



Universiteit Utrecht

Human Rights and Climate Change

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

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List of Abbreviations

ACHR	American Convention on Human Rights (<i>also known as Pact of San José</i>)
ACHPR	African Charter on Human and Peoples' Rights (<i>or Banjul Charter</i>)
ACommHPR	African Commission on Human and Peoples' Rights
ACtHR	African Court on Human and Peoples' Rights
COP	Conference of the Parties
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
GHG	Greenhouse gas (emissions)
HRC	Human Rights Council
IACCommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
MEA	Multilateral Environmental Agreement
NGO	Non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
PIL	Public Interest Litigation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

Introduction

The *Urgenda* case: where it all began

Little did we know that almost exactly two years ago, a judge in the Netherlands would set a groundbreaking legal example for the rest of the world. He did so in what is presumably the most famous case thus far on climate change: the Dutch *Urgenda* case. *Urgenda* (a combination of ‘urgent’ and ‘agenda’) is a foundation established under Dutch law “for sustainability and innovation” with the aim to accelerate the Netherlands’ transition into a (more) sustainable society, and to create a circular economy.¹ Their most impressive action to date is their ‘climate case’ (in Dutch: *Klimaatzaak*). Together with 886 co-plaintiffs, *Urgenda* filed a claim against the State of the Netherlands for taking insufficient action to reduce greenhouse gas (‘GHG’) emissions, thereby not sufficiently contributing to avert dangerous climate change. The current reduction policies would only lead to a 14-17% decrease by 2020, compared to the baseline level of 1990, which is according to *Urgenda* not enough. They claimed that the State was consequently in breach of its duty of care towards current and future generations, and requested the Court to make various declaratory statements of law and order an injunction to reduce CO2 emissions with 25-40% by 2020 compared to 1990. The key question was thus whether the State had a legal obligation towards *Urgenda* to limit GHG emissions on a higher scale than it was planning to.² On 24 June 2015, the Dutch Civil District Court in The Hague decided in a historic ruling in favour of *Urgenda*: the State’s reduction policies did indeed not suffice, because its reduction targets were lower than 25-40%. This goal has been established by the Intergovernmental Panel on Climate Change (‘IPCC’), an inter-governmental organisation that assesses the science related to climate change,³ and has internationally been agreed upon by the United Nations Framework Convention on Climate Change (‘UNFCCC’), to which the Netherlands is a party, as well as the European Council.⁴ The State was therefore in breach of its duty of care, and the Court ordered the government to reduce emissions with 25% by 2020.⁵ It disproved the State’s arguments that it is not one country’s responsibility to provide a solution for global climate change, and that a stricter reduction in the Netherlands will merely have a ‘drop in the ocean’-effect. The Court also refuted the claim that more ambitious national reductions than the standards decided upon at EU-level are not allowed; the only restriction is that these should not be

¹ *Urgenda*, ‘Missie en Werkwijze’ <<http://www.urgenda.nl/over-urgenda/missie/>> accessed 16 April 2017.

² *Stichting Urgenda v Staat der Nederlanden* (represented by the Ministry of Infrastructure and Environment), Rechtbank Den Haag 24 June 2015, ECLI:NL:RBDHA:2015:7145. For the English translation, *Urgenda Foundation v the State of the Netherlands*, District Court of The Hague, ECLI:NL:RBDHA:2015:7196, C/09/456689 / HA ZA 13-1396, para 3.1, 4.1, 4.26. This will from now on be referred to as the ‘*Urgenda* case’.

³ The IPCC was set up in 1988 by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP). For more information please see: IPCC, ‘IPCC Factsheet: What is the IPCC?’ <http://www.ipcc.ch/news_and_events/docs/factsheets/FS_what_ipcc.pdf> accessed 25 June 2017.

⁴ *Stichting Urgenda v Staat der Nederlanden* (n 2), para 4.23-4.29, 4.34; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) (UNFCCC). Note that *Urgenda* and the Dutch State were in agreement that CO2 emissions will have be reduced by 80-95% compared to 1990 in 2050, but that the dispute really was about the targets for 2020.

⁵ *ibid* para 5.1.

less ambitious.⁶ In September 2015, however, the State announced it would appeal, for which it has submitted its grounds in April 2016. A year later, Urgenda submitted its reply, thus the already lengthy process will still take quite some time before a judgment is rendered by the Court of Appeal.

