

Climate Change Litigation and Human Rights: Stocktaking and a Look at the Future

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Abstract

This article introduces a special issue on the role of human rights law in climate litigation, collecting selected papers presented at the 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 focussed climate litigation. The idea behind both the workshop and the special issue 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.

KEYWORDS: climate change; human rights; litigation; Paris Agreement

In recent years, litigants around the world have increasingly tried to ‘push the boundaries of the law’¹, 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, climate change mitigation or adaptation, which have been brought before international or domestic judicial, quasi-judicial and other investigatory bodies.²

While so far relatively few climate cases have been argued on the basis of human rights, the trend is continuing and accelerating. At the end of May 2021, the world’s most established climate litigation databases³ listed 112 cases that mentioned human rights.⁴ In these cases, the applicants typically rely on human rights law alone, or do 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 after 2015, when the Paris Agreement became the first international treaty to explicitly recognise the link between climate action and human rights.⁵ The relationship

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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 Colombia 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 Crossreference to piece by Savaresi and Setzer.

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

between climate change and human rights obligations has also been abundantly recognised by human rights bodies⁶ and in the literature.⁷

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 away from the carbon economy. Equally, liability and insurance regimes are yet to provide redress for the harm associated with the impacts of climate change at the individual and aggregate levels.

Human rights law and remedies are therefore increasingly used to name and shame climate laggards and paper over the gaps in climate law. For example, applicants have complained that permits or licenses to extract fossil fuels⁸ or to cut down forests constitute a violation of human rights.⁹ Similarly, applicants have complained that failure to adopt and/or implement climate change response measures has resulted in human rights violations. In the Netherlands¹⁰, the celebrated *Urgenda* case against the Dutch state and, more recently, the *Friends of the Earth* case against Royal Dutch Shell¹¹ have already demonstrated that winning court cases on the basis of human rights arguments is possible, inspiring similar lawsuits all over the world.

As a result, human rights law and institutions now are in the frontline of climate accountability all over the world. As we have already observed elsewhere, human rights law and remedies have long been used as a means to protect environmental interests that can be couched in terms of human rights violations, thus providing remedies where no others are available and to give voice to the voiceless.¹² These institutions therefore are well suited to bridge the climate

⁶ The Human Rights Council has adopted ten resolutions on human right and climate change between 2008 and 2020. 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/hrandclimatechange/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 e.g. 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 (eds), ‘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.

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,

accountability gap on an interim basis, while national, regional and international law and policymakers step up the challenge. Clearly, human rights obligations are no replacement for effective climate legislation, and human rights remedies are no replacement for effective enforcement measures. Yet, in the climate emergency, human rights law and remedies provide expedient tools to hold state and corporate actors accountable.¹³

The literature has already detected this new trend in climate litigation,¹⁴ but is yet to provide a systemic analysis of it. We therefore decided to invite a pool of selected academics and practitioners involved in rights-based climate cases 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 level.

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 may be learnt from successes and failures. We asked them to go beyond the single case to draw general inferences on the role of human rights law in climate change action and to identify future pathways to effectively use human rights arguments in climate 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 litigation in ensuring climate accountability, and to the need of systemic thinking about climate change and human rights.

The ensuing discussion was structured in two sessions, where 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 human rights-based climate litigation worldwide, and on the use of human rights in climate litigation in key cases, with the aim to gauge the role played by human rights so far, and the impacts of this caselaw on pending and future cases. In the second session, contributors discussed future pathways to use human rights in climate change litigation in specific areas, like adaptation, as well as the role of international human rights bodies in this connection. They furthermore analysed actual and prospective trends in regional rights-based climate litigation, with perspectives from Latin America, the Asia-Pacific, Africa and North America.

We discussed at length the role of the judiciary and what it may be expected to do in the context of the climate emergency. We reflected how unusual actors, like national human rights institutions, are increasingly called upon to ensure climate accountability, and a just the

'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) 2020 *European Human Rights Law Review* 140.

transition away from fossil fuels. 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,¹⁵ you may 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 future generations' rights, 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 issue, which contains selected papers from the workshop. The ultimate question that we set out to answer with this special 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 got us started on this 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 also what they call just transition litigation, in order to fully appreciate the role of human rights law and remedies in climate action.

Dennis van Berkel, Lucy Maxwell and Sara Mead look to the next frontier of climate litigation, which they describe as 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 recent judgments of other national courts, as well as proceedings that are underway.

Sebastien Jodoin, Margaretha Wewerinke, Larissa Parker and Juliette Mestre take stock of the wave of youth-focused 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 that children and youth have experienced in climate litigation.

Riccardo Luporini reviews the practice of human rights-based litigation on climate change adaptation to date, providing some reflections on this case law's prospects to advance climate action.

Pau de Vilchez Moragues and Annalisa Savaresi set out to establish the extent to which the right to a healthy environment has furthered the prospects of applicants and, conversely, the extent to which climate litigation has bolstered the recognition of the right to a healthy environment. They conclude that, so far at least, the recognition of the human right to a healthy environment seems to have contributed to the success of human-rights based climate cases and that the climate litigation has given even greater prominence to this right.

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).

Marc Willers and Jacques Hartmann examine the potential for bringing cases to hold states to account for their failure to tackle dangerous climate change before regional European courts. They point out the difficulties in pursuing rights-based climate litigation before the Court of Justice of the European Union and, conversely, the better prospects before the European Court of Human Rights.

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

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

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 the special issue are essential to see the big picture and the story behind the individual case. We therefore sincerely hope that this special issue will advance the academic debate on this important new chapter in the literature on human rights and the environment, as well as to the growing body of scholarly research on climate change litigation.