EUROPE OF RIGHTS & LIBERTIES

# Climate Change Litigation in the European Court of Human Rights : Causation, Imminence and Other Key Underlying Notions

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## 1. INTRODUCTION

Ever since the *Urgenda* case[1] was filed in the Netherlands, followed by climate change cases reaching the United Nations treaty-bodies complaint procedures, first in the *Torres Strait Islanders* case[2] (against Australia) before the Human Rights Committee, and second in the *16 children* case[3] before the Committee for the Rights of the Child, it was a mere question of time for climate change litigation to reach the European Court of Human Rights ('European Court' or 'ECtHR').

On 3 September last, the first climate change case was filed before the European Court of Human Rights. Six Portuguese children and young adults (aged 8 to 21) made an application against thirty-three State parties to the European Convention on Human Rights ('European Convention' or 'The Convention') (twenty-seven EU Members, plus the United Kingdom, Norway, Russia, Turkey and Ukraine).[4] They argue that they are victims of climate change amounting to violations of article 2 (right to life), article 8 (right to privacy) and article 14 (prohibition of discrimination) under the Convention. This case has now been followed by a case against Switzerland, filed by *Senior Women*

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[1] Dutch Supreme Court, *The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) and Stichting Urgenda* ('*Urgenda* case'), Judgment of 20 December 2019, Case N°19/00135.

[2] *Torres Strait Islanders* case ('*Torres Strait Islanders* case'), Communication 3624/2019, currently pending before the Human Rights Committee.

[3] Case 104/2019 Argentina, 105/2019 Brazil, 106/2019 France, 107/2019 Germany, 108/2019 Turkey, currently pending before the United Nations Committee for the Rights of the Child (*'16 Children'* case). The complaint involves 16 children of various nationalities. They claim to be victims of climate change, and that the respondent States are responsible for 'a) failing to prevent foreseeable human rights violations caused by climate change by reducing its emissions at the 'highest possible ambition', and b) delaying the steep cuts in carbon emissions needed to protect the lives and welfare of children at home and abroad'. They allege violations of Article 3, 6, 24 and 30 of the UN Convention on the Rights of the Child, see Table of pending cases before the Committee of the Rights of the Child [last accessed on 25 October 2020].

[4] "Six Portuguese youth file 'unprecedented' climate lawsuit against 33 countries" *Climate Home News*, 3 September 2020. < https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/ >[last accessed on 17 December 2020].

*for Climate Protection* over alleged inadequate state efforts to curb emissions.[5] A third case, relating to Austria, is potentially also on the cards.[6]

As more cases raising the issue of climate change reach the European Court, there are a number of key emerging topics the correct understanding of which is essential for the proper adjudication of such cases. This Article deals with five key topics. Namely, Jurisdictional Issues (**Section 2**); Whether climate change treaties are relevant for interpreting the European Convention on Human Rights (**Section 3**); Causation and whether it is relevant or not under the Rules of State Responsibility underlying the Convention (**Section 4**) ; The notion of 'Imminence' (**Section 5**); and The notion of Due Diligence - Duty to Protect (**Section 6**).

## 2. JURISDICTION IN DIAGONAL CLAIMS

Issues of jurisdiction will be essential in the adjudication of some of the climate change claims that are reaching the European Court of Human Rights.

An important distinction in that sense is to be made between diagonal claims and non-diagonal claims. Diagonal claims are transboundary claims or claims brought by individual or groups against States other than their own. The *Portuguese Youth* case is an example of a diagonal claim. It is brought by Portuguese children alleging violations of the Convention by States other than the State under whose jurisdiction they live. This is a novel type of environmental claim posing an issue of transboundary harm before the Strasbourg organ. In contrast, the *Senior Women for Climate Protection* is jurisdictionally speaking, a case falling squarely within the jurisdiction of Switzerland.

In an Article entitled '*The Rise of Environmental Law in International Dispute Resolution*'[7] I noted that the Strasbourg court, sooner or later, would have to do its own thinking on what "jurisdiction' means for transboundary environmental damage. That time seems to have arrived now.

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[5] The case was submitted originally in Swiss domestic courts in 2016. It was elevated to the European Court of Human Rights on 27 October 2020, after a group of senior women exhausted domestic remedies on 20 May 2020, see Greenpeace international, *Climate Seniors to sue Switzerland before the European Court of Human Rights*, 27 October 2020 [last accessed on 29 October 2020]. The Swiss Supreme Court denied an appeal in the case of *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* which challenged the adequacy of the Swiss government's climate change mitigation targets and implementation measures, see Swiss Federal Administrative Court, *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others, 7 November 2018* [last accessed on 29 October 2020].

[6] See *Greenpeace et al v Austria*. Greenpeace Austria and 8,063 petitioners filed a request with the Austrian Constitutional Court to invalidate tax exemptions that give credits to air travel and not railways. The request arises *inter alia* out of Article 2 and Article 8 of the European Convention on Human Rights. The claim was dismissed as inadmissible by the Constitutional Court on 30 September 2020. http://climatecasechart.com/non-us-case/greenpeace-v-austria/ [last accessed on 28 October 2020].

[7] M. Feria-Tinta and S. Milnes, 'The Rise of Environmental Law in International Dispute Resolution'' (2016) 27 *Yearbook of International Environmental Law* 64-81.

