266</sup> COX, Rhj. *The Liability of European States for Climate Change*, p. 134.

<sup>267</sup> *Summons Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague. 25 June 2014, § 412.

<sup>268</sup> *Urgenda Foundation v. The State of the Netherlands*. District Court of The Hague, § 4.98.

<sup>269</sup> *Urgenda Foundation v. The State of the Netherlands*. The Hague Court of Appeal. § 31.

<sup>270</sup> *Ibid.*, § 32.

<sup>271</sup> *Ibid.*, § 35.

<sup>272</sup> *Ibid.*, § 43.

not legally binding upon the state, and finally; that the previous courts' decisions had political connotations.<sup>273</sup> On 20<sup>th</sup> December 2019, the Supreme Court issued the final decision<sup>274</sup> reiterating that the state has a positive obligation to protect its citizens against the imminent threat of climate change based on the joint responsibility of all the states of the world and partial responsibility of each individual state.<sup>275</sup> The court of the final instance approved the way the court of appeal in the Hague interpreted application of human rights under ECHR,<sup>276</sup> and finally explained that the court's decision in this case is not an order to enact legislation, since the state is given freedom to choose appropriate measures to achieve the 25% reduction goal.<sup>277</sup>

The importance of this case relies heavily on the fact that the plaintiffs based their claims on the scientific data, especially by IPCC, as well as on findings of European and American researchers with very detailed and precise description of climate change facts, which set a precedent for other cases to use a persuasive scientific arguments before the courts.

Corollary to Urgenda case, the expansion of the litigation around the world followed. The case has become a lodestar for other European countries, such as Germany, Belgium, Ireland, United Kingdom and Switzerland where claimants used the similar argumentation, unfortunately mostly with negative results.<sup>278</sup> Nevertheless, the fact that the case got to the highest stage of the proceedings, i.e. to the Supreme Court, hold significant meaning which will be hard to overlook in other jurisdictions in currently pending cases, even if it is necessary to bear in mind that much of the Urgenda's success must be attributed to the specifics of the Dutch law.

### **3.1.2 Leghari v. Federation of Pakistan: 'The story of the Global South finally told.'**

In 2015, a Pakistani farmer and a law student Asghar Leghari filed a public interest lawsuit contesting his government for failing to implement the National Climate Change Policy 2012 (the 'Policy') and the Framework for Implementation of Climate Change Policy 2014-2030 (the

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<sup>273</sup> *Urgenda Foundation v. The State of the Netherlands*. Supreme Court of the Netherlands. 20 December 2019. 19/00135 (English translation). § 3.2-3.5.

<sup>274</sup> *Urgenda Foundation v. The State of the Netherlands*. Supreme Court of the Netherlands. 20 December 2019.

<sup>275</sup> *Ibid.*, § 5.7-5.8.

<sup>276</sup> *Ibid.*, § 8.3.4.

<sup>277</sup> *Ibid.*, § 8.2.7.

<sup>278</sup> See more about the cases here: URGENDA. *Global Climate Litigation* [online]. [Accessed 7 April 2020]. Available from: <https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>.

‘Framework’).<sup>279</sup> Mr. Leghari claimed that his rights were infringed upon due to the lack of policy implementation from the state, as he was affected by the changes of temperatures in Pakistan.<sup>280</sup> Among others, such changes lead to water scarcity and food and energy insecurity<sup>281</sup> in the Punjab region where Mr. Leghari lives. Due to the said lack of the government’s action, he appeared to be in danger of sustaining his livelihood, by which his fundamental rights were blatantly violated.<sup>282</sup> In his claim, he invoked his constitutional right to life anchored in Art. 9 of the Pakistani Constitution<sup>283</sup> and the right to human dignity according to Art. 14.<sup>284</sup> The Pakistani Constitution does not contain any provision about the right to a healthy environment, but Art. 9 (right to life) has been interpreted in light of the international environmental law principles, such as the precautionary principle, public trust, sustainable development or intergenerational equity as including the right to a healthy environment.<sup>285</sup> The claimant stated that he realised that Pakistan as a developing country is mainly a victim of climate change, vulnerable and unable to mitigate its effects, and, therefore he emphasized that adaptation efforts should be the primary goal for the government in the battle against the climate change.<sup>286</sup>

This case is noteworthy especially for the enlightened adjudication from the judge Mr. Justice Syed Mansoor Ali Shah. Primarily, the judge confirms that *‘for Pakistan, climate change is no longer a distant threat’*<sup>287</sup> and that the government’s lack of endeavour result in violation of inhabitants of Pakistan.<sup>288</sup> Since the government fell short of implementing the legislation, the judge issued two main orders. Firstly, he ordered the government to create a Climate Change

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<sup>279</sup> *Leghari v. Federation of Pakistan*. Lahore High Court. 25 January 2018. W.P. No. 25501/2015, HCJDA38, § 3 [Accessed 11 November 2019]. Available from: <http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/>.

<sup>280</sup> *Ibid.*, § 4.

<sup>281</sup> *Ibid.*, § 10.

<sup>282</sup> *Ibid.*, § 4.

<sup>283</sup> NATIONAL ASSEMBLY OF PAKISTAN. *The Constitution of the Islamic Republic of Pakistan*. 10 April 1973 [Accessed 6 April 2020]. Available from: [http://www.na.gov.pk/uploads/documents/1333523681\\_951.pdf](http://www.na.gov.pk/uploads/documents/1333523681_951.pdf) (English translation).

<sup>284</sup> *Leghari v. Federation of Pakistan*, § 3.

<sup>285</sup> *Ibid.*, § 3.

<sup>286</sup> *Ibid.*, § 5.4.

<sup>287</sup> *Ibid.*, § 2.

<sup>288</sup> *Ibid.*, § 11.

Commission composed of 21 members from NGOs, key ministries, and universities.<sup>289</sup> At the same time, each ministry, department or authority was obliged to name a Climate Change Focal Person to assist and ensure the implementation of the Framework. Secondly, he examined the Framework and Policy and set expectations for the Commission and a supervisory power of court over the Commission.<sup>290</sup> After 25 hearings, the final judgement was issued in 2018, when the report of the Climate Change Commission was presented with very satisfactory results, showing that almost 66.11% of the targets labelled with high priority were accomplished. Following this report, the Commission was dismissed.<sup>291</sup>

What is interesting about this case, is that the whole proceeding was led in a very practical and directive manner. The judge took on the role of a supervisor, understanding that the question of enforcement is fundamental in climate litigation. Such an approach must necessarily attract our attention and we might ask the question whether the court is not overstepping the thin line of the separation of powers doctrine. According to Barritt, the judge in this case is not an activist, but instead active in his role as a supervisor. She further adds that historically, after the era of colonialism, the role of the judge has been bringing life to constitution, and that is exactly what has been done here.<sup>292</sup> Moreover, according to scholarly literature, appointing similar committees in environmental matters is a part of the Pakistani legal tradition.<sup>293</sup> Furthermore, the judge did not interfere with the legislative power and did not prescribe how the policy should look like. The court only made sure that the policies were fulfilled as they were supposed to be. In the light of the above-mentioned arguments, the potential threat of a judicial activism seems to be averted. This very creative approach from the court, nevertheless, would not be possible to replicate in other countries with different legal traditions. The contribution of this case resides in highlighting the significance of enforcement in environmental law, which still seems to be a lacking aspect in

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<sup>289</sup> *Ibid.*, § 13.

<sup>290</sup> *Ibid.*, § 14-16.

<sup>291</sup> *Ibid.*, § 19.

<sup>292</sup> LONDON SCHOOL OF ECONOMICS AND POLITICS. *Climate Litigation: achievements and challenges* [online podcast]. 9 January 2020 [Accessed 16 February 2020]. Available from: <http://www.lse.ac.uk/lse-player?id=4798>, from 34 min 9 sec.

<sup>293</sup> *Leghari v. Federation of Pakistan*, § 19.

many disputes. Scholars such as Shelton agree that the role of a judge is instrumental in environmental and climate cases in order to protect fundamental rights of disadvantaged groups.<sup>294</sup>

One might argue that the claimant benefited from the tolerant provisions on standing, considering the court did not deal in depth with this issue in the case in question. Nonetheless, the Leghari case was a big step for Global South's climate justice, bringing the Global South to the light and making the Global North realise the importance of dealing not only with mitigation, but also with adaptation, especially in places where the threat of climate change has been already happening.<sup>295</sup>

### **3.1.3 Future Generations v. Ministry of the Environment and Others: 'For the sake of future generations.'**

A group of 25 young people including children from Colombia with the support of Dejusticia (Colombia-based research and advocacy organization) decided to challenge their government. According to the Colombian law, children and future generations may bring the claim on the basis of fundamental rights through a special constitutional claim *tutela* without a special allowance from their parents.<sup>296</sup>

Claimants sued the government on the grounds that it did not fulfil its national and international commitments anchored both in the National Development Plan 2014-2018 and the Colombian NDC under the Paris Agreement requiring them to scale down the net rate of deforestation in Amazon to zero.<sup>297</sup> On the contrary, the deforestation in 2016 increased by 44%

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<sup>294</sup> SHELTON, Dinah. *Complexities and Uncertainties in Matters of Human Rights and the Environment*. In: J. KNOX, John H. and PEJAN, Ramin (eds.). *The Human Right to a Healthy Environment* [online]. Cambridge: Cambridge University Press, 2018, p. 104. [Accessed 26 February 2020] DOI 10.1017/9781108367530.006 Available from: <https://www.cambridge.org/core/books/human-right-to-a-healthy-environment/complexities-and-uncertainties-in-matters-of-human-rights-and-the-environment/1B146D271A1CA5C5C1A109D1823FA6D1>. ISBN 978-1-108-42119-5.

