

## Editorial

### Climate change litigation and human rights: stocktaking and a look at the future

This editorial introduces a special collection of articles on the role of human rights law in climate litigation. The collection draws on selected papers presented at the groundbreaking workshop ‘Implementing the Paris Agreement: Comparative Lessons from the Global Human Rights Regime’, which took place on 6–7 May 2021 at Sant’Anna School of Advanced Studies, Pisa, Italy. The workshop brought together scholars and legal practitioners in order to share insights and explore the future potential of human-rights-based climate litigation. The idea behind both the workshop and this collection of articles is to take stock of recent developments in climate change litigation in order to ascertain the role of human rights in this rapidly growing area of legal practice. The aim is to identify future pathways to effectively use human rights arguments in climate change litigation at the international, regional and national level.

In recent years, litigants around the world have increasingly tried to ‘push the boundaries of the law’,<sup>1</sup> by filing test cases to prompt state and corporate actors to reduce greenhouse gas emissions, or to obtain redress for harm to persons, property or the environment associated with the impact of climate change. At the time of writing, this swelling body of climate litigation consists of hundreds of lawsuits raising questions of law or fact regarding climate science and climate change mitigation or adaptation, which have been brought before international or domestic judicial, quasi-judicial and other investigatory bodies.<sup>2</sup>

While so far relatively few climate cases have been argued on the basis of human rights, rights-based climate litigation is growing. At the end of May 2021, the world’s most established climate litigation databases<sup>3</sup> listed 112 cases that mentioned human rights.<sup>4</sup> In these cases, the applicants typically relied on human rights law alone, or did so in the context of broader complaints based on private or public law, to demand that state or corporate actors mitigate climate change and/or tackle its impacts.

This kind of litigation has seen a significant acceleration since 2015, when the Paris Agreement became the first international treaty to explicitly recognize the

1. This expression is borrowed from Annalisa Savaresi and Juan Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 *Climate Law* 244.

2. This definition of climate litigation draws on David Markell and JB Ruhl, ‘An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?’ (2012) 64 *Florida Law Review* 15.

3. These are the databases curated by the Sabin Centre for Climate Change Law at Columbia Law School <<http://climatecasechart.com/>> and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics <<http://www.climate-laws.org>> accessed 1 June 2021.

4. Annalisa Savaresi and Joana Setzer, ‘Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers’ in this issue.

link between climate action and human rights.<sup>5</sup> The relationship between climate change and human rights obligations has also been abundantly recognized by human rights bodies<sup>6</sup> and in the literature.<sup>7</sup>

While the laws of most states have already evolved to accommodate climate change mitigation and adaptation, they are yet to ensure greater and better accountability of state and corporate actors to deliver the transition towards net zero emissions. Equally, liability and insurance regimes are yet to provide redress for the harms associated with the impacts of climate change at the individual and aggregate levels.

Human rights law and remedies are increasingly used to name and shame climate laggards and to bridge the accountability gaps in climate law. For example, applicants have complained that permits or licences to extract fossil fuels<sup>8</sup> or to cut down forests constitute a violation of human rights.<sup>9</sup> Similarly, applicants have complained that failure to adopt and/or implement climate change response measures has resulted in human rights violations. In the Netherlands the celebrated *Urgenda* case against the Dutch state,<sup>10</sup> and, more recently, the *Friends of the Earth* case against Royal Dutch Shell<sup>11</sup> have already demonstrated that winning court cases on the basis of human rights arguments is possible, inspiring similar lawsuits all over the world.

5. Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740, Preamble.

6. The Human Rights Council has adopted a series of resolutions on human rights and climate change between 2008 and 2021. See <<https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx>>. A summary of the activities of the Office of the UN High Commissioner for Human Rights is available at <<https://www.ohchr.org/en/issues/hrandclimatchange/pages/hrcclimatechangeindex.aspx>>. See also: UN Special Rapporteur on Human Rights and the Environment, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (OHCHR 2016) A/HRC/31/52; UN Special Rapporteur on Human Rights and the Environment, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (OHCHR 2019) A/74/161.

7. See eg D Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues' (2009) 38 Georgia Journal of International and Comparative Law 511; Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press 2010); Lavanya Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 Journal of Environmental Law 391; S McInerney-Lankford, M Darrow and L Rajamani, 'Human Rights and Climate Change. A Review of the International Legal Dimensions' (World Bank 2011); Sébastien Duyck and others, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach' (2018) 12 Carbon & Climate Law Review 191; Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Handbook on Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018); Annalisa Savaresi and Joanne Scott, 'Implementing the Paris Agreement: Lessons from the Global Human Rights Regime' (2019) 9 Climate Law 159.

8. *Nature and Youth and Greenpeace Nordic v the Government of Norway*, Oslo District Court, Writ of Summons, 18 October 2016.