## A. The Meaning of Jurisdiction in a Transboundary Environmental Harm Context

Questions of extraterritorial human rights obligations and (concomitantly) 'diagonal' claims under human rights accountability mechanisms, i. e. claims against a state other than the one in which the victim lives, have become an increasingly acute problem for the international human rights system. State practice to date is limited and cautious, while the issues have been the subject of searching academic treatment.[8]

In a sense, the entire field of 'diagonal' human rights obligations can be said to be defined by the clash between two propositions, each of them cogent and widely accepted. The first is the principle that a State which has undertaken to respect human rights should not be able to use national boundaries to escape responsibility for human rights violations which it has actually committed. As the Human Rights Committee has stated in *Sergio Euben Lopez Burgos v. Uruguay*,[9] with reference to the International Covenant on Civil and Political Rights, "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[10] This principle implies that human rights accountability mechanisms should respond where there is a direct relationship between an act attributable to a State and the violation of an individual's human rights, even though the individual is located, and the violation occurs, outside the State's borders.

The second premise, in tension with the first, is that all the major international human rights treaties were conceived primarily as applicable between a State and those under its territorial jurisdiction: each State is responsible for establishing and ensuring the conditions for a dignified human life to the individuals within its boundaries. States by their very nature and the limitations on their jurisdiction cannot be expected to do the same for individuals living elsewhere. This principle, or at least a strong version of it, would hold that States can only be responsible for ensuring the human rights of individuals who are within its borders or, at the outermost, extends only to those who are in a territory over which the State concerned is exercising "effective control' at the material time.[11]

Most international lawyers would concede at least some real validity to each proposition: neither can be *a priori* rejected. But in real cases, they quickly come into mutual conflict and one must give way to the other. The much-debated *Banković v. Belgium and others* case[12] is an example of the second proposition ousting the first. The

[8] See, among others, Skogly and Gibney (eds), *Universal Human Rights and Extraterritorial Obligations* (2010); Langford, Vandenhole, Scheinin, and Van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013).

[9] Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc Supp. No. 40 (A/36/40) at 176 (1981) ('*Lopez-Burgos v. Uruguay*').

[10] *Lopez-Burgos v. Uruguay, Human Rights Comm*., Commentary No. 52/1979.

[11] The ECtHR recognized 'effective control' of territory as a basis for jurisdiction under Article 1 of the ECHR in *Loizidou v. Turkey*, Application No. 15318/89, at para. 52.

[12] ECtHR, *Vlastimir and Borka Banković, Živana Stojanović, Mirjana Stoimenovski, Dragana Joksimović and Dragan Suković against Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland,*

ECtHR held that 'jurisdiction' in Article 1 of the European Convention was to be given its 'ordinary meaning' and that the ordinary meaning of 'jurisdiction' in international law was 'primarily territorial', with limited exceptions recognized (such as flag state jurisdiction over ships).[13] It noted that it had recognized another exception, where a state had 'effective control' over foreign territory, such as Turkey exercised in northern Cyprus.[14] It rejected the applicants' argument that 'effective control' (and hence jurisdiction) could be founded simply on the basis that the State had caused the impugned act itself.[15] It also held that jurisdiction could not be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question',[16] i. e. a State is either internationally responsible for fulfilling all of the Conventional rights in a particular territory, or it is not responsible at all. In practice, however, neither the requirement for 'effective control' over territory nor the indivisibility principle has been adhered to in subsequent Strasbourg case law, e.g. *Pad and others v. Turkey.*[17]

By way of comparison, within the Inter-American system, the Inter-American Commission on Human Rights has inclined towards a broader approach, e.g. in *Coard*,[18] *Alejandre and others v. Cuba*[19] and *Molina (Ecuador v. Colombia).*[20] In *Molina* the Inter-American Commission distanced itself from the logic in *Banković* by holding that

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*Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Application No. 52207/9, 12 December 2001. ('*Banković')*

[13] *Banković*, paras. 59-61.

[14] *Banković*, paras. 68-71, referring to *Loizidou* and *Cyprus v. Turkey*, Application No. 25784/94 (see especially para. 80). The ECtHR concluded in *Banković* (para. 71) that: 'In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.' (Emphasis added).

[15] *Banković*, para. 75.

[16] *Id.*

[17] For example, in *Pad and others v. Turkey*, Application No. 60167/00, 28 June 2007 the ECtHR held that Turkey had 'jurisdiction'' over the applicants' relatives when they were shot and killed by a Turkish helicopter inside Iran (see especially paras. 52-55). In *Al-Skeini v. United Kingdom*, Application No. 55721/07, 7 July 2011 ('*Al-Skeini*'), the ECtHR held that Iraqi men killed by UK armed forces in south east Iraq, some in UK detention facilities and others who had been killed by UK soldiers on street patrol, were all within the UK's 'jurisdiction' under Article 1, ECHR, notwithstanding that the UK was clearly not obliged to ensure all human rights to all people in Iraq.

[18] IACHR, *Coard et al. v. United States*, Report No. 109/99 Case 10.951 September 29, 1999.

[19] IACHR, *Armando Alejandre Jr., Carlos Costa, Mario De La Peña, and Pablo Morales v. Cuba* Report No. 86/99, Case 11.589. The case concerned the shooting down by the Cuban air force over international waters of two civilian aircraft owned by the organization 'Brothers to the Rescue'. The Inter-American Commission on Human Rights observed (at para. 23) that:

> 'Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.'