<sup>295</sup> BARRITT, Emily and SEDITI, Boitumelo. *The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South*. King's Law Journal [online]. 4 May 2019, Vol. 30, no. 2, p. 207–208 [Accessed 16 February 2020]. DOI 10.1080/09615768.2019.1648370. Available from: <https://www.tandfonline.com/doi/full/10.1080/09615768.2019.1648370>. ISSN 1757-8442.

<sup>296</sup> *Future Generations v. Ministry of the Environment and Others*. Supreme Court of Colombia, § 10. See also SAVARESI, Annalisa and AUZ, Juan. *Climate Change Litigation and Human Rights: Pushing the Boundaries*. *Climate Law* [online]. 26 June 2019, Vol. 9, no. 3, p. 7 [Accessed 13 December 2019]. DOI 10.1163/18786561-00903006. Available from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3374730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374730).

<sup>297</sup> *Ibid.*, Section 1, § 2.2.

compared to 2015.<sup>298</sup> Due to detrimental consequences of the deforestation such as negative alteration of the water cycle, alternation of soils and global warming,<sup>299</sup> the plaintiffs' fundamental rights such as right to a healthy environment (embedded in the Colombian Constitution<sup>300</sup>), life, health, food and access to water are impaired.<sup>301</sup> The authors of the amicus brief in support of claimants further invoked the precautionary principle, and the principle of intergenerational equity and solidarity.<sup>302</sup>

Despite the lawsuit being initially refused by a District Court, the Supreme Court of Colombia issued an order against the Colombian government for not effectively tackling the Amazon deforestation. Moreover, this unprecedented judgement encouraged the plaintiffs to be a part of the decision-making process. The Presidency of Colombia and Ministry of Environment were therefore invited to the discussion with affected individuals about the way how the policies should be designed.<sup>303</sup> Furthermore, they were ordered to prepare an intergenerational pact for the life of the Colombian Amazon – PIVAC, in order to adopt measures for reducing deforestation with the cooperation of communities, scientific organisations, environmental research groups etc.<sup>304</sup> The municipalities of the Colombian Amazon were also ordered to implement Land Management Plans and adopt action plans as a way towards more efficient adaptation measures.<sup>305</sup>

This case shows once again an example of a 'transformative ruling'.<sup>306</sup> The judge recognizes that the constitutional state pursues respect for others as a limit to legal precepts and, in this case, this principle extends to people of other countries, including future unborn generations, as well as

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<sup>298</sup> *Ibid.*, Section 1, § 2.3.

<sup>299</sup> *Ibid.*, Section 1, § 2.4.

<sup>300</sup> NATIONAL CONSTITUTENT ASSEMBLY. *Constitution of Colombia*. 1991 [Accessed 6 April 2020]. Available from: [https://www.constituteproject.org/constitution/Colombia\\_2015.pdf?lang=en](https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en) (English translation).

<sup>301</sup> *Future Generations v. Ministry of the Environment and Others*, Section 1, § 1.

<sup>302</sup> *Ibid.*, Section 1.1, § 14.

<sup>303</sup> *Ibid.*, Section 2, § 14.

<sup>304</sup> *Ibid.*, Section 2, § 14.

<sup>305</sup> *Ibid.*, Section 2, § 14.

<sup>306</sup> HOEXTER, Cora. *Judicial Policy Revisited: Transformative Adjudication in Administrative Law*. South African Journal on Human Rights [online]. January 2008, Vol. 24, no. 2, p. 281, 268 [Accessed 16 February 2020]. DOI 10.1080/19962126.2008.11864956. Available from: <https://www.tandfonline.com/doi/full/10.1080/19962126.2008.11864956>. ISSN 1996-2126.

the fauna and flora surrounding us.<sup>307</sup> What is even more intriguing, the Colombian judge elevated the Colombian Amazon to be a subject of rights (a right-bearing entity).<sup>308</sup> The rainforest should be therefore protected, conserved and restored (the same acknowledged the Constitutional Court of Colombia in case of the Atrato River<sup>309</sup>).

Holding commonalities with *Leghari*, success of this case was dependent on the relaxed rules on standing, where the judge did not go into depth with how the conditions for standing were met, as well as on the existence of the right to a clean and healthy environment under national law. Another similarity is the innovative approach of the judge and a deep understanding of the necessity to deal with the climate change. As the judge Luis Armando Tolosa Villabena accentuated, it is necessary for humans to cease their egoistic approach towards environment.<sup>310</sup> Unfortunately, none of the judges explained, how exactly the human rights were affected in particular and therefore the arguments can be hardly used in future cases.

#### **3.1.4 Union KlimaSeniorinnen: ‘Swiss grannies in danger.’**

A group of elderly women formed an association and in 2017 sued the Swiss government for setting the goal for keeping the temperature below the 2 °C in comparison to pre-industrial levels too low. They argued that Switzerland’s current and planned reduction targets according to the national CO<sub>2</sub> Act – 20% compared to 1990 levels by 2020 and 30 % by 2030, do not correspond to the state’s international law commitments. They required the GHGs concentrations’ abatement of at least 25-40% by 2020 and at least 50% by 2030.

According to the claimants, due to unsatisfactory policies, Switzerland violated its state obligations under Art. 10 of the Swiss Constitution<sup>311</sup> and human rights entrenched in Art. 2 and 8 of ECHR. The claimants contended that the state has to take an affirmative measure to protect those on its territory and take all appropriate measures to protect the lives of those within its jurisdiction, and considering the ruling of the European Court of Human Rights in *M. Özel and*

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<sup>307</sup> *Future Generations v. Ministry of the Environment and Others*, § 5.2.

<sup>308</sup> *Ibid.*, Section 2, § 14.

<sup>309</sup> *Ibid.*, Section 2, § 14.

<sup>310</sup> *Ibid.*, § 18.

<sup>311</sup> SWISS CONFEDERATION. *Federal Constitution of the Swiss Confederation*. 18 April 1999 [Accessed 3 April 2020]. Available from: <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html> (English translation).

*Others v. Turkey*<sup>312</sup>, the authorities have to take preventive steps to reduce the scale of the disaster.<sup>313</sup> Equivalently to previous cases, the claimants invoked environmental principles, such as precautionary or sustainability principle.

Firstly, the plaintiffs addressed the Federal Council, DETEC (Department of the Environment, Transport, Energy and Communications), Federal Office for the Environment (FOEN) and the Swiss Federal Office for Energy (SFOE). They pointed to omissions in area of climate protection and requested the issuance of a ruling on real acts concerning this matter, in accordance with Art. 25a Administrative Procedure Act (APA).<sup>314</sup> Only after they were declined, they approached the Federal Administrative Court by lodging an appeal. The claimants demanded the review of the DETEC's administrative actions by court as a competent authority (according to Swiss constitution) which helped them to overcome the problem of separation of powers.<sup>315</sup>

DETEC denied that Swiss policies were not stringent enough, and at the same time determined that applicants were thereby trying to regulate global CO<sub>2</sub> emissions rather than seeking remedy for the infringement of an individual right.<sup>316</sup> The court inclined to DETEC's reasoning and while acknowledging the present problematics of human rights<sup>317</sup>, it nonetheless found that the claimants were not victims under the ECHR.<sup>318</sup> The court stated that the adoption of a new legislation would not mirror just their particular interest, but it would reflect the needs public interest in general<sup>319</sup> (so-called *actio popularis* which is not allowed in Switzerland).

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<sup>312</sup> *M. Özel and Others v. Turkey*. European Court of Human Rights. 17 November 2015. Application nos. - 14350/05, 15245/05 and 16051/05. See also: *Petition Union KlimaSeniorinnen Schweiz to Federal Department of the Environment, Transport, Energy and Communications (DETEC)*. 25. 10. 2016, § 150 [Accessed 5 March 2020]. Available from: <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>; BÄHR, Cordelia Christiane, BRUNNER, Ursula, CASPER, Kristin and LUSTIG, Sandra H. *KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation*, p. 212.

<sup>313</sup> *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, § 7.1.

<sup>314</sup> THE FEDERAL ASSEMBLY OF THE SWISS CONFEDERATION. *Federal Act on Administrative Procedure*, Section 25a.

<sup>315</sup> BÄHR, Cordelia Christiane, BRUNNER, Ursula, CASPER, Kristin and LUSTIG, Sandra H. *KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation*, p. 216.

<sup>316</sup> *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, Section B.

<sup>317</sup> *Ibid.*, § 7.4.2.

