Human Rights and Climate Change

Protecting the Right to Life of Individuals of Present and Future Generations

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Abstract

This article explores the opportunities to use international human rights law to protect one's right to life against the effects of climate change. It discusses four legal avenues: greening the existing human rights paradigm, formulating a new substantive right to the environment, public interest litigation and intergenerational justice. This is illustrated with case law from the European Court of Human Rights and various national jurisdictions. The main finding is that the human rights system should become more open towards public interest litigation and intergenerational justice, complemented by a broadening of the standing requirements.

Keywords

human rights – climate change – public interest litigation – intergenerational justice – Urgenda

Introduction¹

Little did we know that over three years ago, a judge in the Netherlands would set a ground-breaking example in what is presumably the most famous case thus far on climate change: the *Urgenda* case. Together with 886 co-plaintiffs,

¹ This article is the result of a summary of the thesis written for my master's degree. It has thus been updated until 30 June 2017 – new developments since then have not been incorporated. It was awarded with the 2018 J.P.A. François Prize by the Royal Netherlands Society of International Law (KNVIR).

the foundation Urgenda² filed a claim against the State of the Netherlands for taking insufficient action to reduce greenhouse gas (GHG) emissions, thereby failing to sufficiently avert dangerous climate change. It claimed that the State was consequently in breach of its duty of care towards current and future generations, and that the emission targets also violated Article 2 and 8 of the European Convention on Human Rights (ECHR). It requested the Court make various declaratory statements of law, and order an injunction to reduce CO₂ emissions by 25–40% by 2020 compared to 1990 levels.³ The key question was thus whether the State had a legal obligation towards Urgenda to limit GHG emissions on a higher scale than it was planning to.⁴ On 24 June 2015, the Dutch Civil District Court in The Hague decided in a historic ruling in favour of Urgenda: the State's reduction policies indeed did not suffice, and it had therefore breached its duty of care.⁵

This case illustrates how the judiciary can function as a tool in averting climate change: for the first time a government was held accountable towards its citizens for a substandard climate policy according to international norms.⁶ Furthermore, it brings to light the potential success for further public interest

2 Urgenda (a combination of 'urgent' and 'agenda') is a foundation established under Dutch law "for sustainability and innovation" with the aim to accelerate the Netherlands' transition into a (more) sustainable society, and to create a circular economy. Urgenda, 'Missie en Werkwijze'. Retrieved 16 April 2017, <http://www.urgenda.nl/over-urgenda/missie/>.

3 A goal established by the Intergovernmental Panel on Climate Change (IPCC), which internationally has been agreed upon by the United Nations Framework Convention on Climate Change (UNFCCC), to which the Netherlands is a party, as well as the European Union. United Nations Framework Convention on Climate Change, adopted 9 May 1992, entered into force 21 March 1994.

Note that Urgenda and the Dutch State were in agreement that CO₂ emissions will have been reduced by 80–95% compared to 1990 in 2050, but that the dispute really was about the targets for 2020. *Stichting Urgenda v Staat der Nederlanden*, Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, paras. 4.23–4.29, 4.34. For the English translation: *Urgenda Foundation v the State of the Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196, C/09/456689 / HA ZA 13–1396. This will from now on be referred to as the 'Urgenda case'.

4 *Stichting Urgenda v Staat der Nederlanden*, Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, paras. 3.1, 4.1, 4.26.

5 *ibid.*, para. 5.1; R. Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands', in *Journal of Energy & Natural Resources Law*, 2016, vol. 34, no. 2, p. 1.

6 M. Loth, 'Climate Change Liability After All: A Dutch Landmark Case', in *Tilburg Law Review*, 2016, no. 21, p. 5.

litigation, and the possibilities for standing for future generations.⁷ It nevertheless would have been particularly interesting to hear the Court's view on the proposed argumentation based on international human rights.⁸ Given the likelihood that similar cases will become prevalent in the near future, this article will try to tackle some dilemmas by providing a critical roadmap of the various human rights tools, and aims to answer the following research question:

If a State is breaching the (right to) life of individuals of both present and (possibly) future generations by putting in too little effort to avert climate change, in what ways can international human rights law most effectively function as a tool to protect the (right to) life of individuals of both present and future generations in combatting the injustices caused by climate change, and how can the major obstacles identified be overcome?

Delineation and Methodology

This question can be approached from three theoretical angles. One is the human rights-oriented approach, according to which protecting the environment is an essential pre-condition for and a means to secure the effective universal enjoyment of internationally recognised human rights. The environment-oriented approach views protecting certain human rights as a vital instrument to achieve environmental protection.⁹ Finally, the integrative approach emphasises an indivisible and inseparable link between human rights and environmental protection – for instance through an independent substantive right to a satisfactory environment.¹⁰ The premise of this article is to focus on

7 O. Spijkers, 'The Urgenda Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?', 2017.

8 F.M. Fleurke and A. de Vries, 'Urgenda: Convergentie tussen Klimaat en Mensenrechten?', in *Milieu en Recht*, 2016, no. 42, pp. 1–2.

9 Thereby resembling the Stockholm and the Rio Declaration, respectively Declaration of the United Nations Conference on the Human Environment, adopted 16 June 1972, UN Doc A/Conf.48/14/Rev. 1, 11 ILM 1416; Rio Declaration on Environment and Development, 12 August 1992, United Nations Conference on Environment and Development, 3–14 June 1992, A/CONF.151/26 (vol. 1) / 31 ILM 874.

10 A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, p. 3; D. Shelton, 'Human Rights and Climate Change', in *Buffett Center for International and Comparative Studies Working Paper Series*, 2009, No. 09–002, p. 12; D. Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', in *Stanford Journal of International Law*, no. 28, pp. 104–106.

protecting human rights *against* violations caused by climate change, while aiming to find a balance and display the underlying interdependence in reaching the two-fold goal: simultaneously protecting human rights and averting climate change.

On the level of the ‘subjects’, those affected, I will deal with three scenarios of people’s – both individual and collective – need for human rights tools. There is the present generation filing a claim about their current (right to) life; the present generation filing a claim about their future (right to) life; and the present generation filing a claim on behalf of future generations’ (right to) life. I will hereby focus on substantive international human rights law, with the inclusion of certain indispensable procedural aspects. The case law used is predominantly at the level of the European Court of Human Rights (ECtHR), supplemented by national cases in which international human rights or norms have been applied.

After a brief section on the necessity of a human rights-based approach, I will critically assess the two human rights tools of greening existing human rights (i.e. reinterpreting universally recognised rights to incorporate an environmental dimension) and creating a new substantive right to the environment, followed by two other legal avenues that have seemed to become increasingly prevalent in the (inter)national human rights field: public interest litigation and intergenerational justice for future generations.

1 The Necessity of a Human Rights-Based Approach

“Climate change is the greatest human rights challenge of the twenty-first century.”¹¹

In 2008, the Human Rights Council (HRC) was the first to adopt a resolution stating, “climate change poses an immediate and far-reaching threat to

11 As said by Mary Robinson, the former High Commissioner for Human Rights, during a full-day panel discussion on climate change and human rights by the Human Rights Council in March 2015. The connection between human rights and the environment was already recognised in 1972 during the first UN Conference on the Human Environment, but did for a long time not yet refer to climate change. UNHRC, ‘Summary Report of the Office of the United Nations High Commissioner for Human Rights on the Outcome of the Full-Day Discussion on Specific Themes Relating to Human Rights and Climate Change’, 1 May 2015, 29th session, A/HRC/29/19, para. 77.

people and communities around the world and has implications for the full enjoyment of human rights”.¹² The first United Nations’ Special Rapporteur on human rights and the environment moreover noted in his first report that “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights, including rights to life, health, food and water.”¹³ Nowadays, there is a general consensus that climate change and inadequate environmental conditions hinder the full enjoyment of human rights.

1.1 *The Supreme Right*

Most likely, some human rights will be affected negatively quicker than others, and the right to life belongs to this group: the “supreme right from which no derogation is permitted. [It] has profound importance both for individuals and for society as a whole. It is most precious for its own sake, but also serves as a basic right, facilitating the enjoyment of all other human rights”.¹⁴ We need a receptive environment to enjoy our human rights in the first place, and without the right to life guaranteed, all other human rights are basically meaningless. It is namely estimated that anthropogenic,¹⁵ human-induced climate change now causes 400,000 deaths per year, a number that has been projected to rise to 700,000 per year by 2030.¹⁶

12 UNHRC, Resolution 7/23 ‘Human Rights and Climate Change’, 28 March 2008, UN Doc. A/HRC/RES/7/23.

13 UNHRC, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’, Preliminary Report, John H. Knox, 2012, A/HRC/22/43, p. 12.