[20] Report No. 112/10, Inter-State Petition IP-02**,** Admissibility, *Franklin Guillermo Aisalla Molina, Ecuador – Colombia.* The case concerned Colombia's alleged '*jurisdiction*' under Article 1(1) of the American Convention in respect of the killing of Ecuadorean citizens inside Ecuador by Colombian military during a cross-border raid.

a 'formal, structured and prolonged legal relation in terms of time' was not needed in order for a State to be responsible for the acts of its agents abroad.[21]

In addition, in 2017, the Inter-American Court of Human Rights issued its *Advisory Opinion 23 on Environment and Human Rights*.[22] The main significance of the Advisory Opinion in relation to the notion of 'jurisdiction' in the context of the application of a human rights treaty, is that it signals the possibility of 'diagonal' human rights claims in circumstances far broader than those which have been held admissible under the Inter-American system to date. Its reasoning may be of interest in the examination of a climate change case raising similar features before the Strasbourg court.

Up to that point, both the Inter-American system and the ECtHR have taken a cautious approach to extraterritorial obligations. The relatively few cases found to be admissible have involved direct exercises of violence by state agents outside a State's borders, and sometimes even that is not enough.[23] The Inter-American Court Advisory Opinion 23 makes it clear, however, that in principle, the Inter-American system permits cross-border human rights claims in respect of other types of conduct, such as transboundary pollution and ecological damage. Neither does it restrict such claims to damages caused by a State's agents, but holds that jurisdiction extends to activities over which a State exercises 'effective control'.

In this context, one of the most interesting features of the Advisory Opinion 23 is the Inter-American Court's handling of the concept of 'effective control'. In summing up its answer to question (I) in the Advisory Opinion, the Inter-American Court held that:

> 'As regards transboundary harms, a person is under the jurisdiction of the State of origin if there is a causal relationship between the event that occurred in its territory and the affectation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises <u>effective control over the activities carried out that caused the harm</u> and consequent violation of human rights.'[24]

As compared to the Strasbourg case law,[25] a subtle but important shift has therefore occurred: in the Inter-American Advisory Opinion, as concerns transboundary

[21] *Id*, at para. 99:

> 'the following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.'

[22] Inter-Am. CtHR, *The Environment and Human Rights*, (Advisory Opinion OC-23/18, (ser. A) No. 23, 15 November 2017 (In Spanish, in the original) ('Advisory Opinion 23').

[23] As in *Banković*.

[24] Advisory Opinion 23, para 104(h) (author's translation) (emphasis supplied).

[25] In particular, *Loizidou* (supra n 11) *Banković* (supra n 12), and *Al-Skeini* (supra n 17).

environmental harms, 'effective control' is no longer something which has to be exercised over the territory where the victim was, nor over the victims themselves. Rather, what matters is whether the source state – State X – has effective control over the activities that caused the transboundary harm. This is significant, because the types of transboundary harm at which the Advisory Opinion Request was directed, and which it can be foreseen are sadly likely to occur with severe impacts on vulnerable people, are types of activity over which States do exercise effective control. It is hard to see how any State which decided, for example, to build a trans-isthmus canal, or license drilling in an offshore oil field, or indeed authorize any infrastructure mega-project with environmental impacts, could credibly claim that such activities were outside its effective control. It follows that the Inter-American Court's ruling permits cross-border human rights claims in respect of transboundary ecological damage to be pursued before the Inter-American System and (subject to the procedural requirements in the American Convention) before the Court itself.

The Inter-American Court was careful to emphasize in the Advisory Opinion that extraterritorial obligations are exceptional and should be restrictively construed.[26] But although the court cautioned that extraterritorial obligations are 'exceptional', its reshaping of 'effective control' opens the door to cross-border human rights claims.

Given that cross-fertilisation among international judicial bodies is common, this Advisory Opinion may be relevant to the development of the Strasbourg Court's own reasoning concerning 'jurisdiction' in the context of a claim alleging transboundary environmental harm.

**B. Climate Change**

The Inter-American Advisory Opinion 23 does not address climate change, but some of the Court's observations on States' duties are clearly pertinent to this ultimate example of transboundary pollution. Moreover, the Court's reasoning could be used to support an argument that a State's contribution to the accumulation of greenhouse gases in the atmosphere should result in State responsibility and accountability to victims living in other States, e.g. persons whose lands have become submerged or uncultivable due to rising sea levels. Arguably, it might be pre-empted by a myriad of hurdles. Nonetheless, it has crystallised that under the Inter-American Court's ruling States can (depending on the precise circumstances) be accountable for the emission of pollutants from activities in their territory which cause transboundary ecological harm.

Whereas in 2005, the Inter-American Commission on Human Rights decided against accepting a petition by Inuit peoples that climate change was violating their American Convention rights, in the light of the Advisory Opinion 23 the arguments of the Inuit (and other vulnerable groups for whom climate change has become an existential threat to their lands, livelihoods and cultures) benefit from enhanced weight of principle and authority. Potentially, the benefit of principle and authority in the Inter-American

[26] Advisory Opinion 23, para 81, para 104(d).

region, may also be taken into account by the Strasbourg Court in considering similar cases by way of analogy.

## 3. ARE INTERNATIONAL CLIMATE CHANGE TREATIES RELEVANT TO THE INTERPRETATION OF HUMAN RIGHTS OBLIGATIONS OF STATE PARTIES?

A second important potential issue in climate change litigation is whether international climate change treaties are relevant at all to the interpretation of human rights obligations of States parties to the human rights treaty (e.g. the European Convention on Human Rights).

