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BEYOND THE COURTROOM: THE EVOLUTION OF RIGHTS-BASED CLIMATE LITIGATION FROM *URGENDA TO HELD* AND ITS POLICY IMPACT

Abstract

This paper examines the growing trend of employing international and human rights law in domestic climate change lawsuits as a strategic tool for legal action. Using a qualitative and comparative analysis of seminal case law, such as *Urgenda Foundation v the Netherlands* and *R (Friends of the Earth and others) v Heathrow Airport Ltd* and *Held v State*, this paper aims to explain the juridical trajectories and methodologies employed in rights-based climate litigation. The primary objective is to critically evaluate the potential regulatory impact of this emergent jurisprudential paradigm on both domestic legislation and international climate change treaties. The study posits that when traditional enforcement mechanisms enshrined in international environmental law treaties prove ineffective, domestic litigation grounded in human rights claims serve as a catalyst for transformative jurisprudence. This, in turn, can exert substantial pressure on state and non-state actors, compelling them to adopt more strict regulatory measures to mitigate the effects of climate change. The aim of this paper is twofold: first, to elucidate the effectiveness and development of rights-based jurisprudence in climate litigation, and second, to assess its potential for influencing the creation of stronger regulatory mechanisms at both state and international levels. The paper argues that when international treaties fail to take adequate climate change action, domestic lawsuits based on human rights claims start to serve as a lever of change, pressuring both state and non-

state actors into adopting more ambitious measures. The study underscores the importance of this rights-based approach not merely as a legal strategy but as a multifaceted tool for effectuating systemic regulatory advancements and fostering climate justice.

KEYWORDS

rights-based climate litigation, state responsibility in international law, climate change mitigation, judicial activism, regulation through litigation, Paris Agreement

SŁOWA KLUCZOWE

spory klimatyczne, odpowiedzialność państwa w prawie międzynarodowym, łagodzenie zmian klimatu, aktywizm sędziowski, regulacja poprzez postępowanie sądowe, Porozumienie paryskie

I. INTRODUCTION

While most current domestic lawsuits address climate change violations through statutory law, the recent cases based on claims of rights infringement represent a major turn away from these more conventional models. The use of human rights law as a tool which fills the gaps to enforce states' standards and obligations more effectively is not new in the international environmental context.¹ In recent years, this method has become increasingly popular to redress the impact of climate change and to put pressure on state and non-state actors to take more ambitious actions to tackle climate change problems. While relatively few cases have been brought on human rights grounds, the trend is continuing and accelerating with some promising results for the future.

Litigation has arguably never been a more important legal mechanism to influence policymakers and market players to develop and implement effective means of climate change mitigation and adaptation than it is today. Standards and mechanisms of international treaties find their way into domestic climate change jurisprudence providing interpretation and guidance, thereby becoming significant indirect drivers of litigation.

The paper methodology revolves around a qualitative and comparative analysis of key climate litigation cases, and the use of international human rights law

¹ See John H Knox, 'Constructing the Human Right to a Healthy Environment' (2020) 16 Annual Review of Law and Social Science 79, 81–82.

as a strategic tool in legal action against climate change. This approach involves a detailed examination of the legal arguments and judicial decisions in these cases, assessing how they align with and are influenced by international human rights standards and climate change treaties, like the Paris Agreement. The paper is designed so as to critically evaluate a potential regulatory impact of this emerging jurisprudential paradigm on both domestic legislation and international climate law. It provides insights into how domestic courts increasingly make use of international human rights frameworks to address climate change, thereby contributing to the development of global legal and policy responses to this critical issue.

The emerging case law, including the *Urgenda*, *Held v State* or *Heathrow* cases, reveals an observable model for petitioners to employ international human rights claims in climate change lawsuits, as well as a growing receptivity of courts to this framing. By analysing domestic human rights litigation trends based on climate claims it is possible to capture law in action on different levels that allow for the mutual supportiveness and complementarity of legal tools. The selection of cases is strategic, as these are high-profile cases from the US, the UK, and the Netherlands underpinned by their representation of developed countries in the Global North, dependent on industries driven by fossil fuels, such as petroleum, natural gas, and coal. These nations are either among the top current emitters globally or have significant industrial histories with historical emissions registered, but they are also relevant actors in setting precedents in environmental policies and legal frameworks. Notably, all the three countries are making strides in diversifying their energy sources with increasing investments in renewable energy.

Each case represents a different approach and proposed reasoning incorporating human rights and environmental concerns into legal decisions. The *Urgenda* case is pivotal for establishing a government's legal obligation to reduce emissions based on the human rights regime of protecting its citizens from the imminent dangers posed by climate change, thus aligning with the Paris Agreement objectives. The *Heathrow* case is significant for its initial incorporation of international commitments pledged by the British government in the form of, e.g. nationally determined contributions (NDCs) under the Paris Agreement into national policy decisions. The *Held v Montana* case recognizes a constitutional right to a stable climate by emphasizing the state's responsibility to protect the environment and combat climate change for future generations.

The selected cases demonstrate how legal actions in these countries can directly influence major industrial sectors. By taking a closer look at their reasoning, scholars may predict how these jurisdictions may have far-reaching effects, potentially leading to global shifts in industry practices, also by inspiring similar actions in other developed countries, and creating a domino effect in strengthening climate-related legal frameworks globally. Thus, the case selection illustrates the current state of climate litigation but also reflects a strategic approach to

influencing global climate policy and industry practices from a legal standpoint. This paper analyses the development and effectiveness of the emerging case law based on the selected examples of courts' decisions and assesses their possible impact in the development of human rights and constitutional mechanisms, as well as remedies in climate change litigation.