14 UNHRC, ‘Draft General Comment No 36 – Article 6: Right to Life’, prepared by Y. Shany and N. Rodley, 2 September 2015, 115th session, UN Doc CCPR/C/GC/R.36/Rev.2, para 2; UNHRC, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’, Preliminary Report, John H. Knox, 2012, A/HRC/22/43, p. 7.

15 “Anthropogenic climate change refers to the production of greenhouse gases emitted by human activity.” ‘Anthropogenic Climate Change’. Retrieved 25 May 2017, <http://www.global-greenhouse-warming.com/anthropogenic-climate-change.html>.

16 Amongst others due to more extreme weather events taking place, leading to alteration of ecosystems, disruption of food production and water supply, and ultimately even (violent) uprisings. UNHRC, ‘Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General – Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’, 2009, A/HRC/10/61, pp. 8–9; DARA, ‘Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet’ (2nd ed.), 2012. Retrieved 12 April 2017, <http://daraint.org/wp-content/uploads/2012/09/EXECUTIVE-AND-TECHNICAL-SUMMARY.pdf>, p. 17.

However, the wry outcome is that those mostly responsible for emitting GHG emissions, are oftentimes not the ones most vulnerable to the effects, nor the ones with difficult access to justice systems. As the Intergovernmental Panel on Climate Change (IPCC) has stated: “People who are socially, economically, politically, institutionally, or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.”¹⁷ This makes one wonder what help the international human rights framework can offer to an individual squeezed in between these actors.

All States have, in accordance with general human rights obligations, committed to respect, protect, promote and fulfil the right to life. Merely *refraining* from interference is insufficient; States also have a due diligence obligation to *protect* individuals against harm resulting from external sources, including climate change. At the very least, this includes taking effective measures against foreseeable and preventable loss of life, such as weather-related hazards, and to mitigate and adapt to climate change. This is underlined by the Human Rights Committee’s General Comment on the right to life, which states that States must take positive measures against possible threats.¹⁸

1.2 A (Stronger) Human Rights-Based Approach

The most important reason for a (stronger) human rights-based approach, is the lack of an international environmental court. Despite the often criticised fragmentation in international law and international jurisdictions, resulting in numerous issue-specific regimes and rules, at least for human rights law this

Simon Caney, ‘Climate Change, Human Rights and Moral Thresholds’, in: S. Humphreys (ed.), *Human Rights and Climate Change*, Cambridge University Press, 2011, pp. 76–78; IPCC, ‘Summary for Policy Makers’, in C.B. Field and others (eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2014, pp. 6–8; OHCHR, ‘Understanding Human Rights and Climate Change’, Submission to 21st COP of the UNFCCC, 27 November 2015, pp. 13–14.

17 IPCC, ‘Summary for Policy Makers’, in C.B. Field and others (eds.), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, 2014, p. 6.

18 Rio Declaration on Environment and Development, 12 August 1992, United Nations Conference on Environment and Development, 3–14 June 2012, A/CONF.151/26 (vol. 1) / 31 ILM 874, p.13; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, ‘Climate Change and Human Rights’, 2015, p. 13; UNHRC, ‘Draft General Comment No 36 – Article 6: Right to Life’, prepared by Y. Shany and N. Rodley, 2 September 2015, 115th session, UN Doc CCPR/C/GC/R.36/Rev.2, para. 23.

also resulted in human rights courts and institutions. International environmental law, however, in this regard missed the boat.¹⁹ That is, the decentralisation of environmental law resulted in the creation of hundreds of multilateral environmental agreements supplemented by customary norm, but no environmental courts or institutions.²⁰ As these agreements focus on compliance and facilitation, instead of enforcement and sanctions, there is no strong enforcement mechanism in the form of a judicial body that exercises jurisdiction over the implementation of this disorderly jumble of treaties.²¹

States understandably desire to keep the creation of an international environmental court or other litigation-based compliance mechanisms at bay, as it could possibly lead to a dramatic expansion of their obligations – in terms of *ratione temporis* (future generations and intergenerational equity), and *ratione loci* (unlimited geographical scope and extraterritorial responsibility). According to the human rights regime, the State would moreover also be responsible for harm directly caused by third parties. For victims, however, the result is that once domestic remedies have been exhausted, there is virtually nowhere to go. That is, except for perhaps a human rights court.²²

At the moment, however, there is no global binding human rights agreement that explicitly recognises the close interconnection between human rights and the environment, let alone a separate human right to a clean or healthy

- 19 E. Grant, 'International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 156, 158; D. Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 139–140.
- 20 T. Stephens, *International Courts and Environmental Protection*, Cambridge University Press, 2009, pp. 304–305.
- 21 C. Voigt and E. Grant, 'Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 131–132.
- 22 The exception is the Aarhus Convention, which offers procedural human rights on a national level – the right to information, public participation and access to justice – but no sanction regime. UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447, 38 ILM 517; S. Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change', in *Vermont Journal of Environmental Law*, 2008, no. 9, pp. 516–517; D. Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 141–143.

environment.²³ Instead, most human rights bodies make use of an interpretative strategy: they apply existing human rights to environmental issues, and environmentally-sensitive strategies to existing human rights norms and jurisprudence. This is leading to a growing body of human rights jurisprudence related to the environment.²⁴ It is however less clear what the corresponding obligations of governments to address such human rights implications or violations exactly look like, underlining the necessity to expand and exemplify a human rights approach.²⁵

1.3 *Initial Limitations*

Some inherent limitations of the human rights framework must be kept in mind. The first is the individualistic and anthropocentric focus of human rights: if human rights adjudication only considers the effects of the environmental dimension on an individual and his/her particular right, the inherent connection between the interests of the individual and the collective interests of communities in having a healthy environment is ignored.²⁶ This is quite understandable given the founding thoughts behind human rights: to protect the individual against the majority and the State. Nevertheless: “[I]ndividualised justice in environmental disputes is somehow fictitious, ie, suggested by the specific requirements of human rights litigation, but out of tune with the nature of most environmental problems.”²⁷ Secondly, human rights take a *reactive* stance towards environmental degradation, instead of *preventive*. The consequence is often that the damage must have already occurred, thereby

- 23 The two regional human rights treaties that do, next to a number of non-binding instruments, are the African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, 1520 UNTS 363, art. 24; and the Additional Protocol to the American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978, OAS Treaty Series No. 36, art. 11.
- 24 C. Voigt and E. Grant, 'Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, p. 133; D. Shelton, 'Human Rights and Climate Change', in *Buffett Center for International and Comparative Studies Working Paper Series*, 2009, No. 09-002, p. 10.
- 25 UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, 'Climate Change and Human Rights', 2015, pp. 11-12.
- 26 E. Grant, 'International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, p. 159.
- 27 R. Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight', in F. Lenzerini and A.F. Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Hart Publishing, 2014, p. 332.

complicating the possibility of standing (for future generations). Finally, human rights law aims to remedy injuries caused by violations, but it does not cure the source of the violation: environmental degradation.²⁸

2 Greening Existing Human Rights

Greening the already existing human rights paradigm is the most prevalently mentioned strategy for climate change litigation. It is the most simple and uncomplicated way: a widely accepted human rights framework is already in place, and judges increasingly often find creative ways to incorporate environmental aspects into human rights litigation. In the following analysis, I will examine the most important procedural criteria and jurisprudence of the ECtHR in this regards.²⁹

2.1 *Procedural Requirements: Legal Standing and Actio Popularis*

Individual human rights often require *individuals* to apply to a Court. In comparison to other regional systems, the European system has the strictest limitations in this regard. According to the victim requirement of Article 34 ECHR, individuals as well as NGOs and groups of individuals may submit a claim, but the applicant must be “personally affected by an alleged violation of a Convention right”,³⁰ or if there is a serious and imminent risk of being directly affected, a potential victim.³¹ Consequently, the individualistic, victim-centred approach of the ECtHR is reflected in the fact that there is no room for *actio*

28 E. Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’, in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, p. 157; Voigt and E. Grant, ‘Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes’, in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 134–135.

29 It is not my intention to denounce the other two most important regional human rights systems: the Inter-American Commission on and Court of Human Rights and the African Commission and Court on Human and Peoples’ Rights. The procedural requirements there are quite different, allowing more room for environmental and/or group claims, and some interesting cases have been dealt with. However, it would not do justice to only mention these (too) briefly; that is better left to properly discuss in another article.

