

ZOOM IN

The question:

Plugging the enforcement gap: The rise and rise of human rights in climate change litigation

Introduced by Annalisa Savaresi

The 2015 Paris Agreement set the path to address the climate emergency and to get to net zero emissions by 2050. However, it provides little means to hold state and corporate actors to account for failing to deliver on the promised emission reductions. The same may be said about much national climate legislation, which does not provide measures to hold public authorities accountable for failing to meet emission reduction targets. Similarly, liability and insurance regimes all over the world are yet to provide convincing answers to the complex compensatory and restorative justice questions associated with the impacts of climate change, such as floods, droughts, wildfires and people displacement.

Before climate change law rises to these challenges, litigants around the world have increasingly tried to push the boundaries of extant law, by filing test cases prompting state and corporate actors to reduce greenhouse gas emissions, and redress the harms associated with the impacts of climate change.¹ In January 2021, the world's leading climate litigation databases curated by the Sabin Centre for Climate Change Law and the Grantham Research Institute in Climate Change and the Environment list over 1,500 cases worldwide.

To date, only 66 of these cases invoke human rights, but the numbers are rising fast. By far and large, human rights-based climate cases – broadly understood as encompassing also complaints before national and international quasi-judicial and non-judicial bodies – predominantly target states (eg citizens suing governments), but increasingly also non-state

¹ This matter has been extensively investigated in the literature, see eg L Vanhala, C Hilson, 'Climate Change Litigation: Symposium Introduction' (2013) 35 L & Policy 141; J Peel, HM Osofsky, *Climate Change Litigation* (CUP 2015); J Setzer, and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 Wires Climate Change e580.

actors (eg citizens suing corporations). Typically, most of these cases rely on human rights to prop up arguments based on private or administrative law.² ‘Pure’ human rights complaints are however on the rise, with individual and groups seeking human rights remedies at the national³ and international level,⁴ with the aim to name and shame state and corporate actors. Conversely, no inter-state complaint based on human rights has been lodged, though this matter has been at the centre of much scholarly speculation.⁵

As I have already observed elsewhere, this use of human rights law and remedies enables applicants to raise grievances that might otherwise be overlooked and might engender a change in attitude by courts and lawmakers.⁶ Such a use of human rights is not new. Human rights law and remedies are commonly invoked as a means to protect environmental interests that can be couched as human rights violations, to provide remedies where no others are available. In this sense, human rights function as an interim ‘filler’⁷ to plug the accountability gap left by international and national law on a host of environmental matters. This practice has been

² See eg *The State of the Netherlands v Urgenda Foundation*, The Supreme Court of the Netherlands (20 December 2019) case 19/00135 (English translation) <www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> and *Milieudefensie et al v Royal Dutch Shell plc* (The Hague 2019) unreported <<https://en.milieudefensie.nl/climate-case-shell/climate-case-against-shell>>.

³ See eg *Salamanca Mancera et al v Presidencia de la República de Colombia et al*, Corte Suprema de Justicia de Colombia, No 110012203 000 2018 00319 01 (5 April 2018) <www.cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf> ; and *Petition 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*, Case No CHR-NI-2016-0001 (2015) <www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/CC-HR-Petition.pdf>.

⁴ See eg *Cláudia Duarte Agostinho et autres contre le Portugal et 32 autres États* Requête no 39371/20 (2020) unreported <<https://youth4climatejustice.org>>.

⁵ See eg M Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019); A Savaresi, ‘Inter-State Climate Change Litigation: “Neither a Chimera nor a Panacea”’ in I Alogna, C Bakker, JP Gaucci (eds), *Climate Change Litigation: Global Perspectives* (forthcoming 2021) <www.ssrn.com/abstract=3662391>.

⁶ A Savaresi, J Auz, ‘Climate Change Litigation and Human Rights: Pushing the Boundaries’ (2019) 9 *Climate L* 244; A Savaresi, ‘Human Rights and the Impacts of Climate Change: Revisiting the Assumptions’ [2020] *Oñati Socio-legal Series* <<https://onatifirstonline.wordpress.com/2020/11/26/human-rights-and-the-impacts-of-climate-change-revisiting-the-assumptions-annalisa-savaresi/>> (‘Human Rights’).

⁷ Savaresi, Auz (n 6) *ibid*; Savaresi, ‘Human Rights’ (n 6) *ibid*.



amply documented in the literature,⁸ and has been thoroughly mapped by the UN Special Rapporteurs on Human Rights and the Environment.⁹

The surge in human rights-based climate litigation has come after a decade of increased attention to the relationship between human rights and climate change law. This relationship has been abundantly recognised by scholars,¹⁰ states and international organizations. Since 2008, human rights bodies have progressively emphasised how obligations associated with both substantive (eg the right to life, adequate housing, food, and the highest attainable standard of health) and procedural human rights (eg the right to take part in the conduct of public affairs and to have access to remedies) have specific implications in relation to climate change.¹¹ The preamble to the Paris Agreement acknowledges this

⁸ See for example: A Boyle, MR Anderson, *Human Rights Approaches to Environmental Protection* (OUP 1998); D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford J Intl L*; A Boyle, 'Human Rights or Environmental Rights? A Reassessment' (2007) 18 *Fordham Environmental L Rev* 471; D Shelton, *Human Rights and the Environment* (Edward Elgar 2011); DK Anton, D Shelton, *Environmental Protection and Human Rights* (CUP 2012); A Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *Eur J Intl L* 613; A Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 *ICLQ* 759.