<sup>318</sup> *Ibid.*, § 8.2.

<sup>319</sup> *Ibid.*, § 3.3.

Pursuant to Art. 48 (1) of the APA, standing before administrative court is granted only to (i) individuals participating in previous proceedings, (ii) who has been specifically affected by the contested ruling and have an interest ‘worthy of protection’.<sup>320</sup> Individuals be must at the same time ‘*affected more strongly than the general public*’<sup>321</sup>. Claimants alleged that they belong to the most vulnerable group affected by the climate change, in particular by the heatwaves appearing in Switzerland since older women have an interest worthy of protection as a result of higher amounts of premature deaths due those heatwaves.

Similarly to the *Urgenda* case, KlimaSeniorinnen based their arguments and evidence on the findings in the IPCC’s Fifth Assessment Report from 2014. The scientific evidence did not stop there. Claimants provided the court with studies on the impact of heatwaves on the health (cardiovascular diseases, asthma) and premature deaths.<sup>322</sup> Premature deaths in hot summers hit especially the older generation, with a higher portion of women as compared to men.<sup>323</sup>

Unfortunately, even then the court did not find proximity of appellants to the matter in dispute sufficient compared to the general public and therefore held that demands belong to the category of inadmissible *actio popularis*.<sup>324</sup> According to the court ‘[t]he impacts of climate change on people, animals and plants are hence of a general nature, even if not all are impacted equally.’<sup>325</sup> Thereby the case was dismissed at the very beginning on procedural grounds. Consequently, the court did not look further into the question of human rights or the subject-matter of the dispute.

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<sup>320</sup> THE FEDERAL ASSEMBLY OF THE SWISS CONFEDERATION. *Federal Act on Administrative Procedure*, Section 48 (1) b. See also *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*.

<sup>321</sup> BÄHR, Cordelia Christiane, BRUNNER, Ursula, CASPER, Kristin and LUSTIG, Sandra H. *KlimaSeniorinnen: lessons from the Swiss senior women’s case for future climate litigation*, p. 203.

<sup>322</sup> *Union KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)*, § 7.1.

<sup>323</sup> *Ibid.*, § 7.1.

<sup>324</sup> *Ibid.*, § 7.2, § 7.4.3.

<sup>325</sup> *Ibid.*, § 7.4.2.

### 3.1.5 People's Climate Case: 'Can we battle with the EU?'

People's Climate Case<sup>326</sup>, also known as *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, began in 2018 when 10 families working pre-eminently in agriculture and tourism sector of various origins sued the EU before the General Court on the grounds of Art. 263, 268 and 340 of the Treaty on the Functioning of the EU (TFEU).<sup>327</sup> The claimants came not only from the territory of the EU (Portugal, Germany France, Italy, Romania), but also from other parts of the world, such as Kenya, Fiji, including even Swedish Youth Association protecting the rights of indigenous Sami.<sup>328</sup>

The reasoning was straight-forward: according to the plaintiffs, EU's insufficient emissions reduction targets (40% by 2030 as compared to 1990 levels) contributed to the acceleration of global warming and endangerment of plaintiffs' rights to life, health, occupation and property.<sup>329</sup> Each family was affected in a different way. The Carvalho family endured harm due to a number of 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.<sup>330</sup> The Guyo's family from Kenya is endangered because the main source of the family's livelihood is jeopardized due to higher temperatures and droughts. Moreover, children's health and education is at stake when high temperatures prevent them from attending school.<sup>331</sup> The Recktenwald family from Germany owning a hotel and a restaurant is in danger of being flooded, as their facilities are situated only 20 m above the sea level.<sup>332</sup> Finally, Sáminuorra, an association of Sami people is concerned with

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<sup>326</sup> *Armando Ferrão Carvalho and Others v. European Parliament and Council of the EU*. General Court (Second Chamber). 8 May 2019. Case T-330/18. [Accessed 23 December 2019]. Available from: <http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/>.

<sup>327</sup> *Ibid.*, § 22.

<sup>328</sup> *Ibid.*, § 1.

<sup>329</sup> *Ibid.*, § 30.

<sup>330</sup> *Application Armando Ferrão Carvalho and Others v. European Parliament and Council of the EU*. General Court (Second Chamber). 24 May 2018. Section D § 46-49 [Accessed 23 December 2019]. Available from: <http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/>.

<sup>331</sup> *Ibid.*, Section D § 63-66.

<sup>332</sup> *Ibid.*, Section D § 73-77.

the survival of reindeers which are to date a source of food and employment for locals. Warmer weather conditions put the survival of reindeers' main aliment, such as lichen, at peril.<sup>333</sup>

The action consisted of two parts. In the first part, the claimants asked for the nullification of three EU legal acts, where the - in their opinion insufficient - reduction target is imprinted.<sup>334</sup> According to the plaintiffs, insufficient emission reduction is in contradiction to higher laws of the EU, such as the EU Charter of Fundamental Rights (CFR), the Treaty on the functioning of the European Union (TFEU), the UNFCCC and the Paris Agreement.<sup>335</sup> In the second part, claimants demanded an injunction to set more stringent GHGs emission reduction targets, based on the non-contractual liability anchored in Art. 340 TFEU. Applicants required an injunction ordering abatement of GHGs emissions by at least 50% to 60% compared to 1990 levels, or even higher if court finds it necessary.<sup>336</sup>

The Council's and the Parliament's defence in this case was based on denying the standing to plaintiffs as '*the applicants have not shown that any of the contested acts has affected their legal situation.*'<sup>337</sup> The Council underlined that under Art. 192 and 193 TFEU, according to which the contested acts were adopted, the states are allowed to adopt more stringent measures and EU thereby provides only a baseline, a springboard for countries to follow.<sup>338</sup>

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<sup>333</sup> *Ibid.*, §111.

<sup>334</sup> Directive 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76, p. 3).

Regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018 L 156, p. 26).

Regulation 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU. *See also Armando Ferrão Carvalho and Others v. European Parliament and Council of the EU*, § 18.

<sup>335</sup> *Armando Ferrão Carvalho and Others v. European Parliament and Council of the EU*, § 23.

<sup>336</sup> *Ibid.*, § 23.

<sup>337</sup> *Ibid.*, § 25.

<sup>338</sup> *Ibid.*, § 25.

The main foundation for the court's assessment was the 'direct and individual concern criterion', as formulated in 1963 in case *Plaumann v Commission*<sup>339</sup>. Conditions of this formula 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*'<sup>340</sup>. In applicants' opinion, each plaintiff is individually concerned, even if each individual will be affected in a different way. Council was, on the other hand, of an opinion that '*accepting the applicants' argument whereby each of them claims that their fundamental rights have been infringed would render the condition of individual concern entirely meaningless.*'<sup>341</sup> Applicants further polemized about the up-to-datedness of the *Plaumann formula* and the suitability of its usage for the current case. The claimants believe that the application of the *Plaumann formula* on environmental matters might lead to paradoxical situations when they contend that '[t]he more widespread the harmful effects of an act, the more restricted the access to courts.'<sup>342</sup> Bearing this in mind, the restricted interpretation of the standing conditions causes impingement of the judicial protection under Art. 47 CFR.<sup>343</sup>

The General Court ruled the case inadmissible, claiming that applicants are not meeting requirements of the direct and individual concern criterion.<sup>344</sup> Primarily, the court did not find a close relation between plaintiffs and the contested acts as required.<sup>345</sup> Neither did the court agree with the contention that the individual concern criterion is too restrictive for environmental measures. Lastly, the court also refuted that procedural conditions would be violating the access to justice under Art. 47 CFR.<sup>346</sup>

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<sup>339</sup> *Plaumann & Co. v Commission of the European Economic Community*. 15 July 1963. European Court of Justice. Case 25-62. [Accessed 16 December 2019]. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0025>.

<sup>340</sup> *Armando Ferrão Carvalho and Others v. European Parliament and Council of the EU*, § 45.

<sup>341</sup> *Ibid.*, § 26.

<sup>342</sup> *Ibid.*, § 32.

<sup>343</sup> *Ibid.*, § 32.

<sup>344</sup> *Ibid.*, § 71.

<sup>345</sup> *Ibid.*, § 45.

<sup>346</sup> *Ibid.*, § 52.

As for the second part, the court was of the opinion that the claimants are not seeking damages, but rather an amendment of the legislative package, and logically, they are trying to achieve the same result as in the first part of the lawsuit.<sup>347</sup> The court decided to hold the claim for damages equally inadmissible for the interconnectedness of both claims.<sup>348</sup>

The attitude of the General Court is not unexpected, we have to take into consideration that the individuals bringing the action came from different backgrounds, and what is more, also from the states outside the EU. It is apparent that EU is at this point reluctant to adjust its procedural rules in order to rule in favour of environmental/human rights claims. Nonetheless, that does not mean that the court would dismiss a potential future case on material grounds.