It can be observed in that regard that it is an established principle that the content and standard of a State's human rights obligations can be informed by the State's obligations under other international instruments when relevant, including (where appropriate) international environmental law. For example, the Human Rights Committee held in its General Comment 36 that:

> '[o]bligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.'[27]

To continue with the example of the Human Rights Committee, the Committee adopted this approach in *Portillo Cáceres v Paraguay*[28] where the Committee considered it relevant to the content of Paraguay's obligations that Paraguay was bound by the *Stockholm Convention on Persistent Organic Pollutants* (one of the pollutants concerned was one where the Review Committee of the Stockholm Convention had requested a global ban in 2008).[29] Thus, relevant international climate change law (i. e. the Paris Agreement) and the State's climate change policies adopted thereunder, are relevant to the interpretation of the State's duties under the human rights treaty in question in the context of climate change, when said State is a Party to the Paris Agreement. The Human Rights Committee has taken this approach to inform the obligations of such a State under the ICCPR. For instance, in its Concluding Observations on the initial report (on its compliance with its obligations under the ICCPR) by Cabo Verde, the Committee referred to Cabo Verde's obligations under Article 6 of ICCPR in the context of climate change.[30] The Committee did not only recognise the particular vulnerability of small island States to the effects of climate change, it also made quite detailed recommendations on sustainable development and resilience to climate change.[31]

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[27] Human Rights Committee, General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018. CCPR/C/GC/36, para 62. ('General Comment No. 36')
[28] Portillo Cáceres et al. v. Paraguay, Communication No. 2751/2016, Doc. No. CCPR/C/126/D/2751/2016.
[29] Ibid at paragraph 7.3 and footnote 7 to paragraph 2.11.
[30] CCPR/C/CPV/CO/1/Add.1 §17-18.
[31] Ibid.

Indeed, it could not be otherwise, because Art. 31(3)(c) of the Vienna Convention on the Law of Treaties 1969 (which reflects customary international law) requires the interpreter of a treaty, to take into account any other relevant rules of international law binding on the State concerned. It is to be noted in that sense that human rights treaties are not synallagmatic treaties whose primary beneficiaries are other States. The primary beneficiaries of the obligations under a human rights treaty are not other State Parties, but individuals under the jurisdiction of the State in question.[32]

Indeed, the true significance of Article 31(3)(c) as the International Law Commission observed, is to reflect the principle of systemic integration – namely that treaties should be interpreted in the context of its normative environment.[33] As the International Law Commission pointed out, "the systemic nature of international law has received clearest formal expression in that article'.[34] This means that human rights treaties such as the European Convention of Human Rights or the ICCPR, cannot be interpreted in the vacuum. There is a normative environment (binding rules on a Respondent State) which is relevant to the interpretation of its obligations under the human rights treaty in question. As the ILC Special Rapporteur Martti Koskeniemi on Fragmentation of International Law, observed:

> 'It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument […]. But if, as discussed… above, all international law exists systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say "other" international law.'[35]

In the *Namibia Advisory Opinion*,[36] the International Court of Justice applied this approach and held: '…an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'[37] Not only was the principle of systemic interpretation upheld but the ICJ also stated that that 'interpretation cannot remain unaffected by the subsequent development of law'.[38]

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[32] See Crawford, Special Rapporteur on State Responsibility, A/CN.4/507 and Add. 1–4 §17.
[33] Ibid §430.
[34] Ibid § 420.
[35] Ibid §423 (footnotes omitted).
[36] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.
[37] Ibid p. 19.
[38] Ibid.

Such an approach to interpretation is also reflected in the works of human rights organs and courts. The Human Rights Committee, for example, has held that the ICCPR should be interpreted as a 'living instrument'.[39] For its part, the first explicit reference to the European Convention on Human Rights as a living instrument appeared in the European Court of Human Rights' case-law in the judgment of *Tyrer v. United Kingdom*[40], more than 40 years ago. The Court stated therein that the Convention "must be interpreted in light of present-day conditions'.[41] This is a principle likely to be relevant in the examination of novel claims raising climate change issues under the European Convention on Human Rights today.

## 4. CAUSATION

A State may argue that climate change is a 'global phenomenon' and not the sole responsibility of one single State. From that perspective, it could be argued that as a matter of international law, a State Party to a human rights treaty would be under no obligation to reduce its contribution to a global harmful phenomenon, so long as other states are continuing to contribute to it.

This approach to causation would require victims to demonstrate that a single State is responsible for the majority of climate change at a global level or exclusively responsible for climate change harms, to be found internationally responsible. Such a *rationale* however would lead to the absurd conclusion that no State could ever be held liable for the effects of its wrongful greenhouse gas ('GHG') emissions due to the character of climate change as a cumulative problem to which all States contribute. This in any event is simply incorrect under the Law of State Responsibility as will be seen below.

Further, it may also be argued, that to succeed, claimants would have to sufficiently substantiate any meaningful connection 'or causation' under international law between the measures taken by the State in question (or alleged failure to take measures) and the alleged violations of the Covenant/Convention.

However, causation is not the applicable test to assess the responsibility of a State in the above scenario, but rather the rules of attribution.