As a result, this study tries to show that, when sanctioning mechanisms cannot be sufficiently established by international environmental legal treaties, non-state actors' petitions employing international human rights claims in climate change lawsuits in domestic courts may influence case law of tribunals, and thus pressure state and non-state actors into adopting more ambitious regulatory action to tackle climate change problems.

II. CATALYSING CLIMATE ADAPTIVE MEASURES

1. THE CHARACTER OF THE PARIS AGREEMENT

The climate change regime is a major environmental challenge facing the world today and has increasingly become a complex issue in the spotlight of international relations. From a technical point of view, the 1997 Kyoto Protocol² remains in force, but the Paris Agreement has, in effect, superseded it as the major regulatory instrument governing the global response to climate change. These two key legally binding agreements have relied on voluntary arrangements, with insufficient enforcement and liability instruments that would enable an effective and fast response to tackle climate issues.³

To be more precise in calibrating its legal validity, the Paris Agreement – like the 1997 Kyoto Protocol and unlike the 2009 Copenhagen Accord – is unquestionably a treaty within the meaning of international law, but not all its provisions establish legal obligations, which vary widely. Some provisions create legal obligations (for example, Article 4.2, which requires that each party *shall* submit their

² The Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change (UNFCCC) by committing industrialized countries to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. The Convention only requires those countries to adopt policies and measures on mitigation and to report periodically (Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 UNTS 162).

³ See e.g. Richard J Millar and others, 'Emission Budgets and Pathways Consistent with Limiting Warming to 1.5°C' (2017) 10 Nature Geoscience 741; Luke Kemp, 'A Systems Critique of the 2015 Paris Agreement on Climate' in Moazzem Hossain, Robert Hales and Tapan Sarker (eds), *Pathways to a Sustainable Economy* (Springer 2017); AP Schurer and others, 'Interpretations of the Paris Climate Target' (2018) 11 Nature Geoscience 220; Joeri Rogelj and others, 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well below 2°C' (2016) 534 Nature 631.

NDCs every five years) whereas others express general normative expectations, for instance, Article 4.3, which provides that successive NDCs *will* represent a progression and reflect a party's highest possible ambition.⁴ As a result, parties do not have an obligation to achieve their NDCs to address climate change; thus, in this respect, the substance of the provided NDCs is not legally binding.⁵

The Paris Agreement (PA)⁶ aimed at keeping the increase in the global average temperature to well below 2 °C above pre-industrial levels (Article 2 PA) as states' shared common commitments, which will be based on NDCs that allow autonomy and flexibility for governments in self-differentiation of emission reductions in accordance with varying national capacities and circumstances (Articles 4.4 and 4.6 PA).⁷ Although there is a compliance procedure (Article 15 PA) with incentives of transfer of technology, cooperation and financial resources provided by developed countries (Articles 8.4, 9, 10, 11 PA), the agreement does not cover enforcement mechanisms as there are no penalties if countries withdraw or fail to meet their commitments. Therefore, it is reasonable to believe that the Paris Agreement effectiveness depends on the interpretation, structure, and enforcement of substantive measurements at the national level.

2. A POTENTIAL ROLE OF THE PARIS AGREEMENT IN CLIMATE CHANGE LITIGATION

Although the Paris Agreement seems to be a challenging framework that lacks enforcement mechanisms and the willingness of states to implement its objectives, it may have an important impact on the development of domestic case law as a novel anchorage for lawsuits based on governments' legislative and policy commitments.

Firstly, even though the Paris Agreement does not directly mention information on measures to safeguard human rights in the nationally determined contributions, the preamble links the obligations and efforts of states to potentially affected individual legal positions, which implicitly promotes access to a review of impact on individuals under existing rights mechanisms.⁸

Secondly, the previously mentioned NDCs do not specify how countries need to allocate carbon budgets but irreversibly shape the governments' national com-

⁴ Daniel Bodansky, 'Paris Agreement' Introductory Note (United Nations Audiovisual Library of International Law 2021).

⁵ *ibid.*

⁶ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNFCCC, COP 21, UN Doc FCCC/CP/2015/10/Add.1 (Paris Agreement or PA).

⁷ Rogelj and others (n 3) 631.

⁸ Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) Transnational Environmental Law 17, 31.

mitments, no matter how vaguely they are defined.⁹ This shows that the Paris Agreement is a central legal management tool for global climate efforts in its mitigation and adaptation, but the management of substantive obligations relies on the self-commitments of signatories. The Paris Agreement goals are highly relevant guidance for judicial interpretation and domestic law-making, where the envisaged model still needs to be assessed on how it is reflected in actual national contributions.¹⁰ Hence, the functional interlinkage and interactions between global and domestic governance are essential in determining the development in climate change law.¹¹

Lastly, the Paris Agreement calls on all parties to undertake and communicate ambitious efforts while defining their mitigation commitments that will represent a progression beyond the states' current NDCs.¹² This means the governments will make their NDCs incrementally ever more stringent compared to their previous national policies. Thus, even if a national government claims that it has never specified or directly implemented the Paris Agreement objectives into domestic law, it cannot argue that its commitments allow backsliding in national climate adaptive and mitigatory policies.¹³

Whenever international climate change law has been invoked by domestic courts, it has been usually addressed indirectly as a means of interpretation or guidance for general principles that have been incorporated into case law by re-interpreting them within the framework of national law.¹⁴ For example, *Urgenda* relied on the 2 °C target negotiated by the Conferences of the Parties under the UNFCCC.¹⁵ On the other hand, the Paris Agreement was the basis of scientific reference and legal constraint in both *Heathrow* and other European cases, including *Greenpeace Nordic Association v Norway Ministry of Petroleum and Energy* or *PUSH Sweden v Government of Sweden*, in which the Paris Agreement is perceived as the international law obligation binding their governments.¹⁶

⁹ *ibid* 27.