### **3.2 Corporate actors finally held accountable?**

#### **3.2.1 Greenpeace Southeast Asia: ‘Yes, Carbon Majors might be held liable.’**

In 2015, Greenpeace Southeast Asia together with other local non-profit organisations filed a petition to the Philippines Human Rights Commission. Its main purpose was to find out whether Carbon Majors, 47 largest fossil fuel companies, have breached their obligation to respect the rights of the Filipino people.<sup>349</sup> The petition was a follow-up to tangible impacts of catastrophic Typhoon Haiyan in Philippines and illustrates an extraterritorial character of climate disputes.

The commission received the claim and held the first public hearing in March 2018.<sup>350</sup> Over the time, as more public hearings were held, the commission managed to accumulate overwhelming evidence on the link between climate change, human rights and corporate actions, not only from scientists and scholars, but also from the survivors of the catastrophic events, community witnesses as well as affected cities.<sup>351</sup> The petition was supported by many scientists

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<sup>347</sup> *Ibid.*, § 68-69.

<sup>348</sup> *Ibid.*, § 70.

<sup>349</sup> *Greenpeace Southeast Asia and Others*. Commission on Human Rights. 19 September 2019. CHR-NI-2016-0001, Section III, § 3.1. [Accessed 2 February 2020]. Available from: <https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/>.

<sup>350</sup> *Ibid.*, § 3.14.

<sup>351</sup> *Ibid.*, Section III.

and scholars by *amicus briefs*.<sup>352</sup> Many of legal experts focused on the corporate responsibility, relying on the UN Guiding Principles on Business and Human Rights.<sup>353</sup>

In December 2019, after four years of investigations, commissioner Roberto Eugenio T. Cadiz confirmed during the UNFCCC COP25 in Madrid that the Carbon Majors might be held liable for climate change impacts since they '*played a clear role in anthropogenic climate change*'.<sup>354</sup> According to the commission, fossil fuel companies have a moral responsibility, even if there is no international human rights law concerning this issue that would be directly applicable on businesses.<sup>355</sup> As we have already discussed above, responsibility in the current situation lies on countries which are obliged to adopt enforceable regulations to hold their businesses accountable. The commission also concluded that major fossil fuel companies have an obligation to respect human rights as articulated by the UN Guiding Principles on Business and Human Rights read in connection with international environmental law, international climate law, precautionary principle and polluter pays principle.<sup>356</sup> According to the commission, a business can contribute to violation of human rights by marketing of its products leading to human rights breach.<sup>357</sup> Finally, corporate actors might be held liable on the grounds of '*fundamental principles of responsibility that are common to judicial systems around the world*'.<sup>358</sup> Lastly, the commission declared that the companies might be prosecuted according to criminal law under certain circumstances.<sup>359</sup>

The outcome of this case might have impact beyond the borders of Philippines, despite the fact that the commission's decision (as a quasi-judicial body) is not legally binding, it cannot be

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<sup>352</sup> *Ibid.*, Section III., § 3.13.

<sup>353</sup> *Ibid.*, Section VI., § 6.9.

<sup>354</sup> DESMOG. *Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules* [online]. 9 December 2019 [Accessed 17 February 2020]. Available from: <https://www.desmogblog.com/2019/12/09/carbon-majors-climate-liable-human-rights-violations-philippines-commission>. See also: GREENPEACE PHILIPPINES. *The Climate Change and Human Rights Petition* [online]. 9 December 2019 [Accessed 3 April 2020]. Available from: <https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/>.

<sup>355</sup> *Greenpeace Southeast Asia and Others*. Section VIII., § 8.201.

<sup>356</sup> *Ibid.*, Section VIII. § 8.161.2.

<sup>357</sup> *Ibid.*, Section VI., § 6.16.

<sup>358</sup> *Ibid.*, Section VI., § 6.15.

<sup>359</sup> GREENPEACE PHILIPPINES. *The Climate Change and Human Rights Petition* [online]. 9 December 2019 [Accessed 3 April 2020]. Available from: <https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/>.

enforced or impose sanctions.<sup>360</sup> As the commissioner Cadiz stated: ‘*Our findings can be relied upon as a precedent for parties that seek social justice on the issue of climate change.*’<sup>361</sup> What is more, the mass of evidence might be used in other climate cases, where the state is in a similar position to Philippines.

### 3.2.2 Lliuya v. RWE AG: ‘*German emissions in Peru.*’

Saúl Ananías Luciano Lliuya, a farmer and a mountain guide from Peru filed a lawsuit through an attorney residing in Hamburg before the German court against the German company RWE AG – an electricity producer.<sup>362</sup> This case is a striking example of the problematic character of the climate change issue where a citizen of Peru sues a German company, stressing the distance between the emitter and the consequences of its actions in another country.

Mr. Lliuya resides in the city of Huaraz in in the Ancash region of Peru, situated in the northern range of the Andes. His home city is located near the lake Palcacocha, surrounded by the Palcaraju Glacier. Owing to the gradually rising temperatures, the glacier surrounding the lake has been rapidly melting for the past years which leads to an extensive accumulation of water in the lake. The chief concern of inhabitants of Huaraz has been that the big parts of the glacier falling into the lake would cause a tsunami-like flood of the city. What is more, such an accident is not only hypothetical, but it has already happened in 1941 with catastrophic consequences and loss of many lives.<sup>363</sup>

The defendant, the German company RWE AG has, according to the evidence, contributed to the current situation by 0.47 %, which is a proportion of its share of worldwide GHGs emissions.<sup>364</sup> As the plaintiff’s main aim is to protect his home city, he asked for a preventive

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<sup>360</sup> SAVARESI, Annalisa and AUZ, Juan. *Climate Change Litigation and Human Rights: Pushing the Boundaries. Climate Law* [online]. 26 June 2019, Vol. 9, no. 3, p. 13 [Accessed 13 December 2019]. DOI 10.1163/18786561-00903006. Available from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3374730](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374730).

<sup>361</sup> DESMOG. *Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules* [online]. 9 December 2019 [Accessed 17 February 2020]. Available from: <https://www.desmogblog.com/2019/12/09/carbon-majors-climate-liable-human-rights-violations-philippines-commission>. See also HANLEY, Steve. *Philippine Study Shows Evidence Of “Criminal Intent” By Oil Majors, Says CIEL*. In: *CleanTechnica* [online]. 10 December 2019 [Accessed 3 April 2020]. Available from: <https://cleantechnica.com/2019/12/10/philippine-study-shows-evidence-of-criminal-intent-by-oil-majors-says-ciel/>.

<sup>362</sup> *Lliuya v. RWE AG*. Essen Regional Court. 15 December 2016. 2 O 285/15 (English translation). [Accessed 20 February 2020]. Available from: <https://germanwatch.org/en/14198>.

<sup>363</sup> *Ibid.*, p. 2. – 3.

<sup>364</sup> *Ibid.*, p. 3.

measure from RWE AG to protect the city of Huez from the flood and bear costs for adequate preventive adaptation measures proportionally to its contribution to the damage, or alternatively for an order to pay 17,000 euros to the association of local authorities.<sup>365</sup>

The claim was based on grounds of nuisance under German law. Section 1004 of the German Civil Code states: *'If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.'*<sup>366</sup> Not surprisingly, RWE AG claimed that there is no causal link between its actions and the flood risk.<sup>367</sup> The District Court in Essen dismissed the case, echoing RWE's argumentation and stressing the contribution of RWE on its own does not increase the probability of floods.<sup>368</sup> The District Court thereby based its decision on inadequate proof of causation.<sup>369</sup> According to the court of the first instance, only a cumulative action of all emitters could cause the flood risk,<sup>370</sup> *'the chain of causation is incomparably more complex, multipolar, and therefore more unclear.'*<sup>371</sup> The court also pointed out at *de minimis* test<sup>372</sup>, stating that: *'the contribution of individual greenhouse gas emitters to climate change is so small that any single emitter, even a major one such as the defendant, does not substantially increase the effects of climate change.'*<sup>373</sup>

Mr. Lliuya, consequently, filed an appeal in front of the Higher Regional Court Hamm. The Higher Regional Court, the authority of the second instance, has already indicated that climate damage can give rise to a corporate liability. The court up to this point stated that even though the

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<sup>365</sup> *Ibid.*, p. 3.-4.

<sup>366</sup> THE FEDERAL REPUBLIC OF GERMANY. *German Civil Code (Bürgerlichen Gesetzbuches – BGB)*. 2 January 2002 [Accessed 3 April 2020]. Available from: [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (English translation). § 1004 (1).

<sup>367</sup> *Lliuya v. RWE AG*, p. 4.

<sup>368</sup> *Summary of the submission of the defendant's legal counsel in case Lliuya v. RWE AG*. 28 April 2016 (English translation), Section C, § II (2) (i). [Accessed 20 February 2020]. Available from: <https://germanwatch.org/en/14198>.

<sup>369</sup> *Lliuya v. RWE AG*, p. 6.

<sup>370</sup> *Ibid.*, p. 6-7.

<sup>371</sup> *Ibid.*, p. 7.

<sup>372</sup> INTERNATIONAL BAR ASSOCIATION. *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* [online]. February 2020, p. 4, 20 [Accessed 6 April 2020]. Available from: <https://www.ibanet.org/Climate-Change-Model-Statute.aspx>.

<sup>373</sup> *Lliuya v. RWE AG*, p. 7.

