

Climate litigation, taking stock of an increasingly complex trend of legal actions

Litigância climática, fazendo o balanço de uma tendência cada vez mais complexa de ações judiciais

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COMPLEX TREND OF LEGAL ACTIONS**

**LITIGÂNCIA CLIMÁTICA, FAZENDO O BALANÇO DE UMA
TENDÊNCIA CADA VEZ MAIS COMPLEXA DE AÇÕES JUDICIAIS**

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Abstract: The steady increase in greenhouse gas emissions and their concentration in the atmosphere, especially over the last forty years, contrasts with the insufficient actions taken at both the domestic and international level since the adoption of the United Nations Framework Convention on Climate Change in 1992. The appalling level of climate action as compared to what is needed has driven organizations and individuals across the world to devise legal strategies that focus on courts as an appropriate forum to determine the adequacy of States' responses to climate change. Nevertheless, climate litigation is a diverse phenomenon, and alongside pro-climate citizen-led strategic litigation we also find other instances with different plaintiffs and defendants, some of them even directed at preventing the implementation of measures directed at reducing GHG emissions. The aim of this article is to provide an overview of climate litigation, especially since 2015, with a particular focus on the most recent trends of that constantly evolving field.

Keywords: climate litigation, Paris Agreement, human rights, right to a healthy environment, Science, corporate accountability.

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1. Introduction

The summer of 2022 can probably be characterized as the summer of climate awakening for a considerable part of the public. From the scorching heat burning through Europe to the devastating floods in Pakistan, climate-related disasters seem to have imposed themselves as a pressing reality that either war, or royal funerals can no longer hide. These extreme weather events, and the harms that derive from them have a clear origin. As of 30 September 2022 the Mauna Loa observatory in the Hawaiian Islands recorded a concentration of greenhouse gases (GHGs) in the atmosphere of 415 ppm (parts per million). Ten years ago the global concentration of greenhouse gases was 391 ppm.² To offer some perspective and understand what these amounts imply, it may be helpful to mention that the concentration of greenhouse gases in pre-industrial times, in the 18th century, was 280 ppm, and that according to the Intergovernmental Panel on Climate Change (IPCC), the current concentration of CO₂ in the atmosphere has not been seen for about 2 million years (IPCC, 2021: § A.2.1.),³ that is, long before homo sapiens appeared on Earth. If we add to all this the fact that the concentration of GHGs in the atmosphere has increased by 60% in the last 30 years,⁴ that is, approximately since the United Nations Framework Convention on Climate Change (UNFCCC) was signed, we will understand how an increasing part of the scientific community and society view with a strong concern, not untainted with alarm, the policies deployed by States in recent decades to tackle one of the greatest challenges facing humanity. As a result of this concern, an increasing number of court cases have been filed in recent decades targeting state policies and decisions on climate change. The purpose of this article is to present a brief analysis of the main characteristics of these climate disputes, especially in relation to the most recent trends, which demonstrate the vitality and diversity of this phenomenon.

First, we will briefly present the main characteristics of this type of litigation, highlighting its many varied forms (II.A). Secondly, we will focus on the type of litigation that has attracted most attention, and probably the most success, in recent years: domestic litigation brought by individuals or NGOs against state authorities to force them to adopt more responsible climate policies (II.B). Once the most salient features of these lawsuits have been presented, we will turn to the most recent evolution of these lawsuits, in order to verify the extent to which previous trends have consolidated while also identifying possible emerging trends (III). Lastly, we will conclude by highlighting some of the main challenges faced by this type of litigation (IV) and by sharing some final reflections on the relevance of this type of

2. US National Oceanic and Atmospheric Administration (NOAA). See <<https://gml.noaa.gov/ccgg/trends/weekly.html>>.

3. IPCC, 2021: Summary for Policymakers. In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Masson-Delmotte V et al, editors. Cambridge University Press, § A.2.1.]

4. PBL Netherlands Environmental Assessment Agency, *Trends in global CO₂ and total greenhouse gas emissions: 2019 Report* (The Hague, 2020: 4).

litigation regarding the essential evolution of the law in the context of the climate crisis and the Anthropocene (V).

2. Climate litigation: Key features of a growing phenomenon

2.1 The big picture

According to the Grantham Research Institute on Climate Change and the Environment, of the London School of Economics, 2002 climate disputes had been filed before courts worldwide as of May 2022 (Setzer J, Higham C, 2022). The Grantham Research Institute,⁵ together with the Sabin Centre for Climate Change Law at Columbia University,⁶ have been recording climate litigation for more than a decade in databases that are fully accessible to the public.

In relation to this figure, it is important to bear two things in mind. On the one hand is what these centres understand by climate dispute, since the definition of the phenomenon is fundamental for its correct identification. In this sense, both apply a similar criterion, which they summarise as follows: "To fall within the scope of the database, cases must satisfy two key criteria. Firstly, cases must generally be brought before judicial bodies (though in some exemplary instances matters brought before administrative or investigatory bodies are also included). Secondly, climate change law, policy or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate-relevant laws, policies, or actions in a meaningful way are not included".⁷

The second relevant issue to consider in relation to the figure of 2002 cases is its geographic distribution, since far from being a phenomenon similarly spread throughout the world, climate litigation has since its inception been a type of litigation characteristic of the United States, accumulating 1426 cases while there have only been 576 cases in the rest of the world.

Thus, today, slightly more than a quarter of all climate litigation takes place outside the United States. However, although the gap might appear significant, the importance of climate litigation outside the United States has grown exponentially in the last years, from 5 cases in 2005 to 231 in 2015 and close to 600 in 2022.

It should also be borne in mind that although climate litigation led by individuals or environmental organisations against the policies of their respective States has received great attention,⁸ there is a multiplicity of actors involved in this type of litigation: individuals, companies, NGOs, as well as governmental institutions at different competence levels. In this sense, we can find all possible combinations between them in climate lawsuits: NGOs suing polluting companies, companies suing the administration for a certain regulation aimed at protecting the climate

5. <https://climate-laws.org/litigation_cases>

6. <<http://climatecasechart.com/climate-change-litigation/>>

7. <<https://climate-laws.org/methodology-litigation>>

8. The most paradigmatic example is the famous Urgenda case in the Netherlands. <<https://www.urgenda.nl/en/themas/climate-case/>>

system, administrations seeking that companies assume the costs of adapting to the climate crisis in their respective territories, etc. (see, *inter alia*, Markell D, Ruhl JB, 2012; Wilensky M, 2015; UNEP, 2020).

When assessing climate litigation in the world, another relevant element to take into account is the level of success. However, as we will develop further in the following section, the real success of a climate case cannot be measured solely on the basis of the decision of the court. Notwithstanding this caveat, if we were to take a strict view of the judicial success of these cases, climate litigation does not seem to have played a major role in defining public policy on global warming until the middle of the second decade of the 21st century. Perhaps the most relevant exception to that less than encouraging trend is *Massachusetts v. EPA*, in which the Supreme Court of the United States upheld the request to the Environmental Protection Agency (EPA) by a dozen States and several cities to set emission standards for combustion engine vehicles. The Supreme Court held that greenhouse gases were among the pollutants regulated by the *Clean Air Act*, even though they were not expressly mentioned in the Act, and therefore the EPA had the authority to regulate those emissions.⁹ As regards the rest of cases, as noted by Markell and Ruhl, "the history of climate change in the courts has not been one in which the courts have forged a new jurisprudence, but rather an ordinary history of judicial functioning" (Markell D, Ruhl JB, 2012: 85). This is precisely what changed in 2015.

2.2. 2015 as a turning point

a) *Urgenda*, the case that proved it was possible

In 2013 the Urgenda Foundation, together with more than 800 other people, filed a lawsuit in the District Court of The Hague against the Kingdom of the Netherlands claiming that the country's GHG emission reduction targets were insufficient to keep global temperatures from rising beyond 2°C and thus endangered the physical integrity of current and future generations, both in the Netherlands and worldwide. On 24 June 2015 the District Court handed down an epoch-making judgment, the influence of which has spread beyond the borders of the Netherlands to all continents in only a few years.¹⁰

The District Court in The Hague found that climate change was indeed a real threat that the Dutch state had recognised and committed to act upon, and ordered the State to reduce its emissions by at least 25% by 2020, compared to 1990 emissions. This percentage represented the lower end of the range of emissions that scientific consensus considered necessary to have a 66% chance of limiting the global temperature increase to 2°C. The Court considered that imposing a greater reduction would go against the State's margin of discretion and the separation of powers. However, the Court found that such discretion and separation of powers did not prevent it from

9. *Massachusetts v. Environmental Protection Agency*, U.S. Supreme Court, 549 U.S. 497 (2007), 2 April 2007.

