Bonavero REPORTS

2/2024 | 5 MARCH 2024

Climate Litigation in Europe Unleashed: Catalysing Action against States and Corporations

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UNIVERSITY OF OXFORD
FACULTY OF LAW
Bonavero Institute of Human Rights

CLIMATE LITIGATION IN EUROPE UNLEASHED: CATALYSING ACTION AGAINST STATES AND CORPORATIONS

Bonavero Institute of Human Rights

The **Bonavero Institute of Human Rights** is a research institute within the Faculty of Law at the University of Oxford. It was established in 2017 to foster world-class research and human rights law scholarship and to promote public engagement in and understanding of human rights issues.

This report follows the discussions at the one-day workshop '*Climate Litigation Unleashed: Catalysing Action against States and Corporations*' held on 22 November 2023 at the Bonavero Institute of Human Rights in Oxford. The workshop was convened with support from Oxfam, Woodsford, the Oak Foundation and the Leverhulme Trust. The Institute acknowledges with gratitude all speakers and participants for their invaluable contributions and extends sincere appreciation to the supporting organisations and funders for their generous assistance. The workshop and the report are the outcomes of the Leverhulme Early Career Fellowship held by Dr Ekaterina Aristova (grant reference ECF-2021-132).

Suggested Citation: Ekaterina Aristova and Justin Lim (eds), Climate Litigation in Europe Unleashed: Catalysing Action against States and Corporations (Bonavero Institute for Human Rights 2024)

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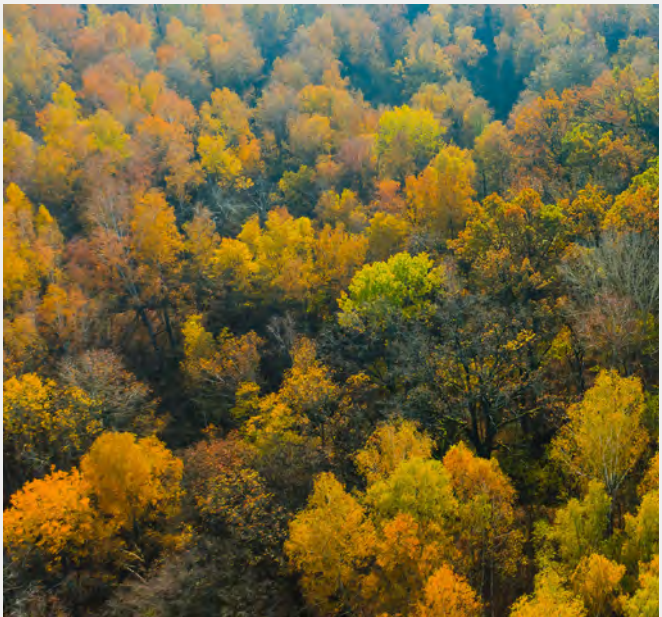

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Foreword

Joss Saunders

General Counsel, Oxfam

When the Vice-Chair of the European Central Bank devotes his keynote speech at the Bank's Legal Conference to 'Climate Litigation - Come Hell or High Water', you know that climate litigation has arrived. In addressing why the financial sector and financial stability are affected by climate and environmental related litigation, Frank Elderson focuses mainly on European litigation, unsurprising for a European regulator, though neglecting the somewhat older trend of climate litigation in the USA.

Climate litigation-oriented NGOs may, in equal measure, be surprised by and in agreement with some of Elderson's remarks. After citing the litigation by Notre Affaire à Tous, Les Amis de la Terre, and Oxfam against Bank Paribas, he said,

> ***The litigants in these cases are sophisticated and use their transnational networks to build precedents across borders. They are well-funded, well-connected and well-organised. And they can – and do – hire the best and brightest lawyers in the field.***

Those litigants might not always feel quite that well-funded, connected or organised. But they will note his confirmation that litigation may increasingly be a driver for change in boardrooms across many industry sectors as well as in government circles when he says:

> ***To address this source of litigation risk, the best advice I can give is that banks should start putting in place their Paris-aligned transition plans.***

Only weeks after Elderson's address, many of the lawyers and others involved in some of the cases he describes joined an experts' workshop of academics and practitioners of climate litigation held at the Bonavero Institute at the University of Oxford in November 2023. This Report is the result. Let me highlight three main themes.

First, in a growing and fast-moving field, this Report provides the opportunity to look under the surface and to detect the deep patterns and the contours of strategic climate litigation. This helps litigants and their backers to chart a course for future litigation and to focus on areas that are most likely to further the primary goals of such litigation, a reduction in greenhouse gas emissions, and greater adaptation efforts for the hardest hit. One such contour is the intertwined relationship between policy and litigation, using a litigation pathway that creates a positive feedback loop with policy-making, as with the European Union Green Deal.[1]

Second, the Report gives valuable insights into both the theory and practice of legal mobilisation. Sometimes, litigation is vital to address power imbalances and to change

1 See Emily Iona Stewart's contribution below.

Foreword

the prevailing narrative. A Court hearing can also provide a forum for affected people to make their voices heard; the workshop heard the powerful words of one of the Gen-Z claimants in the *Duarte Agostinho* case from outside the European Court of Human Rights. This can help develop important areas, such as the rights of future generations.

Conversely, a poorly thought-out legal strategy might be counterproductive, even setting back progress towards Paris alignment. A particularly constituted Court or a poorly argued case may result in an adverse precedent that precludes further litigation, at least for a while.

A further aspect of this theory and practice is the choice of defendants and the legal strategies used. Tackling the financial backers and not only the most polluting industries themselves. Testing individual jeopardy through criminal law and directors' duties, even though it is hard in many jurisdictions. Challenging the professional enablers of climate change, including the lawyers, the greenwashers and spin doctors, and the merchants of doubt.

Third but not least, the methodology of the workshop and the compilation of the Report provide a comparative approach that enables innovations in one forum to be used in another. It allows litigants and judges from each jurisdiction to learn from the others. This ranges from nation-states to regional and global courts to non-judicial forums and includes the use of soft law and legal storytelling, helping to build the normative framework. As one contributor puts it, strategic cases can give the legislators the incentive they need to pass laws and the companies the rationale to green the company scene. This point is underscored by the significant decision by the Supreme Court of New Zealand in *Smith v Fonterra* in February 2024. Allowing the case against polluting companies to go to trial, the Court underscored the ability of the common law to adapt to tackle the problems of climate change, even if they were 'at a quantum leap scale of enlargement' from problems that had gone before.

This Report cannot address every angle. It provides a specifically European perspective on the global phenomenon of climate litigation. The organisers hope that this can be complemented in time by other workshops and other reports in other regions, both those most affected by climate change and those most responsible for global warming. And if I had one regret as a co-organiser of the workshop, it is that the women and men affected by climate change, who have used, or tried to use, climate litigation, were not able to attend. The cost made this difficult, though their voices were heard second-hand, with videos, and with lawyers and academics who have been involved alongside the communities bearing witness to the litigants themselves.

This Report contains many valuable insights to would-be claimants, strategists, and legal advisers. The media perception that corporate litigation has outgrown government litigation seems unjustified. But the more significant point is that corporate and government litigation can work together and create opportunities for each other. Academics, practitioners, claimants, and at times also defendants (as one contributor points out) can have a fruitful dialogue on the role of litigation, the incentives it provides, and play a part in preparing for and mitigating 'Hell and High Water'.

Introduction

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This report aims to contribute to collaborative knowledge-building in environmental jurisprudence by placing a spotlight on the developments and challenges to strategic climate litigation in Europe (**Report**). In doing so, it curates a compilation of 16 expert opinion pieces following the discussions at the one-day workshop *'Climate Litigation Unleashed: Catalysing Action against States and Corporations'* held on 22 November 2023 at the Bonavero Institute of Human Rights in Oxford (**Workshop**). By bringing together scholars, legal practitioners, funders and members of civil society, the Workshop fostered a dynamic environment to explore legal strategies employed in climate litigation against state and non-state actors and potential avenues for legal activism, policy change and precedent setting.

In addition to providing an overview of the discussions and insights from the Workshop, this introductory section serves to underscore the importance of collaborative efforts in addressing the complex challenges of climate change.

Accelerating climate action through collaboration

Sustainable Development Goal 13 (SDG 13 or Global Goal 13) is to limit and adapt to climate change. It is one of 17 Sustainable Development Goals established by the UN General Assembly in 2015. The official mission statement of this goal is to 'Take urgent action to combat climate change and its impacts'.

In the face of the 'defining crisis of our time', an all-hands-on-deck approach is needed to address both the causes and effects of the climate emergency. Whilst global cooperation has continued to make significant progress in reducing greenhouse gas (**GHG**) emissions, greater efforts are needed in order for the world to limit global heating below 2°C above pre-industrial levels. This progress - and its corollary call for action - cannot be appreciated without understanding the crucial role that civil society has played. Civil society, ranging from non-governmental organisations to individuals, has employed a diversity of strategies to hold states and corporations responsible for their contributions to the climate crisis. Such strategies have ranged from collaborating with states most vulnerable to climate change on the international stage to public protest against fossil fuel developments.

The notion of accountability is at the heart of such civil society activity and much of the climate debate. The effects of climate change are real, and the IPCC's finding that human activities have 'unequivocally caused global warming' has left the world searching for

*We are grateful to Liz Fisher for her thoughtful comments and review of the draft Introduction before the publication.

ways to hold the right entities accountable and take remedial action. Thus, it is no surprise that litigation against states and corporations to hold them legally accountable for their contributions to climate change - i.e., climate litigation - has picked up in recent years.

Climate litigation has provided an opportunity to cast environmental problems in the language of legal causation, damage, and, most importantly, justice, thus highlighting the accountability of various actors for their contributions to climate change and the resulting harm to communities and ecosystems. This pursuit of legal climate justice strikes a chord for civil society because, unlike political or moral victories, it shines a light on the reasons why environmentally damaging actions are wrong. Climate justice, particularly when viewed through the lens of legal accountability, is concerned about the how and why, not merely whether environmentally positive outcomes can be reached - a matter described by Liz Fisher as 'throughput legitimacy'.

Only when we appreciate how environmental problems are caused and why they should be considered a legal or moral wrong, can we begin to create and strengthen accountability systems that hold government and private actors responsible for taking action to meet climate goals. A way to frame this is through the lens of the IUCN's Declaration on the Environmental Rule of Law, which seeks to incorporate principles of ecologically sustainable development in the rule of law. When the law offers us clear rights and avenues in relation to the environment, we can clearly identify and take action against environmental harms as legal wrongs. The UNEP First Global Report on the Environmental Rule of Law found that, as of 2017, '176 countries have environmental framework laws; 150 countries have enshrined environmental protection or the right to a healthy environment in their constitutions; and 164 countries have created cabinet-level bodies responsible for environmental protection'. Despite this, environmental protections are still falling short as monitoring and enforcement remain comparatively weak.

Clearly, conceptualising such a climate-conscious legal system is no easy task, but it is not Herculean. It is an exercise in legal thinking and imagination, particularly where existing legal doctrines are unfamiliar with dealing with the unique features of climate change as a collective problem for the global community. Such features include the rapidly developing complex climate science that lawyers and the public must grapple with, the interconnectedness of environmental problems with other socio-political issues, and the devastating effects on the environment and communities that are far from immediate. In light of these features, Justice Preston describes climate change as 'legally disruptive, leading to the law that is novel, scientifically uncertain, legislatively based and entwined in policy'. Our findings in the Workshop, as well as the case studies discussed in the contributions to the Report, reflect the ability of civil society, scientists, scholars and the legal profession to collaborate in the legal thinking and imagination necessary to create and develop laws that can address the complexities of climate change.

Such collaboration has become essential for multiple reasons. Firstly, the types and scale of climate litigation cases have only grown. Environmental problems are no longer confined to administrative law - climate litigation cases now span constitutional, human rights, tort, and even company law. Not only are cases becoming more diverse in respect of the claims being brought, but also where claims can be brought. The global nature of climate change has meant that those suffering the most from climate change and those with the greatest contributions to global warming are often in entirely different jurisdictions. But breakthroughs in climate science and innovative legal thinking have sparked the possibility of litigating against Carbon Majors (i.e. high-emitting producers of oil, natural gas, coal and cement) for losses suffered in other jurisdictions - an important development for communities in the Global South most vulnerable to climate change despite. For instance, the *Luciano Lliuya v RWE* case saw lawyers and scholars across different jurisdictions and disciplines, as well as civil society, come together to help a

Peruvian farmer sue RWE under German tort law. Collaboration with lawyers across the world has expanded the legal avenues available to local communities to address and redress the loss and damage suffered to their environment.

Secondly, collaboration is essential because climate litigation requires special types of non-legal expertise – particularly scientific expertise. The scientific community has become crucial because our understanding of climate change is necessarily framed by science. To argue that a state or corporation's emissions have 'caused' specific environmental damage or that a state is in breach of its public duties because its present actions are insufficient in meeting emissions targets requires complex scientific tools and data. Scientific developments are also continuously reshaping our understandings of what is morally, and subsequently legally, acceptable. Legal challenges in relation to whether it is unlawful for entities to fail to assess their Scope 3 emissions (e.g. *Finch v Surrey County Council*) demonstrate how the increased scientific capabilities to calculate and monitor upstream and downstream emissions has changed our expectations of the responsibilities and duties of care of emitting entities.

Lastly, collaboration is fundamentally a process of knowledge building. Engaging communities, lawyers, and scientists across different jurisdictions helps us better understand how environmental harms are uniquely suffered despite the collective nature of climate change. Only by appreciating these differences can we answer questions crucial to determining why and how climate litigation can form part of our climate change strategy: To what extent can one climate case be transplanted to a different jurisdiction? What types of evidence or science are required to support the case? What constitutes an effective remedy for communities for which cases are brought?

Much like the strategic climate litigation worldwide, the conversations that emerged in the Workshop and the findings in the Report result from collaboration between experts from the legal industry, civil society, scholars, and the scientific community. An effective strategy can be created by sharing legal concepts, climate science, and personal stories of environmental loss and damage.

The purpose of the Workshop

Building upon the imperative of collaborative efforts highlighted in the preceding section, the Workshop convened over 50 scholars, lawyers, funders, and civil society members in Oxford. Its primary aim was to foster dialogue and knowledge exchange, bridging the gap between academic discourse and practical application in the realm of strategic climate litigation. An important objective was to understand why litigants in different jurisdictions frame the argument in a particular way and what are some challenges and opportunities of using different legal strategies.

As a result, the Workshop's scope was broad and ambitious, but certain limitations and specific perspectives were set to guide the discussion. First, the Workshop took primarily a regional focus, spotlighting European climate litigation. This focus was timely given the marked success of cases like *Urgenda* and *Milieudefensie v Royal Dutch Shell* in the Netherlands and the creative application of conventional legal concepts displayed in cases like *Luciano Lliuya v RWE* in Germany or *ClientEarth v Shell* in the UK. Indeed, one need only browse the Global Climate Change Litigation database run by the Sabin Centre for Climate Change Law Sabin Centre or study the annual status reports by the London School of Economics and the UNEP to appreciate the status of climate litigation in Europe. Moreover, the Workshop's format as a face-to-face event aimed to facilitate both formal and informal conversations. Accessibility and travel considerations meant invitations were primarily extended to UK and European experts. That said, the discussion inevitably encompassed references to international law and comparative insights, enriching the discourse with diverse perspectives.

The second limitation of the Workshop's scope centred on strategic climate litigation, a multifaceted concept referring to legal actions deliberately designed to bring about systemic change in addressing climate-related issues and influence broader debates about climate change governance. Strategic climate litigation encompasses 'government framework' cases leveraging legal doctrines to challenge the lack of ambition of the governmental response or a failure to implement necessary policies and regulations. Additionally, strategic climate litigation includes lawsuits against corporations, including cases challenging their climate plans, net-zero targets or failures to disclose relevant climate risks, preventing finance of high-emitting or hazardous projects, and seeking compensation for past and present loss and damage associated with climate change.

To delve into this critical aspect, the Workshop invited several practitioners involved in climate-related 'framework cases'. These experts have been at the forefront of pioneering legal strategies to catalyse broader societal and policy shifts towards climate action. However, amidst the focus on strategic litigation, the Workshop participants - as seen below - remained mindful of the broader debate surrounding the significance of non-strategic or 'low-profile' cases in integrating climate change into the legal order.

Key insights and directions for further research

The purpose of the Workshop was to facilitate a dynamic exchange of ideas and perspectives among various stakeholders engaged in strategic climate litigation. This section provides readers with a comprehensive overview of the key themes, debates, and insights that emerged from the diverse array of expert contributors. In doing so, we have distilled the discussions into ten selected topics, representing areas of significant discourse during the Workshop. Through this synthesis, we seek to offer readers a broad understanding of the discussions that unfolded, highlighting areas of consensus where participants found common ground, as well as points of contention and divergence that stimulated productive dialogue. These insights identify knowledge gaps acknowledged during the Workshop and the need for further research and exploration in this critical field.

1. ***Choice of terminology and focus on strategic climate litigation.*** The landscape of climate change litigation is intricate and multifaceted, presenting a difficult challenge in its definition and scope. The question of how to precisely define climate change litigation remains arguable, with various perspectives and methodologies contributing to an ongoing debate. Amidst this complexity, one approach gaining prominence is the focus on strategic litigation. Though constituting a subset of the broader litigation landscape, strategic climate cases offer a targeted lens through which to analyse and address regulatory challenges. By strategically selecting cases that aim to drive systemic change and precedent-setting outcomes, practitioners and scholars alike seek to harness the potential of litigation as a tool for advancing climate action.

   Recognizing the subjective nature of labelling cases as climate-related, strategic or non-strategic is essential; however, it raises questions about the potential oversight of critical cases that do not fit neatly into this dichotomy. Indeed, cases like the recent lawsuit against the French supermarket chain Casino alleging cattle industry-caused deforestation highlight the interconnectedness of environmental, human rights, and climate issues, challenging traditional definitions of strategic climate litigation. This debate prompts us to consider the broader disciplinary intersections and nuanced environmental challenges that may be overlooked when focusing solely on strategic climate claims (e.g., just transition, biodiversity, ocean pollution, coastal protection). Ultimately, the choice of terminology shapes scholarly discourse and influences the effectiveness and inclusivity of climate change litigation strategies.

2. ***Impact of corporate climate litigation.*** Corporate climate litigation, while not surpassing cases against state actors in scale, is swiftly evolving. The diversity of legal claims and underlying causes of action translates into a spectrum of corporate defendants being targeted, as evidenced by the proliferation of greenwashing cases. However, significant questions remain regarding the nature of corporate responsibility in addressing climate change. While some studies dissect high-profile decisions to discern trends, a critical gap exists in analysing the real impact of such litigation. This gap is understandable given the nascent stage of corporate climate litigation, with many cases still navigating appeals processes.

   The quest for effective legal strategies is central to this discourse, yet agreement on what constitutes effectiveness remains elusive. The multifaceted nature of strategic litigation complicates this assessment, as its effects range from garnering public attention to prompting meaningful action, making it challenging to define a singular measure of 'effectiveness'. Divergent views on impact further complicate the matter. Is it primarily about courtroom victories or catalysing broader societal change?

   Participants in the Workshop demonstrated a spectrum of perspectives, with some advocating for a shift towards more assertive and ambitious legal action aligning with Paris Agreement targets, moving beyond cases enhancing climate-related disclosure. At the same time, others acknowledged the incremental role of less ambitious cases in paving the way for future judicial engagement. For instance, soft instruments like the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct and National Contact Points complaints offer avenues for testing strategies without entangling stakeholders in costly legal battles, exemplifying the nuanced approaches to advancing corporate accountability in climate litigation.

3. ***Giving voice to vulnerable communities and indigenous groups.*** Empowering vulnerable communities and indigenous groups in climate litigation is essential for achieving equitable outcomes and addressing the disproportionate impacts of climate change. Many affected communities, particularly indigenous groups, may not have their voices adequately represented in traditional legal frameworks, as their losses may not always be quantifiable in economic terms. Integrating traditional knowledge into litigation processes is challenging but crucial for ensuring culturally appropriate and effective remedies. Climate change often disproportionately affects vulnerable groups, yet questions persist regarding how to quantify their losses and determine appropriate remedies. The unique interaction between the loss of traditional systems and legal concepts of damages further complicates this issue.