### A. Causation Irrelevant for Assessing Obligations Concerning Adaptation

First, causation is irrelevant for assessing State obligations concerning obligations in relation to adopt adaptation measures. Even if the climate change threat were wholly

[39] *Judge v. Canada*, Communication No. 829/1998, UN Doc. No. CCPR/C/78/D/829/1998, *4 Yoon and Choi v. Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004 of 3 Nov. 2006, U.N. Doc. CCPR/C/88/D/1321-1322/2004, *Atasoy and Sarkut v. Turkey*, Communications Nos. 1853/2008 and 1854/2008 of 29 March 2012, U.N. Doc. CCPR/C/104/D/1853-1854/2008.
[40] *Tyrer v. United Kingdom*, Application No. 5856/72, 25 April 1978.
[41] Ibid., para 31. For an illuminating reading on the European Convention as a 'living instrument' see 'The Convention as a Living Instrument at 70', Background Document, Judicial Seminar 2020 [last accessed on 29 October 2020].

extraneous to a given State, said State would still be under the same duty to take positive measures to address foreseeable climate change impacts on the human rights of those under its jurisdiction (measures of adaptation). This obligation is not dependent upon the causal relationship between a State and global climate change.

The Strasbourg case-law agrees with this approach. In the context of environmental disasters over which States have no control, the obligation of the State to take preventive operational measures comes down to adopting measures to reinforce the State's capacity to deal with the unexpected and violent nature of such natural phenomena irrespective of the origin of the threat (See *M. Özel and Others v Turkey*).[42]

## B. Causation Irrelevant for Assessing State Responsibility in Relation to Mitigation

Second, the key notion to establish the responsibility of a State in relation to mitigation, does not rest on any element of causality (on the mere recognition of a link of factual causality), but on principles of attribution.[43] The Commentary of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts for example, observes that 'The different rules of attribution… have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects'.[44] Failure on the part of the State to take action, to regulate those polluting the environment is an omission giving rise to State Responsibility.

When multiple States are responsible for the same wrongful act (i. e. high GHG emissions), the general principle is that 'each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more States are also responsible for the same act'(Article 47 of State Responsibility rules).[45] For example, when multiple States pollute the same river by separate discharges of pollutants, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.[46]

Following a similar approach, in the celebrated *Potash Mines* case,[47] the Dutch Supreme Court considered a claim against multiple polluters each of which had unlawfully discharged wastes into the Rhine, holding that each defendant was responsible, *pro rata*, for its own contribution.

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[42] *M. Özel and Others v. Turkey*, Applications nos. 14350/05, 15245/05 and 16051/05), Judgment, 17 November 2015 at para 173.
[43] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001), p. 38.
[44] Ibid.
[45] International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, Art. 47.
[46] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001), p. 125.
[47] Dutch Supreme Court, *Handelskwekerij Bier v Mines de Potasse d'Alsace* [1976] NJ 1989.

It is to be emphasised in that sense that the European Convention is not placed outside that general framework of general international law. The rules of State attribution are relevant to ascertain State responsibility under the Convention.[48]

## C. The Applicability of the Rules of State Responsibility in a Human Rights context in relation to Climate Change

The same principle was applied to GHG emissions in the recent *Urgenda* decision, where the Dutch Supreme Court held that, while global climate change is caused by the emissions of all countries, the duty on the Netherlands was to do its part. No one State's reductions could solve climate change, but no State's reductions are negligible either.

In a statement published on 20 December 2019 in the wake of the Supreme Court's ruling, the UN High Commissioner for Human Rights, Michelle Bachelet, welcomed the *Urgenda* ruling. The UN OHCHR stated: 'The decision confirms that the Government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases.' The High Commissioner noted:

> 'This landmark ruling provides a clear path forward for concerned individuals in Europe – and around the world – to undertake climate litigation in order to protect human rights, and I pay tribute to the civil society groups which initiated this action.'
>
> 'I cannot underline too much the importance of today's decision, and the even greater importance of it being swiftly replicated in other countries.'[49]

In the relevant section below, it will be discussed that the nature of the obligations in a climate change scenario is a duty to use due diligence to protect individuals from real and foreseeable risks of severe human rights impacts *inter alia*, the duty to protect the rights to a life of those subject to its jurisdiction. This is not dependent upon the causal relationship between the State in question as a country and global climate change. As noted above, even if the climate change threat were wholly extraneous such a State would still be under the same duty to take positive measures.

In relation to the argument that a State would be violating a human rights treaty by its failure to take sufficient steps to mitigate its contribution to global climate change, the following observations can be made. First, because climate change poses severe and eminently foreseeable threats to human life and other protected rights, each State Party to the human rights treaty in question owes a duty to take positive measures to protect against those threats. That duty includes mitigation, where each State Party is obliged

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[48] See ECtHR, *Kotov v Russia*, Application No 54522/00, 3 April 2012 [Grand Chamber] at paras 30-32; *Al Nashiri v. Poland*, Application No 28761/11, 24 July 2014, at para 207.

[49] United Nations Human Rights Office of the High Commissioner, 'Bachelet welcomes top court's landmark decision to protect human rights for climate change', 20 December 2019 [last accessed on 30 October 2020].

to do its part – not to single-handedly 'solve' climate change, which would be impossible for any one State, but to undertake its fair share of the GHG emissions reductions that are necessary, indeed to do as much as it reasonably can towards averting a global climate breakdown. Second, in this context, the Paris Agreement is relevant for interpreting the content and standard of States' duties, as States parties to this treaty have undertaken a duty to adopt GHG mitigation policies and undertaken to do so in accordance with the principles of 'highest possible ambition' and 'reflecting its common but differentiated responsibilities and respective capabilities'.[50]

In short, in the context of climate change claims a State is responsible for its own contribution, for its own lack of due diligence, for its own failure to ensure adaptation measures to protect the rights of those under its jurisdiction, and to ensure that its own obligations in relation to GHG emissions are fulfilled.