10. *Urgenda Foundation et al. v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, The Hague District Court, Judgment, C/09/456689 HA ZA 13-1396, 24 June 2015.

ruling on the matter, since the gravity of the harm was considerable. Moreover, the Court considered that the State kept sufficient leeway since the Court only defined the level of emissions to be respected in order to protect the population (and thus comply with the duty of care), but the State remained free to define the concrete policies and measures to achieve that goal.¹¹

To reach this conclusion, the Court used a complex legal argumentation which, as we will see below, is a common pattern in climate litigation. The main legal basis of the decision is tort liability, but, in addition, the Court adds numerous sources that while not directly applicable are fundamental to the interpretation of the standard of care required by the Dutch civil code. These sources are human rights, the international legal regime on climate change, the principles of international environmental law, and science.

Until 2015 no case brought against insufficient state action on climate change had been successful. Since the Urgenda decision was delivered, by summer 2022 at least 12 similar cases have been successful in as many countries.¹²

b) Challenging States' climate action at two levels: policies and projects

It is important to note that among the diversity of climate litigation typologies, it is precisely litigation against the insufficient, or even contradictory policies of States that has seen the most significant evolution since 2015. This type of litigation can in turn be divided into two typologies that are certainly close, but with a clearly differentiated object. Thus, on the one hand, we find those cases in which, as in *Urgenda*, what is being demanded of the State is the modification of its climate policy in general; especially, but not only, the emission reduction targets. In other words, what is being questioned is the regulatory and/or programmatic umbrella under which concrete measures are to be developed to achieve the desired GHG reductions.¹³

On the other hand, there is also a growing number of cases, and with increasing success, in which it is not the whole of state climate policy that

11. The Court refused to analyse two potentially relevant issues such as the protection of future generations and the protection of the inhabitants of other countries, arguing that it was unnecessary to assess these issues when the claimants' standing (*ius standi*) had already been accepted in relation to the current generations of Dutch citizens.

12. *Urgenda v. The Netherlands*, *Leghari v. Pakistan*, *Klimaatzaak v. Belgium*, *Salamanca Mancera v. Colombia*, *Neubauer v. Germany*, *Friends of the Irish Environment v. Ireland*, *Notre Affaire à Tous v. France*, *Foster v. Washington*, *Thomson v. New Zealand*, *PSB et al. v. Brazil (on Climate Fund)*, *Friends of the Earth et al. v. the UK Secretary of State for Business Energy and Industrial Strategy*, and *Klimatická z˘aloba v. the Czech Republic*. The Oregon District Court decisions in *Juliana v. United States* can also be viewed as positive, despite the subsequent decision of the Court of Appeals of the 9th Circuit to dismiss the case.

13. We will refer in this article to this kind of cases as 'Policy-based litigation'. The Climate Change Litigation Initiative, refers to these cases as 'Public Policy litigation' (<<https://www.c2li.org/>>), while the Grantham Research Institute refers instead to 'Framework climate litigation' (Higham C, Setzer J, Bradeen E, 2022).

the plaintiffs are challenging, but a specific decision or project authorised by the administration. Two cases are particularly paradigmatic in this regard, *Earthlife Africa v. The Minister of Environmental Affairs* in South Africa and *Gloucester Resources Limited v. Minister for Planning* in Australia. In the former, the court annulled the permit granted by the South African government to a coal-fired power plant and referred the project back to the Minister for proper consideration of its climate change impacts (and vulnerabilities) when making a final decision on its authorisation.¹⁴ In the second, the court upheld the non-granting of a permit to operate a coal mine in New South Wales on the grounds that in the face of the pressing need to reduce GHG emissions to address climate change, the project had been submitted 'in the wrong place at the wrong time'.¹⁵

c) *A complex tapestry of diverse legal threads*

Plaintiffs and courts involved in climate litigation face the same stumbling block: there is no written norm establishing the obligation of States to reduce their emissions to a certain level. The absence of such a rule was key in the first decades of climate litigation, in which courts generally refrained from questioning decisions made by the other two branches of government (Markell D, Ruhl JB, 2012: 45-47; Wilensky M, 2015: 40). The jurisprudential shift that occurred in 2015 was not caused by the emergence of such a rule. The Paris Agreement, for example, adopted that same year, although relevant to the judicial argumentation in these cases does not include a mandatory standard for specific emission reductions, but rather establishes a bottom-up system in which each State unilaterally defines the level of emissions' reduction it intends to achieve.¹⁶ In this sense, courts do not look to a single norm to justify their decisions to compel States to adopt more responsible policies or standards, but rely instead on a complex legal tapestry, composed of a variety of sources (de Vilchez P, 2022 and 2016).

In most successful climate cases since 2015, three major legal sources can be identified that enable courts to identify the obligation of States to act more responsibly on climate: human rights, the international climate change regime, and environmental law principles.

In relation to human rights, a reading of the most recent IPCC reports leaves no doubt that the consequences resulting from climate change (rising sea levels, extreme weather events, vector-borne and water-borne diseases, etc.) will have an indisputable impact on the human rights of the inhabitants of this planet. Indeed, some of the early manifestations of climate change are already taking a heavy toll on human lives and health (floods in Pakistan, fires in Australia, the United States and Canada, heat waves in Europe and India, tropical storms in the Caribbean, among others). Climate change

14. *Earthlife Africa v. the Minister of Environmental Affairs et al.*, High Court of South Africa Gauteng Division, Pretoria, Judgment, 6 March 2017.

15. *Land and Environment Court of New South Wales Gloucester Resources Limited v Minister for Planning*, Land and Environment Court, New South Wales, [2019] NSWLEC 7.

16. Decision 1/CP.21, Adoption of the Paris Agreement, 29 January 2016, FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016).

makes the occurrence of these events much more probable, frequent and intense (for the physical impacts of global warming see IPCC, 2021; for the impacts on natural and human systems, see IPCC, 2022), threatening rights as diverse as the right to life, to physical integrity, to private and family life, to health, the right to food, to water, to property, to self-determination, or the right of indigenous peoples and communities to fully live their culture. These are rights fully endorsed by most human rights instruments, at the international (such as the two International Covenants on Human Rights), regional (such as the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights, also known as the Banjul Charter), and domestic (in national constitutions) levels.

The impact of climate change on human rights has been thoroughly analysed by the literature (*inter alia*, Quirico O, Boumghar M, 2016; Wewerinke-Singh M, 2019), as well as by specialized human rights agencies and bodies (Human Rights Committee, 2018). Specialised UN human rights institutions have included this dimension in their recommendations, resolutions, and proposals since at least 2008. In March of that year, the UN Human Rights Council adopted Resolution 7/23, in which it recognised that 'climate change creates an immediate and far-reaching threat to people and communities around the world and has an impact on the full enjoyment of human rights'. Since then, there have been repeated Human Rights Council resolutions¹⁷ and reports by the UN High Commissioner for Human Rights on the close link between human rights and climate change.¹⁸ In 2012, the Human Rights Council appointed an Independent Expert - who became a Special Rapporteur in 2015 - to analyse the interactions between the environment and human rights. One of the main lines of work of the Independent Expert, and subsequently of the Special Rapporteurs, has been precisely climate change and human rights.¹⁹ Culminating this process, and underlining the already undeniable influence of climate change on human rights, as well as the need to adopt human rights as the backbone of the response to the climate crisis, in October 2021 the Human Rights Council approved the creation of a Special Rapporteur on Climate Change and Human Rights.²⁰

For all these reasons it should come as no surprise that an increasing number of claims are based, among other legal grounds, on States' human rights obligations, especially given that States have a threefold obligation to respect, protect, and fulfil these human rights.

The second legal thread woven into the tapestry of climate litigation is constituted by the international climate change regime, especially its

17. A/HRC/RES/7/23, 28 March 2008; A/HRC/RES/10/4, 25 March 2009; A/HRC/RES/18/22, 17 October 2011; A/HRC/RES/26/27, 15 July 2014; A/HRC/29/15, 2 July 2015; A/HRC/RES/32/33, 1 July 2016; A/HRC/35/20, 3 May 2017 and A/HRC/38/4, 2 July 2018; A/HRC/RES/41/21, 12 July 2019; A/HRC/RES/44/7, 16 July 2020; A/HRC/RES/47/24, 14 July 2021.