RWE's contribution is not a single cause of flooding risk in Peru, it still might be partially responsible for the risks of flooding in the region.<sup>374</sup> Subsequently, the court named experts responsible for looking into the situation in Peru and inspect the risk of impairment of the property of the claimant. The great importance was placed upon scientific evidence, especially attribution models which, according to Higher Regional Court in Hamm, might determine the responsibility of RWE for the situation in Peru.<sup>375</sup> The case has been on stand by and the final decision of the Higher Regional Court in Hamm is awaited after the thorough assessment of the situation in Peru, especially the potential risks to claimant's property.

The case is a breakthrough, as for the first time in European history, the court acknowledged that a private entity might be responsible for the climate change consequences. Even though the case does not directly refer to human rights, the decision will definitely have impact on the level of protection of plaintiff's rights. Its result might be a leading beam of light for other individuals to hold businesses liable for climate change and set an example of the progressive approach to a causation problem from the Higher Regional Court, as well as the role of scientific determination.

### **3.2.3 Milieudefensie et al. v. Royal Dutch Shell plc: 'Building on the Urgenda's success.'**

In 2018, Milieudefensie (Friends of Earth Netherlands), six NGOs and around 17,200 citizens have announced their intention to sue Shell for breaches of the duty of care on multiple occasions. They sent a notice letter and required from Shell to stop unlawful conduct and adjust their policies to Paris Agreement's targets.<sup>376</sup>

A year later, in April 2019, Milieudefensie together with aforementioned co-claimants sued Shell, a transnational company seated in The Hague, in front of the District Court in The Hague. The objective of Milieudefensie is to reduce Shell's emissions to at least 45% by 2030 (compared

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<sup>374</sup> GERMANWATCH. *Interesting facts: Background information on the decision of the higher regional court Hamm* [online]. 12 December 2017 [Accessed 3 April 2020]. Available from: <https://germanwatch.org/en/14831>.

<sup>375</sup> *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 (English translation). [Accessed 20 February 2020]. Available from: <https://germanwatch.org/en/14198>.

<sup>376</sup> MILIEUDEFENSIE. *Timeline climate case Shell* [online]. [Accessed 4 April 2020]. Available from: <https://en.milieudefensie.nl/climate-case-shell/timeline>. See also: *Summons Milieudefensie et al. v. Royal Dutch Shell plc*. District Court of Hague. 5 April 2019. File no. 90046903 (English translation), § 63.

to 2010) and to net zero by 2050.<sup>377</sup> Among others, the claimants were inspired and driven by the success of the *Urgenda* case.

According to claimants, with regard to extensive volume of scientific research, Shell as an emitter, has a duty of care to act in climate protection similar to the one the State of the Netherlands has.<sup>378</sup> The claimants point out the fact that ‘*Shell has a power, similar to that of the State, to decide the fate of current and future generations.*’<sup>379</sup> What is more, Shell historically (from 1988 to 2015) holds to account for 1.7 % of all GHGs emitted and traced back.<sup>380</sup> Annually (data from 2015), Shell emits around 1, 2 % of global GHGs, which is at least twice as much as the Dutch State’s share, which is around 0.5%.<sup>381</sup> Moreover, Shell’s actions lead to the threat to the right to life, to respect for private and family life as defined under Art. 2 and 8 of ECHR. This duty to act derives from the so-called indirect horizontal effect of the ECHR. Professor Hartkamp commented on this matter: ‘*The values embodied in the fundamental rights are important to society as a whole that it is desirable that such rights can also, that is, to a certain extent, be invoked by citizens in their relationships with other citizens, including associations and other organisations of a private law nature. This corresponds with today’s reality in which these organisations are able to exert such legal, economic or actual control over individuals that the need for protection against such control is comparable to the need for protection against the control exerted by public organisations.*’<sup>382</sup>

Furthermore, the NGO sued Shell on the grounds of an unlawful endangerment.<sup>383</sup> According to the Dutch case law<sup>384</sup> there is an established number of conditions to be fulfilled to find a defendant guilty among others: (i) the danger must be significant enough, (ii) the nature and the

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<sup>377</sup> *Summons Milieudéfensie et al. v. Royal Dutch Shell plc.* District Court of Hague. 5 April 2019. File no. 90046903 (English translation), § 744.

<sup>378</sup> *Summons Milieudéfensie et al. v. Royal Dutch Shell plc.*, § 666, § 669, § 670.

<sup>379</sup> *Ibid.*, § 669.

<sup>380</sup> *Ibid.*, § 552.

<sup>381</sup> *Ibid.*, § § 552, 641.

<sup>382</sup> HARTKAMP, A. S. *Europees recht en Nederlands vermogensrecht*. Deventer: Wolters Kluwer Nederland B.V, 2018. 339 p. Fourth edition. ISBN 978-90-13-15134-3. *As translated in: Summons Milieudéfensie et al. v. Royal Dutch Shell plc.*, § 667.

<sup>383</sup> *Ibid.*, § 511. *See also: THE KINGDOM OF NETHERLANDS. Dutch Civil Code (Burgerlijk Wetboek)*. Book 6, Section 162.

<sup>384</sup> *Kelderluik*. Supreme Court of the Netherlands. 5 November 1965. No. 9885. [Accessed 7 April 2020]. Available from: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:1965:AB7079>.

scope of the damage must be caused by climate change, and (iii) the defendant must be sufficiently aware of the problem. If we look at these conditions, we can see that all of them were met. First and second condition are not necessary to be proven individually, as an extensive research by IPCC and other authorities has been conducted about the adverse effects of GHGs emissions. Secondly, as we have already mentioned, most of the Carbon Majors already knew in 1980s, many of them even sooner, that climate change would have grave effects on our lives, Shell was not an exception.<sup>385</sup>

As we have mentioned, it is not common to hold private parties directly accountable for the infringement on human rights of individuals. Milieudefensie therefore invoked the so-called ‘indirect horizontal effect’ as described above. In addition, Milieudefensie highlighted the fact that Shell voluntarily, as a part of self-regulation and CSR, abides by the UN Guiding Principles on Business and Human Rights. According to Shell’s websites: ‘*Shell is committed to respecting human rights as set out in the Universal Declaration of Human Rights and the International Labour Organization core conventions. Our approach to implementing our responsibility is informed by the UN Guiding Principles on Business and Human Rights.*’<sup>386</sup> Lastly, according to plaintiffs, the change of the business model in the energy sector is not impossible. In fact, Shell was planning on the transformation in early 1990s, but abandoned the idea as the company feared it would become unprofitable.<sup>387</sup> The plaintiffs argue that in 2019 nothing stands against the prosperous conversion of the company to sustainable energy sector.<sup>388</sup> Claimants in this context invoked the case of the energy company Danish Oil and Natural Gas (later renamed to Ørsted), which in 2017 transferred from a fossil fuel to a renewable energy company.<sup>389</sup> To date, company has been lucrative and growing.<sup>390</sup>

This case is still pending, the decision from the court is awaited in 2020. Even though the decision of the Supreme Court on *Urgenda* last December definitely strengthened the plaintiffs’

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<sup>385</sup> *Summons Milieudefensie et al. v. Royal Dutch Shell plc*, § 23, § 530.

<sup>386</sup> SHELL. *Human rights*. [online]. [Accessed 28 March 2020]. Available from: <https://www.shell.com/sustainability/transparency/human-rights.html>. See also *Summons Milieudefensie et al. v. Royal Dutch Shell plc*, § 693.

<sup>387</sup> *Ibid.*, § 624-625.

<sup>388</sup> *Ibid.*, § 624-625.

<sup>389</sup> *Ibid.*, § 823-826.

<sup>390</sup> *Ibid.*, § 823-826.

position, it is not clear whether the court will be willing to issue a similar judgement against a private actor. Either way, the number of claimants shows that the public requires a change not only in politics, but also in business arrangements.

### 3.3 Some reflections on possible climate litigation scenarios in the Czech Republic

After assessing the extensive body of literature together with the climate litigation cases above, one might start wondering how the climate litigation could look like in his/her own country. Šeba elaborated on this topic in relation to the Czech Republic in 2017, after the success of *Urgenda* before the court of the first instance.<sup>391</sup> He explores several scenarios according to various legal norms, highlighting that the Czech legal system is not designed in favour of public interest litigation.<sup>392</sup> If we consider obligations according to the Czech Civil Code<sup>393</sup>, we have an option either under the prevention obligation according to § 2903 (2), or alternatively we can file a lawsuit for breaching the personality rights under § 81 (2), which deals with the right to live in a favourable environment.<sup>394</sup> From the administrative perspective it should not escape our notice that the climate policies in the Czech Republic have a strategic and conceptional rather than legally binding character. Moreover, the strict standing conditions (especially the interest in the matter, more precisely, under Czech legal system the condition of being affected on subjective rights) constitute a barrier in access to administrative courts in the Czech Republic. Therefore, the administrative law would not likely establish a strong basis for eventual claims.<sup>395</sup> Finally, looking at the problem of climate change from the human rights perspective opens the options of a constitutional complaint before the Czech Constitutional Court. Despite the existence of the constitutional right to a healthy environment as anchored in Art. 35 Section 1 of the Charter of Fundamental Rights and Freedoms of the Czech Republic<sup>396</sup>, claimant's position here is quite limited, since the

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<sup>391</sup> ŠEBA, Jan. *Klimatická změna před soudem: případ Urgenda proti Nizozemsku*. České právo životního prostředí [online]. 2017, no. 3, p. 116-147 [Accessed 4 April 2020]. Available from: [http://www.cspzp.com/dokumenty/casopis/cislo\\_45.pdf](http://www.cspzp.com/dokumenty/casopis/cislo_45.pdf). ISSN 1213-5542.