9. *Salamanca Mancera et al. v Presidencia de la República de Colombia et al.*, Corte Suprema de Justicia de Colombia, No 110012203 000 2018 00319 01, 5 April 2018.

10. *Urgenda Foundation v The State of the Netherlands* C/09/456689 / HA ZA 13-1396, 24 June 2015.

11. *Friends of the Earth Netherlands et al. v Royal Dutch Shell PLC* C/09/571932 / HA ZA 19-379, 26 May 2021.

As a result, human rights law and institutions are now in the frontline of climate accountability efforts all over the world. And, as we have already observed elsewhere, human rights law and remedies have long been used as a means to protect environmental interests and to provide remedies where no others are available.<sup>12</sup> Human rights institutions may therefore serve to bridge the climate accountability gap on an interim basis, while national, regional and international law and policymakers step up the challenge. So, while human rights obligations are no replacement for effective climate legislation, and human rights remedies are no replacement for effective enforcement measures, they provide expedient tools with which to hold state and corporate actors accountable in the climate emergency.<sup>13</sup>

The literature has already detected this new trend in climate litigation,<sup>14</sup> but is yet to provide a systemic analysis of it. We therefore decided to invite a group of selected academics and practitioners to reflect on the potential and the shortcomings of using human rights arguments in climate change litigation, drawing on comparative insights from the international, regional and national levels. After a one-year delay due to the pandemic, we co-convened a workshop at Sant'Anna School of Advanced Studies in Pisa, Italy on 6–7 May 2021, with support from the European University Institute, the University of Eastern Finland and the University of Stirling, and with sponsorship from the British Academy and the Italian Ministry for the Environment 'All4Climate – Italy 2021' initiative. We invited selected contributors to write papers analysing the use of human rights arguments in the practice of climate change litigation and to take stock of lessons that can be learnt from successes and failures. We asked authors to go beyond single cases to draw general inferences on the role of human rights law in climate litigation and to identify future pathways to effectively use human rights arguments in said litigation.

The workshop opened with a keynote address by the UN Special Rapporteur on Human Rights and the Environment, David Boyd, who specifically drew attention to the important role of human rights in ensuring climate accountability, and to the need for systemic thinking about climate change and human rights.

The ensuing discussion was structured into two sessions, in which academics and practitioners presented papers and received feedback from us, as well as from a pool of selected expert discussants. In the first session, contributors reflected on trends in climate litigation worldwide, and on the use of human rights in key cases, with the aim of gauging the role played by human rights so far and the impacts of this development on pending and future cases. In the second session, contributors discussed pathways for the use of human rights in climate change litigation in specific areas,

12. Savaresi and Auz (n 1); Annalisa Savaresi and Jacques Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in Jolene Lin and Douglas Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020); Annalisa Savaresi, 'Human Rights and the Impacts of Climate Change: Revisiting the Assumptions' (2021) 11 *Oñati Socio-Legal Series* 231.

13. Annalisa Savaresi, 'Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation' (*QIL QDI*, 31 January 2021) <<http://www.qil-qdi.org/plugging-the-enforcement-gap-the-rise-and-rise-of-human-rights-in-climate-change-litigation/>> accessed 10 February 2021.

14. This litigation is specifically investigated for example in: Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37; Savaresi and Auz (n 1); Keina Yoshida and Joana Setzer, 'The Trends and Challenges of Climate Change Litigation and Human Rights' (2020) *European Human Rights Law Review* 140.

such as children's rights, as well as the role of international human rights bodies in this connection. Contributors also analysed actual and prospective trends in regional rights-based climate litigation, drawing on perspectives from Europe, the Americas, the Asia-Pacific and Africa.

The workshop discussed the role of the judiciary at length and what it may be expected to do in the context of the climate emergency. We reflected on how unusual actors, like national human rights institutions, are increasingly called upon to ensure climate accountability and a just transition towards net zero emission societies. We furthermore debated the meaning of success in the context of rights-based climate litigation, noting that, like the climate applicants before the Court of Justice of the EU,<sup>15</sup> it is possible to win the argument without winning the court case. We noted how, in a human rights context, success might also mean the acknowledgement of new principles, for example in relation to the rights of future generations, that are likely to inform litigation for years to come.

The debate was rich, and the time available felt too short. We are therefore very pleased to be able to continue this engaging and timely dialogue with this special collection of papers in this dedicated issue of the *Journal of Human Rights and the Environment*. This edition contains selected papers from the workshop, as well as some relevant additional scholarship produced in response to the call for papers for the edition. The ultimate question that we set out to answer with this themed issue is: 'how much do we know about rights-based climate litigation, and what more do we need to find out?'