⁹ See the mapping studies prepared by the UN Special Rapporteur on Human Rights and the Environment <www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>; and UN Special Rapporteur on Human Rights and the Environment, 'Good Practices Report' (2015) <www.srenvironment.org/report/good-practices-report-2015>; and the best practice study UN Special Rapporteur on Human Rights and the Environment, 'Good Practices in Implementing the Right to a Healthy Environment' (2020) <www.srenvironment.org/report/good-practices-in-implementing-the-right-to-a-healthy-environment-2020>.

¹⁰ See eg D Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues' (2009) 38 *Georgia J Intl and Comparative L* 511; S Humphreys, *Human Rights and Climate Change* (CUP 2010); L Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 *J of Environmental L* 391; S Duyck, S Jodoin, A Johl (eds), *Handbook on Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018); S Duyck and others, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach' (2018) 12 *Carbon & Climate L Rev* 191.

¹¹ The Human Rights Council has adopted ten resolutions on human right and climate change between 2008 and 2020. See <www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx>. A summary of the activities of the Office of the UN High Commissioner for Human Rights is available at <<https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx>>.



relationship. It reminds parties that, when taking action to address climate change, they should ‘respect, promote and consider their respective obligations on human rights’.¹² This preambular reference confirms that systemic integration should be practiced in the interpretation of states’ obligations, both at the national and at the international level.¹³

As far as litigation is specifically concerned, human rights law requires states to ‘enable affordable and timely access to justice and effective remedies for all, to hold states and businesses accountable for fulfilling their climate change obligations’.¹⁴ The success of human rights based climate litigation fundamentally depends upon whether a victim can substantiate a claim that a duty-bearer has failed to comply with the obligations to protect, respect and fulfil human rights.¹⁵ In this regard, human rights arguments associated with climate change can be formulated in two main ways: applicants may complain that failure to act (eg to adopt and/or implement climate change legislation) has resulted in human rights violations; conversely applicants may complain that certain actions (eg permits or licenses to extract fossil fuels or log forests) have led to human rights violations.

To begin with, applicants need to persuade a judicial or quasi-judicial forum to hear their complaint. They must therefore demonstrate that they have standing to be heard. Once they overcome this non insignificant hurdle, applicants must prove that they have suffered for a human rights violation, and that the responsibility for such violation may be attributed to the alleged abuser. This entails providing proof that human rights breaches have occurred, and of causation and attribution associated with said breaches.

While these hurdles are not easily surmounted, some litigants have managed to successfully make human rights arguments in relation to cli-

¹² Paris Agreement, Preamble.

¹³ A Savaresi, ‘Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages’ in S Duyck, S Jodoin, A Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018) <www.ssrn.com/abstract=2902662>.

¹⁴ UN Special Rapporteur on Human Rights and the Environment, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (OHCHR 2019) UN Doc A/74/161 para 64.

¹⁵ Savaresi, Auz (n 6).



mate change, obtaining important court victories. In the most famous climate case to date, the Urgenda Foundation and a group of Dutch citizens successfully challenged the Dutch Government for not taking sufficiently ambitious action to reduce greenhouse gas emissions, relying on tort and human rights law arguments.¹⁶ Replica cases have been initiated elsewhere and presently remain pending before judicial and quasi-judicial bodies all over the world.

This Zoom in reflects on the rise and rise of human rights-based climate litigation, building on the workshop ‘Climate Change Litigation and Human Rights Arguments: Stocktaking and a Look at the Future’ that will be held at Sant’Anna School of Advanced Studies, Pisa on 6-7 May 2021. The contributors look at recent developments occurred at the national and at the international level in human rights-based climate litigation. Christine Bakker considers a pending complaint before the Committee on the Rights of the Child initiated by a group of youth, including climate activist Greta Thunberg. Riccardo Luporini analyses an Urgenda-replica case, *Giudizio Universale*, which is about to be launched in Italy. Finally, Emanuele Sommario reviews the UN Human Rights Committee’s decision over a complaint brought by a South Pacific islander against New Zealand.

¹⁶ *Urgenda Foundation v The State of the Netherlands*, District Court of The Hague (24 June 2015) case C/09/456689/ HAZA 13-1396 (English translation) <<https://uitspraken.rechtspraak.nl/inziendocumentid=ECLI:NL:RBDHA:2015:7196>> (District Court of the Hague decision); *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018) case 200.178.245/01 (English translation) <<https://uitspraken.rechtspraak.nl/inziendocumentid=ECLI:NL:GHDHA:2018:2610>> (Hague Court of Appeal decision); and *The State of the Netherlands v Urgenda Foundation*, The Supreme Court of the Netherlands (20 December 2019), case 19/00135 (English translation) <www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> (Supreme Court decision).