## 5. THE NOTION OF IMMINENCE

A fourth important notion that has cropped up in human rights litigation relating to climate degradation is the notion of '*imminence*'.

In *Teitotia,*[51] a recent case decided by the Human Rights Committee, an individual sought asylum in New Zealand on the basis that the effects of climate change and sea level rise in Kiribati, his home, had forced him to migrate from the island of Tarawa in Kiribati to New Zealand. He had argued that the situation in Tarawa had become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded, resulting in a housing crisis and land disputes that have caused numerous fatalities. The author argued that Kiribati has thus become an untenable and violent environment for him and his family.[52] He argued that should New Zealand send him back to Kiribati, his right to life (as the right not to be arbitrarily killed) would be at risk for the above reasons.

The Committee examined the right to life in the *Teitotia* case, focusing on whether the author was in any 'imminent' danger of harm to his right to life. The Committee concluded that the Author's life was not 'in imminent danger' as follows:

> 'The Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the time frame of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.'[53]

[50] Paris Agreement, Art. 4.3.
[51] Human Rights Committee, *Ioane Teitiota v New Zealand*, Opinion, 7, January 2020. CCPR/C/127/D/2728/2016 ('Teitiota' or 'Kiribati refugee case').
[52] Ibid para 2.1.
[53] Ibid para 9.12.

Some observations are pertinent in relation to *Teitiota* and its treatment of the right to life. It should be noted first, that the *Teitiota* case was in essence, a deportation case. It was not a climate change case raising obligations of adaptation or mitigation by a State party under a human rights treaty. A second important observation is that the author's complaint in *Teitiota* was based on actual danger to life, not the right to life with dignity. This is an important consideration. *Teitiota*'s case argued that if he were to be back in Kiribati, the circumstances described above were threatening his right not to be arbitrarily killed. The case was not pleaded as entailing the right to life in its positive obligations, the approach for climate change litigation cases.

To continue with the example of the ICCPR, States Parties have, under Art. 6 itself and under Art. 6 in combination with Art. 2, the obligation to ensure the right to life and to exercise due diligence to protect the lives of individuals against threats not attributable to the State itself.[54] This as will be seen below is a positive obligation. This due diligence obligation obliges the State Party to protect against 'reasonably foreseeable threats'.[55] States parties may be in violation of Article 6 even if such threats and situations do not result in the loss of life.[56]

Under international human rights law (see for example a long line of Strasbourg case-law), for a positive obligation by the State to arise it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the rights of the individuals subject of its jurisdiction and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[57]

In the *Urgenda* case, the Dutch Supreme Court applied this test to the specific risks posed by climate change and stated :

> 'The ECtHR has on multiple occasions found that Article 2 ECHR was violated with regard to a state's acts or omissions in relation to a natural or environmental disaster. It is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk. In this context, the term 'real and immediate risk' must be understood to refer to a risk that is both genuine and imminent. The

[54] E.g. *Teitiota*, at paragraph 9.4; *Portillo Cáceres* at paragraph 7.5. See also *Y. Sh. v Russian Federation*, Application No. 2815/2016, UN Doc. No. CCPR/C/128/D/2815/2016, at paragraph 8.5; Martinez v Colombia (No. 3076/2017) ('*States parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State*').

[55] Ibid.

[56] *Teitiota*, para. 9.4; *Portillo Cáceres* at para. 7.3. In *Portillo Cáceres*, the victims of the violation were not only Mr Portillo Cáceres, but the other authors, because despite the '*threats to the life of the authors that were reasonably foreseeable by the State party*', '*the fumigations continued*', causing '*the serious intoxication suffered by the authors*'. Based on these facts, '.'*the Committee concludes that the facts before it disclose a violation of article 6 of the Covenant, to the detriment of Mr Portillo Cáceres and the authors of the communication.*'

[57] See for example ECtHR, *Mastromatteo v Italy, (Application no.37703/97),* Judgment 24 October 2002 §68; *Paul and Audrey Edwards v. the United Kingdom (Application no.46477/99),* Judgment 14 March 2002 § 55.

> term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved. The protection of Article 2 ECHR also regards risks that may only materialise in the longer term.'[58]

The test of 'imminent threat' therefore does not imply that the risk must materialise within a short period of time, but rather that the risk is *directly threatening the persons involved*.

Where an environmental problem creates risks to life and where the state has known of those risks, over a period of years, and yet has failed to take action to address them, resulting in eventual loss of life and other serious human rights impacts the responsibility of the State is engaged. The case of *Oneryildiz v Turkey*[59] in the European Court of Human Rights is instructive in that regard. In respect of Article 2 the Court noted:

> '…the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals…'.[60]

## 6. THE NOTION OF DUE DILIGENCE – DUTY TO PROTECT

Finally, turning now to the nature of the obligations cross-cutting specific rights under a human rights treaty in a climate change claim.

The three main cross-cutting issues are: (A) A State's general duty to take positive measures to protect those under its jurisdiction : obligations of conduct (due diligence); (B) A State's positive duties to protect the rights of those under its jurisdiction against the known and foreseen threat of climate change impacts (measures to lessen or soften the impact of that materialization, or 'adaptation'); and (C) A State's positive duties to protect those under its jurisdiction against the known and foreseen threat of climate change impacts – by cutting greenhouse gas emissions (measures to prevent the threat from materializing or 'mitigation').