18. A/HRC/10/61, 15 January 2009; A/HRC/32/23, 6 May 2016; A/HRC/35/13, 4 May 2017; A/HRC/37/CRP.4, 22 March 2018; A/HRC/41/26, 1 May 2019; A/HRC/44/30, 22 April 2020; A/HRC/47/46, 30 April 2021.

19. A/HRC/31/52, 1 February 2016; A/74/161, 15 July 2019.

20. Resolution 48/13, adopted on 8 October 2021.

founding instrument, the 1992 United Nations Framework Convention on Climate Change, as well as the two treaties that have developed within that framework since then: the 1997 Kyoto Protocol, and the 2015 Paris Agreement. These treaties are not often used as a direct source of obligations, but rather in a number of indirect, mutually compatible, and potentially mutually reinforcing ways. On the one hand, the international climate regime allows courts to identify that a State has publicly recognised that there is a problem linked to global warming and that it has committed itself to work to respond to that problem.²¹ On the other hand, the treaties mentioned above include several key principles of international environmental law, which, as we will see below, are another of the main legal pillars of recent judicial decisions. Courts often refer to these principles to define the level of diligence required from States regarding climate change. In addition, the Paris Agreement has added two additional elements of key importance to this type of lawsuits. For example, it has set a more restrictive temperature target than the one that had been in place previously (2°C), establishing for the first time the need to limit the increase in global mean temperature to as close to 1.5°C as possible.²² Also of great importance is the new dynamic established in the Paris Agreement, whereby member States do not have to achieve an internationally defined emissions' reduction target, as in Kyoto, but instead define domestically their own reduction commitment it intends to achieve in order to comply with the objectives established in the agreement. Such Nationally Determined Contributions (NDCs) provide an additional opportunity for state-level climate litigation that could focus on the adequacy of the measures taken by a State as compared to the NDC set domestically by that State in the framework of the Paris Agreement.²³ Moreover, several courts underline the necessary coherence between international and domestic law, between the obligations undertaken by the State in the international sphere, and the legislative and executive action adopted within its borders.²⁴

The principles of international environmental law constitute the third major legal pillar underpinning these cases. Neither their diversity, nor their uneven legal consideration both from a doctrinal or an international judicial perspective²⁵ have been an obstacle for courts in many of these recent cases to rely on environmental law principles to identify the degree of diligence required of their States regarding climate change. Six principles in particular appear repeatedly in these cases: prevention, precaution, sustainable development, intergenerational equity, intragenerational equity (mainly

21. For example, in *Earthlife Africa v. the Minister of Environmental Affairs et al*, High Court of South Africa Gauteng Division, Pretoria, Judgment, 6 March 2017, § 83.

22. See, for example, the argumentation of the Dutch Supreme Court in *Urgenda. The State of the Netherlands v. Urgenda Foundation*, The Supreme Court of the Netherlands, Case number 19/00135, 20 December 2019 [ECLI:NL:HR:2019:2007], § 50.

23. See, for example, *Earthlife Africa v. Minister of Environmental Affairs and Others*, High Court of South Africa, Gauteng Division, Pretoria, judgment, 6 March 2017.

24. See also, e.g., *Urgenda v. The Netherlands*.

25. While some principles, such as the precautionary principle, seem to have indisputably acquired the status of international custom, others, such as the precautionary principle, have had an uneven reception, for example, between the ICJ and the ITLOS, or, depending on the geographical area, between the EU (this principle is included in Article 191 TFEU) and the United States.

through the principle of common but differentiated responsibilities), and environmental impact assessment. It is particularly interesting to note how courts in several countries have relied on these principles to justify their decisions, performing an analysis of their substance and legal validity and thereby contributing to their strengthening and better definition, both in terms of content and scope. The level of interaction between environmental law principles and another fundamental strand of climate litigation – human rights – is also noteworthy. This is particularly relevant in relation to the precautionary principle, as it often facilitates the identification of the degree of protection required to ensure respect for human rights.²⁶

To conclude this section, it is important to note that domestic constitutions have also played a relevant role in this type of process, either through the definition and protection of fundamental rights,²⁷ the proclamation of environmental law principles,²⁸ the necessary coherence between international law and domestic law,²⁹ or the identification of the obligation of States to protect the environment (in some cases even recognising the fundamental right to a healthy environment),³⁰ thereby allowing the courts involved to identify the required *duty of care* to be exercised by States with respect to the threats posed by climate change to their population.³¹

d) A key evidentiary element: The relevance of science

All of these legal grounds, and especially their interaction and mutual reinforcement, provide the legal basis for numerous courts to find that States' actions to address climate change are insufficient (or even counterproductive). But there is an additional piece of evidence that is indispensable to make all this possible: science.

There is already a considerable case law in which courts have found the State to be responsible for the harmful consequences experienced both by people and the environment as a result of decisions taken by public authorities.³² However, climate change is a particularly complex phenomenon, burdened by additional difficulties: on the one hand, the most serious impacts of global warming have yet to occur, and will only become apparent in the decades (and centuries) to come; on the other, there is no single cause of climate change, but its origin lies mainly in the greenhouse

26. For example in *Urgenda v. The Netherlands* or in *Neubauer v. Germany*.

27. *Ashgar Leghari v. Pakistan*, *Eartlife Africa v. South Africa* or *Salamanca Mancera v. Colombia*.

28. E.g. *AFLG Antifluglärmgemeinschaft and Others v. Provincial Government of Lower Austria and Others*, Bundesverwaltungsgericht (Federal Administrative Court), W109 2000179-1/291E, Decision, 2 February 2017.

29. *Eartlife Africa v. South Africa*.

30. *Salamanca Mancera v. Colombia* and, albeit unsuccessfully, *Greenpeace Nordic et al. v. Government of Norway*, Oslo District Court, Judgment, 4 January 2018.

31. *Urgenda v. The Netherlands*.

32. There are numerous examples within the European human rights system. See, for example, *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004, *Kyrtatos v. Greece*, no. 41666/98, 22 May 2003, 2003-VI, *Tâtar v. Romania*, no. 67021/01, Judgment of 27 January 2009, or *López Ostra v. Spain*, no. 16798/90, Judgment of 9 December 1994. Spain, no. 16798/90, Judgment of 9 December 1994.

gas emissions generated since the industrial revolution, which have been accumulating for decades and are emitted by a multiplicity of actors, since fossil fuels form the basis of today's consumer society.

In this sense, science plays a fundamental role in establishing the existence of a problem, its causes, consequences, and possible solutions. Moreover, the knowledge acquired over the last thirty years, as well as the comprehensive process through which the Intergovernmental Panel on Climate Change (IPCC) prepares its reports and adopts its conclusions, with the participation of thousands of scientists and the agreement of all State parties (in the case of the Summaries for Policy-Makers -SPM-), make climate science today an extremely robust basis on which courts can rely when mobilising the legal grounds outlined above (Cox R, 2012).

In addition, science makes it possible to address highly complex questions such as the identification of the level of risk (for instance, the probability that a certain concentration of greenhouse gases will lead to a certain increase in global temperature), causality (to what extent climate change is attributable to a State), or even the question of redressability, i.e. the possibility that the judicial decision will prevent, diminish, or repair the damage.

e) The impact of the recent wave of climate litigation

As mentioned above, one of the relevant aspects of the new wave of climate litigation is its level of success. Thus, if prior to 2015 no policy-based case had been successful, between then and 2021 there are at least 10 cases in as many jurisdictions that have been successful.³³ However, it is necessary to devote some consideration to this notion of success, since, again, this is a complex issue in climate litigation.

On the one hand, there are cases in which plaintiffs have obtained from the court what they requested. In this category of litigation, the first difficulty regards the enforcement of judgments, which is clearly illustrated in the Colombian case.³⁴ On the other hand, there are cases in which the court, while not granting the plaintiffs' request, has reached relevant conclusions that have great potential for future cases. An example of this could be found in *Sarah Thomson v. New Zealand*, where the court ruled that emission reduction targets set by the State are not beyond the reviewing powers of the courts. Moreover, we also find some cases in which the very notion of success seems to be reversed. Thus, in Ireland, the High Court rejected the petitioners' request to annul the permission granted to extend the runway at Dublin airport, but at the same time established that there exists an unwritten constitutional right to a healthy environment in Ireland, and that environmental NGOs can access the courts to demand its protection.³⁵ By contrast, in a later case, the Supreme Court of Ireland upheld the parties'

³³. *Supra*.