Annalisa Savaresi and Joana Setzer open this edition and its heuristic journey by drawing up a global map of human-rights-based climate litigation. They analyse main trends as well as aspects that deserve further investigation. They argue that there are two sides to human-rights-based climate litigation: lawsuits that align with climate mitigation and adaptation objectives, and those that do not. The latter litigation has been largely ignored by the literature, and Savaresi and Setzer point to the need to better consider what they call 'just transition litigation', in order to fully appreciate the role of human rights law and remedies in climate action.

Lucy Maxwell, Sara Mead and Dennis van Berkel look at the quest for judicially manageable standards to determine whether a state has adopted 'reasonable' and 'appropriate' measures to mitigate climate change pursuant to its obligations to protect human rights. They propose a framework for such review, drawing upon the principles established by the Dutch Supreme Court in *Urgenda v the Netherlands* and upon recent judgments of other national courts, as well as proceedings that are underway.

Larissa Parker, Juliette Mestre, Sébastien Jodoin and Margaretha Wewerinke-Singh take stock of youth-led climate litigation, considering how these cases and related decisions advance or challenge the agency of children and young people. They discuss how courts have responded to these cases and comment on key victories and setbacks.

Jacques Hartmann and Marc Willers examine the potential for bringing cases to hold states to account for their failure to tackle dangerous climate change before European courts. They point out the difficulties in pursuing rights-based climate litigation

15. Case T-330/18 *Armando Carvalho and Others v European Parliament and Council of the European Union* (Order of the General Court (Second Chamber) of 8 May 2019), on appeal Case C-565/19 P *Armando Carvalho and Others against the Order of the General Court* (Judgment of the Court (Sixth Chamber) of 25 March 2021).

before the Court of Justice of the European Union and, conversely, applicants' better prospects before the European Court of Human Rights.

Juan Auz identifies and analyses constitutional opportunities and constraints for adjudicating rights-based climate lawsuits in Latin America. He cautions that political economy considerations might hinder the development, inclusivity and long-term effectiveness of climate litigation.

Birsha Ohdedar draws attention to case law which contends with the drivers of vulnerability in the climate emergency. He uses India as a case study to analyse the links between vulnerability and rights and to assess how different framings of climate vulnerability are embedded in the different court arguments and decisions.

Kim Bouwer considers rights-based climate litigation in Africa's regional and domestic courts. She argues that far from being peripheral, human rights protection and human-rights-based strategies have fundamentally shaped African climate litigation.

Finally, Lisa Benjamin and Sara Seck consider recent developments in human-rights-based climate litigation brought against the state, as well as the potential for future transnational corporate accountability cases before Canadian courts.

Together, these articles highlight the need for greater comparative research and understanding of the granularity and difference between rights-based climate cases. The rapidly expanding body of litigation is going to make this task harder. At the same time, mapping exercises such as the ones carried out in this issue of the journal are essential in order to see the big picture and the story behind each individual case. We therefore sincerely hope that this dedicated issue will advance academic debate on this important new chapter in the literature on human rights and the environment, as well as contribute to the growing body of scholarly research on climate change litigation.

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In this edition, as noted above, there are four extra contributions relevant to the overall theme from authors who were not present at the workshop.

Justine Bell-James and Briana Collins address 'temporal imminence' as a precondition to a violation of a positive human rights obligation in a number of jurisdictions, tracing the relevant case law in search of a clear rationale for its imposition. The authors

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urge considerable caution concerning the judicial importation of temporal imminence in the context of climate change.

Sara K Phillips and Nicole Anschell argue that while states are the primary duty bearers for the human rights of their citizens, recent examples of climate change litigation offer unique opportunities to consider the role and responsibilities of corporations for their contributions to anthropogenic climate change. The authors examine the interface between business, human rights and climate change through the lens of an analysis of the Philippines' National Inquiry on Climate Change and in the ASEAN context more generally.

Nicola Silbert considers how scholars and advocates working on climate litigation could learn from frameworks developed to assess and understand its impact in the human rights field. She suggests that theoretical tools such as Helen Duffy's human rights litigation impact framework could be productively deployed to analyse the impact of climate litigation. She illustrates this by applying some aspects of this framework to two prominent climate litigation cases, namely the Australian case *Gloucester Resources v Minister for Planning* and the Pakistani case *Leghari v Federation of Pakistan*.

Finally, Orla Kelleher examines whether the widely accepted political theory contributions on fair burden sharing, harm avoidance and a just distribution of the remaining carbon budget can (and ought to be) reflected in judicial reasoning on causation in 'systemic rights-based climate litigation', paying particular attention to the implications of the European Court of Human Rights' more lenient approach to causation at the national level.

These four articles fit well with the ground-breaking papers presented at the workshop at the Sant'Anna School of Advanced Studies, and add to the convergence of arguments – and developments – now so firmly placing human-rights-based approaches to climate change on the agenda.

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