This case illustrates how the judiciary can function as a tool in averting climate change: for the first time a government has been held accountable towards its citizens for a climate policy that is substandard according to international norms.⁷ It is now being succeeded by various similar cases in other countries.⁸ Interestingly enough, however, the main focus in the judgment was not on human rights. While Urgenda stated that the current emissions targets also violated Article 2 and 8 of the European Convention on Human Rights ('ECHR'), the Court held that Urgenda is no (in)direct victim in light of Article 34 ECHR and would thus not have legal standing before the European Court. It therefore could not invoke these Articles.⁹ Instead, the Court focused on Dutch tort law and the duty of care (Article 6:162 BW), but it did indirectly use the human rights norms in a complementary way as "a source of inspiration for the interpretation and the realisation" of the duty of care.¹⁰ However, despite the fact that Urgenda itself cannot invoke the ECHR, the Court also did not elaborate on the question whether the State had then perhaps violated its obligations under international human rights law towards the 886 co-plaintiffs. The Court declared that, even if these individuals could invoke the ECHR, the decision would not differ from the current one, thus they did not have sufficient interests by themselves besides Urgenda's. Their claim was consequently rejected.¹¹

It nevertheless would have been interesting to hear the Court's view whether individuals can enjoy standing as victims of future damage, or whether the State had actually committed a breach of international human rights law. That would have also clarified the Court's position on approaching the protection of the environment as a human right – not only on a domestic, but also on a regional level. This is all the more relevant since there is no international institution to submit claims to relating to international environmental law and the protection of the environment, thus applying human rights litigation might be a very fruitful avenue. Consequently, a discussion was sparked amongst scholars whether there was in fact a violation of the ECHR.¹² The case furthermore brings to light the potential

⁶ *ibid* para 4.80-81; Roger Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands' (2016) 34(2) *Journal of Energy & Natural Resources Law*, 1.

⁷ Marc Loth, 'Climate Change Liability After All: A Dutch Landmark Case' (2016) 21 *Tilburg Law Review*, 5.

⁸ Such as a similar case already pending in Belgium, instigated in spring 2015 by the NGO *Klimaatzaak*. For more information please see: www.klimaatzaak.eu/en. Other cases are taking place in Australia, New Zealand, Pakistan, the United States...

⁹ *Stichting Urgenda v Staat der Nederlanden* (n 2), para 4.45; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights, as amended, in force 1 June 2010) ETS No 5 (Protocol 11, ETS No 155) (ECHR), art 34 ECHR. "Individual Applications. The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. ..."

¹⁰ *ibid* para 4.46.

¹¹ *ibid* para 4.109.

¹² FM Fleurke and A de Vries, 'Urgenda: Convergentie tussen Klimaat en Mensenrechten?' (2016) 42 *Milieu en Recht* 1, 1-2.

success for further public interest litigation, and the possibilities for standing for future generations.¹³ These questions function as the starting point for a further exploration. Given the increasing likelihood that climate change will impact our (future) lives, I believe that cases like these will only become more prevalent in the near future and more people will try or have to depend on such legal strategies. This is naturally giving rise to a number of legal issues, and this thesis will try to tackle a few.

The research question and the scope

A very practical question sparked my inspiration and interest for this thesis – to discuss the legal possibilities and obstacles for people whose (right to) life is or will be in danger due to climate change, and who want to protect this, in light of current developments in the international legal framework. The underlying motive is legal-political, since protecting human rights is hopefully also an indirect way to put the topic of climate change on the agenda of policymakers.¹⁴ The challenge is thus to translate this practical question into a legal thesis, while not losing sight of the originally concrete inset.

The research question this thesis aims to answer, is the following:

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

The nature of the research question is partly descriptive and partly evaluative/normative, as goes for the following chapters. I will describe the different possibilities and/or obstacles that the human rights framework presents, and simultaneously assess their effectiveness. The objective of this thesis is namely to provide a critical roadmap of the various human rights tools and their usefulness in offering protection against climate change impacts – not just a description of what they entail.

¹³ Otto Spijkers, ‘The Urgenda Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?’ (2017) 1 (forthcoming).