¹⁰ Patricia Galvão Ferreira, “Common but Differentiated Responsibilities” in the National Courts: Lessons from *Urgenda v the Netherlands*’ (2016) 5(2) Transnational Environmental Law 329, 351.

¹¹ Jerry Patchell and Roger Hayter, ‘How Big Business can Save the Climate’ *Foreign Affairs* (92(5) September/October 2013) <www.foreignaffairs.com/articles/commons/2013-08-12/how-big-business-can-save-climate> accessed 8 March 2024.

¹² Paris Agreement, Art 3 and Art 4 para 3.

¹³ United Nations Environment Programme and Columbia University Sabin Center for Climate Change Law, *The Status of Climate Change Litigation: A Global Review* (UN Environment and Columbia Law School 2017) 17 <<https://wedocs.unep.org/20.500.11822/20767>> accessed 8 March 2024.

¹⁴ Wegener (n 8) 25.

¹⁵ *Urgenda v the Netherlands*, ECLI:NL:RBDHA:2015:7196 (24 June 2015) (*Urgenda I*), paras 4.84–4.86.

¹⁶ *Greenpeace Nordic Ass’n and Nature and Youth v Ministry of Petroleum and Energy*, 16-166674TVI-OTIR/06, Oslo District Court (1 April 2018), paras 18–19; *PUSH Sverige*,

This transposition of international law into domestic systems allows courts to synchronize national policy goals with the ambitious and general objectives of the Paris Agreement. More precisely, it makes judicature perform a crucial role in defining the scope of executive or legislative discretion based on the up-to-date scientific research and evolving international environmental agreements.¹⁷ Still, the absence of specified rules of determining individual shares of the global carbon budget creates a significant barrier for courts which are to determine the extent to which international commitments constrain domestic discretion in defining NDCs.¹⁸

In the domestic litigation associated with the Paris Agreement a different approach may be developed, which will focus on cross-level interactions of climate regime rather than the legal normativity of a single instrument as well as on the identification of international and domestic synergies in legislation and case law.¹⁹ As a consequence, litigation may become a transnational feature and influence and shape climate change governance.²⁰

III. THE ROLE OF RIGHTS-BASED CASE LAW IN SHAPING CLIMATE LAW

1. JUDICIAL ROLE IN DEFINING LEGAL OBLIGATIONS TO ADDRESS CLIMATE CHANGE BASED ON HUMAN RIGHTS

It must be stated that climate change litigation on the grounds of human rights is nothing new but in recent years its sudden exponential increase across the globe has been observed.²¹

Overall, international environmental law is compiled as a set of agreements between states that regulate their relations with other states as well as between the states and their citizens. Thus, litigation serves as a tool which enables citizens to

Fältbiologerna och andra v Sverige regering, T 11594-16, Stockholm District Court (30 June 2017), paras 26 or 33.

¹⁷ Wegener (n 8) 26.

¹⁸ *ibid* 27.

¹⁹ *ibid* 18.

²⁰ Joyeeta Gupta, 'Legal Steps outside the Climate Convention: Litigation as a Tool to Address Climate Change' (2007) 16(1) *Review of European Community & International Environmental Law* 76.

²¹ The Sabin Center for Climate Change Law at Columbia Law School has gathered already 144 non-US climate change litigation cases against government on the grounds of human rights, with the biggest number of suits related to the right to a healthy environment. The database is available online <<https://climatecasechart.com/non-us-case-category/human-rights>> accessed 8 March 2024.

check whether national actions or lack of action are compatible with those agreements.²² More precisely, it may help to turn commitments articulated in international agreements into domestic actions and regulations by allowing the domestic courts to interpret their application. Consequently, even if the Paris Agreement does not provide for specific enforcement mechanisms on the emission reduction goals set by NDCs, it offers signatories' citizens a ground for defining a carbon budget as part of national government commitments. Some of the examples mentioned below illustrate this process and show how judicial reasoning differs in responding to them globally.

2. SELECTED CASES OF CLIMATE CHANGE LITIGATION

The judicial advancements and landmark rulings, such as the cases of *Heathrow*, *Urgenda Foundation v State of the Netherlands*, and *Held v Montana*, may be perceived as important contributors to the ongoing discussions on the shape of the future international climate law. These cases, each with a distinct judgment, collectively reflect a transnational shift in the debate of the Global North towards recognizing and operationalizing the symbiosis between human rights, environmental protection, and climate governance within the international legal paradigm.

a) The United Kingdom

In February 2020, the global news broke that the Court of Appeal of England and Wales stopped Heathrow Airport expansion based on climate change grounds, which included the Paris Agreement.²³ For environmental supporters, this was a ground-breaking ruling as it inspired challenges against other high-carbon projects globally. Nevertheless, the impact of the *Heathrow* ruling should not be overestimated, especially after the Supreme Court's revision of the decision. Undoubtedly, at first it was perceived as a possible game-changer that would overcome political differences as well as governments' inaction. Although public sentiments are quite understandable, it is crucial to analyse what is the actual outcome of this judgment.

R (Friends of the Earth) v Secretary of State for Transport and others case²⁴ concerned the proposed expansion of Heathrow Airport by adding the third runway under the policy set out in the 2018 'Airports National Policy Statement'

²² Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law* 37, 39.

²³ Tom Espiner, 'Climate Campaigners Win Heathrow Expansion Case' *BBC News* (London, 27 February 2020) <www.bbc.com/news/business-51658693> accessed 8 March 2024.