30 *Karner v Austria*, App. No. 40016/98, ECHR, 2003-IX, para. 25.

31 C. Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’, in *Journal of Environmental Law*, 2008, vol. 20, no. 3, p. 421; Oxford Reference, ‘Actio Popularis’. Retrieved 14 June 2017, <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-72>.

popularis (in Latin literally meaning an action by the people, it is a lawsuit brought by a third party in the interest of the public as a whole).³² As the Court has stated: “Article 34 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* [from an abstract point of view] simply because they feel it contravenes the Convention.”³³

2.2 Substantive Law: An Overview

The ECtHR has adjudicated most environmental cases via Article 2 and Article 8 ECHR. The environmental cases for Article 2, however – the right to life – can be counted on one hand; it turns out that human rights protection is often more successfully achieved through Article 8 – the right to respect for private and family life.³⁴

2.2.1 The Right to Life

Whereas the primary obligation of a State in relation to the right to life is negative,³⁵ in the jurisprudence the ‘doctrine of positive obligations’ has developed. This means that a State must take appropriate steps to safeguard the lives of those within its jurisdiction, even when it is threatened by other (private) persons or activities not directly connected to the State.³⁶ From the Court’s (meagre) case law, it becomes clear that positive obligations may apply in two situations in connection to the environment: dangerous (industrial) activities and natural disasters.³⁷

32 E. Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’, in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, p. 161; F.M. Fleurke and A. de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’, in *Milieu en Recht*, 2016, no. 42, p. 2.

33 *Karner v Austria*, App. No. 40016/98, ECHR, 2003-IX, para. 24.

34 *Öneryıldız v Turkey* [GC], App. No. 48939/99, ECHR, 2004-XII, para. 90; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, p. 18; F.M. Fleurke and A. de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’, in *Milieu en Recht*, 2016, no. 42, pp. 3–4.

35 Article 2(1) ECHR: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

36 *Öneryıldız v Turkey* [GC], App. No. 48939/99, ECHR, 2004-XII, paras. 71–73.

37 I will only discuss the two most relevant cases. For the sake of completeness, a brief mentioning of the other two here is in place. *L.C.B. v UK* was a case about the father’s applicant who had been exposed to radiation from nuclear tests. The applicant later contracted leukaemia, which she claimed was caused by the UK’s failure to warn her parents and to monitor her health. The Court however concluded that there was no causal link between

In *Öneryıldız v Turkey*,³⁸ which concerned a methane gas explosion on a municipal rubbish tip in Istanbul causing the death of thirty-nine people,³⁹ the Court specifically mentioned industrial activities as a situation in which positive obligations could be invoked. The decision was based on two criteria: whether there was a *real and immediate risk* to the lives of the people living nearby, and whether the authorities *knew or ought to have known* this – both conditions were met.⁴⁰ The Court furthermore criticized the fact that the authorities had not informed the people living nearby of the risks, nor was the regulatory framework sufficient. Consequently, Article 2 had been violated both substantively and procedurally.⁴¹ *Budayeva and others v Russia* concerns the second situation: deathly mudslides.⁴² The resulting dispute was not whether it was likely that these would take place, but rather whether the authorities *had known* that it would cause devastation on a larger scale than usual, and had thereby forsaken its positive obligation by failing to mitigate the consequences.⁴³ The Court ruled that given the foreseeable threat to the lives of the population in this hazardous area, and the failure to establish an effective legislative and administrative framework, there was no justification for the authorities' omissions. Again, both the substantive and procedural aspects of Article 2 had been violated.⁴⁴

the radiation and the leukaemia, plus the State could not have known this at that time, thus there was no violation of Article 2. The other case, *Murillo Saldias v Spain*, was about a positive obligation in the event of a natural disaster. The applicants complained the State had not taken necessary measures to prevent deaths caused by a flood, but the applications were found inadmissible because satisfaction had already been obtained at national level and available domestic remedies had not been exhausted. Both cases are therefore not very helpful in relation to environmental degradation and climate change. Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, pp. 36–37.

38 *Öneryıldız v Turkey*, [GC], App. No. 48939/99, ECHR, 2004-XII.

39 *ibid*, para. 10.

40 *ibid*, para. 71.

41 *ibid*, paras. 89–90, 98, 101, 109, 118; S. Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change', in *Vermont Journal of Environmental Law*, 2008, no. 9, p. 532; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, pp. 36–37.

42 *Budayeva and Others v Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, ECHR, 2008-II.

43 *ibid*, paras. 3, 116, 146, 147, 153.

44 *ibid*, paras. 158–159, 165; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, p. 37.

To what extent do these cases establish helpful precedent? The duty of care was similar for both: the authorities knew of the dangers but failed to act and take precautionary measures.⁴⁵ The difference is that the margin of appreciation, already considerable regarding positive obligations, is even broader in response to unpredictable meteorological events or natural disasters – as opposed to man-made danger. That is, *unless* the hazard is clearly identifiable or recurrent, or when potential loss of life is at stake; then the State “has a positive obligation to do everything within the authorities’ power in the sphere of disaster relief for the protection of the right to life”.⁴⁶ The greenhouse effect, however, is precisely one of the few meteorological events *caused by humans*. If it could be proven that a natural disaster is very probably caused by climate change or GHG emissions, and loss of life would be involved, the State could indeed have a strong positive obligation. A climate change-related disaster could then be connected to the omissions of a State in a way comparable to the *Urgenda* case: if a State’s targets to reduce GHG emissions are insufficient in relation to international agreements, it could be held responsible for a violation.⁴⁷

2.2.2 The Right to Respect for Private and Family Life

Article 8(1) ECHR concerns the quality of private life and the enjoyment of the amenities of one’s home – the “private sphere”.⁴⁸ The environmental degradation must affect one directly herein, as established in *Kyrtatos v Greece*: “[T]he crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person’s private or family sphere and not simply the general

45 D. Shelton, ‘Human Rights and Climate Change’, in *Buffett Center for International and Comparative Studies Working Paper Series*, 2009, No. 09–002, p. 18.

46 *Budayeva and Others v Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, ECHR, 2008-II, paras. 135, 174, 175; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, pp. 38–39.

47 S. Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’, in *Vermont Journal of Environmental Law*, 2008, no. 9, pp. 532–533; F.M. Fleurke and A. de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’, in *Milieu en Recht*, 2016, no. 42, p. 7.

48 E.g. *Fadeyeva v Russia*, App. No. 55723/00, ECHR, 2005-IV, para. 70. Art. 8(1) ECHR: “Everyone has the right to respect for his private and family life, his home and his correspondence.” This may also be breached by intangible sources such as noise, emissions or smells. Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, p. 45.

deterioration of the environment”.⁴⁹ Moreover, depending on the circumstances of the case, the negative impact must reach a certain threshold of harm.⁵⁰ Both conditions illustrate the inherently individualistic approach of the ECtHR.⁵¹

The first, in retrospect landmark, environmental case of the ECtHR was *López Ostra v Spain*. Herein it was established that a State’s positive obligations regarding the environment also cover activities carried out by private third parties.⁵² The Court did not confirm a positive duty to prevent pollution, but found that the government did not strike a fair balance between the town’s economic interests and the applicants’ rights. Even if severe environmental pollution does not seriously endanger individuals’ health, it can still affect their well-being and the enjoyment of their rights enshrined in Article 8.⁵³ Similarly, in *Fadeyeva v Russia*, State responsibility was invoked for industrial activities with a large environmental impact, since the failure to regulate the private industry resulted in environmental degradation affecting human rights.⁵⁴

As is the case with Article 2, it is important whether the authorities knew or ought to have known that a violation could or would take place, whereby the Court often refers to the precautionary principle, originating from international environmental law. In *Tătar v Romania*, even though the applicants failed to establish a causal link between the pollution and their health symptoms, environmental impact assessments still indicated a substantial threat to their well-being. The State had known this and thus violated its positive obligation to take reasonable preventive measures to, notably, respect the applicants’

49 *ibid* 46; Shelton (n 50) 149; *Kýratos v Greece*, App. No. 41666/98, ECHR, 2003-VI 257, paras. 44, 46–47, 52–53.

50 *Fadeyeva v Russia*, App. No. 55723/00, ECHR, 2005-IV, para. 69.

51 E. Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’, in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 162–163.