   Furthermore, framing cases for success may not always align with the best interests of the affected communities, as legal strategies may prioritize what is most effective in court rather than addressing community needs comprehensively. Additionally, the selective nature of litigation means that only a small fraction of cases make it to court, leaving many vulnerable people without recourse, highlighting the need for political solutions. Moreover, power imbalances between communities and defendants, particularly in corporate litigation, underscore the importance of addressing intersectionality - the complex interplay of various systems of power that shape individuals' experiences, risks, and resiliencies. Recognizing and addressing these power imbalances is crucial for fostering a more inclusive and equitable approach to climate litigation that truly serves the needs of all affected communities.

4. ***Enhancing expertise in climate litigation.*** Expertise in climate litigation is of paramount importance as courts are tasked with navigating complex matters that often require interdisciplinary knowledge. Workshop participants discussed how expertise manifests in three distinct contexts. First, lawyers engaged in climate litigation must possess a nuanced understanding of climate science, legal

norms, and regulatory frameworks to advocate for climate-conscious lawyering effectively. The International Bar Association and the UK Law Society have recently issued guidance on climate change's impact on legal practice.

Second, courts adjudicating climate cases must grapple with intricate legal, scientific, ethical and policy questions. What does it mean to adjudicate the case well? Is climate change a matter of law, science or policy? Questions, therefore, arise about the judiciary's role in addressing these multifaceted issues and whether judicial conservatism or genuine lack of expertise influences case outcomes.

Lastly, there's a growing imperative for universities to educate legal professionals on climate-related complexities. Durham University and the British Institute of International and Comparative Law already offer courses addressing the integration of scientific knowledge into legal practice and delineating boundaries across various legal disciplines, such as administrative law and environmental law. By recognizing the structural issues facing the legal profession in effectively addressing climate change, these efforts underscore the need for continued education and collaboration across disciplines to meet the evolving challenges of climate litigation.

5. ***Legal transplants in climate litigation.*** Deliberation on the transferability of legal thinking triggered insightful debates during the Workshop. Are there specific legal strategies or precedents from one country that could be replicated, adapted or applied effectively in others? Legal transplants, exemplified by successful strategic cases, pose opportunities and challenges in climate litigation. The landmark *Urgenda* case has served as a beacon of inspiration for similar litigation worldwide. However, the notion of legal transplants is not a simple copy-and-paste exercise. Rather, it involves adapting legal strategies to fit the particular legal system and factual context of each case.

   This complexity is particularly relevant in corporate climate cases, given initiatives to replicate a ruling of the Dutch court in *Milieudefensie v Shell* in other jurisdictions. In Germany, a series of lawsuits attempted to compel car manufacturers, including Volkswagen, BMW and Mercedes-Benz, to reduce their contribution to climate change through injunctive relief, despite a scholarly warning that the Shell ruling cannot simply be transposed into the German legal order. In a series of recent hearings, judges ruled that the link between the infringement of citizens' rights and the defendants' actions was not clear enough.

   How do we address unique jurisdictional challenges while applying similar legal doctrines? The role of courts in different jurisdictions also comes into play, as their interpretations of seemingly similar legal principles may vary. While successful cases are often highlighted, understanding the autonomy of these cases within different legal frameworks remains crucial. This necessitates a deeper exploration through comparative legal studies, not only focusing on fragmented law but also examining the political and legislative processes surrounding climate litigation. By delving into the 'recipe for success' of these cases and identifying common features that contribute to their broader impacts, one can glean insights for shaping future litigation strategies that transcend jurisdictional boundaries and effectively address the complexities of climate change.

6. ***Pursuing novel claims.*** In the absence of specific legal frameworks to address the harms of climate change, lawyers often resort to creative interpretations of existing laws to 'green the black letter'. Employing novel legal claims presents several advantages. It allows legal practitioners to push the boundaries of traditional legal reasoning and test innovative strategies for addressing climate-related

issues. This approach can lead to groundbreaking legal precedents establishing new avenues for climate litigation and environmental protection. For instance, in February 2024, the New Zealand Supreme Court allowed a climate case, *Smith v Fonterra*, against seven big polluters to continue to trial. In a unanimous decision, the Supreme Court allowed claims for 'a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change' to proceed, reversing the Court of Appeal's decision to strike out the claim.

However, litigating novel claims also comes with limitations and risks. One major concern is the potential for creating unfavourable legal precedents that could hinder future environmental litigation efforts. Moreover, novel legal arguments may lack established legal frameworks and jurisprudence, making them more susceptible to judicial scrutiny and interpretation.

These nuances are illustrated by *ClientEarth v Shell* in the UK, a world-first case seeking to hold corporate directors personally liable for their failure to respond to climate change. The English High Court dismissed the case, having made multiple criticisms of ClientEarth's attempt to use the derivative claim process to challenge Shell's response to climate change. The decision to dismiss ClientEarth's lawsuit was not completely unexpected by the legal community. However, - contrary to the existing jurisprudence - the High Court ordered ClientEarth to pay Shell's costs of participating in the proceedings. As a consequence of the dismissal of *ClientEarth* v Shell, claimants in the future may need to satisfy the court that ulterior motives do not drive the purpose for pursuing the claim, and the court order about the defendants' costs is likely to have a chilling effect on future attempts to pursue directors for breach of duty.

7. ***Interplay between international and domestic law.*** The interplay between international and domestic law, particularly in the realm of human rights and climate change, presents a complex and evolving landscape that warrants further research and exploration. Climate litigation against states serves as a prime example, with several cases currently pending before the European Court of Human Rights, reflecting the increasing convergence of human rights and environmental law.

   Additionally, the world community anticipates outcomes from requests for advisory opinions from the International Court of Justice, the International Tribunal for the Law of the Sea, and the Inter-American Court of Human Rights. Through advisory opinions, these bodies have the unique opportunity to interpret and clarify international state obligations related to climate change and climate justice.

   In the realm of corporate litigation, cases such as *Milieudefensie v Shell* highlight the intersection between corporate duties under private law and international instruments like the Paris Agreement. Additionally, as corporations increasingly make net-zero commitments and claim alignment with international climate goals, these commitments are being scrutinized and tested in legal proceedings.

   Challenges persist in areas such as international investment law and climate change, where structural misalignments between climate policy and the investment treaty system raise questions about how investment tribunals will decide claims arising from measures taken to mitigate climate change.

8. ***Integrating 'government framework' cases in domestic policies.*** The discussions during the Workshop underscored the time-consuming nature of strategic climate litigation and the varied outcomes it can yield. Examples highlighted the role of litigation in catalysing legislative action, with notable cases like Neubauer

in Germany leading to significant amendments in climate change legislation. Even unsuccessful litigation, like *Sharma v Minister for the Environment in Australia*, may trigger policy decision-making.

This highlights the ongoing challenges the claimants face, including civil society organisations, where winning or losing a court case does not necessarily signify the end of the fight. One crucial aspect identified in the discussions is the need for stringent enforcement mechanisms to ensure the implementation of court decisions. Moving beyond ambition in climate cases, the focus shifted to effective engagement and collaboration between practitioners and policymakers to integrate court decisions into broader climate action plans and policy frameworks.

9. ***Mandatory human rights and environmental legislation.*** Mandatory human rights and environmental due diligence legislation holds significant promise in fostering corporate accountability for human rights and environmental impacts, including in the context of climate change. In December 2023, EU co-legislators reached a political deal on the Corporate Sustainability Due Diligence Directive. This provisional agreement sets an obligation for large companies to adopt and put into effect, through best efforts, a transition plan for climate change mitigation. There is growing momentum worldwide among governments, particularly in Europe, to adopt binding business and human rights instruments, yet numerous challenges persist in ensuring their effectiveness. One of the key concerns revolves around avoiding mere box-ticking exercises, wherein corporations fulfil procedural requirements without genuinely engaging in harm prevention and mitigation efforts. For example, the French Duty of Vigilance Law faces procedural hurdles and lacks public enforcement mechanisms to address underlying power imbalances between corporations and affected communities.

   While these legislative efforts are commendable, there are questions about their ability to catalyse meaningful change in corporate behaviour and business models. It's essential to recognize that mandatory human rights and environmental due diligence is not a panacea for preventing human rights abuses or holding businesses accountable; rather, it should be part of a broader strategy encompassing regulatory, legal, and societal mechanisms to address corporate accountability comprehensively and trigger a 'transformative shift needed to address systemic changes'. As such, ongoing scrutiny and refinement of these legislative frameworks are necessary to ensure they fulfil their intended purpose of promoting corporate respect for human rights and environmental sustainability.

10. ***Unintended consequences of climate litigation.*** Climate litigation, while aiming to address urgent environmental concerns, can inadvertently trigger a myriad of unintended consequences. One such consequence lies in the realm of public opinion, where litigation outcomes have the potential to fuel polarization. High-profile cases may amplify existing societal divides, with opposing factions using legal victories or defeats to fortify their respective positions. This polarization complicates public discourse on climate action and hampers efforts to build consensus and implement effective policies. Workshop participants also acknowledged that climate litigation can provoke a backlash in the form of counter-litigation. As corporations and governments face legal challenges, they may retaliate with their own lawsuits, creating a cycle of legal battles that further strain judicial resources and prolong resolution. Another unintended consequence is the risk of undermining the legitimacy of courts. Additionally, some argued that climate litigation may lead to symbolic compliance rather than substantive change. Navigating the complexities and unintended consequences of climate litigation demands a careful balancing act between legal strategies, societal impacts, and environmental imperatives.

About the Report

Following the Workshop, participants were invited to contribute short opinion pieces reflecting on the debates and discussions. We received 16 submissions, comprising a diverse mix of scholarly contributions and practical insights. The Report aims not merely to showcase the current status quo of climate litigation but to shed light on knowledge gaps, highlight challenges, and assess particular legal strategies employed in the pursuit of climate justice. The opinion pieces offer a nuanced and multifaceted perspective on the evolving landscape of strategic climate litigation, thereby fostering an informed dialogue among stakeholders in this critical domain.

The Report is also themed around the notion of strategic climate litigation in Europe. The Oxford English Dictionary defines 'strategy' as a 'plan, scheme, or course of action designed to achieve a particular objective, especially a long-term or overall aim'. Applying this to climate litigation, whilst the specific claims and remedies sought in each case will differ, certain issues (e.g. the role of science as evidence, political resistance, availability of funding, challenges in quantifying and attributing damages) and the goal of addressing environmental harms are common across all climate litigation cases. The first section of the Report, titled '*Mapping the Contours of Strategic Climate Litigation*', thus provides a starting point to think about the common goals and approaches to climate litigation as a form of strategy.

Upon setting out a view of what strategic climate litigation entails, the Report proceeds to consider the challenges to effective strategic climate litigation. The second section of the Report, titled '*Challenges and Weaknesses of Strategic Climate Litigation*', builds on the experts' discussions on the obstacles or overlooked issues in climate litigation. The issues discussed in this section are various: they range from the challenges posed by conventional legal doctrine to the ethics of climate lawyering. The diversity of issues exemplifies how the already complex nature of litigation only becomes more pronounced in the climate change context.

However, the challenges and weaknesses of strategic climate litigation are not fatal to climate litigation as a strategy to hold states and corporations accountable for their climate change contributions. After all, a natural part of the strategy is one's plans to overcome obstacles in the way of the objective. As such, the final section of the Report highlights the '*Trends and Opportunities in Strategic Climate Litigation'.* The expert contributions here highlight trends in Europe, South Africa, and even international law to demonstrate how various communities and lawyers are refining existing strategies and attempting new ones to achieve climate justice.

Indeed, the ultimate aim of strategic climate litigation should not be limited to achieving environmentally positive outcomes but rather the idea of climate justice. Climate justice emphasises creating a fairer world in terms of the distribution of economic, social, and political power in addressing the losses and causes of climate change. Because of the different lived experiences with climate change, legal doctrine and strategy must be sensitive to the particular contexts of different jurisdictions and communities. This is important because strategy would be meaningless without the right goals. The search for such goals is then a discursive exercise in navigating between past successes and failures in climate litigation in the context of each case's present local features and limitations. It is a continuous search as the problems arising from climate change often persist even after court judgements are delivered and remedies are awarded. Thus, readers must bear in mind why, not merely how, we employ strategic climate litigation as they read the Report.

Additional resources

The realm of climate litigation encompasses numerous debates that the Report cannot fully explore. In addition to the resources previously highlighted or cited later by the authors of the opinion pieces, we recommend the following books, reports, or online tools for readers seeking a more comprehensive understanding of climate change as a legal issue and the impact of climate litigation.

Books

- Jacqueline Peel and Hari Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy (CUP 2015)
- Kevin Gray, Richard Tarasofsky, and Cinnamon Carlane (eds), The Oxford Handbook of International Climate Change Law (OUP 2016)
- Ivano Alogna, Christine Bakker, and Jean-Pierre Gauci, Climate Change Litigation: Global Perspectives (BRILL 2021)
- Wolfgang Kahl and Marc-Philippe Weller (eds), Climate Change Litigation: A Handbook (Bloomsbury 2021)
- Richard Meeran, Human Rights Litigation against Multinationals in Practice (OUP 2021)
- César Rodríguez-Garavito (ed), Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action (CUP 2022)
- Ivano Alogna, Carole Billet, Matteo Fermeglia, and Alina Holzhausen (eds), Climate Change Litigation in Europe: Regional, Comparative and Sectoral Perspectives (Intersentia 2024)
- Jolene Lin and Jacqueline Peel, Litigating Climate Change in the Global South (OUP 2024)

Reports

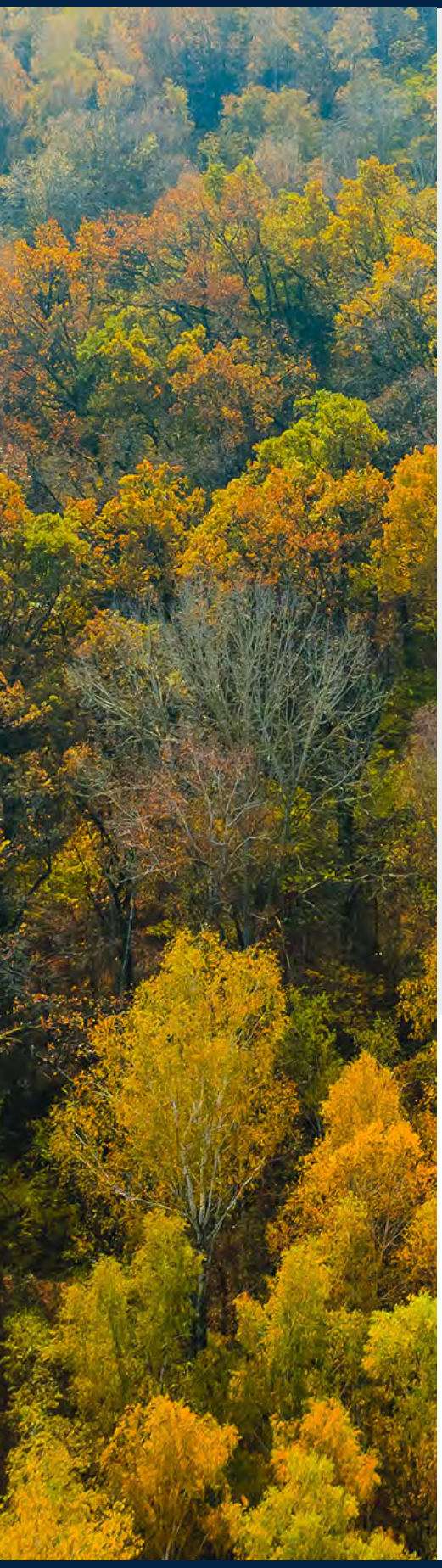
- UN Environment Programme, Environmental Rule of Law Report (2019)
- Kumaravadivel Guruparan and Harriet Moynihan, 'Climate change and human rights-based strategic litigation', Briefing Paper, Chatham House, November 2021
- Joana Setzer, Harj Narulla, Catherine Higham and Emily Bradeen, 'Climate Litigation in Europe' (Grantham Research Institute on Climate Change and the Environment 2022)
- Joana Setzer and Catherine Higham, 'Global trends in climate change litigation: 2023 snapshot' (Grantham Research Institute on Climate Change and the Environment 2023)
- UN Environmental Programme, Global Climate Litigation Report: 2023 Status Review (2023)

Other resources

- Intergovernmental Panel on Climate Change, the UN body for assessing the science related to climate change
- Grantham Research Institute on Climate Change and the Environment, a multidisciplinary centre for policy-relevant research and training on climate change and the environment based at the London School of Economics
- Sabin Center for Climate Change Law, a research institute at Columbia Law School that publishes widely on various legal issues related to climate change and runs climate litigation databases

- Climate-laws.org, a database of climate change laws and policies built on data collection by the Grantham Research Institute and the Sabin Center
- Ekaterina Aristova and Catherine O'Regan (eds), 'Civil Liability for Human Rights Violations: A Handbook for Practitioners' (Bonavero Institute of Human Rights 2022), a practical resource to understand when and how civil claims can be used as a tool to foster human rights and environmental accountability in 19 jurisdictions
- The Oxford Sustainable Law Programme, a multidisciplinary initiative operating at the intersection of law and sustainability
- 'Global Perspectives on Corporate Climate Legal Tactics', a research project led by the British Institute on International and Comparative Law
- The Wave, a newsletter about climate litigation and justice
- Action4Justice, a global platform of civil society organisations working to improve access to justice across the world and developing step-by-step guides on taking legal actions, including to combat climate change
- Climate Litigation Accelerator, a global collaborative hub dedicated to advancing legal actions, advocacy and research on the climate emergency

SECTION I



MAPPING THE COUNTORS OF STRATEGIC CLIMATE LITIGATION

What distinguishes 'strategic climate litigation' as a subset of 'climate litigation'? Addressing this question requires revisiting the definition of 'strategy' as a 'plan, scheme, or course of action designed to achieve a particular objective, especially a long-term or overall aim'. Liz Fisher insightfully explains that the term 'strategic' alone fails to elucidate why certain climate litigation cases hold greater significance, given that virtually all litigation possesses strategic intent. Yet, as Joana Setzer and Noah Walker-Crawford highlight, landmark cases like *Urgenda v Netherlands* undeniably shape the trajectory of subsequent climate litigation, prompting us to ask: 'What renders specific climate litigation cases more impactful?' This query compels us to delve into the legal reasoning and societal impact of climate litigation. For instance, while rights-based arguments may vary in their application to governments or corporations, they collectively contribute to developing a robust legal framework, as scrutinized by Annalisa Savaresi and David Birchall.

Understanding why particular climate cases carry weight reveals the strategic nature underlying them. As articulated by Ivano Alogna, effective strategy equips future litigants with a toolbox of legal arguments and resources while also nurturing a positive cycle of climate policy evolution, as emphasized by Emily Iona Stewart in the EU context. Properly understood, deliberating on the contours of strategic climate litigation thus inspires. By comprehending the intricacies of strategic climate litigation, we gain insight into the essential components of successful cases. It broadens our legal perspectives, prompting us to explore how these components can be adapted across diverse legal landscapes and policies. Above all, it sustains hope for resolving the climate crisis.

1 Overview of Climate Change Litigation against Corporations

DR JOANA SETZER

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DR NOAH WALKER-CRAWFORD

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In the last years a growing number of high-profile climate cases have been brought against corporations, with a range of legal approaches. As a result, climate litigation – and, at times, the risk of climate litigation – is increasingly being understood as a material risk for corporations and financial markets. Corporations and financial markets commonly understand 'climate-related financial risks' in terms of 'physical climate risks' and 'transition risks' (Krueger, Sautner and Starks 2020). These two risk categories were introduced in Mark Carney's 'Tragedy of the Horizon' speech at Lloyds in 2015 and popularised through the work of the Financial Stability Board's Task Force for Climate-Related Disclosures. They now feature in many corporate and financial documents, as well as increasingly in national and subnational law and policy. But with the increase in the number and visibility of climate cases brought against corporations, 'liability risk', the third risk category nestled between these two dominant risk categories in Carney's original speech, can no longer be neglected. Carney warned that such risk – which he estimated might materialise 'decades in the future' – would hit hard for 'carbon extractors and emitters [...] and [...] their insurers'. And so far, the evidence suggests he is likely to be proved right.