### A. A State's General Duty to Take Positive Measures to Protect those under its Jurisdiction: Obligations of Conduct (Due Diligence)

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[58] Dutch Supreme Court, *The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) and Stichting Urgenda*, supra, at para 5.2.2 (emphasis added).
[59] ECtHR, *Öneryıldız v. Turkey*, Application No 48939/99, 30 November 2004 [Grand Chamber].
[60] Ibid at para 101. (emphasis added).

The standard of conduct in climate change cases corresponds with what a responsible State ought to do under normal conditions in a situation with its best practicable and available means, with a view to fulfilling its international obligation. In international law, this concept has been expressed as a best effort standard, or 'due diligence'.[61]

The due diligence standard also varies in many contexts on the basis of common but differentiated responsibilities and respective capabilities. It is well-established that States differ significantly, but they may all face similar challenges to control the activities in their territory, and that this will affect the evaluation of whether they have breached their due diligence obligation.[62]

The notion of due diligence is relevant as a standard for assessing the adequacy of government action in order to ensure the protection of the human rights of claimants under the jurisdiction of a State in question. It does not depend on the source of the threat. For example, in relation to the right to life, General Comment 36 (§21) reads:

> 'The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2, paragraph 1, when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law which is articulated in the second sentence of article 6. States parties are thus under a due diligence obligation to undertake reasonable positive measures which do not impose on them disproportionate burdens.'[63]

In *Urgenda,* the Dutch Supreme Court held the following, in relation to the positive obligations and due diligence obligations of the State under the European Convention on Human Rights:

> '5.3.2 The obligation to take appropriate steps pursuant to Articles 2 [right to life] and 8 [right to respect for private and family life and home] ECHR also encompasses the duty of the state to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain. […] The obligation pursuant to Articles 2 and 8 ECHR to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat

[61] In the context of the ICCPR, the Human Rights Committee stated in General Comment 36 (§7*)*: *'States parties must respect the right to life and have the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties* ***must also ensure*** *the right to life and* ***exercise due diligence to protect the lives of individuals*** *against deprivations caused by persons or entities, whose conduct is not attributable to the State. The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.'* In application of this rule, Australia would be responsible for example, for exercising due diligence to address foreseeable threats and life-threatening situations not attributable directly to the State but to private actors.

[62] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (n 11) 154-155, commentary to art 3, para 12, referring to Principle 11 of the Rio Declaration.

[63] Emphasis added.

> from materialising) or adaptation measures (measures to lessen or soften the impact of that materialisation). […]
>
> 5.3.3. The court may determine whether the measures taken by a state are reasonable and suitable. The policy a state implements when taking measures must be consistent and the state must take measures in good time. A state must take due diligence into account in its policy. The court can determine whether the policy implemented satisfies these requirements. In many instances found in ECtHR case law, a state's policy has been found to be inadequate, or a state has failed to provide sufficient substantiation that its policy is not inadequate.[…]
>
> 6.5. In addition, the courts can assess whether the State, with regard to the threat of a dangerous climate change, is complying with its duty mentioned above in 5.5.3 under Articles 2 and 8 ECHR to observe due diligence and pursue good governance.'[64]

Two elements of the due diligence standard of care are particularly relevant: (i) opportunity to act or prevent (ii) foreseeability of harm.[65] In brief, this means that a claim against a State would be successful if the claimant shows that the State agents knew or ought to have known at the time of the existence of a real and immediate risk to the rights of the individuals subject of the jurisdiction of the State in question and did not take appropriate action. Indeed, under a human rights treaty, there is an obligation to address a real and immediate risk to substantive rights such as the right to life.

In other words, foreseeable impacts – indeed known and expected – mean that a State is obliged to use due diligence to avert such consequences, and, insofar as it is impossible to avert them completely, to do everything reasonable to limit the impacts. Lack of action entails the international responsibility of a State with no more.

Article 2(1) of the European Convention enjoins the State not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction. The ECtHR has found the positive obligation under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction to apply in the context of any activity, whether public or not, in which the right to life may be at stake.[66] The Court has found positive obligations to arise under Article 2 in the context of dangerous activities, including industrial or environmental disasters in the case of *Oneryildiz v Turkey*, *Budyayeva and Others v. Russia*,[67]

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[64] Emphasis added.
[65] See above at paragraph 57 referring to ECtHR, *Mastromatteo v Italy*, Application no.37703/97, 24 October 2002, at para 68; *Paul and Audrey Edwards v. the United Kingdom*, Application no.46477/99, 14 March 2002, at para 55.
[66] ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Application no. 47848/08, 17 July 2014 [Grand Chamber], at para 130.
[67] ECtHR, *Budayeva and Others v. Russia*, Application No 15339/02 and *others* , 20 March 2008.

*Kolyadenko and Others v. Russia*,[68] *Brincat and Others v. Malta*,[69] *M. Özel and Others v. Turkey*.[70]

**B. A State's Positive Duty to Protect those under its Jurisdiction against the known and foreseen threat of Climate Change Impacts (Adaptation)**

It follows from the above, that a State has positive duties to protect those under its jurisdiction against the known and foreseen threat of climate change impacts by measures to lessen or soften the impact of that materialization, or 'adaptation' measures.