52 F. Francioni, ‘International Human Rights in an Environmental Horizon’, in *The European Journal of International Law*, 2010, vol. 21, no. 1, p. 49.

53 *López Ostra v Spain*, ECtHR, 1994, Series A no 303-C, paras. 51, 58, 65; S. Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’, in *Vermont Journal of Environmental Law*, 2008, no. 9, pp. 529–530; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, p. 47.

54 F. Francioni, ‘International Human Rights in an Environmental Horizon’, in *The European Journal of International Law*, 2010, vol. 21, no. 1, p. 49. *Fadeyeva v Russia*, App. No. 55723/00, ECHR, 2005-IV, paras. 87–88, 133–134; S. Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’, in *Vermont Journal of Environmental Law*, 2008, no. 9, p. 530; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, p. 48.

ability to enjoy a safe and healthy environment.⁵⁵ Furthermore, a significant risk that is *likely* to happen, even if no actual harm has taken place yet, could also lead to a violation.⁵⁶ This was established in *Taşkın and Others v Turkey*: pollution which “may affect” individuals, or dangerous activities to which they are “likely to be exposed” are also covered by Article 8. Otherwise the State’s positive obligation would be “set at naught”.⁵⁷

2.2.3 Combining Article 2 and 8

The only case thus far in which the Court discussed both Article 2 and 8, is the *Guerra v Italy* case.⁵⁸ The Court judged that public authorities should have controlled emissions from industrial activities in order to prevent smells, noises or fumes, and had violated their positive obligation under Article 8 to provide the public with information about the risks of living there.⁵⁹ Article 2 was considered in two concurring opinions: Judge Walsh said that it “has also been violated” because it “also guarantees the protection of the bodily integrity of the applicants”.⁶⁰ According to Judge Jambrek, “[t]he protection of health and physical integrity is, in my view, as closely associated with the ‘right to life’ as with the ‘respect for private and family life’.” Withholding information about health may namely also amount to *intentionally* depriving someone of his life – a requirement of Article 2. “It may therefore be time for the Court’s case-law on

55 *Tătar v Romania*, App. No. 67021/01, ECtHR, 27 January 2009 (French translation); Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, pp. 49–50.

56 E. Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’, in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, p. 162; F.M. Fleurke and A. de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’, in *Milieu en Recht*, 2016, no. 42, pp. 4–5.

57 Through its interpretation the Court hereby introduced the requirements of informed process and consultation from the 1998 Aarhus Convention. *Taşkın and Others v Turkey*, App. No. 46117/99, ECHR, 2004–X, paras. 107, 113, 119; F. Francioni, ‘International Human Rights in an Environmental Horizon’, in *The European Journal of International Law*, 2010, vol. 21, no. 1, pp. 49–50; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, p. 51; F.M. Fleurke and A. de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’, in *Milieu en Recht*, 2016, no. 42, p. 5.

58 *Guerra and Others v Italy*, 116/1996/735/932, Reports of Judgments and Decisions, 1998-I.

59 *ibid.*, paras. 12–16, 41, 60–62; S. Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’, in *Vermont Journal of Environmental Law*, 2008, no. 9, pp. 531–532; Council of Europe, *Manual on Human Rights and the Environment* (2nd ed.), 2012, pp. 52–53.

60 Judge Walsh, Concurring Opinion in: *Guerra and Others v Italy*, 116/1996/735/932, Reports of Judgments and Decisions, 1998-I, p. 22.

Article 2 to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life.”⁶¹

3 The Lack of a Substantive Environmental Right

The current human rights framework is thus not unequivocally well-equipped to deal with environmental degradation and its spread-out effect on communities and societies. It “remains blind to the intrinsic linkage between the individual and the collective interests of society”. We therefore need jurisprudence that acknowledges the collective dimension and the *sine qua non* (essential nature) of a clean environment for human security and welfare.⁶² Perhaps an explicit, substantive human right to a clean or healthy environment would help,⁶³ but what would such a right look like, and more importantly, would it result in more effective legal protection?⁶⁴

3.1 Formulating a Substantive Right

“Not every social problem must result in a claim which can be expressed as a human right”.⁶⁵ Would there be any added value in translating the problems caused by environmental degradation and climate change into a human right? Firstly, our current legal architecture is organised in such a way that elevating the necessity of a clean environment into the legal status of a distinct human right, would provide it with the weight that is needed to equally balance it against other human rights.⁶⁶ A separate right would also function as a stronger

61 Judge Jambrek, Concurring Opinion in: *Guerra and Others v Italy*, 116/1996/735/932, Reports of Judgments and Decisions, 1998-I, p. 24.

62 F. Francioni, ‘International Human Rights in an Environmental Horizon’, in *The European Journal of International Law*, 2010, vol. 21, no. 1, pp. 42–44 (quote p. 44).

63 Since there is no consensus about the precise formulation of such a right – as will be illustrated in Section 3.1 – I will use terminology such as ‘clean’ or ‘healthy’ interchangeably.

64 The idea of a substantive right is not something of the past years, but has already been in the making for a few decades at UN level. The scope of this article does however not allow me to present an overview of that development.

65 D. Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’, in *Stanford Journal of International Law*, no. 28, p. 121.

66 For example, in the ICESCR the essential features of a clean environment are to some extent already protected through the right to an adequate standard of living and the right to health. At the same time, however, the Covenant stipulates in Article 1 the right of people to “freely pursue their economic, social and cultural development” and to “freely dispose of their natural wealth and resources”. If it would thus come to a conflict between

and preventive tool for victims to seek redress for wrongs committed. It would prevent them from having to specifically prove that another existing human right has been violated by environmental degradation – which is already dependent on a court's willingness to establish that connection.⁶⁷ Thirdly, a new human right represents a crucial ethical component in the response to climate change. The moral weight and insistence of human rights on equality and individual dignity forces decision-makers to consider both human and global consequences of their actions. A new human right might thus help in reinforcing universal empathy.⁶⁸

The right to environment has been awarded a plethora of options for adjectives, such as healthy, clean, safe, secure, adequate, decent, viable, or satisfactory. For the right to a healthy environment, for example, claimants would only have to prove that a certain activity caused an unhealthy environment to live *in*; not necessarily that actual damage to their health has already manifested itself. The Ksentini Draft Principles present another approach, in which not only a new right is formulated, but also various indispensable corollaries: freedom from pollution, protection and preservation of the environment, and timely assistance in case of a natural or other disaster.⁶⁹ Alternatively, a right to the environment is often categorised as a so-called third-generation right.⁷⁰ Certain rights are more prone to affect groups of people than individuals, the protection of which can only be realised through the joint efforts of various

economic development – which is enshrined as a human right, and natural resource exploitation or environmental protection – which is 'only' an interest, the former would probably prevail. A. Boyle, 'Human Rights and the Environment: Where Next?', in *The European Journal of International Law*, 2012, vol. 23, no. 3, pp. 628–629.

- 67 S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, pp. 90–91, 98–99, 114.
- 68 A. Boyle, 'Human Rights and the Environment: Where Next?', in *The European Journal of International Law*, 2012, vol. 23, no. 3, p. 633; C. Gearty, 'Do Human Rights Help or Hinder Environmental Protection?', in *Journal of Human Rights and the Environment*, 2010, vol. 1, no. 1, pp. 14, 21–22.
- 69 Ksentini Draft Principles: UN ECOSOC, 'Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned Human Rights and the Environment', Final Report Prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur, 1994, E/CN.4/Sub.2/1994/9, art. 5–12; S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, p. 97.
- 70 This in addition to first-generation – civil and political – and second-generation rights – economic, social and cultural. I will not go into the discussion about the value of different 'generations', it is simply one of the ways to consider an environmental human right.

actors.⁷¹ However, one could also say that all human rights are to some extent dependent on concerted efforts of different actors, and that most human rights violations have an impact on more than one individual.⁷² Despite the controversial nature of third-generation rights, many scholars nevertheless do agree on some sort of a collective dimension regarding the beneficiaries of a new right to the environment – as opposed to the reductionist, individualistic use of most human rights.⁷³