In recent years, the field of climate change litigation has grown significantly. There are now more than 2,300 climate cases around the world, more than two-thirds of which have been filed in the years since 2015 (Setzer and Higham 2023; UNEP 2023), the year of both Carney's speech and the signing of the Paris Agreement, when nearly 200 countries committed to limiting global temperature increase to well below 2°C and ideally 1.5°C. Not only is the growth in the number of cases significant, but also the wide diversity in the types of climate cases. This diversity manifests in multiple ways: the strategies deployed by litigants, the variety of defendants, or the remedies sought.

In this short piece, we draw from our latest analysis of 'Global Trends in Climate Litigation' (Setzer and Higham 2023) to highlight four types of climate change litigation brought against corporations which have become more prominent in recent years: polluter pays cases, cases seeking alignment with the Paris Agreement, failure to adapt cases, and climate-washing cases. We also highlight the greater diversity of corporate actors involved in this litigation, and we consider the possibility of climate lawsuits against governments increasing transition risks for corporations.

Polluter pays cases

Luciano Lliuya v RWE is the most famous climate attribution case in which a resident of the Peruvian Andes is suing German energy giant RWE. The claimant argues that RWE is responsible for 0.47% of historic global greenhouse gas emissions. These greenhouse gas emissions contribute to global warming, which, in turn, contributes to increased flood risk from a glacial lake near Luciano Lliuya's home.

Under German property law, Luciano Lliuya argues that RWE has a responsibility to help prevent this risk to his home from being realised, and they must pay for 0.47% of the costs of improving the flood defences around Luciano Lliuya's town. Although the first instance court initially threw out the case on the basis that it would be too challenging to prove the causal link, that was overturned on appeal, and the full trial in the case is now ongoing.

Plaintiff Saúl Luciano Lliuya at glacial lake Palcacocha, which is growing because of the melting glacier due to climate change. Credits: Walter Hupiu Tapia / Germanwatch e.V.

Similar cases to that filed by Lliuya have been filed elsewhere, including the case of *Asmania et al. v Holcim*, filed by Indonesian islanders against Swiss Cement giant Holcim. There are also now more than 20 cases filed against oil majors in the US, many of which raise arguments and provide evidence of the defendants' causal contributions to climate change (Stuart-Smith et al. 2021).

Alignment with Paris Agreement

These are cases that seek to disincentivise companies from continuing with high-emitting activities by requiring changes in corporate governance and decision-making. These cases focus on company-wide policies and strategies and frequently draw on human rights and environmental due diligence standards. These cases have been brought before national courts, but proceedings have also been opened before OECD national contact points under the Guidelines for Multinational Enterprises on Responsible Business Conduct (**OECD Guidelines**) and national human rights bodies.

The most famous case of this kind is *Milieudefensie et al. v Royal Dutch Shell plc.*, which relied on human rights law to define the scope of corporate duty of care and due diligence obligations under national tort law. In 2021, the District Court of the Hague found that Shell owed a duty of care to the plaintiffs to reduce emissions from its operations by 45% by 2030 relative to the 2019 emission level. Bringing a 'forward-looking' case focused on major emitters' activities and investment decisions from the present day and into the coming decades, cases like this seek a declaration from courts that fossil fuel companies' climate change targets should be aligned with those of the Paris Agreement.

Failure to adapt cases

The cases in this category cover a range of circumstances. Some cases are concerned with failures to adapt physical infrastructure to the impacts of climate change. In *Conservation Law Foundation v Exxon*, for example, the claimants argue that Exxon has an obligation to ensure an oil terminal and storage facility is resilient to potential climate impacts in order to protect water quality for the local community. Other cases are concerned with events that have already happened – for example, the collapse of PG&E, labelled as the world's first climate-related bankruptcy, was accompanied by a number of legal cases alleging mismanagement by both the executives and the board for failing to prevent power lines from exacerbating the risks of wildfires (Gilson and Abbott 2020).

Another subset of failure to adapt cases concerns the failure to adapt business models to take account of transition risks such as stranded assets. These lawsuits might be filed against directors, officers, trustees and other fiduciaries for miscommunication or mismanagement of climate change risk of high emission industries. One of the most discussed cases in this category was the unsuccessful case of *ClientEarth v Shell Board of Directors*.

SPOTLIGHT: *CLIENTEARTH V SHELL*

An environmental activist charity, ClientEarth, instituted a derivative action against eleven directors of Shell Plc for the alleged mismanagement of Shell's climate risks. The case attracted significant publicity because it was presented as 'the first ever case of its kind seeking to hold corporate directors personally liable'. On 12 May 2023, the English High Court considered the matter on the papers in the first instance and ruled that a *prima facie* case for giving permission was not established. In response, ClientEarth requested an oral hearing to reconsider the decision. On 24 July 2023, the High Court upheld its earlier ruling and dismissed ClientEarth's renewed application to bring a derivative claim. The judgment contained multiple criticisms of the applicants' attempt to use the derivative claim process to challenge Shell's response to climate change. The High Court also ordered ClientEarth to pay Shell's costs of participating in the proceedings.

Climate-washing claims

Climate-washing cases have surged in recent years and are likely to be shaped by new laws and standards, plus action from enforcement agencies. Over 50 cases challenge inaccurate corporate narratives regarding contributions to the transition to a low-carbon future or misinformation about climate science. These cases cover various types of misinformation, including challenges to corporate climate commitments, claims about product attributes, overstated investments or support for climate action, and failure to disclose climate risks (CSSN Research Report 2022:1). Examples include complaints against Glencore for expanding coal production despite net zero

commitments, challenges to claims of products being 'climate-neutral', a case against Volkswagen for inconsistency between climate pledges and corporate lobbying, and allegations of failure to disclose climate risks by banks (Aristova 2023).

There have also been complaints regarding 'state-sponsored greenwashing' in Australia and challenges to the EU's Green Taxonomy. Laws and standards, such as the now updated OECD Guidelines, proposed EU Directive on Green Claims, and initiatives by regulatory bodies, are becoming more common. This could lead to further litigation and discourage climate-washing behaviour.

Increasing diversification of climate litigation against corporations

Early examples of climate litigation were filed in the US and focused on fossil fuel companies. More recently, the number of cases challenging corporate action has started to diversify, with cases filed in new geographies and against companies in a wide range of sectors. Cases are focused on companies, financial institutions and trade associations. When analysing all cases filed against companies between 2015 and 2022, Setzer and Higham 2023 observe cases targeting companies in an increasingly diverse range of sectors over time. One of the reasons for this trend appears to be a significant increase in climate-washing cases. Part of the shift may also be attributable to the increasing sophistication of litigation strategies and the identification of new pressure points within corporate value chains, particularly regarding the provision of finance for high-emitting activities.

Together with the increase in the types of cases and actors involved, there is a growing effort to understand the unique aspects of climate litigation across the corporate world. For example, the 'Global Perspectives on Corporate Climate Legal Tactics', led by the British Institute of International and Comparative Law (BIICL 2023), aims to examine the unique aspects of climate litigation across the corporate world.

Climate lawsuits against governments can increase transition risks for corporations

The other group of cases that may have far-reaching impacts on business involves legal challenges to governments, which seek to challenge either a lack of ambition or a lack of implementation for climate goals. Over 100 such cases have been filed around the world, which often centre on climate commitments or targets, building on the emerging consensus around global temperature limits represented by the Paris Agreement and reinforced by the publication in 2018 by the Intergovernmental Panel on Climate Change (**IPCC**) of the Special Report on 1.5 Degrees, as well as the growing popularity of the concept of 'net-zero'. Many cases build on the approach taken in the landmark case of *Urgenda Foundation v State of the Netherlands*, which was the first piece of litigation to successfully challenge the adequacy of a national government's overall approach to reducing emissions. Whether successful or not, such cases may often result in increased government ambition and, correspondingly, increased regulation focused on private sector emissions.

2 Global Perspectives on Corporate Climate Legal Tactics

DR IVANO ALOGNA

Research Leader in Environmental and Climate Change Law, British Institute of International and Comparative Law

Climate change litigation is an increasingly 'important component of the governance framework that has emerged to regulate how States respond to climate change at the global, regional and local levels' (Lin 2012), exerting pressure on the executive and legislative branches of government to act on the climate change issues. According to the database coordinated by the Sabin Center for Climate Change Law, more than 2500 climate change litigation cases have been filed globally. Whilst most of these cases (around three-quarters) have been filed against States, climate change-related cases have also been filed against private actors. Notwithstanding a growing body of research that has approached climate litigation from a comparative perspective (Alogna et al. 2023; Alogna et al. 2021; Sindico and Mbengue 2021; Kahl and Weller 2021; Lin and Kysar 2020), analyses of the peculiarities of cases involving corporate players have yet to receive the same rigorous attention.

'Global Perspectives on Corporate Climate Legal Tactics' is the title of a research project currently developed at the British Institute of International and Comparative Law (**BIICL**) aiming at creating a Global Toolbox on Corporate Climate Litigation. Before summarising its main features, it seems necessary to touch on some terminological precisions related to the field before providing a few elements on its scientific basis and its increase as a global phenomenon, supported by a few relevant examples.

SPOTLIGHT: BIICL'S RESOURCE HUB

BIICL maintains a resource hub that links reports, books, journals, and digital resources across various legal issues relevant to corporate climate litigation. The library is growing weekly as experts in climate change from law, science, and economics submit their publications.

Private companies are undoubtedly a critical part of the super-wicked problem of climate change. Considering that time is running out, there is no central authority to tackle it, and those seeking to end the problem are also causing it. However, companies might and should also provide the means to mitigate this problem, especially in the context of the current needed energy, ecological and just transition. That is why talking about 'corporate climate litigation' (**CCL**) allows us to avoid the opposition

between non-governmental organisations (**NGOs**), citizens and local communities or governments on one side and private companies on the other.

> *As corporations are fundamental actors in the fight against climate change, we believe it is more helpful to talk about litigation 'involving' companies rather than just 'against' them.*

Unfortunately, this is not the only reason for this possible choice of terminology. In fact, we are currently witnessing cases where companies are invoking the courts to contrast the claimants with Strategic Lawsuits Against Public Participation (**SLAPP**), like in Italy where in July 2023, the fossil fuel giant ENI filed a SLAPP against Greenpeace Italy and ReCommon, alleging damages for defamation, in an attempt to counter their joint legal campaign. These lawsuits are utilised as corporate tactics to suppress criticism by hindering public protest and draining economic resources from the defendants. They have been used in different parts of the world against NGOs, such as in a similar case brought by Total against Greenpeace in France.

This shows a part of the complex picture of climate litigation involving private companies, particularly the 'Carbon Majors', the major greenhouse gas emitters – mainly fossil fuel and cement companies – already identified in 2014 by Richard Heede and the Climate Accountability Institute through an assessment of the historical contributions of these companies to greenhouse gas emissions. This group of scientists attributed 63% of the carbon dioxide and methane emitted between 1751 and 2010 to a mere 90 entities. With that data brought together by the Climate Accountability Institute, climate scientists can run simple climate models to calculate, among other things, the amount of global average surface temperature and sea level rise linked to the emissions from a carbon producer. This relatively new field of science is growing rapidly, with advances in attribution science being tracked by other groups of scientists involved directly in climate litigation, such as the Union of Concerned Scientists.

Just a few months ago, Marco Grasso and Richard Heede published new research quantifying and highlighting that the world's top fossil fuel companies owe at least USD 209 billion in annual climate reparations to compensate communities most damaged by their activity. Therefore, scientific evidence is growing, as well as the precision of attribution science findings in confirming the causal link between climate change and fossil fuel-related activities. In recent years, there has been a surge in climate litigation not only against fossil fuel firms – what Kim Bouwer critically called 'the Holy Grail' of climate litigation cases – but also against other polluting industries, with many cases challenging corporate inaction on the climate crisis and attempts to spread misinformation, and companies increasingly recognise it as a risk. The Sabin Center global database counts more than 200 cases worldwide, without counting the cases in the US, where we find some of the very first cases brought against corporations, notably including the *Village of Kivalina v Exxon Mobil*, and by States against utility companies, such as *American Electric Power Association v Connecticut* and against automotive companies, such as *California v General Motors*. Many of these initial cases failed under the political question doctrine or were pre-empted by federal statutes such as the Clean Air Act.

Over the last decade, climate litigation has expanded outside carbon-intensive businesses. Aside from the ongoing trend of cases involving a company's impact on climate change through greenhouse gas emissions, new types of claims against companies in many sectors began to arise. These included allegations involving directors' duties and a company's need to fully disclose the financial risk of exposure to climate change caused by its business activities. The expanding panorama of government lawsuits is causing more legal and regulatory changes, reverberating throughout the private sector. Nowadays, we are witnessing an always more

important extension of CCL to new areas, new challenges and what we can call an always more creative use of different causes of action and legal strategies.

Globally, the panorama of CCL cases is quite heterogenous, with already famous cases brought by NGOs, individuals and even States, such as:

- *Milieudefensie et al. v Royal Dutch Shell plc* in the Netherlands based on the company's duty of care under Dutch law and the human rights obligations of business enterprises;
- the case of the Peruvian farmer, *Luciano Lliuya v RWE*, in Germany, based on the general 'nuisance' provision of the German Civil Law code; and
- the more recent lawsuit brought by the State of California against 13 fossil fuel companies and the American Petroleum Institute alleging ex alia statutory causes of action for public nuisance, equitable relief for pollution, impairment and destruction of natural resources, untrue or misleading advertising, misleading environmental marketing, and unlawful, unfair, or fraudulent business practices.

Therefore, considering this disparate framework, the goals of the BIICL project are:

(1) to produce a mapping and comparative analysis of CCL cases globally through three broad areas of research (causes of actions, procedures and evidence, and remedies), taking into consideration perspectives from 17 countries in every continent, in order to offer a comprehensive overview of both the existing best practices worldwide and the most suitable corporate climate litigation avenues for differentiated legal systems and economies.

(2) to catalogue existing cases – also taking stock of the lessons learned in other fields (e.g. tobacco, asbestos, toxic torts).

(3) to engage in strategic, prospective and interdisciplinary thinking, as all the 17 National Reports – which constitute the basis of the Global Toolbox – take advantage of previous workshop discussions among legal scholars and practitioners with different fields of expertise, as well as with the contribution of judges, scientists and economists; and

(4) to identify possible frameworks, arguments, and legal instruments to be used in this growing field of litigation.

The project aims to help litigation planning, contribute to more comprehensive and effective climate action, raise public awareness and eventually – because of its deterrent effect – allow and encourage corporate actors to mitigate their litigation risks by changing business behaviour. In view of these objectives, the project will provide a selection of tools for NGOs, government bodies and local communities, as well as other affected groups and individuals around the world and those representing them. It will also contain an inventory of substantive and procedural provisions relevant to climate change cases to be potentially used as legal models by policymakers and legal practitioners, as well as an authoritative reference point for judges and other adjudicators, leading to more consistent and informed decisions.

In 2024, the first version of the 'interactive' Global Toolbox will be disseminated and tested through discussion with all the relevant stakeholders during 17 national conferences and 5 regional summits. The intention is to expand its impact, improve its content, and foster and encourage worldwide collaboration throughout its network of experts and interactive AI-powered database. The global, interdisciplinary, and practical methodology of the Global Toolbox is the crucial feature that makes it relevant to developing better and more effective litigation planning in this area whilst encouraging corporate actors to make positive changes to achieve a just and ecological transition, aligning with Paris Agreement goals.

3 Rights-based Approach to Climate Change Litigation

PROFESSOR ANNALISA SAVARESI

Professor of Environmental Law, University of Stirling and Associate Professor of International Environmental Law, Center for Climate Change, Energy and Environmental Law, University of Eastern Finland

Several instances of climate change litigation incorporating human rights elements have unfolded before national and international courts. This note aims to underscore the distinctive role of human rights law in climate change litigation. It builds upon my previously published works in the subject area, particularly the special issue of the Journal on Human Rights and the Environment on rights-based climate litigation published in 2022. Joana Setzer and I contributed an article which included a quali-quantitative analysis of rights-based climate litigation. We initiated this work in late 2020 with a clear objective: to merge Joana's expertise in climate change litigation with my focus on human rights and the environment.

At the project's inception, various initiatives were already in progress to explore the relevance and implications of human rights obligations in the context of climate change. Notably, the impactful reports on human rights and climate change by the UN Special Rapporteurs on human rights and the environment, Knox and Boyd, had already been published. Since then, a dedicated UN Special Rapporteur on climate change and human rights has been appointed, and this normative work has played a pivotal role in influencing climate litigation globally by leveraging established jurisprudence on human rights and the environment.

SPOTLIGHT: RIGHT TO A CLEAN, HEALTHY, AND SUSTAINABLE ENVIRONMENT

In 2022, the United Nations General Assembly voted in a non-binding resolution to declare the right to a clean, healthy, and sustainable environment as a human right, echoing a similar 2021 UN Human Rights Council vote and affirmations in international legal instruments like the preamble of the Aarhus Convention. This recognition comes at a critical time as climate change intensifies environmental challenges, leading to devastating consequences such as increased extreme weather events and the destruction of habitats and ecosystems. Enshrining the right to a clean, healthy, and sustainable environment in human rights frameworks provides claimants with a legal basis to hold those responsible for the climate crisis accountable. For instance, in 2018, Colombia's Supreme Court upheld the Amazon Rainforest's right to protection, emphasizing the government's duty to combat deforestation and environmental degradation.

The rights-based climate cases, ranging from lawsuits initiated by children to broader inquiries into the impacts of activities such as oil and gas licenses, share a common thread: they draw upon established jurisprudence concerning human rights and the environment, compelling courts to apply environmental jurisprudence to climate-related issues for the first time.

For someone deeply immersed in human rights and environmental law like me, it is surprising that it took this long for climate litigants to tap into this potential. Early human rights complaints on climate change before international human rights bodies, such as the Inuit and Athabaskan petitions to the Inter-American Commission on Human Rights, were unsuccessful. So why persist? The answer is simple.

> *Human rights law provides remedies unavailable under environmental/climate change law.*

The practice of relying on human rights law to address environmental harms is global and has become evident in recent years in relation to climate change. In Europe, groundbreaking judgments in the Netherlands, Germany and Belgium have relied on the established human rights jurisprudence, demonstrating that courts are comfortable framing climate harms as human rights issues. The question arises as to whether the European Court of Human Rights (**ECtHR**) is prepared to do the same with the numerous climate cases presently pending before it. Only time will tell. But even if none of the current climate complaints before the ECtHR succeed, others likely will. The greatest potential in this connection lies in so-called enforcement cases, where applicants frame climate harms as human rights violations. This form of argumentation is familiar to the ECtHR and is more likely to be accepted. ECtHR judgments on human rights and the environment have been influential, and there is ample reason to expect that any judgment the court may deliver on climate change would similarly carry significant influence.

While human rights are not a silver bullet, they undeniably help bridge the accountability gap currently plaguing climate legislation. In this context, the template of the UK Climate Change Act has started to reveal its flaws and deficiencies. Human rights can offer interim solutions, but ideally, we need better climate legislation that is properly implemented and enforced. In other words, we need better laws and better enforcement. This predicament is not unique to the climate problem and extends to various other environmental matters. Unfortunately, the environmental rule of law, as described by the UN Environment Programme, is still some ways off. Therefore, we must utilise every available means, including human rights law with all its shortcomings and deficiencies, to progress towards this goal.

The workshop organisers put several questions for expert discussion, and I would like to offer a few thoughts.

Q1 What are the most effective legal strategies and arguments n European climate change litigation against states?

It's fair to say that so-called 'ambition' cases, akin to *Urgenda*, have been the most effective so far. These cases aim to instigate legal reforms in various forms. Cases enforcing targets and climate legislation are yet to gain prominence, representing untapped potential.

Q2 Are there legal strategies or precedents from one country that could be applied in others, and how can legal transplants be made effective?

Legal transplants are challenging, but we have a robust foundation in the vast body of jurisprudence on human rights and the environment. Notable victories worldwide have been achieved on this basis, and we must build on these successes, considering regional specifics.

Q3 How can practitioners engagewith policymakers to integrate court decisions into climate action plans?

Climate change has become integral to legal practice. We need to incorporate climate jurisprudence into teaching, outreach activities, and university programs, emphasising that it's mainstream and essential. Engaging with practitioners and demonstrating that climate litigation is a pertinent and necessary endeavour is crucial.