²⁴ *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] EWCA Civ 214 (27 February 2020) (*Heathrow I*).

(ANPS).²⁵ This document, designated by the Secretary of State for Transport in office at the time, is a national policy statement prepared under section 5(1) of the Planning Act 2008.²⁶ The Court produced two judgments, in which the latter, concerning a judicial review of whether the Divisional Court was wrong to conclude that the ANPS was produced lawfully, is a focus of further analysis.²⁷

In conclusions, the Court of Appeal pointed out that the ANPS was not produced as the law requires as it failed to comply with the statutory regime imposed by the Parliament in the Planning Act for the formulation of government policy in a national policy statement. In particular, it corresponds to section 5(8) of the Planning Act, under which the reasons for the policy set out in the ANPS ‘must... include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change’.²⁸ The Court explains that section 5(8) requires to explain in the ANPS how the Secretary of State has ‘taken into account’ government policy, meaning it should also consider government’s commitment to the Paris Agreement.²⁹ The Court of Appeal pointed to a considerable amount of evidence that proved how the Paris Agreement plays an important role in shaping government policy on the climate change regime.³⁰ For example, among statements given on behalf of the government officials, the one striking evidence was mentioned in the ‘The Clean Growth Strategy (CGS)’ (2017), in which the Secretary of State for Energy and Industrial Strategy stated that ‘The UK played a central role in securing the 2015 Paris Agreement’.³¹ Consequently, the Court concluded that the designation of the ANPS was unlawful by reason of failure to consider the government’s commitment to the provisions of the Paris Agreement on climate change, ratified by the UK in November 2016.³²

²⁵ The UK Department of Transport, ‘Airports National Policy Statement: New Runway Capacity and Infrastructure at Airports in the South East of England’ presented to Parliament pursuant to section 9(8) of the Planning Act 2008 (June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/858533/airports-nps-new-runway-capacity-and-infrastructure-at-airports-in-the-south-east-of-england-web-version.pdf> accessed 8 March 2024.

²⁶ The Planning Act is discussed in paras 37–44 of the *Heathrow* decision. It defines procedural steps that must be taken before a national policy statement can be formally ‘designated’ by the Secretary of State. The Planning Act obliges the Secretary of State to take into consideration any relevant national policy statement while deciding on an application for development consent.

²⁷ See *Heathrow I*, paras 135–37.

²⁸ Section 5(8) of the Planning Act and *Heathrow I*, para 38.

²⁹ *Heathrow I*, paras 222–23.

³⁰ See *Heathrow I*, paras 196–216.

³¹ *Heathrow I* para 209. Based on the CGS, the Secretary also stated that ‘[t]he actions and investments that will be needed to meet the Paris commitments will ensure the shift to clean growth will be at the forefront of policy and economic decisions made by governments and businesses in the coming decades.’

³² *Heathrow I*, para 238. For the whole reasoning, see paras 222–38 and 242–61.

Nevertheless, the Supreme Court overturned the decision of the Court of Appeal in full in December 2020. Contrary to the previous reasoning, the Supreme Court stated that the Secretary of State had acted lawfully, and to the extent that he needed, to consider the Paris Agreement, through consideration of the emission reduction commitments in the Climate Change Act 2008.³³ Secondly, the Court determined that environmental assessment was conducted lawfully, and did not need to expressly refer to the Paris Agreement itself and it was already sufficiently considered.³⁴ In relation to Plan B Earth's ground of challenge, the Supreme Court held that the government's commitment to the Paris Agreement was not a part of 'government policy' for the purpose of section 5(8) of the Planning Act 2008. It disagreed with the Court of Appeal's conclusion and held that a 'relatively narrow meaning' should be applied while referring to 'carefully formulated written statements of policy'.³⁵

Importantly, the Supreme Court's judgment did not endorse the expansion of Heathrow Airport, nor give Heathrow the 'green light' to start building; it made it clear that all climate considerations remain to be addressed and resolved, though at the moment at the planning permission stage.³⁶ According to the judgment, built on the reasoning of the Court of Appeal, the National Policy Statement (NPS) has not irrevocably predetermined the approval of Heathrow expansion. Absent these judicial proceedings, there might have been a presumption that the runway obtained approval concerning environmental implications via the NPS designation. However, the litigation unequivocally dispels such presumption: to proceed, the developer is compelled to align its proposals with the most current evaluation of environmental impact at the time when the application is determined.

b) The Netherlands

When analysing *Heathrow*, parallels should be drawn with other cases of climate change litigation, including the landmark *Urgenda Foundation v State of the Netherlands* case. The issue in *Urgenda* was whether the Dutch state was obliged to reduce the emission of greenhouse gases originating from Dutch soil by at least 25% by the end of 2020, instead of the pledged 19%, in order to comply with its legal obligations and whether the courts could order the state to do so.³⁷ In December 2019, the Dutch Supreme Court in its final decision affirmed the lower

³³ *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52 (16 December 2020) (*Heathrow II*).

³⁴ *Heathrow II*, para 149.

³⁵ *Heathrow II*, para 105.

³⁶ *Heathrow II*, para 143.