³⁴. *Salamanca Mancera v. Colombia et al*, Supreme Court of Colombia, No. 110012203 000 2018 00319 01, 5 April 2018.

³⁵. *Friends of the Irish Environment et al. v. Fingal County Council et al.*, High Court of Ireland, Judgment, 2017 No. 201 JR, 21 November 2017.

request to strike down the Climate Change Plan as insufficiently detailed, but at the same time denied the existence of a right to a healthy environment, as well as the ability of NGOs to go to court in cases of human rights violations even when they relate to the environment.³⁶ It is not easy to decide which of the two decisions can be considered more successful.

On the other hand, even in cases where the court's decision is totally contrary to the plaintiffs' claims, the success of these cases goes beyond the court ruling, as they are often linked to social mobilisation campaigns that place the climate issue at the centre of the public debate.³⁷

Last but not least, such cases are enabling the establishment of a transnational dialogue between plaintiffs and NGOs, as well as between judges, who are beginning to cite each other despite belonging to different jurisdictions and even legal traditions.³⁸

The most recent developments in climate litigation, which we will analyse in the following section, confirm some of these trends, while they also add new elements that enrich its legal framework and its potential as a driving force for much needed responsible climate action.

3. Recent developments in climate litigation

Although the typology of climate litigation we are examining is relatively recent, it is a very dynamic field, so it is important to study its most recent manifestations in order to understand the extent to which some of the trends noted in the previous section are consolidating or evolving. Some of the more interesting features of this evolution include the increasing complexity of the application of human rights to such litigation, the growing relevance of additional legal grounds to those already noted, the emergence (or come back) of climate lawsuits against corporations, or the filing of claims before judicial or quasi-judicial bodies at the international level.

36. *Friends of the Irish Environment v. the Government of Ireland*, Supreme Court, Appeal No: 205/19, Judgment of 31 July 2020.

37. For example, the organizations behind *Notre Affaire à Tous et al. v France* collected more than two million signatures of support in just a few weeks. <<https://notreaffaireatous.org/actions/laffaire-du-siecle/>>

38. This phenomenon can be seen in numerous recent cases, such as *Thomson v. New Zealand*, *Juliana v. United States* or *Greenpeace Nordic v. Norway*. *United States v. Greenpeace Nordic v. Norway*. It is also interesting to note the existence of frameworks that encourage dialogue between judges on sustainability issues, such as the Global Judicial Institute for the Environment, which notably involves two judges responsible for some of the most important recent judicial decisions on climate: Justice Preston, President of the Land and Environment Court of New South Wales (Australia) and Justice Syed Mansoor Ali Shah, a member of the Supreme Court of Pakistan (Pakistan). <<https://www.iucn.org/commissions/world-commission-environmental-law/our-work/global-judicial-institute-environment>>. On the other hand, it is worth noting that some of the organisations behind this type of litigation have also created networks to support organisations and individuals who want to launch similar initiatives. This is the case of the Climate Litigation Network, promoted by the Urgenda Foundation, or the network established by Our Children's Trust, especially in countries with Anglo-Saxon influence.

3.1. The increasing and complex relevance of human rights

a) Putting human rights-based climate litigation in perspective

We noted above how human rights have become one of the key pieces of the complex legal argumentation underpinning the claims, and often also the judgments, of the recent wave of domestic climate litigation against States for inadequate climate action. In this regard, Jaqueline Peel and Hari Osofsky highlighted in 2018 the growing importance of human rights in both claims and court judgments in climate change cases, and how this opened up new possibilities in other parts of the world (Peel J, Osofsky H, 2017). This trend has strengthened since then in a very pronounced way, with the number of cases almost doubling in 2020 (Savaresi A, Setzer J, 2022).

However, notwithstanding the undeniable progression of human rights in recent climate litigation, these cases are still a minority when compared with the total number of climate-related cases. As per 2021 there had only been 112 cases in which fundamental rights have played a more or less relevant role out of two thousand cases.

b) Novel elements in the use of human rights

The “rights turn” described by Peel and Osofsky has become increasingly complex in recent years, through various mechanisms that we will examine below.

b.a) The Right to a Healthy Environment

One of the novelties in the application of human rights to climate litigation is the increasing reference in such cases to the right to a clean, safe, or healthy environment. This issue has recently been studied by de Vilchez and Savaresi, who have identified several noteworthy elements in relation to this right (de Vilchez P, Savaresi A, 2022 forthcoming). Firstly, it is a right that is brought forward in just under half of the cases based on human rights, and although it does not appear with the same frequency as other rights, such as the right to life, its importance is growing in parallel to the increase in cases based on fundamental rights. Secondly, the success rate of cases alleging this right is higher than in cases based on other human rights. Thirdly, it is worth noting that this right has also been invoked in countries where it is not explicitly recognised in any domestic law, and the Courts in some of these cases have declared the existence of such a right, with different degrees of success.³⁹ Lastly, it is important to bear in mind that the absence of the right to a healthy environment in the most relevant universal human rights treaties has led some courts in recent climate cases to dismiss

³⁹. *Friends of the Irish Environment v. Fingal County Council or Juliana v. Fingal County Council. Fingal County Council or Juliana v. USA. USA.*

its legal relevance,⁴⁰ or to reject its existence altogether.⁴¹ Nevertheless, this right is already included in several regional human rights instruments, such as the Protocol of San Salvador or the Banjul Charter. Moreover, the UN Human Rights Council explicitly recognised for the first time in October 2021 the “right to a clean, healthy and sustainable environment as an important human right for the enjoyment of human rights”.⁴² Just a few months later, on 28 July 2022, it was the turn of the UN General Assembly to explicitly recognise ‘the right to a clean, healthy and sustainable environment as a human right’.⁴³ Even more recently, and reinforcing this trend, the Committee of Ministers of the Council of Europe issued a recommendation for state parties to recognise such a right and to review their national legislation and practice to ensure consistency with the recommendation.⁴⁴ Therefore, attention should be paid to the impact that such an increased international recognition of the right to a healthy environment may have upon forthcoming climate cases.

b.b) Human rights obligations of corporations regarding climate change

Another particularly interesting development in recent years concerns the use of human rights in climate litigation against private companies. A clear example of this type of litigation is provided by *Milieudefensie v. Shell* in the Netherlands, in which the Court of First Instance of The Hague ordered the multinational oil company to reduce its CO₂ emissions by 45% by 2030 due, *inter alia*, to the serious risks posed by climate change to human rights. The Court found that this obligation derived from various *soft law* standards relating to business and human rights, such as the UN Guiding Principles on Business and Human Rights, or the OECD Guiding Principles for Multinational Enterprises, which constitute ‘the global standard of conduct for companies wherever they operate’. Moreover, the Court specified human rights obligations of corporations require not only their refraining from taking certain actions, but also required them to actively take measures to avoid these human rights violations or threats. Lastly, the Court also rejected Shell’s argument that taking such actions would have a negative impact on its turnover, affirming that the protected public interest ‘far outweighs the company’s commercial interests’.⁴⁵

40. *Greenpeace Nordic v. Norway*, Supreme Court of Norway, HR-202020-2472-P (Case No 20-051052SIV-HRET), 22 December 2020.

41. *Friends of the Irish Environment c. Ireland*. Supreme Court of Ireland, Appeal No: 205/19, 31 July 2020.