4 Climate Litigation against Corporations: A Business and Human Rights Perspective

Dr David Birchall

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In this brief note, I will focus on climate litigation in the context of business and human rights (**BHR**). Climate litigation is often undertaken against companies and sometimes under human rights-related laws. Environmental rights and harms are also increasingly important in human rights thought. The recently developed 'right to a clean, healthy and sustainable environment', ESG metrics and human rights due diligence (**HRDD**) rules all feature standards relevant to businesses and climate change emissions.

The workshop explored current legal claims against corporations for their climate impacts. These claims occur in many jurisdictions and under many causes of action, meaning there is no singular standard for corporate accountability in the area. Claims are proceeding under a tortious duty of care, directors' duties, standards for the government climate targets, and other areas based on plausible national legal avenues. These claims are often either ongoing or denied but are part of a rising tide of litigation techniques. These include both claims against states and wider environmental claims, such as *Lungowe v Vedanta* and *Okpabi v Shell* in the English courts that established a parent company duty of care for harm caused by subsidiaries.

There is also a clear climate dimension to HRDD rules, currently in place in several European states and soon to be brought in Europe-wide by the Corporate Sustainability Due Diligence Directive (**CSDDD**). One climate-related case against BNP Paribas is currently proceeding under the French Duty of Vigilance Law. The CSDDD incorporates both 'adverse environmental impacts' and 'adverse human rights impacts'. HRDD laws should, in general, obligate companies to investigate their environmental impacts and to mitigate and remedy environmental harm caused. Some HRDD laws are framed more narrowly; for example, the Swiss Conflict Minerals and Child Labor Due Diligence Law is limited to conflict minerals and child labour.

SPOTLIGHT: OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT

On 8 June 2023, during a Ministerial Council Meeting, the OECD launched an updated version of the Guidelines for Multinational Enterprises on Responsible Business Conduct. The changes represent substantial and potentially far-reaching implications for business, particularly in the areas of climate change and biodiversity. Significantly, the 2023 update explicitly identifies climate change

as a critical environmental impact that MNEs should address by conducting risk-based due diligence, acknowledges that MNEs have a responsibility for achieving a just transition, and aims to bring the text of the Guidelines in alignment with the Paris Agreement of 2015. There is already a growing trend of using the Guidelines for climate-related complaints. The number of climate-related complaints referred to NCPs is doubtlessly to increase, triggering new types of allegations within the scope of the expanded Guidelines.

From my perspective as a BHR scholar, as much focused on the soft laws and normative framework of BHR as on case law, it may be useful to elaborate on where the more progressive, softer rules currently stand. As we have seen with HRDD, emissions benchmarking, and environmental and human rights-based codes of conduct, these softer rules frequently inform later binding legislation.

First, climate due diligence under the UN Guiding Principles on Business and Human Rights (**UNGPs**). Under the UNGPs, business enterprises hold a responsibility to respect human rights, including environmental rights.

> *While responsibilities towards climate change are not specifically mentioned in the UNGPs, insofar as climate change causes adverse human rights impacts, corporate responsibility toward climate change is part of the corporate responsibility to respect human rights.*

According to the UNGPs, companies should assess the risk of causing climate harm, communicate this risk, and act upon the findings to mitigate it. They should measure their own climate impacts both in empirical terms and in terms of specific human vulnerabilities, such as impacts on specific communities. How this is done should follow evolving international law and best practices. For example, today's best practice for emissions reporting comes from the IFRS S2 'Climate-related Disclosures' and includes scope 1, 2, and 3 emissions. Scope 3 'indirect' emissions often also form the basis of legal claims, including *Milieudefensie v Shell* in the Netherlands and *Finch v Surrey County Council* in the UK. For the carbon majors that produce fossil fuels, cutting scope 3 emissions in line with Paris Agreement targets and transitioning towards clean energy production is at least recommended and is probably a compliance requirement.

Taking a constructivist perspective, I would highlight the ideational evolution that created climate litigation discussions. Binding law is always, or usually, an end stage of ideational evolution. To be accepted as a law, something needs a significant amount of normative approval. This bar is set even higher for progressive ideas that ostensibly appear as a threat to economic development. This process of normative approval starts at the societal level, moves through to marginally authoritative actors, and begins to inform idealistic goals. Over time, these goals become voluntary standards, soon standards backed by a legitimate authority (as the UNGPs may be described) and eventually translated into binding law via international law or, as in the case of HRDD, by individual states. The Paris Agreement is another example of a long, slow road from social concern to binding(ish) law.

As many participants at the event noted, legal claims can reflexively spur greater social pressure to change laws and actions. The ambitious attempts to take the directors of BP to the International Criminal Court and the *Portuguese Youth* case in the European Court of Human Rights are two examples of cases perhaps designed primarily as public relations exercises. More feasible claims can also spur public hopefulness for climate action, particularly when they succeed.

The next evolution in the soft law-hard law dyad will be towards broader and firmer HRDD standards, with more states enacting legislation, clearer standards for what companies must do under such laws, and clarification of the climate due diligence under such laws. This will also lead to more comprehensive global obligations on companies, as HRDD is innately extraterritorial in its scope. Such rules should help address the concern in the *Milieudefensie* case that Shell may be able to avoid obligations through its global operations and wider concerns about forum shopping by multinational corporations in general.

Beyond HRDD, there is a renewed focus on the obligations of banks, investors and investment funds towards human and environmental rights. There is also extensive attention being paid to directors' duties, both in relation to HRDD obligations and, more broadly, to protecting people and the planet. Finally, attention is also being paid to climate reparations or funding for extensive climate remedies, which may well feature in future legal cases.

5 How Litigation and Policy Making for Climate Can Create a Positive Feedback Loop: The European Union as a Case Study

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It is a fact that a great deal of the laws that govern the running of the European Union are created by non-lawyers. Policymakers in the EU come from diverse backgrounds, but as politicians, the skill sets required to succeed in politics are not necessarily commensurate with clerical patience and a good eye for the technical details. As such, many of the EU's laws are created with a political agenda in mind, and the details of legal transposition are left to a hidden army of legal clerks (Korkea-aho and Leino-Sandberg 2022).

While the process for making laws and policies in the EU is certainly untidy, it is also arguably the most open to civil society of any system of its type in the world. The European Green Deal stands chief among the great successes of civil society pressure (Charveriat 2023). Environmental concerns only became one of the EU's competencies in 1993 with the Treaty of Maastricht. Yet, the European Green Deal launched in 2019 has dominated the last five years of the EU's legislative agenda.

The role of litigation in climate policy

Intense campaigning from civil society and public pressure might have delivered the Green Deal, but a multifaceted approach is needed to continue to nourish its provisions. To uphold and strengthen the gains made by the European Green Deal, litigation emerges as a crucial tool in the arsenal, but only if it is used to create a positive feedback loop with policy making.

The EU has one of the most robust regulatory frameworks for the environment and climate in the world, but litigation can greatly enhance both their foundation and future. Policies, such as emissions reduction targets and renewable energy mandates, provide a foundation for legal standards, making it easier for litigants to challenge entities that violate these regulations. Equally, litigation serves as a vital accountability mechanism, ensuring that policies are not only formulated but also enforced.

Litigation may thus be a driving force behind new policy initiatives, eventually leading to new EU-wide legal frameworks. A notable example is *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, commenced in 2011 by ClientEarth against the UK regarding its failure to meet air quality standards required by the EU Ambient Air Quality Directive. This successful legal action saw not only the UK forced to draw up new plans for tackling air pollution but ultimately influenced subsequent EU-wide initiatives, including more stringent enforcement in other countries and tabling ambitious revisions to the Ambient Air Quality Directives.

Climate change as a human rights issue

Increasingly, climate change is also recognised as a human rights issue, adding to the frameworks which can be utilised. The decision of the Federal Constitutional Court of Germany in 2021 in the *Neubauer* case that the targets of the new climate law were insufficient rested on the argument that the human rights of the complainants were being violated.

SPOTLIGHT: *NEUBAUER ET AL. V GERMANY*

A group of German youth challenged the German Federal Climate Protection Act, arguing that the Act's target of reducing greenhouse gases by 55% until 2030 from 1990 levels was insufficient and hence violated their rights to life and physical integrity as protected by Articles 2(2) and 20a of the Basic Law. The Federal Constitutional Court held that parts of the Act were incompatible with the claimants' fundamental rights for failing to set sufficient provisions for emissions cuts before 2030. They interpreted Article 20a as requiring the legislature to protect the climate and aim towards achieving climate neutrality across generations. The Court ordered the legislature to set clear provisions for reduction targets from 2031.

This case may be the first in what many hope to be a domino effect for cases of this kind. At the time of writing, a judgement is still expected in the *Portuguese Youth* case to the European Court of Human Rights (**ECHR**) as to whether the lack of action on climate change has affected the claimants' right to life. A decision will ultimately be made by the ECHR's Grand Chamber of 17 judges.

These cases did not emerge in a vacuum. It is important to note the many unsuccessful claims that walked so these might run. Notably, the *People's Climate* case, although unsuccessful, introduced the idea of inadequate emissions reductions as rights limiting.

Litigation pathways for strengthening the European Green Deal

Like the revision of the Air Quality directives, much of the European Green Deal was about revisiting existing policies, but it was also the initiation of many new legal targets for greenhouse gas emission reduction. While these legal targets represent the first of their kind written into a state-wide law, they are not without their criticisms.

The EU's Climate Law has set a target of reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. Campaigners and scientists argue that this figure should be upped to 65% by 2030, in keeping with the Paris Agreement and as highlighted by the UN Environment Programme's Gap Report on limiting global warming to 1.5°C above preindustrial levels. The judgment of the German court and the Portuguese Youth case may present roadmaps to challenging these insufficient targets.

Indeed, Climate Action Network Europe and Global Legal Action Network have already taken the first steps towards a legal challenge of this law, citing that the 55% target does not adequately address Europe's historical contribution to emissions.

Policy as a driver for litigation

As we have seen, litigation can be the jumping-off point for many policy decisions, but the pendulum swings both ways, and those looking to make impactful challenges are wise to be mindful of the direction of political winds.

The evolving nature of the policies at the heart of the Green Deal creates a dynamic environment for influencing policy through legal actions. Keen observation of the policy agenda indicates the most strategically viable moments to align cases with overarching climate goals. For instance, the ramping up of mining projects for the minerals needed for Europe's demand for renewables should be on the radar as both a potential human rights and environmental issue, as underscored by the experience of Europe's native Sami population.

Other issues of political importance, such as the beleaguered Nature Restoration Law, will require careful monitoring for future infringement, given the lack of political appetite for its adoption.

Litigators can also strengthen the policy making landscape by identifying gaps or ambiguities in existing climate policies. Strategic cases can then be crafted to address these deficiencies, aiming for legal clarity and, in turn, influencing policymakers to refine and strengthen climate-related legislation. This is the aim of the complaint filed by Greenpeace and others, which aims to overturn the decision to include gas and nuclear in the EU Taxonomy Regulation, establishing activities eligible for sustainable finance initiatives.

The policy agenda can also serve as a benchmark against which litigators gauge government actions. Legal challenges can be framed to hold governments accountable for fulfilling their climate-related policy commitments, as in the case of *Carême v France*, where the claimant asked the Council of State to cancel the Government's refusal to take additional measures agreed to meet the Paris Agreement.

Of course, this would not work if elected representatives paid no mind to whether they were seen to be fulfilling policy objectives. Litigators should, therefore, be alive to the role of public opinion in shaping policy discourse, and mindful of timing actions when a certain policy is on the news agenda to gain public support.

Building positive feedback loops: The way forward

The intertwined relationship between policy and litigation offers a promising avenue for addressing the complex challenges posed by climate change. In the EU, legal challenges have played a pivotal role in shaping and strengthening climate policy, propelling the region towards more ambitious commitments.

By recognising climate change as both a sui generis issue and a human rights concern, policymakers and legal practitioners can work collaboratively to build positive feedback loops that drive effective climate action. The EU Green Deal is a stepping stone, and the integration of legal challenges into its evolution highlights the potential for even more transformative climate policies in the future.

The Green Deal was hard won but is not by any means perfect. However, we must all be alert to the potential for future policymakers to water down its provisions in answer to political pressures that swing increasingly towards populist inclinations. In this way, litigation can underpin upholding our wins on the one hand while challenging us all to go further in protecting climate and human rights on the other.

6 Why I Don't Talk in Terms of 'Strategic Climate Change Litigation'

Professor Liz Fisher

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Words matter. The writer Ursula Le Guin once wrote:

> *As a writer, you want the language to be genuinely significant and mean exactly what it says. That's why the language of politicians, which is empty of everything but rather brutal signals, is something a writer has to get as far away from as possible. If you believe words are acts....then one must hold writers responsible for what their words do.*[1]

Lawyers not only want language to be 'genuinely significant' but know it is. Define an environmental right differently and it will have different consequences.[2] Provide different definitions for 'guidelines and policies to ensure environment protection'[3] or what are 'the direct and indirect significant effects of the proposed development'[4], and the same is true.

Lawyers and legal scholars, like writers, are in the word business. Consider Le Guin's statement with the word writer replaced with lawyer:

> *As a [lawyer], you want the language to be genuinely significant and mean exactly what it says. That's why the language of politicians, which is empty of everything but rather brutal signals, is something a [lawyer] has to get as far away from as possible. If you believe words are acts....then one must hold [lawyers] responsible for what their words do.*

Many legal challenges concerning climate change are about the meaning of words – that is why reasoning about statutory construction figures so significantly in case law.[5] These legal actions are attempts to ensure that the language and reasoning of law reflect more accurately the problem that climate change presents.[6] They are cases holding lawyers responsible for how they imagine the world. They are demands to imagine better.[7]

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1 Quoted in Jonathan White, *Talking on Water: Conversations About Nature and Creativity* (Trinity University Press 2016) 106.

2 E.g. *Neubauer and others v Germany*, Case No. BvR 2656/18/1, BvR 78/20/1, BvR 96/20/1, BvR 288/20 and *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2006.

3 *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* 250 LGERA 1, [2021] NSWLEC 92.

4 *Finch On Behalf of the Weald Action Group, R (On the Application Of) v Surrey County Council & Ors* [2022] EWCA Civ 187 (currently on appeal).

5 Elizabeth Fisher, 'Climate Change and Statutory Construction: Administrative Law Expertise and "New" Emergencies' (2023) 27 Edinburgh Law Review 322.

6 See nns 3-4 and also *Massachusetts v EPA* 549 US 497 (2007) and *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257, [2019] NSWLEC 7 as good examples.

7 Elizabeth Fisher, '"Going Backward, Looking Forward": An Essay on How to Think About Law Reform in Ecologically Precarious Times' (2022) 30 New Zealand Universities Law Review 111.

That demand to 'imagine better' applies to all lawyers and legal scholars.[8] Critical reflection on the language, narrative, and metaphors deployed in specific instances is part of the lawyer's craft.[9] But sometimes lawyers inadvertently fall into practices without such reflection. Particularly where swift action is needed. I would argue that the use of the term 'strategic litigation' is hindering the ability of lawyers and legal scholars to imagine better.

Strategic litigation is commonly used to describe cases being brought to hold decision-makers to account for action in relation to climate change.[10] As Batros and Khan note, '[a] case is litigated strategically when it is not seen in isolation (with the judgment as the solution or an end in itself) but rather as one step in a bigger effort to achieve the ultimate goal'.[11] In many ways, it is an understandable label – the catalyst for these cases is a desire to use litigation as a 'regulatory pathway' to low carbon energy futures.[12] Much of the literature has also been on the perspectives and agendas of those bringing these legal actions[13] – hence the 'external' focus on litigation.[14]

But 'strategic litigation' is a term that also limits thinking if it is used in a generic way to refer to cases about climate change more generally. Take the word 'strategic'. Virtually all litigation is 'strategic' in that litigation is nearly always brought to achieve particular ends.[15] The ends might vary – they may be financial, calling decision-makers to account, catalysing specific type of action, or symbolically right an injustice – but the 'craft work' of litigating lawyers is always about calculated action.[16] To distinguish climate change actions as 'strategic' is to separate out climate change legal challenges from other types of litigation. It is to isolate it as a practice and not make it seem very legal. Such a separation not only discourages cross fertilisation between different areas of litigation, but it can also give the impression that legal actions in relation to climate change have very little to do with law. It thus should come as no surprise that some see climate change litigants as political agents demanding courts to step outside their legitimate constitutional role.[17]

The label 'strategic' can also narrow the field of view in other ways. While many cases are about calling decision-makers to account for their climate change action (and thus might be thought about as climate accountability challenges), there are also many cases about resolving a range of different types of legal disputes in light of the disruption created by climate change and climate laws.[18]

> *All litigation is strategic, but the ends that litigants seek to achieve are different. As climate change is only going to become a more significant reality in the future, the ends that litigants will be seeking to achieve will only become more various.*

8 See Elizabeth Fisher, 'Public Law, the Levels of the Law, and Environmental Problems', (Jorge Huneeus Public Law Lecture, 5 December 2023).

9 Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020).

10 For excellent literature overviews, see Joana Setzer and Lisa Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 WIREs Climate Change e580 and Jacqueline Peel and Hari Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 28.

11 Ben Batros and Tessa Khan, 'Thinking Strategically about Climate Litigation' in César Rodríguez-Garavito (ed) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (CUP 2022) 104.

12 Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015).

13 For some examples of good scholarly examples of this literature see *ibid*; Lisa Vanhala, 'Coproducing the Endangered Polar Bear: Science, Climate Change, and Legal Mobilization' (2020) 42 Law & Policy 105; and Kim Bouwer and Joana Setzer, *Climate Litigation as Climate Activism: What Works?* (British Academy COP26 Briefings 2020).

14 On what is meant by an 'external' approach, see Elizabeth Fisher 'Imagining Method in Administrative Law Scholarship' in Carol Harlow (ed) *Research Agenda for Administrative Law* (Edward Elgar 2023) 7-9.

15 Fisher, 'Climate Change and Statutory Construction' (n 5) 337.

16 See Karl Llewellyn's unpublished lectures discussing this in William Twining, *Karl Llewellyn and the Realist Movement* (2nd ed, CUP 2012) 505-12.

17 David Campbell, 'Temperature Tantrum' (2021) 137 LQR 380.

18 Elizabeth Fisher, 'Law and Energy Transitions: Wind Turbines and Planning Law in the UK' (2018) 38 OJLS 528.

The word 'litigation' also distorts the field of view. It draws attention away from the fact that from the perspective of judges and others who are deciding cases, the focus is not on litigation but on adjudication.[19] It is an internal perspective[20] – in these cases, the courts are discharging legal tasks, and the aspiration is to discharge them well.[21] Adjudicators are considering legal arguments in light of current legal doctrine in different legal contexts. This is 'active' and difficult legal work in that those adjudicating are needing to sort through arguments and keenly and conscientiously apply and develop the law in light of climate change.[22] The focus is less on the ends but on ensuring the integrity of the law. That requires legal expertise on the part of both the adjudicator and those arguing before the court[23] – something easy to overlook if the focus is on a strategy for achieving a particular end. As is the fact that the possible outcomes of adjudication can be multivarious – a possible mixture of different interpretations, different doctrinal evolutions, and different remedies. Few cases fit easily into a win/lose binary. To put it differently, talking in terms of strategic litigation risks not taking law and legal reasoning seriously.

I am not saying the term 'strategic litigation' is never appropriate to use. My argument is that the term should be used less. There is a better language to use. There is more going on in relation to climate change and adjudication than the term denotes or connotes. There is the potential to imagine better.

19 Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 MLR 173, 175-6.

20 Fisher, 'Imagining Method' (n 14) 6-9.

21 Fisher, Scotford and Barritt (n 19) 196-200.

22 Fisher, 'Climate Change and Statutory Construction' (n 5) 341.

23 *ibid* 338-344.

SECTION II

CHALLENGES AND WEAKNESSES OF STRATEGIC CLIMATE LITIGATION

Recognizing that strategy entails deliberate decision-making regarding one's course of action is crucial. Litigants must carefully consider the costs and benefits of their arguments, as litigation doesn't always yield favourable outcomes. As Steven Vaughan emphasises, climate litigation may prove unproductive due to legal, practical, and ethical considerations. The opinion pieces in this section shed light on the challenges that contribute to and arise from climate litigation. Conventional legal doctrines impede litigants' efforts to hold corporations accountable for their contributions to climate change. Marc-Philippe Weller and Theresa Hößl discuss how legal innovation must overcome hurdles the German Civil Code poses in tort litigation. Similarly, Uglješa Grušić explores jurisdictional issues in horizontal private international law claims as litigants seek avenues beyond their domestic legal system for climate justice.