³⁷ *Urgenda v the Netherlands*, ECLI:NL:RBDHA:2015:7196 (24 June 2015) (*Urgenda I*), para 4.85.

courts' rulings³⁸ by stating that the Netherlands had a positive obligation under Articles 2 and 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) to take protective human rights measures for the prevention of climate change impact, which meant that the state was required to reduce national GHG emissions by at least 25% by 2020 compared with 1990 ('*Urgenda* target').³⁹ It was the Supreme Court which substituted tort law with human rights law as the legal basis for the state's obligation to achieve that target. What is more, the judgment was pivotal as it demonstrated that courts could determine responsibilities of individual states and order legal remedies against a violation or imminent violation of the rights that are safeguarded by the ECHR.⁴⁰

Both *Heathrow* and *Urgenda* cases show a range of important similarities. First and foremost, both represent high-profile climate lawsuits, which may increase public awareness and lead to a growing receptivity of domestic courts to this framing. They include stakeholders from both public and private sectors: a coalition of environmental non-governmental organizations or private individuals as claimants and public authorities as defendants. Last but not least, the goal for both claims was to protect a broader set of values of common interest, including environmental protection or public health, rather than merely personal interests.

Nevertheless, we can observe striking differences between these two cases, in which reasoning sometimes seems contradictory. In *Urgenda* cases, the Dutch Court unequivocally stated that the government of the Netherlands had to comply with its international legal obligations established in the ECHR and that the risks caused by climate change were sufficiently real and immediate to bring them within the scope of Articles 2 and 8 ECHR. By interpreting the ECHR case law on Article 2 (e.g. *Öneryildiz v Turkey*)⁴¹ and Article 8 (e.g. *Tătar v Romania*), the Court concluded that these provisions obliged the state to take measures against the risk of dangerous climate change.⁴² It means that the Court recognized the obligation of the Netherlands to take preventive action to reduce its GHG emissions as a part of positive human rights obligation. As a consequence, the Dutch Court advanced the argument that climate change is a human rights issue, which was previously articulated by many other international bodies, includ-

³⁸ *Urgenda I* and *Urgenda v the Netherlands*, ECLI:NL:GHDHA:2018:2591 (9 October 2018) (*Urgenda II*).

³⁹ *Urgenda v the Netherlands*, ECLI:NL:HR:2019:2007 (20 December 2019) (*Urgenda III*), paras 5.2.1–5.5.3.

⁴⁰ *Urgenda III*, paras 8.1–8.3.

⁴¹ *Urgenda III*, para 5.2.2.

⁴² *Urgenda III*, para 5.2.3. As the Court concluded, 'The obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. That risk need not exist in the short term'.

ing the UN Special Rapporteur on Human Rights and the Environment⁴³ and the Human Rights Council, in the 2018 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR)⁴⁴ or other relevant domestic court cases⁴⁵. Undoubtedly, this ground-breaking judicial approach may lead to an important change and a surge in much more climate litigation based on human rights obligations of states towards their citizens.

In contrast with *Urgenda*, where the Dutch government was held accountable for its nationwide climate change policy and its mitigation target, *Heathrow* is project-based litigation. It focuses entirely on the legality of the ANPS and not the governmental climate policy per se or its positive human rights obligations towards British citizens. The above-mentioned argument corresponds also another vital difference: whereas *Urgenda* was won on substantive grounds (the state did not comply with its obligation to avert dangerous effects of climate change), *Heathrow* was decided on procedural grounds. Consequently, the British Court's judgment does not prohibit the government from building the third runway but requires that state officials redefine and rewrite the airport policy statement in line with the UK's climate commitments.

Furthermore, the ruling in *Urgenda* states that the national courts can order the state to comply with its international legal obligations as national law must provide an effective legal protection (remedy) against a violation or imminent violation of the rights that are safeguarded by the ECHR (Article 13 ECHR).⁴⁶ The question arises of how this decision can be implemented without interfering with the separation of powers, the unconstitutionality of which was raised in the Dutch state's arguments. According to the Dutch government, the separation of powers should not be interfered with because it is the democratically legitimized government that is the appropriate body to take the relevant policy decisions.⁴⁷ The Dutch Court rejected this argument, claiming that in this case as the state violated human rights, which called for the appropriate measures to be introduced by the judiciary, and the requirement to reduce emissions gave the state sufficient space to decide how to comply with and implement the new measures.⁴⁸

It is noteworthy that the *Urgenda* target has been achieved. According to the National Inventory Report on the state's 2020 emissions, communicated to the

⁴³ See Special Rapporteur resolutions on human rights and the environment <www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Resolutions.aspx> accessed 8 March 2024.

⁴⁴ For example, the Advisory Opinion OC-23/17, *The Environment and Human Rights*, Requested by the Republic of Colombia, Inter-American Court of Human Rights (15 November 2017) <www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf> accessed 8 March 2024.

⁴⁵ For example, *Maria Khan et al. v Federation of Pakistan et al.*, Writ Petition 8960/2019 (15 February 2019) <<http://climatecasechart.com/non-us-case/maria-khan-et-al-v-federation-of-pakistan-et-al>> accessed 23 September 2023.

⁴⁶ *Urgenda III*, para 5.5.2.

⁴⁷ *Urgenda III*, para. 2.3.2.

⁴⁸ *ibid.*

UNFCCC Secretariat in 2023, the Netherlands secured a reduction in national emissions by around 26% (from 228.9 to 168.9 MtCO₂eq), with a small increase by 1.8%, due to a rise in heating means in winter 2021.⁴⁹ Nevertheless, scholars claim that it was not the new policy measures but rather ‘extraneous circumstances’, e.g. displacing sources of emissions to other countries or introducing tax on the disposal of foreign waste, which allowed fulfilment of the *Urgenda* target. Thus, it cannot be explicitly decided whether *Urgenda* has led to an enhanced political support for mitigation action as it would be expected.⁵⁰ Still, it shows that future ‘target-setting’ cases will include structural impediments as their effective enforcement will rely upon designing comprehensive mitigation strategies together with monitoring and compliance measures on emission reduction targets.