42. A/HRC/RES/48/13.

43. A/76/L.75

44. Recommendation CM/Rec(2022)20.

45. *Milieudefensie v. Royal Dutch Shell*, Rechtbank Den Haag, 26 May 2021, ECLI:NL:RBDHA:2021: 5339.

b.c) Broadening the geographic and temporal scope of human rights

A third development in recent climate litigation has to do with the geographical and temporal extension of the scope of application of human rights. For instance, in *Neubauer v. Germany* a group of young people took the German state to court on the grounds that the domestic Climate Change Law was insufficient to achieve the temperature goals set in the Paris Agreement, thereby endangering the human rights enshrined in the German Constitution. In April 2021 the Constitutional Court ruled that the German Climate Law was indeed contrary to the Constitution. The Court's ruling contains many relevant findings, including the recognition of the need to protect the fundamental rights of future generations (those who will live after 2030), as well as the recognition of the legal standing of several people from Bangladesh and Nepal who did not reside in Germany, since it cannot be ruled out that the Constitution does also protect their fundamental rights from the threats of climate change.⁴⁶

Although both the transnational and the intergenerational dimension of human rights had been argued by plaintiffs in previous cases, as in *Urgenda*, the Constitutional Court in *Neubauer* is probably the first to clearly address those issues. It remains to be seen whether other courts will follow or deepen the path opened by the German court.

b.d) Human rights versus climate action

So far, scholar analysis of this recent wave of climate litigation has focused mostly on how human rights are threatened by climate change, assessing the potential of human rights law to enhance and accelerate the response to this civilisational threat. However, there have already been documented cases, especially linked to carbon offsetting projects, in which the human rights of local communities were negatively affected by projects allegedly aimed at mitigating or adapting to global warming (Furtado F, 2017). In that sense, the growing number of claims directed at strengthening the energy transition is slowly joined by claims filed by individuals or communities whose fundamental rights have been adversely affected by climate action. This is what Savaresi and Setzer have come to call the "dark side of the moon" of climate litigation (Savaresi A, Setzer J, 2022).⁴⁷

Both authors highlight the emergence of a type of litigation that cannot be confused with more traditional cases aimed at dismantling policies devised to address climate change, which can be qualified as "anti-climate litigation". Conversely, the incipient phenomenon identified by Savaresi and Setzer refers to cases that do not reject the need to act on global warming, but

46. *Neubauer et al. v. Republic of Germany*, Constitutional Court, 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20, 24 March 2021. See, particularly, paras 101, and 175-181, in which the Court distinguishes between mitigation and adaptation measures, affirming that the impossibility to directly conduct the latter outside of Germany limits the duty of protection of that State regarding the human rights of people living in other countries.

47. 'Mapping the whole of the moon' was the title of the presentation that gave rise to the article under review. *Supra*.

rather reject the decisions and projects that, in order to respond to the climate crisis, put the human rights of affected communities at risk. The authors use the term 'just transition litigation' to refer to such cases, which seem to focus on procedural human rights such as those protected under the Aarhus Convention (information, participation, and access to justice).⁴⁸

3.2. An increasingly rich legal tapestry

In addition to human rights, the international climate regime, or environmental law principles mentioned in the first part of this study as the common legal grounds for most policy-based climate litigation since 2015, courts in some recent cases have included additional elements to their legal reasoning that either reinforce some of the trends already noted or bring back to the fore some legal grounds that seemed to have declined after initial unsuccessful attempts.

a) National emission reduction targets

We have already mentioned how the international climate change regime has been one of the fundamental pillars of climate litigation since 2015. As a consequence of the Paris Agreement, domestic action has become central to the global response to climate change, since the intensity of each State's commitments is defined at the domestic level through State parties' NDCs (Nationally Determined Contributions). This change of focus, as compared to the Kyoto Protocol, which at first might appear to be a step backwards, has unexpectedly provided an additional entry point for domestic courts to assess their States' climate policies. In this regard, while several courts have highlighted the lack of direct application of international climate treaties at the domestic level, they have been less hesitant to assess their governments' compliance with climate regulations adopted at the state level. Two recent examples can be highlighted in this regard. On the one hand, in *Earthlife Africa v. South Africa*, the South African court held that the authorisation of a coal-fired power plant should be analysed, *inter alia*, in the light of South Africa's NDC under the Paris Agreement, which set a trajectory of increasing, stabilising, and declining emissions for the country. On the other hand, in France the Paris Administrative Court has recently found that the executive had failed to comply with the GHG emission reductions set out in the 'national low-carbon strategy', and therefore obliged the French authorities to take all necessary measures to compensate for the excess in emissions by 31 December 2022.⁴⁹

48. Savaresi and Setzer acknowledge that they do not have sufficient data to make a quantitative analysis of these cases.

49. *Notre Affaire à Tous et al. v. France*, Tribunal Administratif de Paris, N°1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021 and 14 October 2021.

b) *Tort law*

In the first decade of the 21st century there were several attempts in the United States to use tort law as a basis for climate change claims. However, the poor record of such claims, as illustrated by *Kivalina v. ExxonMobil*, led some authors to consider the door to climate litigation based on tort liability to be definitively closed (Sorenson Q M, 2013). In fact, although part of the doctrine continued to rely on tort law as the fundamental basis for identifying the responsibility of States and companies in the area of climate change,⁵⁰ there had only been one case until 2021 in which the State had been considered by the courts to be legally responsible for insufficient climate action based on tort law considerations: the 2015 decision of the Hague District Court in *Urgenda v. The Netherlands*. Moreover, the subsequent decisions taken by the Court of Appeal and the Dutch Supreme Court in the case relied primarily on obligations derived from the European Convention on Human Rights (ECHR), leaving aside tort law considerations.

It seems therefore particularly relevant that several courts have relied on the tort liability regime in climate cases since 2021, as in *Klimaatzaak v. Belgium*⁵¹ or *Notre Affaire à Tous v. France*. Moreover, 2021 also witnessed the first judicial decision stating the obligation of a private company to reduce its GHG emissions – in *Milieudefensie v. Shell* –, relying, *inter alia*, on the Dutch tort liability regime. Furthermore, in June 2021 a Brazilian court issued a preliminary injunction against a farmer accused of contributing to deforestation, also on the basis of tort liability.⁵²

c) *An even more important role for science*

As noted in section 2.2, science plays a key role in climate litigation, providing a strong evidentiary basis for claims that are largely based on potential future harms. However, in some of the most recent cases we can see how this role is reinforced by the inclusion of some key scientific concepts and elements that allow for a more precise identification of the level of responsibility of States and the threshold of due diligence that is required from them. In this sense, both the notion of the carbon budget as well as the limitation of the increase in global mean temperature to 1.5°C are particularly noteworthy.

The carbon budget defines the amount of greenhouse gas concentration in the atmosphere that is consistent with the probability of global mean temperature reaching a certain level. According to the IPCC, between 1850 and 2019 around 2390 GtCO₂ were emitted, and in order to have a 67% chance that the global temperature will not rise above 1.5°C by the end of

50. The Oslo Principles, promoted by a group of jurists led by Jaap Spier in 2015, ground the climate change obligations of states and companies mainly on the precautionary principle and on tort law.

51. *Asbl Klimaatzaak and others v. Belgium and others*, French-speaking Court of First Instance of Brussels, 015/4585/A, 17 June 2021.

52. This is a case brought by the Brazilian prosecutor's office against a rancher who deforested the Amazon to obtain pasture for his cattle. *Ministerio Público Federal v. Rezende*, 7a Vara Federal Ambiental e Agrária da SJAM, 1005885-78.2021.4.01.3200, 16 April 2021.

the century we cannot emit more than 400 GtCO₂ additional GtCO (IPCC, 2021). It should be noted that at the current rate of emissions we will have exceeded this threshold by 2030, which would make it impossible to limit the global temperature increase to 1.5°C (UNEP, 2021).

In 2019 an Australian court upheld the refusal to grant a mining company permission to open a new opencast coal mine in the town of Gloucester on the grounds of, among other things, the dwindling carbon budget and the need to reduce emissions accordingly.⁵³ In 2021 at least two courts considered the carbon budget as an important element in defining the level of responsibility of States in defining and implementing their climate policies. On the one hand, in Germany the Constitutional Court considered in the *Neubauer* case that the GHG emissions reduction envisaged by the German authorities left such a meagre carbon budget for people living after 2030 that the additional reductions that would have to be achieved after that year to limit the increase in global mean temperature to 1.5°C would be of such a nature and intensity that they would probably be detrimental to freedoms that we now consider fundamental. On the other hand, in France the Paris Administrative Court found the French state to be responsible for the ecological damage resulting from its failure to respect the carbon budget that France itself had defined for the period 2015-2018, thereby contributing to the worsening of GHG emissions.