Despite novel legal approaches, practical barriers persist for claimants seeking recourse in court. Steven Friel's contribution delves into the legal and political challenges hindering certain climate lawsuits suits from obtaining funding. The risks for litigants extend beyond the initial filing of their claims. Poorly argued cases may result in judicial restatements of the law disadvantageous to future climate litigants and foster public scepticism regarding the effectiveness of climate litigation. Defendants, state or corporate, may employ defences like the perfect substitution argument to undermine potential legal remedies, as illustrated by Brice Laniyan. Therefore, litigants must navigate potential pitfalls in their legal arguments, underscoring the essence of strategic decision-making in climate litigation.

7 Viability of Legal Transplants in Corporate Climate Responsibility: A German Perspective

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Diversification of cases

Climate litigation against corporations is still on the rise (Global Climate Litigation Report: 2023 Status Review). In Germany, particularly prominent lawsuits have been directed against the car manufacturers VW, BMW, Mercedes Benz, and the energy supplier RWE. At the same time, a considerable diversification of cases can be observed worldwide. On the one hand, the law of unfair competition is being examined as a new cause of action in greenwashing cases in Germany. Since vague statements on climate friendliness or neutrality (especially concerning compensation with CO2 certificates from forest protection projects) may mislead consumers, this area of law proves successful.

On the other hand, various defendants, such as the financial institutions in the Netherlands, are being targeted for financing climate-damaging activities, i.e. their scope 3 emissions. The Italian State (represented by the Ministry of Economy and Finance) is targeted as a defendant in a climate lawsuit, not in its role as a legislator but as a shareholder with the controlling influence of the fossil fuel company ENI. This diversification in both causes of action and parties offers new and promising opportunities for the claimants, e.g., adopting best practices from climate lawsuits against states.

SPOTLIGHT: LITIGATION AGAINST CAR MANUFACTURERS IN GERMANY

Individual claimants and civil society groups initiated a series of cases against German car manufacturers for their historic contributions to climate change. The claimants argued that climate change resulted in an increase in natural disasters that resulted in an individual loss (e.g. farms beset by droughts and heavy rains in *Alhoff-Cramer v Volkswagen AG*) or that their fundamental rights to climate protection and the freedom of future generations had been violated (*Deutsche Umwelthilfe*

v Mercedes-Benz AG, *Deutsche Umwelthilfe v Bayerische Motoren Werke AG*). Of particular significance was the contention that manufacturers' contributions to climate change were evident from the sale of vehicles with internal combustion engines. The remedies sought by the claimants varied from demands for emissions reduction to restrictions on the sale of vehicles with internal combustion engines. However, the Regional Court dismissed the claims in each instance, citing reasons such as the inability of the remedies to address the alleged rights violations or matters falling outside the jurisdiction of the court.

Aims and legal hurdles of climate lawsuits

However, legal hurdles remain, particularly in the case of tort law actions. Under German law, climate-related claims under tort law pursue three different aims:

(1) *compensation* for damage caused by climate change (Sec. 823, para. 1, German Civil Code),

(2) *adaptation* to climate change risks or reimbursement of expenses for such measures (Sec. 670, 677 and 683(1) German Civil Code in conjunction with Sec. 1004, German Civil Code) and

(3) *mitigation* or *reduction* of CO2 emissions (Sec. 1004 German Civil Code).

The legal prerequisites are similar for all aims:

(1) First and foremost, the violation of an individual legal interest has to be proven. As the climate is a problem of the commons, it is not protected under Sec. 1004 and 823 German Civil Code.

(2) The causation between climate change, specific damage and excessive CO2 emissions has to be established.

(3) And finally, the duty of care to reduce the emissions, especially with regard to scope 3 emissions in the value chain, has to be founded (Weller, Hößl and Radke 2023, p. 143).

Innovative approaches

Overcoming these hurdles requires innovative approaches, e.g. finding new arguments by transposing successful climate litigation cases from one state into another jurisdiction, integrating climate science, or challenging well-known legal concepts.

This potential can be illustrated with three examples.

(1) Sec. 823 and 1004 of the German Civil Code require the infringement of an individual legal interest. To meet this requirement and establish such an infringement, claimants, in particular the non-governmental organisation Deutsche Umwelthilfe, apply and transfer findings from the famous *Neubauer* (also known as Klima-Beschluss) case by the German Federal Constitutional Court into private law. This judgment is a climate lawsuit against Germany. The claimants argued that their fundamental rights are already being violated today, as the ongoing CO2 emissions

will eventually require public life to be stopped. The constitutional court agreed in this respect with the claimants and obliged the legislator to tighten the Federal Climate Protection Law.

Therefore, claimants in the civil lawsuits against BMW and Mercedes Benz assert infringements of their general right of personality as future restrictions in personal life, limitation of cultural life, and lack of mobility can already be predicted with certainty due to ongoing CO2 emissions. In the words of the German Federal Constitutional Court, the claimants' general right of personality operates 'intertemporally' and excessive corporate CO2 emissions cause an 'interference-like effect'. Although this legal transplant of reasoning from a public case into a private lawsuit might sound convincing, the Regional Court of Stuttgart has considered the future effects of the further production of combustion engines on the climate as completely uncertain in the Mercedes Benz case and dismissed the case. It is now up to the highest German civil court, the German Federal Court of Justice, to judge the viability of the claimants' arguments.

(2) The attribution of the risks of the climate change to the defendant – in the RWE case, the causality between its CO2 emissions and the increased level of the Peruvian glacier lake and the flood risk for Saúl Luciano Lliuya's property – is even more complicated.

A transfer from public law is unlikely to succeed here. While the legislator has a wide margin of appreciation in public law, the causal chain must be fully provable in civil law (Sec. 286, German Code of Civil Procedure). The Higher Regional Court of Hamm currently addresses this issue and has decided to gather evidence in Huaraz, Peru. It needs to be clarified whether Saúl Luciano Lliuya's property is seriously threatened by flooding and to what extent climate change and RWE's CO2 emissions contributed to this. If claimants aim to compensate for climate-related damages, proving the concrete causal link will be more difficult (Wagner and Arntz 2021, p. 413, para. 37; Schirmer 2023). The crucial point will be the cooperation and integration of modern climate science disciplines into law to provide the legally necessary full proof.

(3) Another decisive hurdle is the construction of a duty of care to reduce corporate CO2 emissions, particularly with regard to scope 3 emissions from the use of products, such as driving a car or heating with fossil fuels. As opposed to the *Shell* case in the Netherlands, German courts have so far not felt the need to discuss this issue because the pending claims have already failed for other reasons. Nevertheless, the question is likely to be challenging since German civil law generally limits liability to a company's own actions due to the principle of immediacy and separation. In contrast, scope 3 emissions are emitted by other legal entities (suppliers or customers).

Unlike German courts, legal scholars are already taking up this challenge. One of the possible solutions is activating the well-known German concept of producer liability to justify a new duty of care concerning CO2 emissions. According to this concept, producers – in simple terms – must generally ensure that defective or dangerous products do not cause any harm to users of the product. Energy producers such as RWE burn fossil fuels in their own plants, and mineral oil companies such as Shell sell fossil fuels, which the customer then burns - in any case, harmful CO2 is released (as waste) during combustion. The major emitters should have at least warned about this emission as part of their product monitoring obligation to prevent harm from the users (Schirmer 2023). The idea can also be applied, at least in principle, to car manufacturers such as Mercedes Benz, BMW or VW, whose vehicles emit CO2 when used as intended.

SPOTLIGHT: BONAVERO INSTITUTE'S PROJECT ON CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS

In 2019-2022, the Bonavero Institute of Human Rights led the project on civil liability for human rights violations. The project involved a comparative study of the legal systems of a wide range of jurisdictions to analyse existing domestic law mechanisms or principles for imposing civil liability on public bodies, corporations, and individuals in three specified categories of human rights violation: (1) assault or unlawful arrest and detention of persons; (2) environmental harm; and (3) harmful or unfair labour conditions. One of the project's outcomes was a Handbook for Practitioners intended to serve as a practical resource to understand when and how civil claims can be used as a tool to vindicate human rights. The study revealed various forms of civil remedy that exist in different jurisdictions and their contemporary development in response to global challenges. The individual reports provide comparative law insights into the similarities and differences between the law of civil remedies in the relevant jurisdictions, contributing to the debate about legal transplants.

Corporate climate responsibility: A task for the legislator

As can be seen, climate lawsuits against companies are both innovative and challenging. German courts have so far struggled to rule in favour of the claimants. The attention is, therefore, turning to the European and national legislators following it. On 14 December 2023, the European Council and Parliament reached an agreement on the Corporate Sustainability Due Diligence Directive. Its Article 15 (in the Parliament's draft version) requires companies to develop and implement a transition plan to ensure that the business model and strategy of the company are aligned with the targets of (1) 1.5°C according to the Paris Agreement and (2) climate neutrality by 2050 according to the European Climate Law. The proposed provisions impose an independent, material, climate-related duty on companies that by far exceed the reporting obligations of the Corporate Sustainability Reporting Directive. Regardless of future success in court, this legislative act marks a new era of corporate climate responsibility.

8 Climate Change Litigation and EU Private International Law

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Horizontal climate change litigation (i.e. between private persons based on private law) invokes private international law (**PIL**) rules due to the nature of the harm and potentially other factors, such as parties' different domiciles or habitual residences. Unlike other types of cases that invoke PIL rules, climate change litigation deals with a unique phenomenon that transcends spatial and temporal boundaries and involves a virtually unlimited number of man-made and natural causes. As a result, it poses unprecedented challenges to PIL.

PIL issues arising in climate change litigation can be approached from a domestic, regional or global perspective. This note specifically examines these issues from the perspective of EU law. This focus is chosen due to space limitations, which prevent consideration of other perspectives, and because the EU presently stands as an important global centre for horizontal climate change litigation (see, for example, the *BNP Paribas* and Total (here and here) cases in France, the *BMW*, *Lliuya*, Mercedes-Benz, VW (here and here) and *Wintershall Dea* cases in Germany, the *ENI* case in Italy, the *Shell* case in the Netherlands and the PGE GiEK (here and here) cases in Poland).

Jurisdiction

The first PIL issue that arises is whether the court has jurisdiction to adjudicate. So far, this issue has not posed problems. In the mentioned cases, all defendants were domiciled in the forum state. According to the Brussels I *bis* Regulation, the courts of the defendant's domicile have general jurisdiction over the defendant (Article 4(1)), which they cannot refuse to exercise under domestic doctrines such as forum non conveniens.

However, should the courts of one or more Member States show receptiveness to climate change litigation, claimants may seek to commence proceedings in those courts against defendants domiciled in other states.

If the defendant is domiciled in a Member State, the Regulation may give jurisdiction to the courts of another Member State. This includes, most importantly, the courts for the place of the event giving rise to the damage (Article 7(2); *Bier*), the courts for the place where the damage occurred (*ibid*) and the courts for the place of a defendant's establishment over disputes arising out of the operations of the establishment (Article 7(5)).

There are ongoing debates (see Petersen Weiner and Weller 2021/22) concerning the interpretation of the event giving rise to the damage. Additionally, there is a related debate on whether the courts for the place of the damage should have jurisdiction only if the damage was foreseeable and/or direct (van Loon 2018; Lehmann and Eichel 2019; cf Kieninger 2021). Nevertheless, there is consensus that the courts for

the place of the harmful event have jurisdiction on a 'mosaic' basis, meaning that the courts for the place of the event giving rise to the damage have jurisdiction solely over the consequences of that particular event and the courts for the place of the damage have jurisdiction solely over the damage occurring within their territorial boundaries. However, the importance of these debates should not be overstated for two reasons.

Firstly, the Regulation's jurisdictional rules operate within a limited and highly integrated juridical space and are not exorbitant. Secondly, the Regulation's rules on lis pendens and related actions (Articles 29-34) can prevent the waste of resources and the risk of irreconcilable judgments resulting from concurrent proceedings.

The more interesting question is whether the courts of EU Member States can or should exercise jurisdiction over non-EU-domiciled defendants. The jurisdiction of EU Member States' courts over such defendants depends on domestic jurisdictional rules (Brussels I bis Regulation, Article 6(1)), many of which are exorbitant. In 2010, the European Commission unsuccessfully attempted to extend the Brussels I Regulation's jurisdictional rules to non-EU-domiciled defendants. A 2023 study aimed at supporting the preparation of a report on the application of the Regulation suggests the European Commission's current willingness to amend it. Some groups advocate extending the Regulation's jurisdictional rules to non-EU-domiciled defendants (Lutzi, Piovesani and Zgrabljić Rotar 2023). However, there appears to be no discussion regarding the impact of this proposed development on climate change litigation and whether EU Member States should exercise extraterritorial adjudicatory jurisdiction in this field.

> *One area where exercising extraterritorial adjudicatory jurisdiction would seem desirable and have an impact on climate change litigation is to bolster the effectiveness of the proposed Corporate Sustainability Due Diligence Directive by facilitating its private enforcement against non-EU-domiciled defendants with significant operations within the EU.*

Applicable law

The second PIL issue that arises concerns the applicable law in climate change litigation. Within this context, various causes of action can be advanced. For present purposes, the most important causes of action stem from tort law (see the French, German, Italian and Dutch cases mentioned above) and environmental protection legislation (see the Polish cases mentioned above).

In the EU, the law applicable to non-contractual obligations is determined by the Rome II Regulation. Since climate change litigation concerns environmental damage (*Milieudefensie v Shell*), Article 7 of this instrument comes into play. It empowers the claimant to select either the law of the place where the damage occurred (lex loci damni) or the law of the place where the event giving rise to the damage occurred (lex loci actus).

Just as in the field of jurisdiction, there are also debates in the field of choice of law concerning the interpretation of the event giving rise to the damage and the relevant damage. However, the stakes differ in the field of choice of law. While the law of jurisdiction accepts and sometimes even promotes concurrent jurisdiction, Rome II only allows the application of a single law to one issue. Moreover, under Rome II, the applicable law can be the law of any country in the world (Article 3). This has the potential to lead to different interpretations of seemingly identical connecting factors in these two fields.

For example, Petersen Weiner and Weller 2021/22 outline four main approaches regarding the lex loci actus: (1) applying the law of the place of the business decision; (2) applying the law of the place of the emitting plant(s); (3) applying the law of the place leading to the damage in the most predominant way (a focal point approach); and (4) the choice by the victim approach. They propose their own approach, which involves applying the lex loci actus on a 'mosaic' basis as the starting point, granting the courts discretion to estimate the proportion of each plant's greenhouse gas (**GHG**) emissions, a fall-back rule in favour of the law of the central place of action and a last-resort rule in favour of the law of the place of the business decision at the real seat of the company.

Lehmann and Eichel 2019 begin with the premise that the determination of the lex loci damni should be limited to avoid the potential application of the law of every country in the world. They propose limiting Article 7 of Rome II by an analogous application of the foreseeability proviso in the second paragraph of Article 5(1) of this instrument, which deals with product liability. Van Loon 2018 and Nishitani 2022 also advocate incorporating a foreseeability requirement in determining the lex loci damni. Álvarez-Armas 2020 and Kieninger 2021 oppose a foreseeability requirement. Laganière 2022 adopts a similar position, arguing against a foreseeability requirement but in favour of a directness of damage requirement.

However, it is questionable whether a foreseeability or directness of damage requirement would provide a satisfactory solution. Scientific consensus confirms a causal link between GHG emissions and climate change (IPCC 2023, p. 4). Therefore, personal injuries and property damage caused by climate change are generally foreseeable. Following the logic of the seminal *Bier* case, which concerned property damage caused by polluted water, they can also be seen as direct consequences of GHG emissions. In this sense, the foreseeability and directness requirements do not add anything to legal reasoning in this context. Nevertheless, one can argue that a specific claimant's personal injury or property damage caused by climate change in one country might not be sufficiently foreseeable consequences of GHG emissions in another country. Similarly, one can also argue that while personal injury or property damage caused by climate change are direct consequences of climate change, they are indirect consequences of GHG emissions. In this sense, the foreseeability and directness requirements become so restrictive that they negate the place of the damage as a connecting factor.

There is consensus, however, that the *lex loci damni* applies on a 'mosaic' basis.

Another point of disagreement revolves around applying Article 17 of Rome II to climate change litigation. This article permits a court to take into account, as a matter of fact, and in so far as is appropriate, the rules of safety and conduct which were in force at the place and time of the event, giving rise to the liability in assessing the conduct of the person claimed to be liable. The question arises whether this article enables a court seized of a climate change litigation outside the place of the event giving rise to the damage to decide in favour of the defendant based on the argument that its acts complied with the rules of, or administrative authorisations issued in, that place. On the one hand, the objectives of environmental law support limiting the transnational effect of the rules of, or authorisations issued in, the place of the event giving rise to the damage. On the other hand, the fact that 'greenhouse gas emissions are attributable to operations of numerous enterprises, as well as transportation, residence, agriculture, forestry, and other human activities' (Nishitani 2022) that are legitimate and lawful in the places where they occur should have some influence on legal reasoning, even in litigation taking place in another country.

Finding the right balance between these considerations is difficult and involves a policy choice. Weller 2022 argues that the courts can scrutinise the substance of authorisations, as well as the regulatory objectives of the provisions on which they are based (similarly, Nishitani 2022). Taking a more assertive stance, Lehmann and Eichel 2019 connect the application of the *lex loci damni* with Article 17. They propose that the *lex loci damni* should only be applied to liability where an authorisation does not exist, was obviously invalid, obtained by fraud or consciously transgressed. Conversely, Bošković 2019, Álvarez-Armas 2020 and Kieninger 2021 advocate limiting defendants' access to Article 17. Offering an alternative perspective, Pasqua 2023 argues that the EU Emissions Directive contains a unilateral rule, allowing a Member State court to take into account an authorisation issued by a third Member State, i.e. whose law is neither the law of the forum nor the law designated as applicable by Article 7.

These debates are only partially reflected in the existing, albeit limited, case law. In *Milieudefensie v Shell*, the Hague District Court relied on the objectives of environmental law underlying Article 7 to hold that the event giving rise to the damage encompassed the adoption of a group corporate policy at the defendant's Dutch headquarters, that Dutch law could also apply as the *lex loci damni* and that administrative authorisations, while the court took them into account, did not stand in the way of allowing the claims. In *Lliya v RWE*, the claimant invoked Article 7 to plead the application of German law before the District Court of Essen. However, the court did not address the applicable law. Both cases are currently under appeal.

Recognition and enforcement of foreign judgments

So far, recognition and enforcement of foreign judgments in climate change matters has not posed any problems in the EU. Nevertheless, the effectiveness of climate change litigation depends on the ability to give effect to judgments against polluters across borders, either because such judgments may order injunctions directed at foreign acts or because the judgment debtor lacks assets in the state of origin.

Looking ahead

We are just beginning to comprehend how EU PIL regulates climate change litigation.

> *The current framework is inadequate in several respects due to the mismatch between the territoriality of much of the existing law, the potential incorporation of a foreseeability or directness of damage requirement and the unclear relationship between the lex loci damni and the lex loci actus, on the one hand, and the ubiquitous and multicausal nature of climate change, on the other hand.*

Laws in other countries and global frameworks face their own challenges, such as dealing with the impact of the exclusionary *Moçambique* rule (Laganière 2020) and the application of *forum non conveniens* in Anglo-Commonwealth legal systems and the suitability of the 2019 Hague Judgments Convention for judgments in climate change matters.

More work is needed to formulate adequate responses to climate change litigation in PIL, in the EU and elsewhere. Nonetheless, PIL issues hold significant importance because they go to the core of the questions of which state(s) can exercise legitimate regulatory authority over climate change, the objectives of climate change law and access to justice for climate change victims.

9 Mind the Governance Gap: Corporate Climate Litigation and the Perfect Substitution Defence

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This contribution aims to clarify the relationship between corporate climate litigation and the perfect substitution defence, which can be a source of headaches for lawyers.