At the same time, in *Heathrow* judges were more reluctant to confirm findings of the *Urgenda* decision. They underscored that they did not want to take part in political debate about climate change and would not assess whether the British government was obligated under the Paris Agreement to impose its reduction limits but only deliberated on the legality of the ANPS in accordance with the clear statutory requirements of the Parliament, based on which national policy on climate change should be taken into account. Suffice it is to say, the Court gently discussed a possible lack of consideration by the British government aligning with the Paris Agreement’s commitments in domestic planning, which they have strongly supported in their official statements.

The reasoning of both the Court of Appeal and the Supreme Court emphasized that their role was neither to interfere with the government’s national policy and engage to political debates nor to decide for the government which international obligations they should comply with. Therefore, the courts did not decide whether the Paris Agreement binds the UK government to act in accordance with its provisions. ‘That is none of the court’s business’⁵¹ and the courts’ only role was to answer a legal question of whether the ANPS was produced lawfully. Therefore, the courts’ intention was not to challenge the government’s climate policy, as it was underscored in the *Urgenda* decision; instead, the British courts focused on judicial review of legality of a single project of expanding Heathrow Airport confirmed in the ANPS.

It must be underlined that the *Heathrow* decision still plays an important role as a precedent in climate change litigation and potential shaping of the future international climate legal framework. Although it is much more judicially conservative and restrained than *Urgenda* seems to be, it still raises a lot of climate

⁴⁹ *Greenhouse Gas Emissions in the Netherlands 1990–2021*, National Inventory Report: RIVM report 2023-0052 (National Institute for Public Health and the Environment, the Netherlands 2023) 17.

⁵⁰ Benoit Mayer, ‘The Contribution of *Urgenda* to the Mitigation of Climate Change’ (2023) 35(2) *Journal of Environmental Law* 167, 169.

⁵¹ *Heathrow I*, para 281.

issues. Without doubt, the British government is held accountable for their climate commitments expressed in a public forum, and therefore it will be undeniably harder to ignore the state's environmental responsibilities. Still, as the time has shown, the growing body of climate litigation is yet to find consistent and predictable treatment in English courts. Undoubtedly, the possible global impact will prevail, as other courts around the world follow the example of *Heathrow* and are more willing to draw directly upon the international environmental commitments undertaken by governments as part of their national policies.

c) The United States

The introductory note on the US climate change litigation should refer to the *Juliana v the United States* case (2019), which for many scholars remains a starting point in both judicial and legislative climate discourse. *Juliana* was brought in 2015 by a group of young plaintiffs who filed a constitutional climate lawsuit, asserting that the US government, by enabling the proliferation of fossil fuels, violated the youngest generation's constitutional rights to life, liberty, and property, and failed to fulfil its duty to protect natural resources for the public use and benefit, according to the Public Trust doctrine.⁵² Despite relentless determination of plaintiffs, there has been a continuous resistance of the US federal court in addressing remedies⁵³ based on constitutional climate claims against the federal government, due to the separation of powers clause, which deters courts from interfering in matters reserved for political branches, like climate change policy, that are not suitable for judicial resolution.⁵⁴ This resembles the reasoning provided in the *Heathrow* case.

It remains uncertain whether the US federal courts will reconsider this decision yet, no matter what the outcome will be, it still remains a pivotal precedent, in which the federal court acknowledges the seriousness of climate change and clearly agrees that the federal government promoted fossil fuel use despite its

⁵² Climate Change Litigation Database: *Juliana v the United States* (Sabin Center for Climate Change Law, Columbia Law School) <<https://climatecasechart.com/case/juliana-v-united-states>> accessed 8 March 2024.

⁵³ Madeleine Carlisle, 'A Federal Court Threw out a High Profile Climate Lawsuit. Here's What it Might Mean for the Future of Climate Litigation' *Time* (New York, 17 January 2020) <<https://time.com/5767438/climate-lawsuit-kids>> accessed 8 March 2024.

⁵⁴ See the action launched against the US government in the US District Court for the District of Oregon in 2015 (*Juliana v the United States*, Case 18-36082, 9th Cir. 2020), in which plaintiffs argued that the government actions that cause climate change violated the Fifth Amendment, i.e. the youngest generation's rights to life, liberty, and property, and that the government failed to protect essential public trust resources. On 17 January 2020, a divided Ninth Circuit Court issued an order on the interlocutory appeal and decided that Juliana Plaintiffs lacked standing to press constitutional climate claims against the federal government. In October 2021, the Ninth Circuit Court refused rehearing the young plaintiffs' constitutional climate case against federal defendants.

effect on the environment.⁵⁵ The case initiated extensive legal debate around the justiciability of climate change issues, the role of courts in addressing such global and political matters, and the interpretation of constitutional and public trust doctrines in the context of environmental harm. This proves that not only the results of current cases but also pending and appealed lawsuits suggest that the trend may change and will gain an even greater support in the future.⁵⁶ It provoked discussions on the role, abilities, and responsibilities of the legislative and executive branches in addressing climate change, environmental protection, and sustainable development, which is the nexus in the Preamble to the Paris Agreement.⁵⁷

Despite all impediments and the court's decision on lack of standing, *Juliana* plaintiffs continue to pursue their case⁵⁸ and can proceed to trial, which may result in key changes in judicial reasoning thanks to the recent decision in the *Held v State* case, in which the Montana Trial Court ruled that state law restriction on considering climate change impact violated young plaintiffs' constitutional rights.⁵⁹ In August 2023, the Montana Trial Court affirmed the plaintiffs' claim that stable climate is included in the state constitutional right to a healthy environment. More accurately, in this lawsuit brought by 16 young plaintiffs, the Montana Court ruled that a provision of the Montana Environmental Policy Act (MEPA) that prohibits considering GHG emissions and corresponding climate change impact in environmental reviews (the MEPA Limitation) violated the plaintiffs' right to a clean and healthful environment under the Montana Constitution.⁶⁰ The court held that the plaintiffs had a fundamental right to a clean and healthful environment, 'which includes climate as part of the environmental life-support system'.⁶¹ What is more, the court also held that a statutory provision limiting the remedies available to the MEPA litigants violated the Montana Constitution because 'it removes the only preventative, equitable relief available to the public and MEPA litigants'.⁶²

⁵⁵ Carlisle (n 53).