3.2 *Inherent Problems with a Substantive Right*

The foremost objection to a new right is the anthropocentric premise. According to anthropocentrism, human beings are the most superior and significant entities of the universe, while nature's resources are there to be exploited – a view opposed to for example ecocentrism.⁷⁴ Hence, the *human* right to the environment is inherently focused on humans, leading to the exclusion of other species.⁷⁵ However, since this article focuses on using human rights as an instrument for protection against climate change, a new human right grounded in anthropocentrism is not necessarily problematic, but rather an inevitable characteristic of a human-made legal system.⁷⁶ Besides, perhaps the anthropocentric nature of human rights is not black-or-white, but more a matter of degree and could function complementarily. Even if there is a growing perception that the existence of primarily *our* lives is threatened through the destruction of the environment, we nevertheless achieve the same goal: protecting both ourselves and the environment. It is about reconciling the two agendas:

- 71 K. Vasak, in: S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, pp. 109–110.
- 72 D. Shelton, 'Human Rights, Environmental Rights, and the Right to Environment', in *Stanford Journal of International Law*, no. 28, pp. 124–125.
- 73 S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, p. 113; F. Francioni, 'International Human Rights in an Environmental Horizon', in *The European Journal of International Law*, 2010, vol. 21, no. 1.
- 74 Jonathan Padwe, 'Anthropocentrism' in *Oxford Bibliographies*, 2015. Retrieved 7 June 2017, <http://www.oxfordbibliographies.com/view/document/obo-9780199830060/obo-9780199830060-0073.xml>.
- 75 M.R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, p. 14.
- 76 *ibid*, pp. 14–15; S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, pp. 113–114.

by holding governments accountable for human rights violations caused by climate change, the environment will indirectly also be taken care of.⁷⁷

The second objection is the indeterminacy on the definition of a right to the environment. It confronts us with moral choices what standard of life we envision, and whether we only aim to protect human life or also the aesthetic value of nature.⁷⁸ Although too complex to solve here, it is perhaps not truly problematic if this indeterminacy remains. On the one hand, the cause of environmental- and human rights protection will not be improved by proposing a generic human right to the environment.⁷⁹ On the other hand, the same vagueness surrounds, for example, the concept of sustainable development, but this has not prevented the United Nations from promoting this as a central objective in its policies. In other words: "Indeterminacy is thus a problem, but not necessarily an insurmountable one."⁸⁰ One should also keep in mind the importance of judicial interpretation. The judiciary is there to refine and interpret broadly defined rights, and to evaluate competing moral claims – that is what constitutes the main drive behind the evolvement of human rights law.⁸¹

Lastly, the recognition of a new right may be redundant: it could detract attention from existing rights, possibly overpowering and devaluing the 'old' ones, nor does it necessarily contribute to the credibility and integrity of the system. Nevertheless, it may be plainly necessary to translate new claims into

77 M.R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, p. 14; S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, pp. 113–114; C. Redgwell, 'Life, The Universe And Everything: A Critique Of Anthropocentric Rights' in A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, pp. 71, 73–74, 83, 86–87.

78 M.R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, pp. 10–12.

79 G. Handl, 'Human Rights and Protection of the Environment', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Brill Nijhoff, 2001, p. 313.

80 A. Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, pp. 43, 51.

81 S. Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', in *Tulane Environmental Law Journal*, 2002–2003, pp. 112–113; M.R. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in A.E. Boyle and M.R. Anderson (eds.), *Human Rights Approaches to Environmental Protection*, Oxford University Press, 1996, pp. 11–12.

rights if emergent threats, that are touching upon human dignity and well-being, cannot be solved anymore at a domestic level. The human rights system should be dynamic and able to respond to changing needs and perspectives.⁸²

4 Public Interest Litigation

In a nutshell, Public Interest Litigation (PIL) may be defined as litigation in the interest of and for the protection of the public in general.⁸³ It is used as a strategy by claimants in light of an alleged shortcoming by the government to safeguard a public interest and bring about change of the status quo via the judiciary, and is as such an important weapon for marginalised groups. The cases are often focused on the future and put emphasis on idealistic aspects.⁸⁴ A public interest cannot be individualised and is of such a general nature that it concerns many or even all members of a society.⁸⁵ The importance of protecting the environment has been referred to as a “common concern” or “common heritage” of mankind, thereby qualifying as a true public interest.⁸⁶ Lastly, a crucial role is played by NGOs in PIL, which use the law as a tool to seek policy changes.⁸⁷

82 The final question whether the human framework is the most suitable for solving the issues of protection against climate change, for example regarding its inherent limitation of anthropocentricity and individualism, is a very legitimate one. Perhaps the focus should not even be on any legal framework, but for example on policy measures or technical bodies. This is unfortunately beyond the scope of this article to discuss here, but would certainly be an interesting topic for future research.

83 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447, 38 ILM 517, art. 9(2); C. Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’, in *Journal of Environmental Law*, 2008, vol. 20, no. 3, p. 419.

84 L. Enneking and E. de Jong, ‘Regulering van Onzekere Risico’s via Public Interest Litigation?’, in *Nederlands Juristenblad*, 2014, no. 23, pp. 1–3; R. van Gestel and M. Loth, ‘Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?’, in *Nederlands Juristenblad*, 2015, no. 37, p. 6.

85 B. van den Broek and L. Enneking, ‘Public Interest Litigation in the Netherlands, A Multidimensional Take on the Promotion of Environmental Interests by Private Parties Through the Courts’, in *Utrecht Law Review*, 2014, vol. 10, no. 3, p. 83.

86 United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3, Preamble and art. 136; UNEP Convention on Biological Diversity, 1992, 1760 UNTS 79, 31 ILM 818, Preamble.

87 C. Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’, in *Journal of Environmental Law*, 2008, vol.

4.1 *The (Dis)Advantages of a PIL Approach*

PIL is a successful tool to exercise control over public authorities, and help push (the enforcement of) urgent matters to the forefront. Regarding access to justice for NGOs, specifically, PIL conduces to objective and impartial law-suits, and strengthens the rule of law relevant for the environment and human rights. Oftentimes NGOs have the advantage of being more deeply involved in the subject matter with better access to resources.⁸⁸

However, a rather crucial worry concerns the suitability of human rights courts as the right forum to address PIL issues regarding the environment. One must keep in mind that the rights system of the ECHR is in first instance to be protected by national courts – one can only bring a case to the human rights court if all available national remedies have been exhausted. Therefore, improving democratic access should happen at the national level: “Bringing a claim before these international bodies can thus not be said to constitute a major gain in democracy”.⁸⁹ Another fundamental dilemma concerns the relation between procedural and substantive rights. If procedural rights would allow broader standing, whereas substantive rights would remain the same, would this not lead to the litigation of other people’s rights? This clashes with a fundamental concept in human rights law: the autonomy of the person.⁹⁰ PIL overrules the courts’ primary function of safeguarding the *individual’s* interests by representing the rights and interests of a group of people, with the danger of stepping (unintentionally) on other people’s rights. Nevertheless, collective PIL actions represent one of the few ways in which citizens and NGOs can exercise counterpressure to powerful governments and other big players.⁹¹

4.2 *Successful Cases*

Contrary to the international practice, at the national level a slowly but steadily emerging trend of PIL cases concerning the environment may be discerned, presenting interesting examples of how judges apply international legal norms.⁹²

20, no. 3, p. 420; O. Spijkers, ‘The Urgenda Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?’, 2017, p. 3.

88 C. Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’, in *Journal of Environmental Law*, 2008, vol. 20, no. 3, p. 444.

89 Ibid, p. 446.

90 Ibid, p. 445.

91 J. Teunissen, ‘De Ironie van de SGP-Vrouwenzaak Schrap de Algemeen Belang-Actie uit 3:305a BW!’, in *Nederlands Juristenblad*, 2008, no. 25, p. 5.

92 In most cases only constitutional norms or other domestic law is used. No matter how interesting, these cases therefore unfortunately fall outside the scope of this research.