Corporate climate litigators are not (always) armchair lawyers. We care about the so-called 'unintended effects' of the legal actions we design and promote. These include the market substitution risk (**MSR**), the transferred emissions problem (**TEP**), and the carbon leakage argument (**CLA**). Those issues are often viewed as a blind spot of climate governance fostered by strategic litigation.

> *MSR, TEP, and CLA can be merged under the umbrella term 'perfect substitution defence'. This assumption, also known as the 'drug dealers' defence', is used by companies and governments as a knockdown argument against climate litigation, which is depicted as a 'drop in the ocean'.*

More specifically, the perfect substitution defence – relied on by the businesses in high-emitting sectors - intends to deny the relevance of any individualised reduction obligation targeting only one emitter at a time while others are allowed to keep emitting. For the proponents of this position, relying on the issuance by a domestic court of a reduction order against a single actor is a zero-sum game. It misses the desired goal (the reduction of global emissions and prevention of dangerous climate change by all emitters) since the reduction of emissions would be cancelled out by other 'unchained' emitters that will meet the fixed demand for fossil fuels or any high-emitting products and services.

> *The perfect substitution defence comes down to one existential question: Is prospective corporate climate litigation relevant even though it does not necessarily lead to real-world emissions reduction?*

Before addressing this issue, I'll start by spelling out a full-blooded version of the perfect substitution defence by defining MSR, TEP, and CLA.

(1) MSR is an economic argument suggesting that the market is 'demand-driven'. It claims that production necessary to meet fixed market demand for fossil fuels will, if not supplied by the sued company or challenged project, be supplied by another company or project(s).

(2) TEP results from empirical data showing that divestment tends to shift upstream oil and gas assets, moving from companies with climate commitments and disclosures to owners not active in public markets with weaker or no climate standards and no obligation to disclose anything about their operations.

(3) CLA suggests – in this context – that if we lack a fossil fuel non-proliferation treaty, fossil fuel companies can forum shop – like Shell did – and move their headquarters to more favourable jurisdictions to avoid emissions reduction orders or phase-out injunction, whether mandated by a court or a domestic policy.

MSR, TEP, and CLA share the same consequential assumption: holding a single emitter responsible or not allowing a new high-emitting project will lead to at least the same amount of greenhouse gas emissions because the company can 1) be replaced by another one; 2) clean its portfolio; 3) beat a hasty retreat.

This consequential line of argument has been used – with some variations – in:

- government framework cases (*Urgenda Foundation v State of the Netherlands*, *Neubauer et al. v Germany*)
- corporate framework cases (*Milieudefensie et al. v Shell*, *Notre Affaire à Tous and Others v Total*)
- 'integrating climate consideration' cases (*Xstrata Coal Queensland Pty. Ltd. and Others v Friends of the Earth – Brisbane and Others*, *WildEarth Guardians v US Bureau of Land Management*, *Gloucester Resources Limited v. Minister for Planning*)
- pre-litigation stages of mandatory due diligence cases (*Notre Affaire à Tous, Les Amis de la Terre and Oxfam France v BNP Paribas*, *Comissão Pastoral da Terra and Notre Affaire à Tous v BNP Paribas*)

In those lawsuits, governments and corporations relied on the perfect substitution defence to avoid liability.

This argument raises complex issues in various domains.

- *Economy*: Are the oil and gas markets characterised by an inelastic demand that is completely unresponsive to price and, therefore, to changes in supply? Will restricting the oil and gas supply through an obligation reduction imposed on a Carbon Major drive up the cost of those commodities in the market and thus lower consumption?
- *Moral philosophy*: Is it fair for a government or a company to get away from its climate liability assuming that doing its part would have an insignificant impact on global emissions and 'that "harm" is not caused if someone else would have done the damage' (Bell-James and Collins 2020, p. 184)?
- *Jurisprudence*: Can we consider that unwritten climate duty of care is a valid norm if it would be ineffective in achieving the desired result, i.e. preventing dangerous climate change?
- *Politics*: Should the courts make the law on issues relating to unsettled trade-offs and policy judgments on energy transition and possible reduction pathways?

Les Amis de la Terre France members protesting against the BNP Paribas' contributions towards climate change. © Les Amis de la Terre France et Alternatiba Paris

Not all those issues need to be explicitly answered by a judge who must decide on the relevance or efficiency of an emissions reduction order. When mobilised in domestic court, the perfect substitution defence is mostly used to interpret the conditions set by a given legal provision. For instance, in *Milieudefensie et al. v Shell*, it is one of Shell's core arguments to show that, based on the conditions set by Article 3:296 (1) of the Dutch Civil Code, the claimants had no interest in the injunctive relief sought, i.e. the 45% emissions reduction order, because it cannot contribute to preventing the alleged imminent infringement of interests.

To put the matter another way, Shell claims that the order sought will make no meaningful difference for the claimants. In the corporate defendant's view, an emissions reduction order on a single company will have no or limited effect on global supply, as competitors would step in to meet demand. Therefore, an isolated reduction obligation is not an effective mechanism for reducing global emissions and preventing dangerous climate change.

Total has used the same argument in *Notre Affaire à Tous and Others v Total* where the claimants relied on Article 789 of the French Code of Civil Procedure to request provisional measures. The applicants' idea was to ensure that, considering the climate urgency and timescales of the procedure, Total – which is one of the leading companies developing new oil and gas fields – can still meaningfully reduce its emissions in line with the 1.5°C objective, by the time the judge will decide on the merits.

The team in the Notre Affaire à Tous and Others v Total © Anna Pitoun

While the Paris Court did not consider the perfect substitution defence, it was dismissed in the *Shell* case, where the Hague District Court underlined the lack of evidence supporting the 'demand-driven market' assumption and considered that what was in dispute was Shell's duty of care and 'individual partial responsibility to do its part regarding the emissions of the Shell group, which it can control and influence' (para 4.4.49). Despite this favourable decision, MSR remains a major concern and is at the core of Shell's statement of appeal.

The perfect substitution defence goes beyond the interpretation of a legal provision. It is a radical overhaul of the relevance of prospective climate litigation itself. The perfect substitution defence, which can be employed to avoid liability in court,

also serves as a means to assess the relevance or efficiency of strategic litigation. Both facets of this issue are entangled and must be considered in conjunction to fully comprehend the ramifications of perfect substitution defence.

There is indeed a lack of data on the impacts of climate litigation. Filling this gap would be very useful for people involved in the field. However, assessing the value of climate litigation based on its 'impacts' is a wrong metric. Climate litigation does not seek to provide a management strategy for the substitution risk but to compel States and companies to supply solutions that will prevent us from consuming the remaining carbon budget needed to achieve the 1.5°C target without overshooting. Nevertheless, due to the governance gap, climate litigators might have to go after companies practising forum shopping to avoid climate liability and those not active in public markets buying oil and gas assets from owners cleaning their portfolios. Until States and corporations accept their responsibilities in addressing climate change, the substitution risk will remain a conundrum in the field for years to come.

10 Climate Litigation Funding

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Most types of litigation take longer, cost more and drain more resources than most parties envisage when they embark on the litigation process. Litigation that seeks to change laws or policies that impact the lives of many people, often far beyond the direct parties to the litigation, is particularly likely to be very expensive. Defendants whose actions have the potential to affect the lives of many people are likely to be well-resourced and highly motivated by profit or politics to vigorously defend the litigation. As well as being legally complex, climate-related litigation is likely to depend on sophisticated scientific and other technical, expert evidence, which is expensive.

Impact litigations are more likely to take longer, have multiple layers of appeal, including on interim issues, and have cross-border elements that increase the likelihood of costs associated with conflicts of laws (both private and public international law), language issues (translation costs) and even travel expenses.

Questions that climate litigation defendants, judges, policy makers and the press have increasingly started to ask: Who pays for all of this? Why do they pay for it? What do they get out of it? And what issues are caused for the procedure and substance of the litigation by the sources of funding?

Who is funding climate litigation?

The largest categories of litigants, particularly on the defendant side, are state or corporate entities with significant funding sources. For corporate litigants, climate change litigation will usually be defended, sometimes positively pursued, with for-profit motives. A lot of such litigation will relate to corporates being sued under or pushing back against environmental regulations and legislation that seek to restrict their activities. For state litigants, climate change litigation is pursued for political and policy reasons. The reasons for litigating and the funds available for doing so will, therefore, depend largely on the political inclinations of the relevant administration.

By volume of litigation, the next category of litigants is non-governmental organisations (**NGOs**) and charities. They are generally funded in two main ways. First, many lawyers, legal academics, and other professionals provide their time on a *pro bono* basis, a significant form of funding. Second, donations are often a combination of a large amount of small donations, essentially crowd funding, and a small amount of large donations, often from philanthropic foundations backed by super-wealthy families. Some examples follow.

In the English litigation *McGaughey & Davies v USS*, the claimants are members of an occupational pension scheme. They brought a common law derivative claim against the scheme's directors for breach of their duties in continuing to invest in fossil fuels

with no divestment plan despite a stated ambition to be carbon neutral by 2050. By November 2023, the crowd funding website for the litigation stated that they had raised GBP 261,921 from 6,323 contributors, an average donation of GBP 41.

The Urgenda Foundation litigation in the Netherlands led in December 2019 to an order of the Dutch Supreme Court that the Dutch government must reduce emissions immediately in line with its human rights obligation. The Foundation's website explains that the litigation was possible due to 'donations from all over the world'.

In October 2021, two First Nations leaders from remote islands in Zenadth Kes (the Torres Strait) filed a legal action against the Australian Government to challenge its inaction on climate change mitigation. This was supported by the Grata Fund - Australia's first specialist non-profit strategic litigation incubator and funder. In May 2018, families and youth associations from around the world filed a case in the EU General Court, claiming that the EU's 2030 climate target is insufficient to prevent dangerous climate change or to protect their fundamental rights to life, health, occupation and property. The litigation was supported indirectly by Bloomberg Philanthropies, Michael Bloomberg's foundation, and other philanthropic family-backed foundations.

Legal issues

- *Control*: The English common law has historically been wary of third parties funding litigations brought by others. While the doctrines of champerty, maintenance, and barretry have over time been substantially limited in their application, it remains the case in England and many states of the US that third-party funders, whether or not they are commercial entities, are not permitted to control the litigation.
- *Lawyer Ethics*: Closely related to the prohibition on third parties controlling the litigation they fund is a prohibition on third parties controlling the lawyers who are paid from their funding. The relationship between a litigant and her lawyer is special, and most jurisdictions have rules in place to avoid the risk that 'he who pays the piper calls the tune'.
- *Disclosure*: An increasing number of courts and tribunals worldwide now require litigants to disclose their case is supported by litigation funding. The only opt-out class action regime in England is found in the Competition Appeal Tribunal (**CAT**). The identity of the litigation funder and the legal and commercial terms pursuant to which litigation funding is provided to the class representative have become key issues in most cases that have proceeded in the CAT opt-out regime.
- *Privilege*: Litigation funders often want to see privileged information, including legal advice on the merits of the case, when making a decision whether or not to back the case and during the course of the litigation. A large amount of information will often be exchanged between the funder and the litigant. Therefore, it becomes relevant to ask whether those communications are privileged, exempt from disclosure to the defendant during the litigation, or whether providing privileged information to a funder somehow leads to a waiver of the privilege. While the law and practice obviously vary from jurisdiction to jurisdiction, English and US courts have generally applied a common interest or similar approach to privilege that effectively protects communications between funder and litigant.
- *Adverse Costs and Security for Costs*: When considering the cost burden that a third-party funder might bear, it is important to consider both own side costs and adverse costs. Many jurisdictions around the world apply a 'loser pays' principle to the costs of litigation. In 2023, ClientEarth, a non-profit environmental law organisation and UK registered charity, was unsuccessful in an English High Court claim against the

directors of Shell that alleged breaches of their duties as directors for failing to take certain steps to protect Shell against climate-change-related risks. Mr Justice Trower ordered ClientEarth to pay Shell's costs in connection with all aspects of the action, including submissions and attendance during the prima facie stage. Where a defendant has reasonable grounds to believe that the claimant will ultimately be unable to meet an order to pay adverse costs, they may apply to the court for an order that the claimant provide *security for costs*. Third-party funders may agree to be liable for adverse costs and/or security for costs or may provide funding for an insurance premium to cover the risk.

Political issues

Climate change is a political hot topic, no pun intended. Impact litigation and litigation funding are also political hot topics. It is, therefore, not surprising that climate litigation funding is drawing increasing political focus. The US House of Representatives Oversight Committee met in September 2023 to discuss climate litigation funding. Opposing statements from Republicans and Democrats set out a clear dividing line.

James Comer is a Republican from Kentucky, and Chairman of the Committee. He stated:

> *The spread of untraceable and undisclosed funding of lawsuits across the country raises significant ethical and legal questions. Many lawsuits are funded by progressive activists… seeking to hijack America's legal system to implement their policy desires… Lawsuits that impact the mining of critical minerals… energy production, international security. The lawsuits… raise concerns about whether attorneys are acting in the best interest of their clients, or those who they're receiving funding from… We know that activist groups use funding to push policies that they could not enact through the legislative process. Some left-wing groups funnel millions to law firms to sue companies across the company on questionable legal grounds.*

Jamie Raskin, a Maryland Democrat, responded with vigour:

> *The [US Republican Party] says the real problem in our legal system is that too many victims of corporate wrongdoing are finding access to the courts in the first place. The GOP wants to dramatically reduce accountability and liability for corporations… that inflict… mass oil spills and other lethal injuries on American communities. The corporate interest represented on the panel today, who are attacking this basic right are here for an obvious reason. They don't like paying damages when their victims prove their rights have been violated in court… Mining and drilling companies have had to pay billions for poisoning communities land and water and causing irreparable harm to human health.*

11 Let's Talk about the Lawyers: Climate Change Litigation, Professional Ethics, and 'Good' and 'Bad' Case Outcomes

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There is a wonderful book by Nathaniel Frank called *Awakening*. It is the story of the fight for equal marriage in the US. Partly, the book tells the tale of the various litigation attempts to have marriage made available for same-sex couples. But mainly, it's a set of narratives focussing on the lawyers – about the lawyers who brought the cases, about the cases and tactics lawyers chose and why, about the claimants lawyers agreed on and those claimants they rejected, about politics between different lawyers, and about 'good' and 'bad' litigation outcomes. For the last couple of years, I have been thinking and working on lawyers and climate change: about the conditions under which we might, and sometimes should, hold lawyers responsible for the (perfectly legal) climate harms their clients bring about. In this contribution, I want to do something related but different, and possibly also provocative – to think, in the vein of Nathaniel Frank and *Awakening*, about the lawyers involved in climate change litigation.

Let us consider first large companies bringing claims to protect their property rights, usually against governments: KLM suing the Dutch government over reduced flights at Schipol; the Canadian cases on moratoria on hydrocarbon exploration in Alberta and Quebec, and similar. Let us also think about the lawyers who prosecute climate activists. What do or might these cases say about the rule of law?; the role of lawyers as servants and agents of the rule of law?; about how lawyers understand the rule of law concepts of legality, and other things that the rule of law may or may not include and wish to protect: property rights, social and other rights, environmental rights even?

As I have just argued forcefully in a report for the regulator, the Legal Services Board, on lawyers and the rule of law - written with Richard Moorhead and Kenta Tsuda - just because a client has a supposed right to bring a claim does not mean the claim should always be brought; other questions have to be asked and answered. Including the important question for law firms, about why they exercise their agency and *choose* to act for the clients they act for. Here, I can accept some nuance when it comes to client onboarding choices, but still find the argument that goes, 'We must help Shell sue Greenpeace for USD 2.1 million because it means we also get to advise them on renewables' a tough pill to swallow. What does it mean when lawyers in elite, global law firms choose to use their power and expertise to shore up the massive wealth and power of their carbon major clients through climate litigation, often to the disadvantage of those much less powerful? And what about when those elite, global law firms have their own glossy ESG and CSR brochures which profess their green

credentials? I am not saying anything directly in this contribution about barristers and the 'cab rank' rule, as that rule always seems to be (unhelpfully) offered up as the end of a conversation when it is simply the beginning of a debate.

Let us also think about claimant lawyers who bring cases that some, possibly many, think are 'bad' climate cases; and here, the Plan B cases are often raised with me as examples. I am thinking of cases being 'bad' perhaps because they are poorly thought out or poorly litigated, and/or because they are likely to set poor precedents or lead to poor outcomes, even if – as Kim Bouwer and Joana Setzer have argued – climate litigation can 'fail with benefits'. Litigation choices – some better than others - will be made by lawyers (and clients) about the forum, about claimants, about grounds of the claim, about funding, about the use of experts, about the timing of a claim, and so on. On bad legal outcomes (cases not helping to advance the law in ways some might desire), we might think about *Sharma* in Australia and *Smith v Fonterra* in New Zealand. More broadly, how legally useful are the English judicial review and Paris Agreement cases (where the English courts repeatedly seem unwilling to operationalise the Paris Agreement); or cases, in Ireland and France and elsewhere, on human rights and climate change (which are not often successful)? Joana Setzer mentioned to me speaking to a lawyer who raised the German car manufacturer cases as examples of unhelpful litigation; filings that were maybe not thought out carefully and that risked creating bad precedents.

What do or might these sorts of cases say: about the competence of the lawyers involved?; about lawyers being required to act in the best interests of clients (and what those best interests look like)?; about the administration of justice and proper use of court resources?; and about the professional, pervasive principles of lawyer independence and integrity? I, of course, accept that ex-post-facto dissection of choices about what is or is not 'good' or 'bad' climate litigation is not without its own challenges. And that 'success' may be thought to come in many forms. 'Strategic litigation' is naturally sometimes brought in the knowledge that a positive court result is highly unlikely and done for other reasons (which itself raises interesting questions about a client's 'best interests' and appropriate use of court time when political and social goals are also in the mix); and that lawyers – and legal advice, and legal expertise – are not always the key players in why litigation decisions or strategies are made. But still.

What, then about in-house lawyers? Those who work for government or public bodies; those who work for industry; and those who work for the third sector. In other work, I have written about the 'tournament of influence' in which in-house lawyers are engaged: managing their independence (a core professional obligation) through a series of networked interactions with their colleagues. That work shows that the tournament of influence can have an important (quantifiably measurable) effect on how in-house lawyers view their role, how they see their professional obligations, and also in terms of how in-housers negotiate their position relative to others within their organisation.

What does this mean for government lawyers (in England & Wales, but also elsewhere) who are also civil servants and have a complex of potentially divided loyalties? What should those government lawyers do when asked to opine on the legality of a proposed course of climate change action that might lead to litigation, especially when the Attorney General has produced guidance telling government lawyers that if they can see 'any respectable argument' as to the legality, then those arguments have to be advanced? This approach, compelling government lawyers to be 'solutions based', has obvious impacts on future climate litigation.

Think also of those ClientEarth in-house lawyers involved in the purported derivative claim against Shell where Trower J, as he was required to do under the Companies Act 2006, engaged in reflection on whether ClientEarth had brought the claim in 'good faith', coming to the view that Client Earth's 'motivation in bringing the claim is ulterior to the

purpose for which a claim could properly be continued.' Was this simply a difference of opinion, especially in a legally-novel climate change arena (where we know courts are often initially resistant to change), or a situation in which the claimants were not best using the court's time and expertise? There is something interesting in professional ethics terms, and worth further thought, about being a lawyer in an environmental NGO whose sole purpose is to advance positive environmental change.

Finally, let us think about how claimants are chosen and treated by lawyers in climate litigation. Let us think about the communities and the people involved: what they want; what they were promised; and how they feel when they are left behind when climate cases fail, like in *Kivalina*. There is a vast body of literature on cause lawyering, including more recent work on climate cause lawyering – and one of the things this vast body of literature raises as a real issue is when people and groups are instrumentalised for the cause. Here, I think Noah Crawford Walker's work on *RWE* and Saúl Luciano Lliuya is interesting and worth further reflection.

My simple point with this contribution is that, when telling the stories of climate litigation, we should think of the lawyers involved – on all sides, working in various public and private practice settings and for various clients – and about their professional obligations and their professional ethics. And that that sort of thinking is useful, both because lawyers are important and often-under looked at as institutional actors with significant agency in climate litigation, and for thinking about climate litigation itself.

Acknowledgements

I am very grateful to Sonam Gordhan, Joana Setzer, and especially Kim Bouwer for their help with my preparatory thinking and research for this contribution.