With regard to the need to limit the increase in global mean temperature to 1.5°C, several courts refer to the temperature target set in the Paris Agreement – well below 2°C and as close as possible to 1.5°C –, often acknowledging the considerable increase in risks associated with higher temperatures, for example resulting from reaching tipping points that would lead to profound and uncontrollable changes in the climate system.⁵⁴ Moreover, the latest studies show that a temperature increase between 1.5°C and 2°C would likely trigger six tipping points (Armstrong McKay *et al.*, 2022). In this respect, it is particularly interesting to note how the temperature limit of 1.5°C is therefore becoming increasingly important in climate litigation, not only against governments or states, but also against corporations. A perfect example is provided by *Milieudefensie v. Shell*, in which the Hague District Court clearly stated that every effort must be made to limit the global temperature increase to 1.5°C that requires GHG emissions to be reduced by at least 45% by 2030.

3.3. Cases against corporations

As we have noted throughout this study, while the recent wave of climate litigation focusing on the responsibility of States for insufficient climate policy is noteworthy, we can also observe how cases targeting corporations are slowly beginning to resurface. In the first decade of the 21st century there were some major lawsuits against private corporations seeking a court order to force them to reduce their emissions, such as the case brought against 24

53. *Gloucester Resources Limited v Minister for Planning*, Land and Environment Court, New South Wales, [2019] NSWLEC 7, 8 February 2019.

54. For example, in *Neubauer v. Germany*.

oil companies by the tribe and municipality of Kivalina,⁵⁵ or the case brought by six States against five electricity companies in the United States.⁵⁶ However, none of these cases were successful. At the time, most courts considered that these were issues beyond their scope of review – due to a strict conception of the separation of powers –, or that the causal link between the corporations' activities and the climate impacts was too tenuous.

In recent years, however, it is noticeable that lawsuits are once again being brought against private companies and, remarkably, courts seem now to be more open to the plaintiffs' allegations. Thus, in 2015 a Peruvian farmer, Saul Luciano Lliuya, filed a lawsuit against the German energy company RWE in the District Court of Essen, in Germany, alleging that emissions from the company's activities contribute to the melting of a glacier above his village, Huaraz, in the Andes, therefore seriously endangering the plaintiff, his family and the village itself. Although the claim was rejected at first instance, the Hamm Regional High Court in 2017 allowed the plaintiff's appeal to proceed. Although the case is still pending, an on-site visit was conducted by judges and experts on the Spring of 2022 to gather evidence.⁵⁷

Also in 2015 Greenpeace and other Southeast Asian organisations petitioned the Commission on Human Rights of the Philippines to investigate the human rights responsibilities of the world's major fossil fuel companies for their contribution to climate change and the harms resulting from it. In 2019 the Commission reported that it had concluded that companies have an obligation to respect human rights and could be held responsible for climate change impacts, including where they are shown to have deliberately obstructed knowledge and decision-making on the issue.⁵⁸

In 2021 the District Court of The Hague handed down what is probably the most relevant judgment in a case against an oil company to date, in the case of *Milieudefensie v. Shell*. As explained above, the court ordered the company to reduce its emissions by 45% by 2030, clearly stating that private companies have an obligation to respect human rights, also in relation to climate change.

This recent scenario, as well as developments in science that allow for better attribution of emissions, suggest that we can expect to see an increase in such cases. In fact, in January 2020 several French municipalities and NGOs brought a claim against oil major TOTAL, requesting the Court to order the corporation to reduce its emissions to a level that is consistent with limiting

55. *Native Village of Kivalina and City of Kivalina v. ExxonMobil et al.* US District Court for the Northern District of California, Case No: C 08-1138 SBA, 30 September 2009.

56. *American Electric Power Company v. Connecticut*, U.S. Supreme Court, 564 U.S. 410 (2011), 20 June 2011.

57. All relevant facts and documents of the case are available at <<https://germanwatch.org/en/huaraz>> (last accessed on 1 October 2022).

58. *Greenpeace South-East Asia et al. v. Carbon Majors, Commission on Human Rights of the Philippines. Carbon Majors*, Commission on Human Rights of the Philippines. Much of the documentation can be found at <<https://chr.gov.ph/nicc-2/>> (accessed 1 October 2022).

global warming to 1.5°C.⁵⁹ In September 2022 New York, Paris and Poitiers, as well as Amnesty International, joined the legal proceedings against TOTAL.⁶⁰ Moreover, at the end of 2021 a German NGO filed two lawsuits against car manufacturers Mercedes Benz and BMW for their decision to continue producing combustion vehicles beyond 2030, which, according to the NGO, seriously jeopardises the rights and freedoms of future generations.⁶¹ Furthermore, in July 2022 four islanders from Pari, in Indonesia, filed a request for conciliation before the Justice of Peace in Zug, Switzerland, against one of the most important cement corporations of the world, Holcim, requesting both compensation for the damages suffered in the island and a reduction of the company's GHG emissions.⁶²

3.4. Beyond domestic litigation: extension to supra-national jurisdictions

Climate litigation is a very dynamic phenomenon, which is reflected both in the growing number of cases and, especially, victories, as well as in the complexity and richness of its legal foundations. This dynamism, in the context of the serious threat posed by the climate emergency and the insufficient international response to that threat, is beginning to reach judicial or quasi-judicial bodies at the regional and international level. The fact that many cases at the national level have already been decided by the highest state-level courts is an additional element that facilitates reaching supra-national jurisdictions.

Given the serious threat that climate change poses to the effective enjoyment of human rights, it should come as no surprise that some climate claims are being filed under regional human rights regimes. In this regard, the European level is particularly noteworthy, with ten applications having been filed before the European Court of Human Rights (ECtHR) between 2020 and September 2022.⁶³ It is worth considering that the Chamber of the ECtHR has relinquished its jurisdiction in favour of the Grand Chamber on three of these cases due to the cases raising serious questions affecting the interpretation of the Convention.⁶⁴ In addition, the Court has qualified the claim filed by Greenpeace Nordic and Nature and Youth against Norway as

59. Notre affaire à tous v. Total <<https://notreaffaireatous.org/actions/les-territoires-qui-se-defendent-et-si-nous-mettions-enfin-les-entreprises-face-a-leurs-responsabilites/>> (accessed 1 October 2022).

60. <<https://notreaffaireatous.org/cp-dereglement-climatique-paris-et-new-york-interviennent-dans-l'action-judiciaire-contre-totalenergies/>> (accessed 1 October 2022).

61. *Deutsche Umwelthilfe (DUH) v. BMW and Deutsche Umwelthilfe (DUH) v. Mercedes Benz*, Regional Court of Stuttgart, Complaint, 21 September 2021. A number of initiatives were presented during COP 26 aimed at guiding companies to adapt their operations and functioning, from a legal point of view, to the climate emergency: See the Commonwealth Climate and Law Initiative, or the Chancery Lane Project.

62. *Pari islanders v. Holcim* <<https://callforclimatejustice.org/en/>>.

63. *Agostinho Duarte et al. v Portugal et al.*; *Müllner v. Austria*; *KlimaSeniorinnen v. Switzerland*; *Carême v. France*; *Greenpeace Nordic et al. v. Norway*; *Uricchio v. Italy et al.*; *De Conto v. Italy et al.*; *Soubeste et al. v. Austria et al.*; *Humane Being v. the United Kingdom*; *Plan B. Earth and Others v United Kingdom*.

64. *Agostinho Duarte et al. v Portugal et al.*; *KlimaSeniorinnen v. Switzerland*; *Carême v. France*.

a potential impact case.⁶⁵ It seems particularly interesting that most of these cases have been directly filed with the ECtHR without having previously exhausted all domestic remedies,⁶⁶ in what seems like a challenging approach to the ordinary norms of standing before the Court. This exceptional approach makes it difficult to foresee the potential stance that the Court will take on the matter. Nevertheless, one of them is part of the three cases that have been so far relinquished to the Grand Chamber.⁶⁷

Together with regional human rights courts, climate claims have also been submitted to human rights treaty bodies at the international level. On the one hand, we can highlight two cases filed with the Human Rights Committee established within the framework of the International Covenant on Civil and Political Rights: *Teitiota v. New Zealand* and *Torres Strait Islanders v. Australia*. In the first case, the Committee upheld in January 2020 New Zealand's decision to reject the asylum application of an inhabitant of Kiribati, who claimed that climate change put at risk the minimum conditions to ensure his right to life. However, although the Committee considered that the risks were still too remote to justify the need to grant an asylum claim, the Committee also noted that these circumstances could change in the future as the consequences of global warming worsen.⁶⁸ Moreover, two Committee members issued dissenting opinions, considering that the risk was sufficiently great and that it was unreasonable to wait for excessive and irreparable harm to occur before granting the requested protection.