This would imply the implementation of adequate measures for assisting individuals under its jurisdiction and their communities to adapt to the effects of climate change.

**C. A State's Positive Duties to Protect those under its Jurisdiction against the known and foreseen threat of Climate Change Impacts (Mitigation)**

States would also have positive duties to protect those under its jurisdiction against the known and foreseen threat of climate change impacts – by cutting greenhouse gas emissions (measures to prevent the threat from materializing) or 'mitigation' measures.

In the *Teitiota* case, the Human Rights Committee recalled that '… climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.'[71] The magnitude of the threat to core human rights on such a scale has consequences for the scope of positive measures States Parties are required by human rights treaties to take in response.

In that regard, five UN treaty bodies issued a joint statement on 'Human Rights and Climate Change', setting out that existing human rights obligations under various universal human rights treaties embraced obligations on all States to strive to reduce GHG emissions:

> 'In order for States to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions, which reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development.
>
> In relation to efforts to reduce emissions, States parties should effectively contribute to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. Additionally, States must regulate private

[68] ECtHR, *Kolyadenko and Others v. Russia,* Application No 17423/05, 28 February 2012.
[69] ECtHR, *Brincat and Others v. Malta,* Application No 60908/11 and others, 24 July 2014.
[70] ECtHR, *M. Özel and Others v. Turkey* (*supra* n. 42).
[71] *Teitiota,* at para. 9.4.

> actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure which are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors as a mitigation measure to prevent further damage and risk'.[72]

In the case of the Human Rights Committee, as seen above, the Committee has raised climate change concerns in the process of consideration of reports of States Parties to the ICCPR. It was mentioned before the case of Cabo Verde. The Committee also recently asked the government of Guyana to respond to concerns that large scale oil extraction significantly increased greenhouse gas emissions, causing ocean acidification and rising sea-levels.[73] In other words, under the ICCPR, the protection of the right to life requires States to review their energy policies and prevent the dangerous emission of greenhouse gases. This is an important development that the European Court of Human Rights may also consider in assessing the obligations of State parties under the European Convention on Human Rights.

It may be also relevant to note that in his 2019 annual report to the United Nations General Assembly, the UN Special Rapporteur on Human Rights and the Environment noted inter alia that:

> '…To comply with their human rights obligations, developed States… must reduce their emissions at a rate consistent with their international commitments. States must submit ambitious nationally determined contributions by 2020… All States should prepare rights-based deep decarbonization plans intended to achieve net zero carbon emissions by 2050… Four main categories of actions must be taken: addressing society's addiction to fossil fuels ; accelerating other mitigation actions ; protecting vulnerable people from climate impacts ; and providing unprecedented levels of financial support to least developed countries and small island developing States.'

## 7. CONCLUSION

The present Article has addressed 5 topics crucial to the proper understanding of climate change potential claims in human rights litigation : (i) Jurisdictional Issues ; (ii) Whether climate change treaties are relevant to interpret the European Convention on Human Rights ; (iii) Causation (and whether it is relevant or not under the Rules of State Responsibility underlying the Convention) ; (iv) The notion of 'Imminence'; and (v) The notion of Due Diligence - Duty to Protect as an essential notion in the context of climate change cases.

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[72] CESCR, CEDAW, CPRAMWMF, CRPD, CRC, Joint statement on *'Human Rights and Climate Change'*, published 16 September 2019 [last accessed on 30 October 2020].

[73] See, Center for International Environmental Law, *United Nations Rights Committee Responds to Guyana's Carbon Bomb*, 10 August 2020 [last accessed on 30 October 2020].

If climate change is (as it is) one of the most pressing and serious threats to human life it is not surprising that climate change litigation has now reached the European Court of Human Rights. Today, before the Court, there are diagonal claims (*Portuguese Youth* case) (that add a level of complexity to the above analysis) and non-diagonal claims (*Senior Women for Climate Protection case)* in which issues of jurisdiction are straightforward.

While climate change raises novel issues in human rights litigation, the Strasbourg case-law has long established that the European Convention on Human Rights is a 'living instrument' which 'must be interpreted in light of present-day conditions'. Doubtless the European System will rise to the challenge to deal effectively with a new wave of claims rooted on environmental degradation arguments. In order for this to happen, the European Convention of Human Rights is to be interpreted in its normative environment which includes relevant binding rules such as those enshrined in climate change treaties such as the Paris Agreement. This is the correct approach under international law, reflecting the principle of systemic integration.

Arguments concerning causation have also been addressed, and submitted that the correct test is rather attribution, in accordance with rules of State Responsibility. Such rules of State Responsibility are key to understand liability principles under the European Convention of Human Rights. Indeed, the international law of state responsibility enshrined in the International Law Commission Articles on State Responsibility for Internationally Wrongful Acts remains relevant for understanding attribution in the context of climate change cases under the European Convention. The European Convention on Human Rights does not exist in that sense outside the general framework of international law. In addition, the appropriate understanding of the notion of imminence (not a temporal notion) has been discussed. Finally, it is submitted that the nature of the obligations at stake are positive, due diligence obligations, crucial to the correct understanding of the underlying duties in climate change cases both in respect of mitigation and adaptation.

The above leitmotivs are to appear in climate change litigation across human rights courts and international organs. A cross-fertilisation of jurisprudential developments is likely to take place as a result. For that reason, reference to the treatment of climate change by other regions and case-law has been made in the discussion relating to the above topics.