4.2.1 Urgenda

The *Urgenda* case is a classic example of a PIL case. Instigated by a small societal organisation together with 886 co-plaintiffs, the case served a future-oriented, idealistic public interest of importance beyond immediate interests.⁹³ In Dutch law, the rules for standing are rather flexible: Article 3:305a of the Dutch Civil Code specifically regulates PIL, as it allows a foundation or association to submit a claim for the protection of the general interest or collective interest of other persons, insofar its by-laws promote these interests. The Court consequently allowed *Urgenda*'s admissibility based on this article.⁹⁴ It thereafter based its argumentation on Dutch tort law and the duty of care (Article 6:162 of the Dutch Civil Code), but dismissed the invocation of Article 2 and 8 ECHR by *Urgenda*. The judge did nonetheless use the human rights norms as "a source of inspiration for the interpretation and the realisation" of the private law norms and the discretionary power of the State, hereby referring to the wide margin of appreciation enjoyed by ECHR Member States in implementing climate policies.⁹⁵ This has been called an example of the horizontal effect of European human rights jurisprudence, as opposed to adopting a vertical obligation, and has been used more often in the Netherlands.⁹⁶ Several commentators are quite enthusiastic about this approach, as it does give the ECHR some influence but avoids a difficult discussion about the State's exact boundaries of discretion.⁹⁷

Nevertheless, one cannot help but notice that the Court brushed aside the question of applying the ECHR rather swiftly. It held that *Urgenda* was not an (in)direct victim in light of Article 34 ECHR, but also did not elaborate on the question of whether the State had violated its obligations under international

93 M. Loth, 'Climate Change Liability After All: A Dutch Landmark Case', in *Tilburg Law Review*, 2016, no. 21, p. 21.

94 3:305a BW; *Urgenda Foundation v the State of the Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196, C/09/456689 / HA ZA 13-1396, paras. 4.4–4.9.

95 *Urgenda Foundation v the State of the Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196, C/09/456689 / HA ZA 13-139, paras. 4.45, 4.46; R. Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v the State of the Netherlands*', in *Journal of Energy & Natural Resources Law*, 2016, vol. 34, no. 2, p. 5; M. Loth, 'Climate Change Liability After All: A Dutch Landmark Case', in *Tilburg Law Review*, 2016, no. 21, pp. 15–16.

96 S. Roy and E. Woerdman, 'Situating *Urgenda v the Netherlands* within Comparative Climate Change Litigation', in *Journal of Energy and Natural Resources Law*, 2016, vol. 34, no. 2, p. 5.

97 For example: *ibid*, p. 5; F.M. Fleurke and A. de Vries, 'Urgenda: Convergentie tussen Klimaat en Mensenrechten?', in *Milieu en Recht*, 2016, no. 42, pp. 7–8.

human rights law towards the 886 co-plaintiffs.⁹⁸ It said that, even if these individuals could invoke the ECHR, the outcome would not be any different. Therefore, the co-plaintiffs lacked sufficient distinct interests, and their claim was rejected.⁹⁹

By employing this reasoning, in fact, the Court turned a procedural norm into a substantive issue. Article 34 ECHR is a formal rule, only applicable to individual admissibility *before the ECtHR*. However, this does not automatically entail that Urgenda is unable to invoke the substantive norms of Article 2 and 8 ECHR *before a Dutch Court*. Namely, the provision that does warrant the ability to invoke Article 2 and 8 ECHR is the abovementioned Article 3:305a of the Dutch Civil Code. In the scenario painted by the Court, the groups of natural persons on behalf of whom Urgenda instituted the proceedings, *can* invoke Article 2 and 8 for interference with their rights. Urgenda, however, may institute these proceedings on their behalf, but *cannot* invoke these same substantive rights. Consequently, the effectiveness of this legal protection would be annulled. Whether Urgenda would be declared admissible before the ECtHR, should be seen as separate from the questions which ECHR provisions it may provoke in a national procedure.¹⁰⁰

4.2.2 More Promising PIL Examples

In 2015, Greenpeace Southeast Asia together with a coalition of civil society organisations submitted a petition to the Commission on Human Rights of the Philippines.¹⁰¹ They requested an investigation of the responsibility of a group

98 *Stichting Urgenda v Staat der Nederlanden*, Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, para. 4.45; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, adopted 4 November 1950, entered into force 3 September 1953, ETS No 5, art. 34 ECHR, Individual Applications: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. ...”

99 *Stichting Urgenda v Staat der Nederlanden*, Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, para. 4.109.

100 *Stichting Urgenda v Staat der Nederlanden*, Memorie van Antwoord [Reply to the Appeal], Gerechtshof Den Haag [Court of Appeal The Hague], April 2017, Case no. 200.178.245, paras. 11.3–11.13.

101 A constitutional body that can investigate human rights violations and make recommendations to the government.

of 47 so-called Carbon Majors for (threats of) human rights violations¹⁰² resulting from the effects of climate change.¹⁰³ The reasoning was that if the government's responsibility could be invoked for safeguarding the rights as laid down in the signed or ratified international human rights treaties, it would also be responsible for the actions of the Carbon Majors as third parties violating the Filipinos' rights.¹⁰⁴ This marked the first climate change related complaint submitted to a national human rights institution, which included reliance on international human rights norms.¹⁰⁵

102 Including Art. 6 ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

103 Meaning industrial carbon producers: oil, coal, cement and mining companies. *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, CHR-NI-2016-0001, pp. 7–10, 31.

104 *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, CHR-NI-2016-0001, pp. 6–7; Annex A presents a list of international human rights treaties to which the Philippines are a State Party: http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/Annex_A-Non-Exhaustive_List_of_International_Human_Rights_Treaties_Signed_and_or_Ratified_by_the_Philippines.pdf; Environmental Law Alliance Worldwide (ELAW), *amicus curiae* brief, 7 November 2016, for: *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, pp. 6–7.

105 J. Vidal, 'World's Largest Carbon Producers Face Landmark Human Rights Case', in *The Guardian*, New York, 27 July 2016. Retrieved 29 June 2017, <https://www.theguardian.com/environment/2016/jul/27/worlds-largest-carbon-producers-face-landmark-human-rights-case>; LexisNexis, 'Climate Change Litigation – Philippines Investigates Carbon Majors' Responsibility for Human Rights Beaches', 16 August 2016; M. Darby, 'Carbon Majors Respond to Climate and Human Rights Inquiry', in *Climate Home*, 27 October 2016. Retrieved 29 June 2017, <http://www.climatechangenews.com/2016/10/27/carbon-majors-respond-to-climate-and-human-rights-inquiry/>; M.L. Banda and S. Fulton, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law', in *The Environmental Law Reporter*, 2017, vol. 47, no. 2, p. 12; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, 'The Status of Climate Change Litigation – A Global Review', 2017, pp. 21–22. For the Petition and other documents please see: Greenpeace, 'The Climate Change and Human Rights Petition', in *Greenpeace USA*, 28 July 2016. Retrieved 24 May 2017,

In 2017, the so-called Swiss Grannies, a group of over 450 women of 65 years and older, who also said to represent “the general public and future generations”, launched a legal complaint before the Swiss Federal Administrative Court. They demanded the government take all necessary measures to reduce GHG emissions to such an extent that Switzerland would meet the “well-below-2-degree-C-target”, as they refused to wait until actual harm would have manifested itself. The claim was based on the national constitutional principles of precaution and sustainability, and on the positive duties of Article 2 and 8 ECHR.¹⁰⁶ However, since the Swiss legal system does not have a general right to popular action, it was argued that the senior women the association represents classify as a particularly vulnerable population group, and were as such especially affected in their legitimate interests by climate change induced heat waves. Consequently, in the capacity of the association they would have the right to take this to Court.¹⁰⁷

5 Intergenerational Justice

Intergenerational justice¹⁰⁸ entails the premise that future generations have legitimate claims or rights against present generations, who in turn have duties towards future generations.¹⁰⁹ This concerns distributive justice: “[T]he level of mitigation the current generation must bear in order to offset the harmful climate change impacts and higher adaptation costs that would impact future

<http://www.greenpeace.org/seasia/ph/press/releases/Worlds-largest-carbon-producers-ordered-to-respond-to-allegations-of-human-rights-abuses-from-climate-change/The-Climate-Change-and-Human-Rights-Petition/>.

106 Press release Greenpeace. Retrieved 25 October 2016, <http://www.greenpeace.org/international/en/press/releases/2016/Swiss-Grannies-launch-legal-challenge-to-demand-stronger-climate-action/>; <http://www.lse.ac.uk/GranthamInstitute/litigation/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>.

107 *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council (Verein KlimaSeniorinnen Schweiz v Bundesrat)*, 25 November 2016, paras. 18–20; M.L. Banda and S. Fulton, ‘Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law’, in *The Environmental Law Reporter*, 2017, vol. 47, no. 2, p. 4.

108 The terms ‘equity’ and ‘justice’ will be used interchangeably, since they basically mean the same.

109 Stanford Encyclopedia of Philosophy, ‘Intergenerational Justice’, 10 August 2015. Retrieved 9 June 2017, <https://plato.stanford.edu/entries/justice-intergenerational/index.html#note-1>.

generations".¹¹⁰ Future generations – or to be more precise, the individuals comprising future generations – must be envisioned as a patchwork of generations overlapping one another.¹¹¹ They will be more susceptible to the long-term effects of climate change, as the aggravating impact will bear disproportionately on them. Moreover, not only will the consequences of climate change *directly* interfere with their enjoyment of human rights; the (side-)effects of measures of adaptation and mitigation might also *indirectly* interfere with their enjoyment of human rights.¹¹² The question is therefore whether intergenerational justice can be incorporated into the human rights spectrum.