⁵⁶ See e.g. the *Torres Strait Islanders* case, in which plaintiffs took their complaint in 2019 to the United Nations Human Rights Committee in Geneva, aiming at forcing the government for a greater climate action as well as more funds for coastal defenses. For more information see <www.clientearth.org/latest/news/torres-strait-islanders-fight-to-hold-australia-accountable-for-climate-change> accessed 8 March 2024.

⁵⁷ 'Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights ...'; see Paris Agreement available online <https://unfccc.int/sites/default/files/english_paris_agreement.pdf> accessed 8 March 2024.

⁵⁸ The plaintiffs have filed an amended complaint to rectify deficiency identified in the Ninth Circuit Court's decision, which was allowed by the Oregon Federal Court in January 2023.

⁵⁹ *Held v State*, CDV-2020-307, Mont. Dist. Ct., Montana (14 September 2023).

⁶⁰ *Held v State*, para 6.

⁶¹ *Held v State*, para 7.

⁶² *Held v State*, para 8.

Thus, the *Held* case resembles judicial reasoning provided by the Dutch court in *Urgenda* by linking the right to the stable climate to constitutional protection of citizens of the Montana state. According to the court, the constitutional right to a clean and healthful environment requires ‘enhancement’ of Montana’s environment and ‘is complemented by an affirmative duty upon [the] government to take active steps to realize’ this right, which was affirmed as one of the unalienable rights included in the Bill of Rights passed by a large majority of members of the Montana’s Constitutional Convention.⁶³ The importance of this ruling lies in the fact that the court – relying on the extensive scientific record presented at trial – affirms climate science after the trial and paves a way for acknowledging a direct link between the constitutional right to a clean environment and the consequences of climate change.

As a result, the decision established a clear causal relationship between the state’s approval of fossil fuel projects and actual injuries suffered by the plaintiffs. It demonstrated that injuries suffered by individuals were linked to global emissions, and that significant share of those emissions were caused by Montana’s fossil fuel production.⁶⁴ The MEPA Limitation’s role in potentially increasing Montana’s emissions further aggravated these injuries. The analysis of this entire causal chain allowed illustrating that the plaintiffs’ injuries were redressable, in contrast with the situation in the *Juliana* case.⁶⁵ It should be underlined that the Montana attorney general’s office indicated the state would appeal to the Montana Supreme Court. Undoubtedly, *Held* will serve as an example and bolster cases in other states with similar environmental protections in their constitutions.

Therefore, *Held* represents the first judicial decision directly tying climate change to constitutional rights in the US that is primarily important for its recognition of the harms caused by climate change. This reasoning can be widely applied in future environmental litigation both at the state and federal levels. Firstly, the ruling provides a framework for litigants in addressing standing and causation issues, showing a direct link between state-sanctioned fossil fuel activities and the plaintiffs’ injuries. Secondly, it underscores the effectiveness of narrowly targeted challenges against specific laws – limited in the scope of the court’s remedial authority – that increased the likelihood of the court’s acceptance of the claim and granting the requested remedy. In contrast to *Held*, the *Juliana* case has a much broader scope of remedial claim by seeking comprehensive federal action against fossil fuel reliance by creating a ‘remedial plan’, which would involve complex policy decisions with difficult trade-offs and without clear manageable standards that could be supervised by the Court within its mandate. The *Held*

⁶³ *Held v State*, para 287.

⁶⁴ *Held v State*, paras 66–70.

⁶⁵ Sam Bookman, ‘*Held v Montana*: A Win for Young Climate Advocates and What it Means for Future Litigation’ (Harvard Law School EELP, 30 August 2023) <https://eelp.law.harvard.edu/2023/08/held-v-montana/#_ftn19> accessed 8 March 2024.

litigation had a narrower focus on state-level legislation – in comparison with *Juliana* – and therefore significantly raised the likelihood of judicial acceptance and remedy provision.

Lastly, the case demonstrates the potential of state constitutional law, particularly in states with environmental rights provisions, as a basis for climate lawsuits.⁶⁶ The success of *Held* is deeply anchored in the Montana Constitution, which guarantees citizens a ‘right to a clean and healthful environment’.⁶⁷ Comparable constitutional provisions exist in five other states: Hawaii, Illinois, Pennsylvania, New York, and Massachusetts.⁶⁸ Notably, three of these states rank among the top ten in terms of carbon dioxide emissions.⁶⁹ Should the judiciary in other states find the rationale of *Held v State* pertinent to their similar constitutional clauses, and consequently impose restrictions on potential greenhouse gas emissions, the *Held* decision could exert immediate, substantive environmental impact, also on federal lawsuits, especially the famous *Juliana* case. In fact, the Hawai’i Supreme Court took a progressive lead in its 2023 decision in the *In re Hawai’i Electric Light Co.* case, declaring an affirmative right to a life-sustaining climate system under the Hawai’i constitution’s right to a clean and healthful environment, with Justice Wilson’s concurring opinion deriving the right also from the due process clause and the public trust doctrine.⁷⁰

Therefore, both *Held* and *Juliana*, as two US landmark litigation cases, unveil a twofold approach. On the state level, with *Held* as an example, the argumentation resembles that in *Urgenda* by proposing human rights law as the legal basis for environmental protection (including climate) clauses derived from either the constitutional or international legal system that requires the government to act progressively in establishing its climate policies. On the federal level, exemplified by *Juliana*, the judicial reasoning favours that adopted in *Heathrow* and employs the separation of powers clause as the rationale for the judicial branch’s non-interference in the governmental climate policy.