The Torres Strait case was filed in 2019 with the support of environmental legal NGO Client Earth, based on Australia's alleged violation of the rights to life (Article 6), to private and family life (Article 17) and to culture (Article 27) of Torres Strait islanders as a result of Australia's insufficient climate policies – both regarding adaptation and mitigation. On its 135th session the Committee issued its decision in which it found that Australia had violated the applicants' rights to private and family life as well as the right to culture for failing to implement sufficient adaptation measures. The Committee recalled that 'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life', and although it fell short of finding that Australia was responsible for its inadequate mitigation policies, it nevertheless concluded that 'by failing to discharge its positive obligation to implement adequate adaptation measures to protect the authors' home, private life and family, the State party violated the authors' rights under article 17 of the Covenant'.⁶⁹ Remarkably, there are six particular opinions to the decision which argue that the responsibility of the State ought to have been identified also in relation to either insufficient mitigation measures or the violation of the right to life.

65. Greenpeace Nordic et al. v. Norway.

66. Agostinho Duarte et al. v Portugal et al.; Müllner v. Austria; Uricchio v. Italy et al.; De Conto v. Italy et al.; Soubeste et al. v. Austria et al.; Humane Being v. the United Kingdom.

67. Agostinho Duarte et al. v. Portugal et al.

68. CCPR/C/127/D/2728/2016, 7 January 2020.

69. CCPR/C/135/D/3624/2019, 21 July 2022.

A third international human rights body where climate change issues have been raised is the Committee on the Rights of the Child. In 2019 children, including Swedish activist Greta Thunberg, filed a petition with the Committee against five States alleging that the inadequacy of their climate policies endangers their rights to life (Article 6 of the Convention on the Rights of the Child), to health (Article 24), to culture (Article 30), and to the protection of the best interests of the child (Article 3). The Committee, while acknowledging that climate change poses a real threat to the human rights of children and affirming that States have a particular responsibility to reduce emissions originating in their respective territories, ultimately rejected the petition on the grounds that children should have exhausted domestic remedies in the respective countries (Argentina, Brazil, France, Germany and Turkey).⁷⁰ Nevertheless, the arguments raised by the Committee in this decision reinforce an expansive interpretation of states' responsibilities to diligently address climate change that may feed into future decisions by similar bodies.⁷¹

Finally, it is worth highlighting several recent initiatives before international tribunals. On the one hand, an Austrian NGO, All Rise, registered in October 2021 a communication with the International Criminal Court (ICC) addressed to the ICC's Office of the Prosecutor so that it can initiate investigations under Article 15 of the Rome Statute into the actions of Brazilian President Jair Bolsonaro. The NGO claims that the actions of Bolsonaro's government tolerate, facilitate, and promote both the destruction of the Amazon and attacks against human rights and nature defenders in the region.⁷² On the other hand, there are also some recent initiatives regarding the International Court of Justice (ICJ), originating in low lying Pacific islands, which are among the regions most affected by rising sea levels due to global warming and which could disappear by the end of the century.⁷³ The Government of Vanuatu, supported by a team of prominent jurists,⁷⁴ has announced it will introduce a proposal at the UN General Assembly to request an advisory opinion from the ICJ on the right of present and future generations to be

70. Committee on the Rights of the Child, Communication No. 104/2019 (Argentina), Communication No. 105/2019 (Brazil), Communication No. 106/2019 (France), Communication No. 107/2019 (Germany), Communication No. 108/2019 (Turkey), 8 October 2021.

71. In this regard, the Committee itself quotes extensively from the *Advisory Opinion of the Inter-American Court of Human Rights, on States' human rights obligations from an environmental point of view*. Advisory Opinion OC-23/17 of 15 November 2017. Series A no. 23.

72. Legal Experts' Report to the Office of the Prosecutor of the International Criminal Court. Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, 12 October 2021.

73. It should be noted that already at the beginning of the 21st century, some Pacific island states considered bringing the issue of climate change before the ICJ, although they never did, in the end. In 2002, in response to its refusal to ratify the Kyoto Protocol, the Tuvalu government threatened the United States and Australia that it would take them to the International Court of Justice for their irresponsible global warming policies. In 2011, Palau announced that it intended to push for a similar initiative for the General Assembly to request an advisory opinion from the ICJ (Ralston H, 2004; Jacobs RE, 2005; Kysar D, 2013).

74. Among them are Margaretha Wewerinke-Singh, Pierre Marie Dupuy, Lavanya Rajamani and Jorge Viñuales.

protected from the adverse consequences of climate change, with the intention of clarifying the obligations of States to prevent and counteract climate change.⁷⁵ This initiative has been fuelled and complemented by a campaign launched in 2019 by a group of Pacific students to urge island States in the region to request an advisory opinion from the ICJ on the issue.⁷⁶ In September 2021 the government of Vanuatu officially announced to the UN Assembly that it was launching a campaign to gather support for the adoption of a General Assembly resolution to request an advisory opinion from the ICJ.⁷⁷ Bearing in mind that the recent steps taken by Vanuatu and the level of support the country is gathering to request the advisory opinion asks to what extent the recent social mobilisation in the region has, together with the undeniable degradation of the global climate system and the totally insufficient response from the international community, facilitated this step forward.

4. Challenges along the way

The relatively positive results of the recent wave of climate litigation should not obscure the fact that these lawsuits continue to face numerous difficulties that have the potential to limit their scope and viability. These are procedural hurdles that have accompanied this type of litigation from the beginning and, just like the legal basis of these claims, they have suffered an evolution in recent years.

Standing is one of the difficulties faced by plaintiffs in this type of claims. This difficulty stems, on the one hand, from the fact that the most serious consequences of global warming will become apparent in the coming decades, so that in some cases the damage has not yet occurred or not in a particularly damaging way. On the other hand, the widespread nature of the damage that will affect everyone and not only the claimants is an additional hurdle regarding their standing capacity. In this regard, for example, the Swiss courts have rejected the claim brought by a group of elderly women because although the courts acknowledged that this demographic group is more vulnerable to heat waves, the proposed measures would benefit the population as a whole and not just the plaintiffs.⁷⁸ Nevertheless, it should be stressed that most courts agree that the fact that other people or, in this case, the majority of the population will suffer the consequences of climate

75. More information can be found on the website of the law firm advising Vanuatu: <<https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatans-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice>> (accessed 2 October 2022).

76. Information about the campaign is available on the student organisation's website: <<https://www.pisfcc.org/icjao>> (accessed on 2 October 2022).

77. <<https://www.pisfcc.org/news/vanuatu-launches-the-icjao-campaign>> (accessed on 2 October 2022).

78. *Verein KlimaSeniorinnen Schweiz gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation UVEK*, Bundesverwaltungsgericht, Abteilung I A-2992/2017, 27 November 2018.

change does not prevent the plaintiffs from being considered as directly affected by its impacts.⁷⁹

In addition, some NGOs have encountered limitations in bringing such claims, especially when human rights risks or violations have been alleged, since some courts have interpreted that as legal persons these organisations do not have human rights that can be directly harmed by climate change. This was, for instance, the position of the District Court of The Hague in the Urgenda case,⁸⁰ which was however subsequently revised by both the Court of Appeal⁸¹ and the Dutch Supreme Court.⁸² In Ireland, the Supreme Court also gave a restrictive reading to the ability of NGOs to claim human rights violations, especially when it comes to rights not expressly recognised by the Constitution.⁸³ However, courts in most cases have adopted a broader understanding of the protection of fundamental rights, facilitating the participation of NGOs in this type of claims.