SECTION III

TRENDS AND OPPORTUNITIES IN STRATEGIC CLIMATE LITIGATION

Much of the focus of the Report aims to explore how legal strategies can be leveraged or adapted for future climate-related cases. As Lucy Maxwell, April Williamson, and Sarah Mead discuss, this involves examining how legal arguments in landmark cases can shape laws and policies. This is evident in Marc Willers' analysis of the *Swiss Senior Women's case*. The case builds upon arguments in *Urgenda* to challenge the Swiss government's failure to adequately address the climate crisis, furthering the rights-based approach to climate litigation discussed earlier in the Report. While the Report primarily examines climate litigation in Europe, it's noteworthy that a rights-based approach is also gaining traction in other regions. Paul Lado's contribution highlights how rights-based litigation has emerged in South Africa, reflecting the country's commitment to a just transition.

However, the evolution of strategic climate litigation isn't limited to transplanting and adjusting existing strategies. Novel approaches are also emerging to address state inaction and corporate contributions to climate change. Lionel Nichols outlines the legal processes and merits of applying to the International Criminal Court to investigate acts and omissions of BP's top managers. Additionally, Michael Clements and Elodie Aba explore the rise of 'just transition litigation', which prioritizes the interests of vulnerable communities by framing environmental issues as breaches of fundamental rights.

These developments underscore the importance of our legal imagination in strategic climate litigation. While tried-and-tested arguments have their place, they may not always comprehensively address the complexities of climate-related challenges. Therefore, embracing new strategies is essential to crafting a multi-layered and holistic legal response to the climate crisis.

12 Future Trends in Climate Litigation against Governments

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We are in a critical decade for climate mitigation action. The world is on track to 3°C of warming, and the 'window of opportunity to secure a liveable and sustainable future for all' is fast closing. National governments are the most important systemic actors in the governance of climate action, primarily because they are the only actors with the ability to adopt economy-wide decarbonisation measures. However, they are failing to adopt and implement adequate mitigation policies. In this short piece, we take stock of developments in climate litigation against governments and identify three trends in future litigation – as communities globally keep the pressure on governments to halt further dangerous climate change.

A stocktake of climate litigation against governments

Over the past decade, as a response to governments' lack of action, communities around the world have turned to the courts to hold their governments accountable. 'Framework' or 'systemic' mitigation cases are those that challenge a government's *overall* efforts to mitigate climate change – encompassing both the *ambition* of emissions reduction targets and/or their *implementation*. As of 2023, over 80 government framework cases have been filed around the world, using a wide variety of legal and factual arguments. To date, there have been numerous successful judgments issued, including decisions issued by apex courts in the Netherlands, Germany, Ireland, France, Colombia and Nepal.[24]

Successful framework cases against governments have had 'a significant impact on government decision-making, forcing governments to develop and implement more ambitious policy responses to climate change'. In successful cases, governments have been ordered to increase their emissions reduction efforts (e.g. Netherlands, Germany and recently Belgium), to clarify their climate plans (e.g. Ireland and the United Kingdom), and to implement their existing targets (e.g. France). Reflecting these developments, the International Panel on Climate Change (**IPCC**) has found that 'climate litigation can affect the stringency and ambitiousness of climate governance'.

24 See: *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (Case number 19/00135), Supreme Court of the Netherlands decision dated 10 December 2019; *Neubauer and Others v Germany* (case numbers 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20), German Federal Constitutional Court decision dated 24 March 2021; *Friends of the Irish Environment v the Government of Ireland, Ireland and the Attorney General* (Appeal No: 205/19), Judgment by the Supreme Court dated 31 July 2020; *Notre Affaire à Tous and Others v France* (case numbers N°1904967, 1904968, 1904972 1904976/4-1), Administrative Court of Paris decisions dated 14 October 2021 and 3 February 2021; *Demanda Generaciones Futuras v. Minambiente* (reporter number: 11001 22 03 000 2018 00319 00), Supreme Court decision dated 4 April 2018; and *Shrestha v. Office of the Prime Minister et al.* (reporter number: 074-WO-0283), Supreme Court decision dated 14 October 2019.

SPOTLIGHT: *NOTRE AFFAIRE À TOUS AND OTHERS V FRANCE*

Four civil society groups brought an action for failure to act against the French government, arguing that the government had violated their statutory duty to act by failing to implement adequate measures to address climate change. The claimants argue that the French government owed such duties under the French Charter for the Environment, the European Convention on Human Rights, and the general principles of French law. The Administrative Court of Paris found for the claimants and later ordered the state to take immediate action to comply with its commitments to reduce emissions under the Paris Agreement. The Court reasoned that the state could be held responsible for failing to meet its own climate and carbon budget goals under the EU (e.g. EU regulation 2018/842) and national law (e.g. under national carbon budgets and the Energy and Climate Act).

High-profile litigation can also shift the public debate outside the courtroom, driving the narrative that climate action is a legal duty. For example, numerous 'framework' climate cases have led to widespread public mobilisation on the urgency of climate action. Over two million people signed a petition to support the French climate case, while nearly 60,000 people joined the Belgian climate case as co-plaintiffs. Success in court in one country can also create international momentum for increased mitigation ambition globally.

To date, framework climate cases have largely focused on the *ambition* of governments' overall mitigation efforts, which we call the Ambition Gap. Here, we define the **Ambition Gap** as the difference between the emissions reductions expected from a government's planned policies and pledges and those required to meet the long-term temperature goals of the Paris Agreement in light of the best available science.

> *Under Article 2 of the Paris Agreement, almost every government in the world has committed to, 'Holding the increase in the global average temperature to well below 2 °C above pre- industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change'.*

The rationale for this focus on the Ambition Gap is clear – despite the proliferation of net-zero pledges over recent years, governments' efforts to reduce greenhouse gas (**GHG**) emissions remain 'woefully insufficient to meet the temperature goal of the Paris Agreement'. According to the latest UN report in November 2023, governments' 2030 targets would lead to an *increase* in global emissions of 3% by 2030 – despite the need for global emissions to be slashed by at least 43% by 2030 to keep the 1.5°C temperature rise threshold within reach. The gap between countries' 2030 targets (unconditional Nationally Determined Contributions (**NDCs**)) and 1.5°C pathways has remained significant (around 19 GT of CO2 equivalent by 2030) and largely unchanged between 2021 and 2023. In particular, wealthy, high-emitting countries are failing to do their 'fair share' of emissions reductions to hold global warming to safe limits.

Out of the successful cases to date, courts have ordered governments in the Netherlands, Germany and (very recently) Belgium to increase or change the *ambition* of their emissions reduction targets, in light of the best available science. In the Netherlands and Belgium, the courts found that the relevant government(s) had a duty of care under

national law and the European Convention of Human Rights to ensure that emissions reduction targets were sufficient for each country to do 'its part' to hold global warming below dangerous levels, in line with best available science. Both governments were ordered to increase their emissions reduction targets to exceed a minimum percentage identified by the courts based on scientific evidence. In Germany, the Constitutional Court found that the Government had a constitutional duty to ensure that its emissions reduction targets would not lead to future generations being subjected to drastic emissions reduction measures (i.e., due to the carbon budget being used up in earlier years), which would significantly impact their fundamental freedoms.

Looking ahead at climate litigation against governments

AMBITION GAP

The gap between the emissions reductions expected from planned policies and pledges, and those needed to meet the long-term temperature goals of the Paris agreement, in light of best avialble science.

IMPLEMENTATION GAP

The gap between the current trajectory of emissions based on existing policies, and pledged or legislated targets.

INTEGRITY GAP

Issues with the transparency or substance of net zero targets.

The scale of the remaining Ambition Gap – as the latest UN report underscores – means that litigation is likely to maintain a focus on this area in the coming years. In terms of emerging trends, there are two key areas of litigation that we anticipate will become more prevalent.

First, the **Implementation Gap** is becoming an increasingly common – and important – area of focus in 'framework' cases. Recently, many governments have enshrined climate targets in comprehensive or 'framework' climate change legislation – a positive development in climate governance. Unfortunately, globally and in many countries, there remains a significant Implementation Gap between the current trajectory of emissions based on existing policies and the pledged or legislated targets. At present, governments are off track to implement even their (unambitious) existing emissions reduction targets. Closing the Implementation Gap could make a meaningful contribution to global heating: according to the UN Environment Program, with current (weak) implementation, policies would lead to around 3°C of warming. Full implementation of NDCs would lower this estimate to 2.5°C. Looking out to 2050, fulfilment of all net-zero pledges could bring warming down to 2°C.

To date, there have been several successful cases that have sought to force governments to comply with their existing legal obligations – to close the Implementation Gap. Courts in Ireland and the United Kingdom have ordered governments to increase the level of detail in their climate plans to ensure compliance with national law. Courts in France have also ordered the Government to implement its existing interim carbon budgets and 2030 target, which were set out in legislation. Overall, courts have been willing to engage with questions of compliance with national climate change legislation. We anticipate this will encourage further development and filing of Implementation Gap cases.

Finally, we expect issues related to the **Integrity Gap** in governments' net zero targets to gain prominence in future cases. We define the Integrity Gap broadly to include issues of transparency as well as substance in governments' net-zero targets. Most governments are failing to provide clear, ambitious and feasible plans to deliver on their promises – and are therefore lacking a 'credible path from 2030 towards the achievement of national net-zero targets'.

One key integrity concern focuses on the lack of transparency and specificity about governments' proposed reliance on carbon dioxide removal (**CDR**) technologies to get to net zero emissions (and beyond). There is a risk that governments are delaying near-term emissions reductions by relying on the future development of CDR. Wealthy, high-emitting governments appear to be relying on a *scale* of carbon removal and storage that is far beyond the physical limits of any currently available techniques. Such large-scale reliance creates a high risk of future non-deployment and significant implications for human rights and ecological integrity.

Recently, leading international lawyers and climate scientists published new research that warned that States that over-rely on future CDR to meet Paris Agreement targets could fall foul of international law. The team called for faster cuts in GHG emissions and warned that governments could otherwise risk legal challenges. In the context of these risks, climate lawyers and legal experts have begun exploring legal intervention avenues against over-reliance on CDR in anticipation of the Integrity Gap becoming a new frontier in climate litigation.

13 Rights-based Climate Change Litigation in the European Court of Human Rights

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Introduction

Global trends in climate change litigation demonstrate the importance of rights-based litigation as a tool for improving the response of public authorities and corporations to climate change (Peel and Osofsky 2018; Savaresi and Auz 2019).

No region has seen more rights-based climate cases than Europe at the domestic and regional levels. At the domestic level, there have been setbacks but also notable successes and following the ground-breaking decision in the *Urgenda* case, an increasing number of pioneering claims have drawn attention to the disproportionate detrimental effect climate change will have on the rights of the most vulnerable members of our society: the elderly, the disabled, children and future generations.

At the regional level, climate change complaints have been filed with the European Court of Human Rights (**ECtHR** or **Court**) in the last three years. Three of the complaints were fast-tracked by the ECtHR for consideration of their admissibility and merits: *KlimaSeniorinnen v Switzerland* (the *Swiss Senior Women's case*); *Duarte Agostinho v Portugal and 32 member states* (the *Portuguese Youth case*); and *Careme v France*. The Court's Grand Chamber heard the *Swiss Senior Women's case* and *Careme v France* in March 2023 and the *Portuguese Youth case* on 29 September 2023. Judgment is awaited in all three cases.

This contribution focuses on the *Swiss Senior Women's case* and aims to give the reader a snapshot of the arguments presented to the Court.

The Portuguese youth applicants stand alongside the members of the Association of Swiss Senior Women for Climate Protection before the European Court of Human Rights. Credits: Marc Willers KC

Swiss Senior Women's case

In November 2020, a complaint was filed with the ECtHR by the Verein KlimaSeniorinnen Schweiz (the Association of Swiss Senior Women for Climate Protection made up of more than 2000 Swiss senior women) and four senior women. In essence, the applicants complained that the Swiss government's failure to tackle climate change by failing to adopt the necessary short- and long-term greenhouse gas (**GHG**) emission reduction targets breached their rights protected by Articles 2 and 8 of the European Convention on Human Rights (**Convention**) and that the Swiss domestic courts' failure to determine their complaint and provide them with a remedy breached their rights protected by Articles 6 and 13 of the Convention. The complaint was supported by a large number of written interventions filed by United Nations' special rapporteurs, non-governmental organisations, universities and legal experts on international environmental law, as well as scientific experts.

In response, the Swiss state argued that the applicants were trying to 'circumvent' the Paris Agreement by seeking to construct an international judicial review of its climate measures and that the Court should not admit and determine the complaint because that would involve it taking on the role of a 'supreme environmental court'. It also argued that the unprecedented and complex issues and challenges of climate change, as well as Switzerland's democratic system, warranted it being granted an 'ample margin of appreciation' when determining how to tackle climate change and what targets for carbon emission reductions it should adopt.

At the hearing before the Grand Chamber, the applicants opened their case by making the point that the world is faced with an existential threat to which we must respond with action. In their words:

> *Weariness – 'defeatism'; neither is an option: every country, institution and policy maker must meet their responsibility to do all that is necessary to mitigate the impending harm.*

The applicants argued that the failure of the Swiss courts to determine the applicants' case at all - on the grounds that there was still time before the Paris Agreement temperature thresholds were reached and that, accordingly, the applicants could not yet claim that their rights were affected - breached their rights protected by Articles 6 and 13 of the Convention.

They addressed victim status explaining the direct effect on the applicants of the Swiss government's ongoing failures to tackle climate change. They relied upon scientific papers and data to show that the applicants are *already* suffering from the effects of climate change. As elderly women, the excessive and sustained high temperatures of increasingly frequent and severe heatwaves pose an extremely serious threat, not just to their health and well-being, but to their lives, and they referred the Court to evidence which showed that:

- there were a disproportionate number of deaths amongst elderly women during heatwaves in Switzerland in the last 20 years;
- and that exposure to extreme heat increases the risk of acute kidney injury, heat stroke, asthma attacks, and respiratory, cardiovascular, immune and nervous system diseases and disorders.

The Swiss government accepted that elderly women were disproportionately affected by excessive heat but argued that the association's claim should be rejected as an *actio popularis*. In response, the applicants pointed to the fact that the association is no more than a *'group of individuals'*, each one of whom is directly affected. Thus, it was argued that all the applicants were detrimentally affected.

The applicants pointed to the Dutch Supreme Court's conclusion in *Urgenda* [para 5.2.2-5.2.3] that a state's positive obligations under Articles 2 and 8 apply to activities, whether public or private, which contribute to climate change on the basis that climate change is known to involve a 'real and immediate' threat to human life and well-being; that is, a risk that was both *genuine* and *imminent*.

They submitted that the ECtHR should follow the Dutch Supreme Court's lead and hold that Switzerland is under a positive obligation to take the necessary steps to guarantee effective protection for the applicants' lives, health and well-being.

Then, the applicants addressed Switzerland's failure to take adequate steps to mitigate climate change. They made the point that the Court was not being asked to determine whether Switzerland was in breach of any of its commitments under the Paris Agreement but rather to decide whether Switzerland had violated the applicants' rights under the Convention.

They argued that to protect the rights of the applicants, the Swiss government must 'do everything in its power to do its share to prevent a global temperature increase of more than 1.5 degrees above pre-industrial levels'. This necessarily means the adoption of a legislative and administrative framework to achieve that objective.

They demonstrated, by reference to evidence from experts in climate change science and the Climate Action Tracker, an independent scientific project that tracks government climate action and measures it against the globally agreed Paris Agreement, that Switzerland's short and long-term GHG emission reduction targets were woefully inadequate (and not embedded in legislation) and that Switzerland has not carried out any studies or due diligence in relation to the requirement to keep global warming below 1.5°C.

The legal team behind the applicants in the Swiss Senior Women's case in the European Court of Human Rights. Credits: Marc Willers KC

Switzerland had no real answer to these points. It responded by referring to the fact that it had taken adaptation measures and argued that it should be given a wide 'margin of appreciation' in any event. On the latter point, the applicants accepted that it was for Switzerland to decide what measures to take to give effect to targets; to that extent, it has a margin of appreciation. However, they made the point that no such margin exists in relation to fixing the targets themselves, nor the need for legislation to give them practical effect.

The applicants explained to the Court that if the remaining global carbon budget is distributed fairly based on the principles of international environmental law, such as common but differentiated responsibilities and respective capabilities, then Switzerland is already using other countries' shares of the small remaining global carbon budget. They described this as 'carbon theft'. The applicants relied upon a report by Professor Rajamani and co-authors entitled 'National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law' and argued that Switzerland's fair share required it: a) to reduce its domestic emissions by more than 60% by 2030 and achieve net zero domestically by 2050 as compared with 1990 levels and that it must not purchase emissions reductions from abroad in order to do so; and b) to discharge its global mitigation burden, so that its overall emissions reduction from 2030 should be net negative.

Finally, the applicants addressed the Swiss government's general defences. Switzerland argued that its actions alone would not prevent or avoid the risks that climate change poses to the applicants and that its failures cannot be considered causative of the relevant harm and risk. The applicants noted that this argument has been roundly rejected by apex courts, including the Dutch Supreme Court in *Urgenda.* They made the point that every degree – indeed every fraction of a degree of temperature increase – matters, observing that the current global temperature increase is causing enormous damage and a 1.5°C global temperature increase will exacerbate that harm (see further IPCC SR 1.5 Report sec. 7.2.10; *Urgenda* para 4.4 and para 5.7.8, referring to the judgment of the U.S. Supreme Court in the case of *Massachusetts v EPA,* 549 U .S. 497 (2007), pp. 22-23; *Neubauer v Germany*, para 32, 119, 122).

Switzerland had also argued that it could not be held responsible for its failures because proposed legislation, which it had intended would tackle climate change, was rejected in a referendum. But the applicants countered that point by reminding the Court that Switzerland is responsible for its Convention violations irrespective of how they came about. Contracting states are not subject to different Convention obligations depending on the technical operation of their democratic system.

In conclusion, the applicants stressed the urgent need for Switzerland to make the necessary emission reductions and noted that its actions to date have been woefully inadequate and that there were no signs that it would change course; before arguing that it was essential that the ECtHR order Switzerland to take the necessary measures. The applicants concluded their oral argument with the following powerful submissions:

> *There is no time left; dangerous climate change is with us; the Applicants are suffering and fear the future. Switzerland has no excuse for its failures to protect the applicants' rights. It has known the harm that inadequate action would cause and, despite that knowledge, it has failed to act with sufficient urgency and application, undermining global efforts and mutual trust … If a country as rich and technologically advanced as Switzerland cannot do its fair share – I go further, does not even take the trouble to assess what its fair share should be – what hope is there that other countries will step up to the challenge we face?*

Conclusion

Whether the ECtHR upholds the climate change complaints before it remains to be seen. But, as the *Swiss Senior Women's case* aptly illustrates, rights-based climate change litigation forces the courts and governments to confront the elephant in the room, namely the devastating and disproportionate impact of climate change on the most vulnerable members of our society.

14 Is a Failure to Act on Climate Change a Crime against Humanity?

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Introduction

The International Criminal Court (**ICC**) was established to try those most responsible for the most serious crimes of concern to the international community, including genocide, crimes against humanity and war crimes. In recent years, some have called upon the ICC to investigate and prosecute individuals who are alleged to have contributed to climate change. This includes, in 2022, an application by two civil society organisations to the ICC Prosecutor setting out the basis for investigating British Petroleum (**BP**) executives. This piece examines the merits of such cases and considers the legal, procedural and practical obstacles that would need to be overcome before a director of a fossil fuel company could appear in the dock of a Hague courtroom.

The Rome Statute

The ICC does not have universal jurisdiction over international crimes, with the Rome Statute imposing several jurisdictional and admissibility requirements before a case may commence:

- First, the ICC only has jurisdiction over crimes committed on the later of 1 July 2002 and the date on which the relevant State Party ratified the Rome Statute (Article 11);
- Secondly, unless there has been a Security Council Referral (Article 13), the crime must have been committed within the territory of one of the ICC's 124 State Parties or by a national of a State Party (Article 12);
- Thirdly, the situation in question requires either a Security Council referral, a referral from a State Party, or for the ICC Prosecutor to commence an investigation on his own motion (Article 13);
- Fourthly, the ICC is intended to be a court of last resort, so a case may only be investigated and prosecuted where the State which has jurisdiction over the crime is unwilling or unable to investigate and prosecute (Article 17);
- Finally, where an investigation is initiated by the ICC Prosecutor, there are further admissibility requirements: (1) the ICC Prosecutor must be satisfied, having regard to the gravity of the crime and the interests of victims, that it is in the interests of justice to proceed (Article 53); and (2), the ICC Prosecutor must obtain authorisation from the Pre-Trial Chamber before commencing an investigation (Article 15(3)).