5.1 Legal Framework

The legal framework surrounding intergenerational justice is still largely a theoretical exercise. It depends, respectively, on establishing standing, duties and proving a violation. Although an interesting thought experiment, I will only very briefly sketch the legal threads, putting the centre of gravity on the discussion of case law.

The first component, legal standing, can be demonstrated by fulfilling two conditions. Firstly, the concerned party must have a concrete, even "special and long standing" interest in the matter. The 'interest' would be the bigger effects and costs future generations will suffer from because of climate change, and their threatened ability to enjoy their human rights.¹¹³ The second condition is a threshold test: there must be a real threat, or even merely a *risk* of

110 R. Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation', in *Tilburg Law Review*, 2016, no. 21, pp. 33–34.

111 When talking about generations, I mean *individuals* comprising generations. To make this read as accessible as possible, I will often just mention the word 'generation'.

112 Such as the rising sea levels, droughts, floods, and transmittable diseases. R. Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation', in *Tilburg Law Review*, 2016, no. 21, pp. 35–36; B. Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice', in *Netherlands Quarterly of Human Rights*, 2016, vol. 34, no. 3, pp. 206–207, 212–213, 220.

113 T. Allen, 'The Philippine's Children Case: Recognizing Legal Standing for Future Generations', in *Georgetown International Environmental Law Review*, 1993–1994, no. 6, pp. 730–731; R. Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation', in *Tilburg Law Review*, 2016, no. 21, pp. 37–38.

harm to establish standing, if that would lead to the possibility of reducing that risk. Clearly, the risks of climate change for human rights are real, and having legal standing would increase the probability of reducing these.¹¹⁴ So far, the two requirements for legal standing have been met.¹¹⁵

The second component are duties: if the current actions of present generations will influence the future generations' human rights, they also have a duty to refrain from acting in a way that would negatively influence these.¹¹⁶ Based on extra-territorial jurisdiction,¹¹⁷ as long as a State has the ability to affect the rights of its future generations, it must exercise its powers and execute its duties in a way consistent with human rights law. Not only must the State refrain from taking action that has a high chance of negatively impacting the human rights of future generations; it must also take adaptation measures against the damaging effects of climate change; and address those negative impacts that can be predicted with some certainty.¹¹⁸

The third component is to establish when a State will have violated a duty. Is it possible to prove the causal connection between the breach of a human right and the impacts of climate change?¹¹⁹ It must first be proven that *a specific harm* can be attributed to a State, which is complicated by the delay in time between cause and effect. The second, arguably even harder, step is tracing the causal connection between the emitters and the victims, thus to attribute the harm to the actions or omissions of *a specific State*. With multiple

114 R. Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation', in *Tilburg Law Review*, 2016, no. 21, pp. 37–38.

115 An important question is who can represent the standing of future generations. There are several options, for example by living persons representing future generations, such as in the *Swiss Grannies* case, by NGOs, integrating future generations' needs with actions to protect the global commons comparable to *erga omnes* actions, or by an appointed ombudsman or legal guardian, in a proxy-type of representation.

116 B. Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice', in *Netherlands Quarterly of Human Rights*, 2016, vol. 34, no. 3, pp. 214–216.

117 The existence of this has been established in the ICJ's *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, in A. Boyle, 'Human Rights and the Environment: Where Next?', in *The European Journal of International Law*, 2012, vol. 23, no. 3, pp. 636–638, 640.

118 According to the duties to respect, protect and fulfil. B. Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice', in *Netherlands Quarterly of Human Rights*, 2016, vol. 34, no. 3, pp. 215–218.

119 *ibid* 218.

contributors and the cumulative effect of GHG emissions, this still seems quite impossible.¹²⁰

5.2 *Intergenerational Justice Worldwide*

Standing to future generations has not yet been awarded in regional human rights courts, but it has been in a number of national cases. The first worldwide landmark case in which future generations were granted the right to a healthy environment, was the *Minors Oposa v Factoran* case, also known as the *Philippine Children's case*. A group of children, acting on their own and future generations' behalf, requested their government cancel timber licenses for logging in the country's rainforests, as this would cause irreparable damage to them and future generations, violating their constitutional right to a healthy environment.¹²¹ The Supreme Court ruled in favour of the applicants both substantively and procedurally: it granted them standing to preserve their generation's right to a healthy environment, and the obligation to ensure its protection on behalf of future generations based on the principle of intergenerational justice and – responsibility.¹²²

Also in the *Urgenda* case standing for future generations was explicitly granted by the Dutch District Court. *Urgenda* had initiated proceedings on behalf of three groups of people: current generations of Dutch citizens, future generations of Dutch citizens, and current and future generations of citizens

120 R. Johnston, 'Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation', in *Tilburg Law Review*, 2016, no. 21, p. 40; B. Lewis, 'Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice', in *Netherlands Quarterly of Human Rights*, 2016, vol. 34, no. 3, pp. 219–220.

121 The happenings leading to the *Minors Oposa* case are truly fascinating. This case was initiated by Antonio Oposa, a lawyer from Manila. Inspired in Norway, his vision from the start was that the real parties in such a case had to be children and children yet unborn. However, out of fear for the powerful logging companies and the corrupt government, no one dared to join him. Hence he decided to let his children appear as applicants – the oldest was three and a half years old, the youngest nine months. Thus the case was filed on behalf of Oposa and his children, other parents and children and children of the future. Hence the name: *Minors Oposa*. – *Juan Antonio Oposa et al v the Honourable Fulgencio Factoran Jr, Secretary of the Department of the Environment and Natural Resources et al*, Supreme Court of the Philippines, 30 June 1993, GR No 101083; O.A. Houck, 'Light from the Trees: The Stories of *Minors Oposa* and the Russian Forest Cases', in *Georgetown International Law Review*, 2007, no. 19, p. 334.

122 T. Allen, 'The Philippine's Children Case: Recognizing Legal Standing for Future Generations', in *Georgetown International Environmental Law Review*, 1993–1994, no. 6, p. 713; O.A. Houck, 'Light from the Trees: The Stories of *Minors Oposa* and the Russian Forest Cases', in *Georgetown International Law Review*, 2007, no. 19, pp. 333–338.

abroad. The Court interpreted the notion of sustainability to include a global and intergenerational dimension: when Urgenda is representing the right of current and future generations to live in a safe and healthy environment and to have availability to natural resources, it is just as well pursuing the interest of a sustainable society. It would simply not be feasible for Urgenda to represent national, but not future or transnational interests. Consequently, it was allowed standing for future generations.¹²³

On the other side of the world, in *Rabab Ali v Pakistan* a petition was filed by a seven-year-old girl through her father, on behalf of present and future generations. She challenged various government (in)actions relating to the continued exploitation of Thar coal, which would drastically increase Pakistan's GHG emissions, and worsen air pollution and global warming. Consequently, she alleged that the constitutional right to life of herself and future generations would be violated. As a first step, the Supreme Court overruled a registrar's objection regarding her right as a minor to file a PIL case and regarding the representation of future generations.¹²⁴ Finally, dealing with adaptation commitments, in *Leghari v Federation of Pakistan* a Pakistani farmer filed a PIL case against his national and regional governments for failing to carry out several climate change policies and to address corresponding vulnerabilities. Interestingly, the Court included in its judgment that the rights to life and dignity were violated and should be read in light of, *inter alia*, the environmental principle of intergenerational equity.¹²⁵

123 It was decided that the State does not have liability for harms suffered by future generations of foreign citizens, but it does have a duty of care towards current and future generations in the Netherlands, and current generations abroad in as far as the transboundary (in)action of the Dutch State would affect them. *Urgenda Foundation v the State of the Netherlands*, District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7196, C/09/456689 / HA ZA 13-1396, paras. 4.4.-4.10; R. Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands', in *Journal of Energy & Natural Resources Law*, 2016, vol. 34, no. 2, pp. 1, 5; M. Loth, 'Climate Change Liability After All: A Dutch Landmark Case', in *Tilburg Law Review*, 2016, no. 21, pp. 5, 13, 21; S. Roy and E. Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation', in *Journal of Energy and Natural Resources Law*, 2016, vol. 34, no. 2, pp. 1, 4.