A second obstacle climate litigation faces has to do with causality, regarding both the causal link between the action or omission of the State and global warming, and between global warming and the impacts that are or will be suffered by the population in general or the claimants in particular. This difficulty is accentuated when we take into account that climate change, far from being a simple phenomenon with a single cause, is a complex phenomenon that is caused by the emissions of billions of human beings in almost two hundred countries distributed across the planet, through their economic activities, transport, etc. In this regard, while courts initially seemed reluctant to hold companies liable for their emissions,⁸⁴ cases brought against States in recent years have opened a window of opportunity that several courts have seized. Courts are now taking into account that it is the State that has the ability to affect the total emissions that occur in its territory, which is a not insignificant volume of emissions.⁸⁵ Moreover, there has been a shift from a perspective of pure causality towards a notion of cumulative effects, in which what is considered relevant is the additional contribution to global warming. In this sense, States cannot hide their inaction behind the insufficient action of others; rather, each State is

79. See, for example, *Juliana et al. v The United States of America et al.*, District Court of Oregon No. 6:15-cv-01517- TC, Order and Findings & Recommendation, 8 April 2016, affirmed by the Court of Appeals in *Juliana et al. v. the US et al.*, United States Court of Appeals for the Ninth Circuit, No. 18-36082 D.C. No. 6:15-cv-01517- AA Opinion, 17 January 2020. A similar position was taken by the German Constitutional Court in *Neubauer v. Germany*, *supra*.

80. *Urgenda Foundation et al. v. The State of the Netherlands (Ministry of Infrastructure and Environment)*, District Court of The Hague, Judgment, C/09/456689 HA ZA 13-1396, 24 June 2015.

81. *The State of the Netherlands v. Urgenda Foundation*, Court of Appeal of The Hague, case number C/09/456689/ HA ZA 13-1396, 09 October 2018 [ECLI:NL:GHDHA:2018:2610].

82. *The State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, case number 19/00135, 20 December 2019 [ECLI:NL:HR:2019:2007].

83. *Supra*.

84. The example of Kivalina is paradigmatic.

85. See, for example, *Juliana et al. v The United States of America et al.*, District Court of Oregon, Opinion and Order, 10 November 2016.

responsible for its share of emissions.⁸⁶ Moreover, this conception responds better to the reality of climate change and the relevance of the accumulation of GHG emissions reflected in the concept of the carbon budget that we have already discussed in section 3.2.

The separation of powers constitutes another relevant hurdle to this type of claims. Prior to 2015 courts were particularly averse to what they perceived as unwarranted interference in the activity of the other branches of government.⁸⁷ However, several courts have considered since then that climate change and the measures taken by States to respond to that phenomenon are not matters entirely excluded from judicial scrutiny, insofar as there may be legal rules that oblige the executive or the legislature to take decisions with a certain level of diligence (for instance, national constitutions, ordinary law and regulations, or human rights norms).⁸⁸ In this regard, it should be noted that not only have certain courts declared the unlawfulness of the State's actions or inaction on climate change,⁸⁹ but some courts have even found that their duty to ensure compliance with the law required them to define a certain level of diligence to be achieved by the State.⁹⁰

A fourth difficulty stems from the efficiency of such proceedings, in two respects. On the one hand, the fact that such a claim can spend years in court before a final judgment is obtained. A clear example of this can be found in the quintessentially successful case, *Urgenda v. The Netherlands*. Initiated in 2013, the plaintiffs sought to obtain from the Court an order for the State to enhance its GHG emissions reduction targets for 2020, but the final ruling by the Supreme Court was not issued until December 2019. Given that we have less than ten years to reduce our emissions with the intensity required to have a realistic chance of limiting the global temperature increase to 1.5°C, the slow pace of judicial proceedings in most jurisdictions casts an ominous shadow over climate litigation. On the other hand, a 'victory' in court does not automatically imply a substantial change in the conduct that is the subject of the court's reproach. As Colombian lawyer César Rodríguez-Garavito lamented, 'the risk of unprecedented rulings is

86. See, inter alia, the decision of the Dutch Supreme Court in *Urgenda v. The Netherlands*.

87. See, for instance, *Friends of the Earth v. Canada*, 2008 FC183, [2009]3 F.C.R. 201.

88. In addition to the successful cases already noted, see for example *Sarah Lorraine Thomson v. Minister for Climate Change Affairs*, High Court of New Zealand, Wellington Registry, Decision, CIV 2015-485-919 [2017] NZHC 733, 2 November 2017.

89. See recent judgment in *Asbl Klimaatzaak and others v. Belgium and others*, French-speaking Court of First Instance of Brussels, 015/4585/A, 17 June 2021, in which the Court found the State liable for insufficient action on climate change, but refused to order measures in this regard.

90. *Urgenda v. the Netherlands* or *Salamanca Mancera v. Colombia*, among others. However, as shown by the US Supreme Court in *West Virginia v. the US Environmental Protection Agency*, some courts still apply a restrictive reading of the separation of powers. In this case, the US Supreme Court, heavily influenced by a conservative majority following several nominations by then US President Donald Trump, affirmed that there wasn't a 'clear congressional authorization' for the EPA to introduce certain mandatory measures leading to GHG emissions reduction from energy generation, which barred the US Environmental Agency from taking those kind of measures. *West Virginia et al. v. Environmental Protection Agency et al.*, US Supreme Court, No. 20-1530, Opinion, June 30, 2022.

that they be just framed and displayed on a wall' (Rodríguez-Garavito C, 2018). The lack of enforcement of judicial decisions in climate litigation can prove to be a major obstacle to their effectiveness, as demonstrated by the 'successful' Colombian case in which Rodríguez-Garavito was lead counsel,⁹¹ the enforcement of which has been openly opposed by the Colombian executive (Rodríguez-Garavito C, 2019). Shell's announcement of its intention to move its headquarters from the Netherlands to the UK a few months after the Dutch courts decision in *Milieudefensie vs. Shell*,⁹² or the complaint filed by the German energy company RWE, based on the Energy Treaty, against the Dutch authorities for their energy transition and coal phase-out policies, taken in the framework of the *Urgenda v. The Netherlands* judgement,⁹³ are both reminders that the fight against climate change does not end with the court judgement, however legally sound it may be.

This last example also highlights the great difficulties surrounding not only climate litigation but the overall legal and political action directed towards effectively tackling the global environmental crisis that threatens the very survival of humanity as we know it. The total inadequacy of a legal system based on rules and principles that broadly endorse and protect the activities that are taking the Earth and the human communities that inhabit it, along with all other living things, to the point of no return is more apparent than ever. The lack of coherence between the international environmental protection regime and the international trade and investment regimes is a clear example of the vital need to rebuild the domestic and international legal systems to protect our most precious asset, life, while ensuring the relevance of law as a tool for the adequate management of human communities.

5. Conclusion

Both the inadequacy of the commitments adopted during COP26 in Glasgow, some of which seem to have come to nothing just a few weeks after the end of the Conference,⁹⁴ as well as the small but real positive steps taken during the Conference of the Parties to the UNFCCC (for example, the references to the need to reduce coal consumption or to end inefficient support for fossil fuels), will surely contribute to fuel the use of courts to foster climate action. Climate litigation is not only a useful tool to identify

91. *Salamanca Mancera v. Colombia*.

92. <<https://www.bbc.com/news/business-59288593>> (accessed 2 October 2022).

93. <<https://caneurope.org/german-energy-rwe-energy-charter-treaty-claims-netherlands/>> (accessed 11 January 2022). Details and case documents can be found at <<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/4>> (accessed 2 October 2022).

94. The European Union, for example, has already announced that it does not plan to review its emissions reduction targets in 2022, despite the annual review of these commitments adopted in Glasgow. <<https://www.politico.eu/article/eu-will-not-strengthen-climate-action-plan-in-2022/>> (accessed 2 October 2022). On the other hand, the United States has just opened new concessions to fossil fuel exploitation. <<https://www.theguardian.com/us-news/2021/nov/17/biden-administration-gulf-of-mexico-oil-gas-drilling-leases>> (accessed 2 October 2022).

the legal obligations of States to address climate change, and to inform and mobilise citizens in this regard. Climate litigation is also as a symptom of the reckless inadequacy of the action of these same States and of the mechanisms established so far to address this and other civilisational challenges (such as biodiversity loss). In this sense, as we move into the age of the Anthropocene,⁹⁵ climate litigation is enabling courts, international law, and law in general to address crucial questions that should allow for an essential evolution of the legal system if law is to remain a useful tool for organising human societies and ensuring their well-being. The scale of the challenge requires us to rethink everything, including the law, and climate litigation is an opportunity to undertake the necessary reflection to achieve such a transformation.

95. On the geological notion of the Anthropocene, see the initial proposal of Crutzen PJ, Stoermer E (2000), or, more recently, Steffen W et al. (2018). From the legal perspective, contributions by Louis Kotzé, Jorge Viñuales, Ellen Hey and Jordi Jaria are noteworthy. Kotzé L (2015); Viñuales JE (2016); Hey E (2018).

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