Some have called for the addition of the crime of ecocide (the destruction of the natural environment by deliberate or negligent human action) to the Rome Statute, but this has not yet been adopted by the States Parties, and the Rome Statute makes almost no reference at all to the environment.

> *Although the International Law Commission's drafts of what would later become the Rome Statute included as crimes punishable by the International Criminal Court 'acts causing serious damage to the environment' and 'wilful and severe damage to the environment', these crimes did not survive to the final text. Indeed, the Rome Statute makes only one passing reference to 'the environment'.*

This appears in Article 8(2)(b)(iv), which recognises as a war crime the intentional launching of an attack during an international armed conflict where it is known that such an attack will cause 'severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.

The Article 15 application

Article 15(2) of the Rome Statute empowers non-governmental organisations to provide the ICC Prosecutor with information that a crime has been committed which falls within the jurisdiction of the ICC. In 2022, the UK Youth Climate Coalition and Students for Climate Solutions Aotearoa New Zealand filed a submission to the ICC Prosecutor (**Submission**) alleging that the senior BP executives have committed a crime against humanity through their conduct in relation to climate change. This follows five submissions filed since November 2019 from human rights groups alleging that Brazil's destruction of the Amazon Rainforest amounts to crimes against humanity and genocide against Brazil's indigenous people.

The Submission relies upon attribution science analysis to demonstrate that the fossil fuel industry was responsible for 91% of global industrial greenhouse gas emissions and that BP alone has overseen more than 34 billion metric tons of carbon dioxide equivalent emissions. The Submission alleges that BP executives, motivated by profit, engaged in a policy which created doubt around climate change science, fostered and procured state dependency on petroleum products, advocated for delay in addressing climate change, engaged in deception around the impact of fossil fuels on climate change, and controlled political processes through lobbying.

The Submission alleges that the conduct of BP's executives constitutes an 'other inhumane act' under Article 7(1)(k) of the Rome Statute, which is of a similar character to the ten specified crimes and likewise causes 'great suffering or serious injury to body or to mental or physical health'. Essentially, the argument is that climate change has caused death, the forcible transfer of populations, serious injury to physical or mental health caused by extreme weather events, and the persecution of indigenous and minority groups. As such, it is said that this is a comparable crime against humanity properly belonging to the 'other inhumane acts' category, like the crimes of forced marriage, forcible transfer and enforced disappearance, which have already been recognised by the courts.

According to Article 7(2)(a), an essential element of a crime against humanity is that there be an 'attack directed against any civilian population' which is made 'pursuant to or in furtherance of a State or organisational policy'. The Submission makes reference to the role played by BP executives in releasing 'carbon bombs' into the atmosphere but struggles to attribute this to a State or organisational policy. The Submission cites the ICC Pre-Trial Chamber's Article 15 Decision in the Kenya situation, in which the Pre-Trial Chamber suggested that a group could qualify as an 'organisation' where it 'has

the capability to perform acts which infringe on basic human values'. The Submission suggests that a company such as BP satisfies this criterion, but it is clear from the Article 15 Decision that what the Pre-Trial Chamber had in mind was an organisation with *de facto* State power. A finding that a corporation may commit crimes against humanity is unprecedented in international criminal law and represents a not insignificant departure from existing jurisprudence.

Jurisdiction is claimed on the basis that BP is incorporated in the United Kingdom (**UK**), which ratified the Rome Statute in 2002, and also on the basis that many of BP's directors are UK nationals or domiciled in the UK. Moreover, it is said that, although BP executives have been responsible for the crime against humanity of climate change since the 1950s, this crime is ongoing and so the ICC has temporal jurisdiction over conduct since 2002.

Finally, on admissibility, the Submission argues that the UK has been unwilling or unable to prosecute BP executives, and also that the conduct is of sufficient gravity such that it would be in the interests of justice to open an investigation.

Interestingly, the objective of the Submission appears not to be the incarceration of BP executives, but rather an order that BP pay reparations to victims. The Submission makes reference to a previous ICC order that Congolese warlord Bosco Ntaganda pay USD 30 million in damages and calls on the ICC to order that BP pay a portion of the costs of climate change harm remediation based on an attribution science assessment.

Prospects of success

In recent years, commentators such as Sharp, Patel and Keenan have expressed some doubts over whether environmental crimes can (or should) be prosecuted by the ICC. Sharp suggests that the requirement that the attack form part of a State or organisational policy 'is likely the most troublesome hurdle'. Patel argues that defendants might have a defence based on the Rio Declaration, which allows for acceptable levels of environmental degradation if those actions are justified for the benefit of society. Keenan goes further by suggesting that we should be wary of prosecuting such crimes at the ICC because this 'would symbolically declare that climate crimes are only those crimes committed by people or institutions that are morally equivalent to the people who committed the genocide in Rwanda or organised the Holocaust'.

Aside from these legal hurdles, investigating international climate crimes is likely to face a number of practical and procedural challenges. One challenge concerns gathering evidence, which is likely to be held in multiple jurisdictions. Moreover, key evidence, such as the minutes of Board meetings and internal emails, will typically not be in the public domain. Under the ICC's Rules of Procedure and Evidence, defendants are under no obligation to disclose all material within their possession and may be able to rely upon the privilege against self-incrimination in refusing to disclose certain documents.

The ICC Prosecutor may, therefore, struggle to collect sufficient evidence to secure a conviction. This challenge is particularly acute, given the presumption of innocence and the requirement that the Prosecutor prove his case beyond a reasonable doubt (Article 66). Given that claimants in domestic civil proceedings have at times struggled to prove their cases on the balance of probabilities where the defendants are subject to disclosure obligations, one might anticipate that this will make it particularly challenging for a Prosecutor to secure a conviction.

Perhaps the greatest challenge, however, is resourcing. In November 2023, the ICC Prosecutor told the UN Security Council that he had 'an inadequate, insufficient core budget' and requested an increased budget for 2024. Later that month, the Office

of the Prosecutor announced that it was closing its ongoing investigation in Kenya. Despite this, it still has 18 ongoing investigations in 16 jurisdictions. The Office of the Prosecutor (**OTP**) appears to be struggling to adequately fund its existing investigations, so it may be reluctant at this stage to take on resource-intensive investigations into international climate crimes.

On 15 September 2016, then-Prosecutor Fatou Bensouda published a Policy Paper on Case Selection and Prioritisation, setting out the Prosecutor's policy and practice for selecting the incidents, persons and conduct to be investigated and prosecuted. This policy paper stated that the Prosecutor would 'give particular consideration' to alleged crimes that result in 'the destruction of the environment'. International non-governmental organisation Global Witness described the policy change as 'a warning shot to company executives and investors'. However, the OTP's current Strategic Plan 2023-2025 identifies ten strategic goals but makes no mention of environmental crimes. Instead, it identifies that the OTP will 'have to define a realistic scope of operations and bring manageable cases', which will inevitably involve the prioritisation of cases 'according to factors such as their relative gravity and prospect of success'.

Conclusion

Attempts to investigate and prosecute directors of oil and gas majors at the ICC for crimes against humanity due to their alleged contributions to climate change are likely to face considerable legal, procedural and policy challenges. This may mean that it may be some time before senior executives appear in the dock (if ever) and may first require amendments to the Rome Statute, the Rules of Procedure and the OTP's prosecutorial policy. The Submission, however, states that it is intended to serve as a template for indigenous communities particularly affected by climate change, so it may be that future fact patterns fit more easily with the existing and developing jurisprudence, thereby opening up the potential for international climate crimes to be tried in The Hague.

15 Climate Change Litigation: A View from South Africa

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South Africa as a microcosm

The contribution of South African litigators towards the wave of global climate litigation cases may seem insignificant. If one looks at the Global Climate Change Litigation Database, South Africa only has nine entries in a database containing nearly 1000 cases, with the majority of cases coming out of the United States, Europe and South America.

The South African context remains important, however. It can be said that South Africa serves as a microcosm of socio-economic, climate and other human rights challenges faced around the world (McConnachie 2023). It is a country that is carbon intensive, ranking as the biggest emitter of greenhouse gases (**GHG**) in Africa and listed in the top 15 emitters globally. South Africa also ranks as one of the most unequal societies in the world. Coupled with energy insecurity and susceptibility to the worst impacts of climate change, it is a country in which the intersection of different struggles for justice are inextricably interlinked.

It must also be mentioned that South Africa is the recipient of funds from the Just Energy Transition Partnership (**JETP**), in which France, Germany, the UK, the US and EU pledged to provide USD 8.5 billion to support South Africa's just transition to a low carbon economy, in what was described as a 'historic international partnership'. Both proponents and sceptics will be watching South Africa's transition closely, the outcome of which will undoubtedly influence public opinion, discourse and policy around just transitions and the financing thereof, generally.

The legal context

The South African Constitution is hailed as one of the most progressive constitutions in the world. In the *Deadly Air* case, the North Gauteng High Court held that the environmental right contained therein is immediately realizable. The other socio-economic rights are also justiciable, and provision is made for curative measures in instances where those rights have been infringed. The Constitution is bolstered by an environmental legal framework comprising comprehensive environmental legislation and associated regulations and policy.

South Africa's climate litigation: A snapshot

Thabametsi case

The 2017 case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (**the *Thabametsi* case**) serves as South Africa's first climate change case. In this case, the proposed Thabametsi independent coal-fired power plant, selected as a preferred bidder under South Africa's 1000MW energy procurement bid window, was challenged by the environmental justice group Earthlife Africa, represented by the Centre for Environmental Rights. Earthlife Africa appealed the granting of an environmental authorisation to the Minister of Environmental Affairs (today referred to as the Minister of Forestry, Fisheries and the Environment), but the appeal was dismissed. The dismissal of the appeal was then taken on judicial review.

Earthlife argued that Thabemetsi should not have been granted an environmental authorisation as the Chief Director (the competent authority responsible for issuing environmental authorisations) had been obliged to consider the climate change impacts of the proposed project but had failed to do so. It was argued that a reading of section 24 O(1) of the National Environmental Management Act, properly interpreted, requires a mandatory climate change impact assessment to be conducted and duly considered before an environmental authorisation can be granted.

In a landmark judgment, the North Gauteng High Court held that a comprehensive climate change impact assessment was necessary and should have been considered by the decision-makers despite environmental legislation not specifically calling for it. In its ruling, the Court held that climate change is a threat to Constitutional rights and that South Africa's international law commitments in terms of the United Nations Framework Convention on Climate Change and the Paris Agreement lean towards a reading of domestic legislation that favoured protection of the climate.

The Court ordered that the Minister reconsider Earthlife's appeal with reference to a climate change impact assessment report, *inter alia.* The Minister reconsidered Earthlife's appeal having regard to a new climate change impact assessment, and yet authorised the Thabametsi project again. This decision was again taken on review by Earthlife Africa. In 2020, the matter was settled between the parties, and an order was issued that set aside the authorisations for Thabametsi. The judgment in the *Thabametsi* case set a vital precedent for climate litigation in South Africa.

Sustaining the Wild Coast (Shell) case

In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*, several environmental/human rights organisations sought an interdict against Shell and Impact Africa from conducting a seismic survey off the eastern coast of South Africa, known as the Wild Coast. To obtain an interdict, one must show:

(i) *prima facie* right

(ii) a reasonable apprehension of irreparable and imminent harm to the right if the interim interdict is not granted

(iii) balance of convenience in favour of granting the interdict and lack of an alternative satisfactory remedy.

In December 2021, the Eastern Cape High Court granted interim interdictory relief to the applicants and agreed that grounds for granting an interdict had been established. Importantly, it found a reasonable apprehension of irreparable and imminent harm owing to seismic surveys promoting fossil fuel extraction that would exacerbate

climate change and adversely impact cultural practices and the sustainable use of the ocean for spiritual healing and fishing, *inter alia*. It further accepted the applicants' concern that the seismic survey would lead to exploration without a climate change impact assessment.

On the return date in September 2022, the Eastern Cape Division of the High Court, sitting at Makhanda, set aside Shell's exploration right. In doing so, it referred to the applicants' submissions and expert reports that spoke to the observed adverse impacts of climate change and the conflict between further oil and gas exploration and South Africa's international greenhouse gas reduction commitments.

***Cancel Coal* case**

The case of *African Climate Alliance and Others v Minister of Mineral Resources and Energy and Others*, also known as the *CancelCoal* case, is unique because it is South Africa's first youth-led climate litigation. Furthermore, the *CancelCoal* case is an administrative law review and a Constitutional challenge to the South African government's plan to procure new coal-fired power. It is argued that the government's energy policy concerning fossil fuels constitutes an unjustified limitation of certain Constitutional rights such as the Section 24 environmental right, *inter alia*.

At present, the *CancelCoal* case is making its way through the Courts. Recently, the North Gauteng High Court ordered the government to make full disclosure in terms of Rule 53(1)(b) of the Uniform Rules of Court, which compels the State Respondents to provide the full record that was before the decision-makers when the impugned decision was made.

***Lephalale Coal Mine* case**

In *Earthlife Africa v Minister of Forestry, Fisheries and the Environment and Others*, the Applicant challenges an environmental authorisation granted to the Lephalale Coal Mine. Along with challenges to the air quality, community health impact assessment and need and desirability, it is argued that the climate change impact assessment conducted by the environmental assessment practitioner for the Lephalale Coal Mine is deficient due to it not being comprehensive. The case is currently in the pleadings stages, with affidavits pending from some Respondents.

What does the future hold?

South Africa has relatively recently joined the global climate litigation response, with the country's first climate litigation case being decided in 2017. The good precedent set in the *Thabametsi* and *Sustaining the Wild Coast* cases, as well as important precedents coming from the international courts, is promising for future South African climate litigation, much of which is still in the pre-litigious stage and which will mark the second wave of climate litigation once it reaches the Court system.

While South African litigators tend to favour a rights-based approach towards litigation, with socio-economic and human rights being tied to climate and environmental concerns, it is acknowledged that litigation alone cannot address the bevy of societal challenges South Africa faces. It is, however, an important aspect of the fight to attain human rights such as climate justice.

16 Human Rights in the Renewable Energy Transition: Litigation and Legislation to Support Communities in Cases of Corporate Abuse

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Since 2015, climate lawsuits have more than doubled to a total of over 2,000 cases globally. Traditionally, climate litigation is a tool used against states to ensure they take action against climate change. But, it has also increasingly been used against companies, in particular in the fossil fuel, agriculture and finance sectors, so that they can be held accountable for the effects of climate change.

With the acceleration of a transition to a net-zero carbon economy within the timeline of the Paris Agreement goals (with key milestones by 2030 and 2050), investment in renewable energy technology and the demand for essential minerals to fuel this sector has increased dramatically, representing an enormous opportunity for many stakeholders. However, key challenges must also be addressed in order that these opportunities are able to be realised. Otherwise, the renewable energy and transition minerals sectors risk replicating patterns of human rights abuses endemic to traditional extractive sectors, including fossil fuel. Bearing this in mind, communities impacted by new mining operations and renewable projects that the transition requires are increasingly turning to courts to vindicate their rights so that the transition is not only just but fair.

'Just transition litigation', a subset of climate litigation, is therefore emerging. The useful definition of just transition litigation by scholars Annalisa Savaresi and Joana Setzer notes that these legal actions are usually brought by Indigenous peoples and affected communities and 'rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions'. Their objective is not to stop the transition towards net-zero emissions but to ensure 'that a transition to green energy should not come at the expense of the rights of Indigenous people', workers, and other affected communities.

The emblematic legal action of the Sámi people in Norway shut down a wind farm project. This led to a historic Supreme Court decision in 2021, ruling that the government's licences issued for the turbines were void and that the project would encroach on the Sámi people's pastures and violate their right to enjoy their own culture, guaranteed by Article 27 of the International Covenant on Civil and Political

Rights. In Mexico, a court decision cancelled an EDF contract following a lawsuit filed by the Unión Hidalgo community against the company's wind energy project due to inadequate consultation. Local communities negatively impacted by the largest wind power project in sub-Saharan Africa on Lake Turkana filed a lawsuit challenging the lease of 150,000 acres of land and the lack of community participation in the land allocation process. The court ruled that 'statutory and constitutional procedures were not followed in reserving the land for the project' and ordered a full consultation process to be re-started.

Early research by the Business and Human Rights Resource Centre indicates that just transition litigation cases have been on the rise in the last few years and that domestic courts in certain key jurisdictions are demonstrating early receptiveness to the arguments and claims of affected communities, with the majority of cases ending in victory for these communities. In most cases, affected communities bring claims directly against companies; however, in some instances, we have identified cases where communities take legal action against States for authorising specific business activities that negatively impact their rights. Most cases concern operations within the transition minerals sector, followed by hydropower and wind energy sectors. A clean, healthy, and sustainable environment, in addition to land rights, access to water, Indigenous Peoples' rights, and lack of free, prior, and informed consent seem to be the key issues litigated. While most cases we have identified are in Latin America, with Chile taking the lead, there are also instances in Africa, Europe, Southeast Asia, and the US.

The rise of just transition litigation should be viewed as an important warning for companies and investors that there is a legal – and associated reputational and financial – risk if they do not ensure a human-rights-centred approach to these projects from the start and throughout the project cycle. Failure to do so risks slowing the transition. Case law is beginning to demonstrate the nuances of the definition of a just transition.

> *But consultation with diverse stakeholders and related research undertaken by the Business and Human Rights Resource Centre has identified, at minimum, three core principles that can underpin a just transition and help build support for it: shared prosperity between stakeholders, including communities and workers; a corporate duty of care that centres respect for human rights to shield workers and communities from harm; and fair negotiations, including community consultation throughout the project lifecycle and robust implementation of the principles of free, prior, and informed consent for Indigenous communities.*

Without this public support, the alternative is increasingly clear: community and worker resistance, including through the courts, resulting in project delays and, ultimately, consequences for the transition as a whole – which the world can ill afford.

Because there are no international standards or definition of a 'just transition', courts around the world are playing a critical role in determining this concept, but legislation is also key to setting expectations and clarity. Governments, in addition to corporate actors, also have a role to play. They have a responsibility to protect the human rights of affected communities and workers along the renewable energy value chain.

There has been a growth in legislative frameworks that have placed human rights at the centre of the transition to renewable energy. We are working on highlighting these initiatives more in-depth, but in the meantime, we can mention the 2022 Sierra Leone law that seeks to enhance practices and accountability in the minerals sector. It mandates community explicit consent prior to the initiation of mining operations and grants equal land rights to women. In Kenya, a 2016 law requires community

consent prior to the sale of land to prevent corruption. It was used by the Lake Turkana activists fighting against the negative impact of a wind power project that we referred to above.

The development of mandatory human rights and environmental due diligence legislation is another tool to regulate companies' conduct and support communities fighting against climate change and for a fair transition. The pioneering 2017 French Duty of Vigilance law has been used in cases against companies over climate change (lawsuit against TotalEnergies), their financing of fossil fuel companies (lawsuit against BNP Paribas) and alleged links to deforestation and land grabs (lawsuit against Casino Group) to name a few. The upcoming European Union Corporate Sustainability Due Diligence Directive (**CSDDD**) is a milestone as one of the world's largest economic blocs recently agreed to impose a legal duty on businesses to address potential and real negative impacts on people and the environment related to their global operations and value chains The text contains some strong access to justice standards for victims of corporate abuse. However, there are also weaknesses, such as the fact that '[c]limate obligations remain insufficient and have worryingly been excluded from the scope of civil liability'. Similar legislation is being drafted at domestic, regional or international levels.

The transition to renewable energy is an opportunity to shift away from the 'business as usual' approach to a new human rights-centred and shared prosperity model to deliver a transition that is fast but also fair for communities affected by these projects. Litigation and legislation have the opportunity to protect the human rights of affected communities and ensure accountability of corporate actors not respecting them throughout the life cycle of their renewable projects.

Bonavero Institute of Human Rights