⁶⁶ Especially *Pennsylvania* (see *Pa. Env’t Def. Found. v Commonwealth*, A.3d 911 (Pa. 2017)) and *Hawai’i* (see in *Re Hawai’i Elec. Light Co.*, 152 Haw. 352 (Haw. 2023)).

⁶⁷ Mont. Const. art. II, § 3; Mont. Const. art. IX, § 2.

⁶⁸ Haw. Const. art. XI, § 9; Ill. Const. art. XI, § 2; Mass. Const. art. 97; N.Y. Const. art. I, § 19; Pa. Const. art. I, § 27.

⁶⁹ US Energy Information Administration, State Carbon Dioxide Emissions Data <www.eia.gov/environment/emissions/state> accessed 8 March 2024.

⁷⁰ *In re Hawai’i Electric Light Co.*, 152 Haw 352 (SC Haw) (13 March 2023) with concurring opinion of Justice Wilson available online <https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230313_docket-SCOT-22-0000418_opinion-2.pdf> accessed 8 March 2024.

IV. CONCLUSIONS

In the process of negotiating international climate change law, state actors seem reluctant to address global regulations and unified, just distribution of such substantive obligations. Consequently, they prefer building a climate change regime based on self-commitment and self-differentiation.

Therefore, the current and future role of international climate change law lies in the promotion and management of initiatives at both national, regional and international levels. These include the UN human rights instruments in the climate framework, used either in complaint procedures under Convention Protocols or in concluding observations made by treaty monitoring bodies. Still, domestic litigation based on international environmental and human rights law will continue to play a pivotal role in strengthening mechanisms of the international climate change regime.

The *Heathrow* case stopped a major airport extension on climate grounds by invoking international climate commitments, like the Paris Agreement, and by setting a precedent for integrating international environmental obligations with national policies. The ground-breaking ruling sparked renewed global interest, potentially influencing legal challenges against other high-carbon projects worldwide. However, its impact is nuanced, serving more as an obligation to align declared national policies with international commitments rather than establishing a mandatory framework for particular climate action compliance, thereby avoiding any political debate on climate policy.

In contrast, the *Urgenda* case was explicit in its verdict, imposing a definite obligation on the Dutch government to adhere to the emissions reduction targets under international law, including the Paris Agreement and the ECHR, highlighting the immediate and real risks posed by climate change, and bringing them within the purview of legal scrutiny and accountability. This stark difference in judicial approaches exemplifies the dynamic and evolving nature of climate litigation, where courts navigate the intricate balance between legal mandate, governmental policy and international obligations. Although the *Urgenda* target set by the Court was achieved, scholars argue that it was not a result of newly proposed mitigation policy measures but rather counter-effective strategies, which sheds light on practical limitations of court-imposed emission-reduction targets, due to lack of proposed compliance and monitoring mechanisms as well as specialized knowledge of the judicial branch to design climate mitigation tools.

Further, the *Held v State* ruling in Montana affirmed the constitutional right to a clean and healthful environment, linking it directly to climate stability and opening avenues for substantive legal recourse and preventive relief against environmental degradation. This decision stands as a testament to the expanding jurisprudential acknowledgment of environmental protection as a fundamental

right. More specifically, it could potentially influence other state jurisdictions with similar constitutional provisions, which could result in reshaping the trajectory of climate litigation at the federal level, especially in the renowned *Juliana* case that included in its claim a direct reference to the Paris Agreement. Thus, this judicial precedent may be a significant tool and persuasive leverage for state agencies, legislative bodies, and the broader public.

These cases collectively symbolize a progressive stride that will impact international climate law, elucidating the intricate weave of national policies, international commitments, and human rights. They also serve as potential harbingers for a more cohesive and robust international legal framework addressing climate change, bridging the dichotomies between legal interpretations and catalysing a more harmonized approach to environmental governance and climate justice at a global scale. Their ramifications extend beyond legal precedents, influencing legislative discourse, public awareness, and international diplomatic dialogues on climate commitments and sustainable development.

Nevertheless, there are limits to what can be achieved by this type of litigation while encouraging both legal and policy changes. Firstly, human rights base its litigation on the ‘violations approach’, which e.g. seeks clear evidence of a causal link between the purportedly violating conduct and the non-fulfilment of the human right in question. Because of the political and scientific complexity of attributing causes to climate change, legal claims to vindicate human rights in this context cannot easily be sustained but prove to be more effective in more targeted and narrowed remedial claims as was seen in the *Held* case. Secondly, the future of ‘target setting’ cases will face significant challenges related to the judiciary’s lack of specialized expertise in formulating climate mitigation tools, whose success hinges on the monitoring and compliance mechanisms that should instead remain in the scope of expertise of executive and legislative branches.

The dynamic interaction between domestic litigation and the Paris Agreement may positively impact the overall efficacy of both. It has been shown that the Paris Agreement architecture reveals pathways and provisions already being used or that can be explored further in litigation. On the other hand, litigation can assist and complement the Paris Agreement in its implementation, effective enforcement, and progress toward achieving its general goals.

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