<sup>392</sup> *Ibid.*, p. 130.

<sup>393</sup> PARLIAMENT OF THE CZECH REPUBLIC. *Czech Civil Code*. 2012. No. 89/2012 Coll. [Accessed 9 April 2020]. Available from: <http://www.czechlegislation.com/law-no-89-2012-coll-civil-code/> (English translation).

<sup>394</sup> ŠEBA, Jan. *Klimatická změna před soudem: případ Urgenda proti Nizozemsku*, p. 130-134.

<sup>395</sup> *Ibid.*, p. 134-135.

<sup>396</sup> THE CZECH NATIONAL COUNCIL. *Charter of Fundamental Rights and Freedoms*. 28 December 1992. No. 2/1993 Coll. [Accessed 3 April 2020]. Available from: [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Pravni\\_uprava/AJ/Listina\\_English\\_version.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf) (English translation).

provision lacks enforcement due to the insufficient implementation legislation.<sup>397</sup> Jančářová takes another stance and in her work contemplates intertwining the right to life and right to a healthy environment to overcome the above mentioned enforcement issue.<sup>398</sup> Additionally, she emphasizes the significance of Art. 2 and 8 ECHR in the Czech Republic.<sup>399</sup> Nevertheless, according to her, taking into consideration the state's margin of appreciation in adopting the climate measures on the national level, the eventual climate lawsuit would require more support from the international and European level regulation.<sup>400</sup>

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<sup>397</sup> ŠEBA, Jan. *Klimatická změna před soudem: případ Urgenda proti Nizozemsku*, p. 138.

<sup>398</sup> JANČÁŘOVÁ, Ilona. *Globální oteplování v reflexi ústavně garantovaného práva na příznivé životní prostředí*. In: MÜLLEROVÁ, H. a kol. *Právo na příznivé životní prostředí: Nové interpretační přístupy* [online]. Praha: Ústav státu a práva AV ČR, 2016, p. 165, 170 [Accessed 29 March 2020]. Available from: <https://www.ilaw.cas.cz/casopisy-a-knihy/knihy-a-e-knihy/pravo-na-priznive-zivotni-prostredi-nove-interpretacni-pristupy.html>. ISBN 978-80-87439-29-6.

<sup>399</sup> *Ibid.*, p. 164.

<sup>400</sup> *Ibid.*, p. 167, 170.

## CONCLUSION

In order to ensure global enactment of multilateral climate treaties, states had to settle on compromises avoiding an adoption and enforcement of binding quantified climate mitigation targets. The Paris Agreement, for example, was declared by many as unenforceable, and moreover, lacking its own tribunal for climate matters to resolve the disputes. How can we then hold the biggest global players accountable? Climate litigation as a trend of the past years has definitely given us new options. The most recent scholarly attention has gravitated towards the use of human rights as a way to bring us closer to the responsible global actors and climate justice. After initial doubts, the link between human rights and detrimental effects of climate change has been acknowledged especially on the level of United Nations.

In this thesis, I explored the latest climate case law with the human rights approach, in order to conclude how to compile a viable climate lawsuit, which would be able to gain relevance. I wanted to discover what should a drafter of the climate case be aware of and what should he/she be concerned with. I was looking for a strong frontline able to repulse attacks trying to crack the core of the lawsuit. My research eventually led me to the second question, i.e. whether the idea of a human rights claim will stack up against states and companies as a single source of law.

In the presented case law, I have followed two lines of climate litigation. One branch represents lawsuits against states aiming usually at state's climate targets, trying to make them enact more ambitious climate policies. The second branch are the claims against the private actors, usually companies, whose behaviour caused or is able to cause a damage to an individual.

The Netherlands, Pakistan, and Colombia showed us that success on the human rights basis is possible, even though it must be noted that such a result is still rare and jurisdiction-dependant. Switzerland and Peoples' Climate Case against the EU, on the other hand, stalled at the very beginning of the proceedings, without getting to the merits. The results in the corporate line of climate litigation are not that clear yet. The decision of the Human Rights Commission in the Philippines' case represents a big step forward, but the character of the decision as non-binding takes away part of its gravity. As much as the *Milieudefensie* case against Shell seems promising, we will have to wait for the actual ruling in Hague to assess its impacts on further claims against the corporate actors.

The success of climate litigation based on human rights depends on many variables. As we learned, the most concerning problems occur usually at the very beginning at the procedural stage, such as matter of standing, the issue of separation of powers, choice of forum etc. In addition, in

order to succeed, lawyers have to be able to predict and eliminate the most possible counterarguments of defendants. The findings indicate that lawyers have to be aware of the relevant legal tradition, make use of its different aspects and embrace them. Many countries offer options on the level of constitutional law. We can look at the example of Colombia, which took advantage of its institute called *tutela*, others, such as the Netherlands, provide us with civil provisions (state's duty of care) which in combination with human rights arguments can be our winning ticket. It is absolutely necessary to have an overview of the relevant legal system, receptivity of the judges, the standing points of society etc. As it has been proved, it is not sufficient just to replicate one lawsuit across the jurisdictions, because even the tiniest nuance in legislation or a case-law precedent in otherwise very similar jurisdictions might cause the fatal end to the case.

Once we find ourselves comfortable in the legal tradition, we have to focus on our plaintiffs and prove their vulnerability to climate change. The closer the threat, or the more visible, the more possible for the plaintiff to claim his/her rights. The further or less possible the actual harm, the harder it is for the judge to assess the claim.

When it comes to procedural hurdles, beginning with standing, a drafter should be aware of whether the public interest litigation is admissible, whether citizens can sue in associations or whether an NGO might file a lawsuit on their behalf. If we consider bringing the claim in Europe, for instance, it might be a good idea to file it under an NGO, thanks to their position under the Aarhus Convention. In some countries, plaintiffs might take advantage of loose standing rules, such as in Pakistan or Colombia. In other states or supranational institutions, the matter of standing might be defined in a very traditional and restrictive way. As we have seen in the People's Climate Case against the EU, attorneys have tried to push the limits of the EU doctrine on standing towards more relaxed rules in environmental issues. Despite the failure, this stream of argumentation might be essential in future, in order to challenge the old precedents and persuade judges to establish an extensive interpretation of standing in environmental matters, in order to prevent the refusal of justice. Following with yet another legal obstacle, if the doctrine on separation of powers is not in our favour in the particular state, we might either employ the strategy, which the elderly in Switzerland did, when they used the administrative justice system, or alternatively, we can challenge the doctrine itself and its understanding as being too reactionary.

The research confirmed that the success of the lawsuit will strongly rely on which human rights instruments the relevant country adhered to, especially on regional level, and whether the constitution itself contains a right to a healthy environment. Boyd found that having such a right

increased the position of courts in protecting the environment and helped to enforce and acknowledge the environmental interest even when other social or economic rights are at stake.<sup>401</sup> Alternatively, it will be crucial to know whether the judge is ready to interpret the right to a healthy (and clean) environment as being a substantial part of the right to life. The Oslo Principles, a non-binding subsidiary source might help the judges as a source of inspiration.

When it comes to suing the private entities, the task is more challenging, and we do not have much hard law or previous experience to rely on. If we want to hold a private entity liable on the grounds of human rights, we can, for example, look more closely whether the companies adhere to UN Guiding Principles on Business and Human Rights or claims to abide by the rules protecting the human rights. Many transnational corporations do so e.g. on their websites as a part of their CSR policy. As we saw in Netherlands with the pending Shell case, the countries which have already seen a supporting precedent on the level of state litigation might want to try to take private entities to court as well.

Among the most important variables belong providing the judge with clear facts and a credible scientific evidence in form of either IPCC reports or other local studies or emerging event attribution science. Nonetheless, we cannot forget that such an extensive mass of scientific evidence might be too complex for the judge to assess. Furthermore, parties might decide to show only a partial picture and choose those studies which are in favour of their demands. It is therefore necessary to push states to promote and design national environmental courts or benches, which would be better equipped for ruling on the complex environmental issues.

One of the most significant findings to emerge from this study is that much will depend on the position of the judge and his/her beliefs. The latest cases show that the judge is more receptive if the public is generally speaking in favour of the change leading to more climate friendly policies. Of course, receptivity of the judge can vary, as we have seen in the Netherlands which would be in the first line if the sea level rises or in Pakistan, which already felt the floods in its country. In both these cases the judges were more likely to decide in favour of claimants. The situation is very different in Switzerland, a land-locked country, which has so far seen the impacts of climate change only marginally, namely through the particularly warm summers. The receptivity of judges might differ depending on other factors as well, such as whether the country's GDP is dependent

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<sup>401</sup> BOYD, David R., 2012. *The Constitutional Right to a Healthy Environment*, p. 8-9.

on industry intensive activities, e.g. automotive industry or others. These areas need to be further examined in depth. In general, the study indicates that the role of judges and their stand is essential.