124 *Rabab Ali v Pakistan*, Constitutional Petition No ___ / 1 of 2016, Supreme Court of Pakistan, April 2016, paras. 1, 6-7, 31, xviii; M.L. Banda and S. Fulton, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law', in *The Environmental Law Reporter*, 2017, vol. 47, no. 2, pp. 1, 4; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, 'The Status of Climate Change Litigation – A Global Review', 2017, p. 19.

125 *Ashgar Leghari v Federation of Pakistan*, Lahore High Court Green Bench, 2015, WP NO 25501/2015, para. 8; Environmental Law Alliance Worldwide (ELAW), 'Asghar Leghari v. Federation of Pakistan', 25 September 2015. Retrieved 10 April 2017, <https://elaw.org/>

Conclusion

There is a growing acceptance that many human rights have some environmental dimension. Interestingly enough, the seeming rigidity of the rules of a human rights framework does not necessarily have to be reflected in the results achieved through the jurisprudence. The ECtHR, for one, has very strict requirements on standing and *actio popularis* (a lawsuit brought by a third party in the interest of the public as a whole), and the Convention does not contain a specific environmental right. It would be an enormous improvement if the Court would widen its standards, also regarding NGOs. Nevertheless, it has in the end managed to adjudicate on a large number of cases by creatively using Article 2 and 8, and in comparison to other regional courts provides the best access for individuals to proceed to a Court delivering binding judgements. However, I keep finding it difficult to grasp that the effects of environmental degradation or climate change almost never seem to infringe an individual in his/her physical integrity, as Article 2 ECHR demands.

A new human right to environment, then, remains a rather controversial concept. Although there are sufficient favourable arguments – an equal status for the environment compared to other human rights, enhanced protection for victims – the problems of individualism and anthropocentrism put spikes in its wheels. More practical problems, such as its definition and redundancy, are easier to overcome. Given the urgency of the problem that climate change is, it seems that a new human right would not be an unwanted luxury – just perhaps not the fastest solution.¹²⁶

The first two strategies thus leave us in need of “more advanced jurisprudence in the field of human rights which recognises the collective dimension of the right to a decent and sustainable environment as an indispensable

pk_Leghari; J. Wentz, ‘Lahore High Court Orders Pakistan to Act on Climate Change’, in *Climate Law Blog, Columbia Law School, Sabin Center for Climate Change Law*, New York, 26 September 2015. Retrieved 17 May 2017, <http://blogs.law.columbia.edu/climate-change/2015/09/26/lahore-high-court-orders-pakistan-to-act-on-climate-change/>; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, ‘The Status of Climate Change Litigation – A Global Review’, 2017, pp. 15–16.

126 P. Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’, in *American Journal of International Law*, 1984, no. 78, pp. 607, 609, 613; D. Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’, in *Stanford Journal of International Law*, no. 28, p. 121; S. Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law’, in *Tulane Environmental Law Journal*, 2002–2003, p. 110; A. Boyle, ‘Human Rights and the Environment: Where Next?’, in *The European Journal of International Law*, 2012, vol. 23, no. 3, p. 628.

condition of human security and human welfare”.¹²⁷ This cry for collectivism may be adhered to by giving more room to PIL at human rights courts – especially the ECtHR. It would match with the collective nature of environment-related human rights litigation, allow NGOs to hold governments accountable, and enhance the empowerment of victims. Instead of excluding the adjudication of the ‘usual’ cases concerning impacts on the personal sphere of individual victims, it would be an opportunity for the ECtHR to modernise its jurisprudence by aligning the protection of the environment as a public good with global environmental risks.¹²⁸

Lastly, intergenerational justice has proven to be quite a pickle. The theoretical framework provides some opportunities, but also makes the limits of the legal system apparent. Nevertheless, national case law has set small, but important first strides towards the possibilities of protecting future generations, and the generally receptive attitude of judges worldwide is promising.

The Interplay between the Four Strategies

The tendency towards greening traditional human rights is of little help for PIL, because the fact remains that these norms concern human rights – not environmental norms. Even if the desired effect for protecting the environment is indirectly accomplished, it is still not framed as a general public interest in the environment. This may seriously damage the much-needed awareness that in the long run, we can only use our human rights to defend ourselves against climate change if we also protect the environment.¹²⁹ Due to its inherent individualism and anthropocentrism, a new substantive human right also clashes with PIL, as do the standing criteria with the current stringent victim requirements: “An individual right to environment construed under the ECHR may, in cases where the public at large is affected, be too diffuse and the individual concern too small to grant access to the ECtHR.”¹³⁰ Then again, intergenerational justice would likely benefit from a right to the environment, as became apparent from the many national cases evolving around a constitutional right

127 F. Francioni, ‘International Human Rights in an Environmental Horizon’, in *The European Journal of International Law*, 2010, vol. 21, no. 1, p. 44.

128 *ibid* 332–333.

129 C. Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’, in *Journal of Environmental Law*, 2008, vol. 20, no. 3, p. 445.

130 *ibid* 448.

to the environment.¹³¹ It would also be an ideal combination with PIL, which would simplify the requirements of standing on behalf of future generations.

The key is in combining PIL and intergenerational justice, complemented by a broadening of the *locus standi* (right to appear before court) of the victim requirement. This would allow the Court to adjudicate cases more boldly and accept PIL claims, underlining a new emphasis on collectivism – in addition to the individualism of human rights which will remain the focus in many cases. Even better, it might make the Court more receptive to recognising the rights of future generations. If not, it has been shown that an increasing number of domestic courts provide a viable alternative for intergenerational justice.

Restrictions and Future Research

The most important restriction in conducting this research was the limited number of international cases specifically adjudicating on (the right to) life and climate change. However, this was partly compensated by courts at domestic levels displaying a trend of general willingness. Another limitation was the focus on (the right to) life, which turned out to not always be the most effective avenue. Oftentimes protection is more efficiently accomplished through other rights, thus a comparison with other rights used might be interesting for further research. Lastly, I embarked upon this research with the premise that the human rights framework is suitable for protecting human rights against climate change. Although in my opinion it still is in important ways, it does leave open the question of whether another, perhaps even non-legal, framework could be just as or even more effective. The more strategies, the better.

The Vital Need for Human Rights Adjudication

“Human rights form a central part of the thought system of many people in the world. ... The enforcement of ‘rights’ in the legal system does not, by itself, change government policy, but the embedding of rights in our thought systems can.”¹³²

¹³¹ Most of these have however not been discussed in this article, since no international human rights law was used.

¹³² S. Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’, in *Vermont Journal of Environmental Law*, 2008, no. 9, p. 514.

A crucial reason for a stronger focus on a human-rights based approach is its potential to function as a political and ethical imperative. If we begin to acknowledge that climate change violates fundamental human rights, and will do so on an incalculable scale, leading to numerous lawsuits and compensation claims against governments, this might contribute to a direly needed breakthrough in politics. Actions can turn into legal obligations, thereby again providing a way to influence or even improve climate policy.¹³³

In absence of an international environmental tribunal and a compulsory dispute resolution mechanism, at the moment international human rights bodies present the only adjudication procedures and enforcement mechanisms available to individuals at the international level for human rights and environmental issues. They add value by complementing national legislation, offer a united forum for addressing global problems, and challenge governmental (in)action.¹³⁴ This is ultimately what human rights are all about: to safeguard fundamental values and empower people to defend these by relying on their rights in Court.

All in all, this article is a plea to act. A plea to protect our human rights against the (future) effects of climate change; a plea for more courageous jurisprudence; and a plea to simultaneously strengthen the realisation of the effects of climate change on our current lifestyle. More and more individuals seem to realise that the environment is a public good, a *sine qua non* (essential component) for the welfare of humanity, given the inspiring cases popping up all over the world sparked by the *Urgenda* judgement – let us hope governments will soon realise this as well. International human rights law presents a very influential tool to reach this objective; surely not the only viable tool, but a very powerful one indeed.

¹³³ D. Shelton, 'Human Rights and Climate Change', in *Buffett Center for International and Comparative Studies Working Paper Series*, 2009, No. 09–002, pp.1, 5.

¹³⁴ C. Voigt and E. Grant, 'Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, pp. 131, 132; E. Grant, 'International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms', in *Journal of Human Rights and the Environment*, 2015, vol. 6, no. 2, p. 158.