Results of this investigation show that, on the basis of the presented case-law, success of claims based solely on international human rights instruments is marginal and is usually supported by relaxed rules on standing or a very specific provision helping to prevent initial procedural hurdles. However, it is difficult to arrive at any conclusions with regard to how effective the human rights instruments actually are without avoiding generalisation. Human rights seem to be more effective in countries which are feeling the strongest impacts of climate change on human rights and people are in a very vulnerable position, such as in Pakistan. Nonetheless, so far it seems that there still needs to be a supporting provision from other legal area (typically tort law) to hold the claim together, and it is very risky to rely solely on human rights provisions, especially if those are not embedded in the relevant constitution. As for now, it seems the claimants need to base their claims on the amalgamation of various legal sources in order to succeed. The deficiencies in actual climate law cause that most common legal basis come usually from private (tort law and public nuisance) instead of public law regulation. Overall, while it is true that human rights arguments might strengthen your position in further proceeding in front of the regional or international authority, they might not be sufficient as a singular source to win the case.

On the other hand, if we decide to approach other type of quasi-judicial body, we have a slight chance to be successful solely on human rights grounds. However, the actual success might be, reduced if the decision holds only a symbolic value and is not legally enforceable. For instance, a victory which brought the decision of the Philippines Human Rights Commission in the case of Philippines against the Carbon Majors is arguable. On the one hand, it might be a beam of light for other tribunals in case they decide to follow the ruling, on the other hand, it does not bring any tangible resolution of the problem.

In a nutshell, even after many studies, it is still very difficult to make predictions about the results of climate litigation claims. All we can do is to ensure that lawyers see the complex picture and connect the pieces invisible to others. This thesis might provide an initial lead. Overall, a lawyer nowadays needs to be versatile. As we have seen, lawyers cannot get along without awareness in all legal areas from energetic law to tort law, criminal law, private nuisance to human rights.

This thesis has provided a deeper insight into the different argumentation styles within the climate litigation cases. As the study compares experiences from different countries, the results

add to the rapidly expanding field of climate litigation by providing a structured overview with the valuable tips for future claimants. The small sample of generally high-profile cases in this thesis naturally cannot provide a complete reflection of the current state of affairs but can give the reader a hint in the right direction. In spite of its limitations, the insights gained from this study may be of assistance to lawyers as a guide for drafting a climate lawsuit in future cases.

This paper further offers a good starting point for discussion and further research, nevertheless, there still need to be more research done as this area has been evolving depending on the ever-changing governments, opinions within society and changes in both national and international law. It therefore still remains a fruitful area for further work.

Finally, we have to realise that climate litigation is not all-powerful and cannot solve the whole issue in its complexity. It's just a piece of a puzzle which needs to be set in place to see to bigger picture. We have to anticipate other ways to help the victims of climate change. It will be exciting to observe what the legal world has to offer, such as Greta Thunberg's petition to the United Nations under the United Nations Convention on the Rights of the Child, which is a first formal petition of its kind relating to climate change.<sup>402</sup> In general, a judicial process tends to be very long, especially if the other party lodges an appeal to higher instances. And even when the claimants succeed, a sufficient enforcement might be an issue, as we need to realise that not all states are equipped with 'transformative adjudication'<sup>403</sup> similar to Pakistan or Colombia. Therefore, we cannot stop exploring other options and must find other ways to start motivating companies to switch to clean technologies. Finally, it might be easy to place all the blame on companies only, but we cannot omit the position of an individual. As long as we demand gas for our vehicles, the companies will provide. If we switch our choices the market will adjust to those preferences.

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<sup>402</sup> ARNOLDY, Ben. *Greta and 15 Kids Just Claimed Their Climate Rights at the UN*. In: *Earthjustice* [online], 23 September 2019 [Accessed 2 April 2020]. Available from: <https://earthjustice.org/blog/2019-september/greta-thunberg-young-people-petition-UN-human-rights-climate-change>.

<sup>403</sup> HOEXTER, Cora. *Judicial Policy Revisited: Transformative Adjudication in Administrative Law*. *South African Journal on Human Rights* [online], p. 281, 286.

## List of Abbreviations

<b>ACHPR</b>	African Court on Human and Peoples' Rights
<b>APA</b>	Administrative Procedure Act
<b>CDM</b>	Clean Development Mechanism
<b>CFR</b>	EU Charter of Fundamental Rights
<b>CISG</b>	United Nations Convention on Contracts for the International Sale of Goods
<b>CSR</b>	Corporate Social Responsibility
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EPA</b>	Environmental Protection Agency
<b>EU ETS</b>	European Union Emission Trading Scheme
<b>ETO</b>	Extraterritorial Obligations
<b>GDP</b>	Great Domestic Product
<b>GHGs</b>	greenhouse gases
<b>HRC</b>	Human Rights Council
<b>IACHR</b>	Inter-American Commission and Court on Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IPCC</b>	International Panel on Climate Change
<b>NDCs</b>	Nationally Determined Contributions
<b>NGOs</b>	Non-governmental Organisations
<b>OHCHR</b>	Office of the High Commissioner on Human Rights
<b>REDD+</b>	Reducing Emissions from Deforestation and Forest Degradation
<b>SIDS</b>	Small Island Developing States
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNEP</b>	United Nations Environmental Programme
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>WHO</b>	World Health Organisation
<b>WMO</b>	World Meteorological Organisation

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## **List of Annexes**

Annex no. 1 – Impacts of climate change on specific human rights

Annex no. 2 – Map to show location and quantity of climate cases up to May 2019

# Annex no. 1: Impacts of climate change on specific human rights

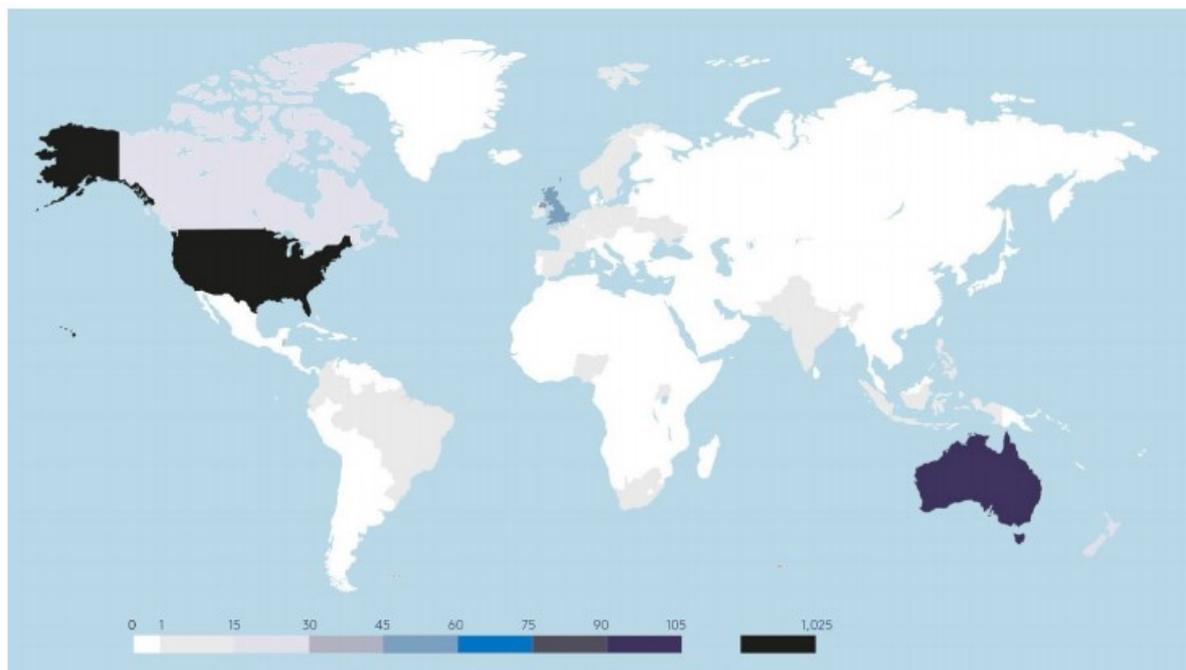
Climate Impact	Human Impact	Rights Implicated
<b>Sea Level Rise</b> <ul style="list-style-type: none"> <li>• Flooding</li> <li>• Sea Surges</li> <li>• Erosion</li> <li>• Salination of land and water</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of land</li> <li>• Drowning, injury</li> <li>• Lack of clean water, disease</li> <li>• Damage to coastal infrastructure, homes, and property</li> <li>• Loss of agricultural lands</li> <li>• Threat to tourism, lost beaches</li> </ul>	<ul style="list-style-type: none"> <li>• Self-determination [ICCPR;ICESCR,1]</li> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Water [CEDAW,14; ICRC 24]</li> <li>• Means of subsistence [ICESCR,1]</li> <li>• Standard of living [ICESCR, 12]</li> <li>• Adequate housing [ICESCR,12]</li> <li>• Culture [ICCPR, 27]</li> <li>• Property [UDHR,17]</li> </ul>
<b>Temperature Increase</b> <ul style="list-style-type: none"> <li>• Change in disease vectors</li> <li>• Coral bleaching</li> <li>• Impact on Fisheries</li> </ul>	<ul style="list-style-type: none"> <li>• Spread of disease</li> <li>• Changes in traditional fishing livelihood and commercial fishing</li> <li>• Threat to tourism, lost coral and fish diversity</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR, 6]</li> <li>• Health [ICESCR, 12]</li> <li>• Means of subsistence [ICESCR, 1]</li> <li>• Adequate standard of living [ICESCR, 12]</li> </ul>
<b>Extreme Weather Events</b> <ul style="list-style-type: none"> <li>• Higher intensity storms</li> <li>• Sea Surges</li> </ul>	<ul style="list-style-type: none"> <li>• Dislocation of populations</li> <li>• Contamination of water supply</li> <li>• Damage to infrastructure: delays in medical treatment, food crisis</li> <li>• Psychological distress</li> <li>• Increased transmission of disease</li> <li>• Damage to agricultural lands</li> <li>• Disruption of educational services</li> <li>• Damage to tourism sector</li> <li>• Massive property damage</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR,6]</li> <li>• Health [ICESCR,12]</li> <li>• Water [CEDAW,14; ICRC 24]</li> <li>• Means of subsistence [ICESCR,1]</li> <li>• Adequate standard of living [ICESCR, 12]</li> <li>• Adequate and secure housing [ICESCR,12]</li> <li>• Education [ICESCR,13]</li> <li>• Property [UDHR,17]</li> </ul>
<b>Changes in Precipitation</b> <ul style="list-style-type: none"> <li>• Change in disease vectors</li> <li>• Erosion</li> </ul>	<ul style="list-style-type: none"> <li>• Outbreak of disease</li> <li>• Depletion of agricultural soils</li> </ul>	<ul style="list-style-type: none"> <li>• Life [ICCPR,6]</li> <li>• Health [ICESCR,12]</li> <li>• Means of subsistence [ICESCR,1]</li> </ul>

**UDHR = Universal Declaration of Human Rights; ICCPR = International Covenant on Civil and Political Rights; ICESCR = International Covenant on Economic, Social and Cultural Rights; CEDAW = Convention on the Elimination of All Forms of Discrimination against Women; ICRC = Convention on the Rights of the Child.**

Source: CIEL: *Climate Change & Human Rights: A Primer*.<sup>404</sup>

<sup>404</sup> THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW. *Climate Change & Human Rights: A Primer*. [online]. July 2013, p. 6 [Accessed 16 February 2020]. Available from: <https://www.ciel.org/reports/climate-change-and-human-rights-a-primer-orellana-johl-revised-july-2013summary-of-how-climate-change-impacts-and-response-measures-are-affecting-the-full-and-effective-enjoyment-of-human-ri-4/>.

## Annex no. 2: Map to show location and quantity of climate cases up to May 2019



*Source: Policy report: Global trends in climate change litigation: 2019 snapshot*<sup>405</sup>

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<sup>405</sup> BYRNES, Rebecca and SETZER, Joana. *Policy report: Global trends in climate change litigation: 2019 snapshot*, p. 3.

## **Abstract**

Climate change has proven to be a real threat to human rights over the past years. The complex and layered link has been acknowledged, explored and nowadays it represents a justly feared aspect of climate change. Intentions of not only scientific, but also scholarly society has been therefore spinning around the question, how to stop the dangers stemming from the climate change and prevent further human rights violations. A climate litigation, born in the USA, and having spread the idea around the world seems to be one of the options to (partly) resolve the situation. The trend has been expanding over the past years and has become a phenomenon. Elderly, children and farmers take not only states, but also the biggest private emitters of GHGs known as Carbon Majors to court. The main objective of this thesis has been to discover the way to success in climate litigation cases based on human rights argumentation. The aim has been to generate an exemplary set of advices for drafters aiming at filing a climate lawsuit. Together with this question, the author had a particular interest in assessing the capability of human rights arguments to succeed on its own without additional support from other legal areas, such as tort law. The leading methodology used in this thesis was a comparison of legal arguments across the selected case law, including successful, unsuccessful and pending cases to cover the widest spectrum possible. The author decided to examine the topic on the level of national authorities, with the exception of one EU case, and incorporate both types of defendants, public and private ones. The study is opened by explanation of the link between climate change and human rights, introduction to the history of climate litigation, and finally, how these have intertwined over the time. The second chapter has an objective to outline the main legal hurdles concerning drafting a climate lawsuit. Finally, the last chapter's outcome are lessons from selected case law. The research findings indicate that success of the lawsuit based on human rights is possible, nonetheless, it is advisable to combine those with other legal resources. The victory depends on many factors. The most evident being overcoming legal obstacles regarding the procedural stage of proceedings, among others the question of justiciability, standing, separation of powers etc. Furthermore, the result might be influenced by legal tradition, provisions a drafter can rely on national level and international treaties which have been ratified. Finally, an attitude of the judge will play a substantial role. Due to limitations in the extent of this research, especially the number of assessed cases, and thanks to the fact that the environment of climate litigation has been changing depending on societal, scientific and legislative advancement, there is still space for further research, especially in the area of cases against the private actors. Those cases still lack clear obligations on the side of companies stemming from international law.

## Abstrakt

Změna klimatu byla prokázána jakožto hrozba pro lidská práva. Toto komplexní a strukturované propojení bylo zkoumáno, potvrzeno OSN a v současné době je oprávněně obávaným aspektem klimatické změny. Zájem vědecké, ale i právní veřejnosti nyní osciluje kolem jedné otázky. Jak můžeme zabránit nebezpečí plynoucímu z klimatické změny, a předejít tak dalšímu porušování lidských práv? Klimatická litigace, která vznikla v USA a rozšířila se do dalších států, představuje jednu z možností řešení. Tento stále více oblíbený trend posledních let se stává fenoménem naší doby. Senioři, děti, ale i zemědělci žalují nejen státy, nýbrž i největší emitenty skleníkových plynů. Hlavním záměrem této diplomové práce je nalézt cestu k úspěchu v klimatických případech založených na lidskoprávní argumentaci. Autorka si stanovila cíl vytvořit příkladný seznam poučení pro právní zástupce, kteří mají za úkol sepsat klimatickou žalobu. Kromě tohoto hlavního úkolu autorku dále zajímalo, zda lidskoprávní argumentace bude schopna před soudem obstát sama o sobě, tj. bez podpory dalších právních zdrojů, jako je např. delikt ní právo aj. Ústřední metodologii pak představuje komparace právních argumentů napříč vybranými případy, zahrnující případy úspěšné, neúspěšné i probíhající, tak, aby autorka pokryla ve svojí vědecké práci co nejširší vzorek žalob. Autorka se rozhodla prozkoumat téma z pohledu národních autorit, vyjímaje jeden případ z prostředí EU, ve vybraných případech obsáhla oba typy odpůrců, veřejné (stát) a soukromé (společnosti). Tato práce je uvedena vysvětlením propojení mezi klimatickou změnou a lidskými právy, historií klimatické litigace, závěrem kapitoly pak objasňuje jejich propojení. Druhá kapitola si dala za úkol vyjasnit hlavní právní překážky při sepsání klimatické žaloby. Výsledkem třetí kapitoly jsou lekce, které si můžeme vzít ze současných případů. Výsledek výzkumu naznačuje, že úspěch žaloby založené na lidskoprávní argumentaci je možný, nicméně, je doporučeníhodné zkombinovat tuto s dalšími zdroji práva. Sukces záleží na mnoha dalších faktorech. Zřejmě nejzásadnější je překonat procedurální překážky řízení, jimiž jsou například otázka pravomoci soudu, dělení moci aj. Dále může být výsledek ovlivněn zejména právní tradicí toho kterého státu, množstvím ustanovení v národní právní řádě, o které se můžeme opřít z pohledu lidských práv (zejména ústava), případně které lidskoprávní mezinárodní smlouvy stát ratifikoval. Konečně, je třeba si uvědomit zásadní roli soudce v klimatických sporech, jehož přízeň může ovlivnit výsledek celého sporu. Díky omezením týkajícím se rozsahu tohoto výzkumu, zejména množství posuzovaných sporů a dále díky skutečnosti, že prostředí klimatické litigace se proměňuje v závislosti na společenském, vědeckém a legislativním pokroku, je zde stále prostor pro další výzkum, zejména týkající se žalob proti soukromým aktérům, u nichž i nadále přetrvává nedostatek jasných závazků vyplývajících z mezinárodního práva.

## **Key words**

Climate Law

Climate Change Litigation

Human Rights

Climate Change Liability

Climate Lawsuit

## **Klíčová slova**

Právo ochrany klimatu

Klimatická litigace

Lidská práva

Odpovědnost za klimatickou změnu

Klimatická žaloba