¹⁴ Ian Curry-Sumner and others, *Onderzoeksvaardigheden: Instructie voor Juristen* (Ars Aequi Libri 2010) 3-7.

“[C]limate change poses an existential threat that has already had a negative impact on the fulfilment of the Universal Declaration of Human Rights.”¹⁵

These words explaining the unequivocal connection between human rights and climate change were stated only a year ago in a Draft Resolution by the United Nations (‘UN’) Human Rights Council (‘HRC’). Twenty-four years earlier, at the World Conference on Human Rights in Vienna, it was declared that: “All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” It therefore is the duty of States, despite varying national or regional systems, particularities or backgrounds, to promote and protect all human rights and fundamental freedoms.¹⁶ In light of this Declaration, it means that States are obliged to protect the wide range of human rights affected by climate change. It would however be beyond the scope of this thesis to address the entire human rights paradigm, and some human rights are more likely than others to be (sooner) negatively impacted. The right to life belongs to this group.¹⁷ It can be found in numerous human rights treaties and declarations. To cite two of the most widely endorsed documents, the Universal Declaration on Human Rights (‘UDHR’) states that “Everyone has the right to life, liberty and security of the person”, and in the International Covenant on Civil and Political Rights (‘ICCPR’) one can read that “Every human being has the inherent right to life”.¹⁸ Obviously, we need a receptive environment to enjoy our human rights in the first place, and without the right to life guaranteed, all other human rights are basically meaningless. Hence this thesis will focus on what is in my opinion the most all-encompassing, “supreme right from which no derogation is permitted. [It] has profound importance both for individuals and for society as a whole. It is most precious for its own sake, but also serves as a basic right, facilitating the enjoyment of all other human rights”.¹⁹

How exactly does anthropogenic, human-induced climate change violate the right to life?²⁰ One way is through the growing frequency of extreme weather events taking place, such as floods, tornadoes,

¹⁵ UNHRC Res 32/33 ‘Human Rights and Climate Change’ (28 June 2016) 32nd Session UN Doc A/HRC/32/L.34, 2.

¹⁶ This quote can now be retraced to almost every declaration or document of any importance to human rights. Vienna Declaration and Programme of Action (12 July 1993) A/CONF.157/23, para 5.

¹⁷ UN Human Rights Council ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ Preliminary Report, John H Knox (2012) A/HRC/22/43, 7 (UNHRC).

¹⁸ For now, I will not go into the debate what entities have an entitlement to this right, nor what arbitrarily exactly means. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6 (followed by: “This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).

¹⁹ UNHRC ‘Draft General Comment No 36 – Article 6: Right to Life’ prepared by Yuval Shany and Nigel Rodley (2 September 2015) 115th Session UN Doc CCPR/C/GC/R.36/Rev.2, para 2.

²⁰ “Anthropogenic climate change refers to the production of greenhouse gases emitted by human activity.” ‘Anthropogenic Climate Change’ <<http://www.global-greenhouse-warming.com/anthropogenic-climate-change.html>> accessed 25 May 2017.

hurricanes and landslides, which lead to a direct loss of life. A notorious example of this is typhoon Haiyan (or Yolanda), which cost over 6,000 Filipino's their lives and left four million displaced, and which was very likely caused by climate change.²¹ The risk of more extreme weather events occurring is according to the IPCC "moderate to high at temperatures of 1°C to 2°C above pre-industrial levels",²² and the World Bank confirms that "further health impacts of climate change could include injuries and deaths due to extreme weather events".²³ Heat waves will also become more prevalent, leading again to droughts, wildfires and diseases. These events amongst others induce the alteration of ecosystems, disruption of food production and water supply, damage to infrastructure and settlements, and ultimately even (violent) uprisings.²⁴ It is estimated that climate change now causes 400,000 deaths per year, a number that has been projected to rise to 700,000 per year by 2030.²⁵

All States have committed to respect, protect, promote and fulfil the right to life – in accordance with general human rights obligations. Merely *refraining* from interfering with human rights is insufficient; States also have a due diligence obligation to *protect* individuals against harm resulting from external sources, including climate change. According to the Office of the United Nations High Commissioner for Human Rights ('OHCHR'), at the very least this includes taking effective measures against foreseeable and preventable loss of life, such as weather-related hazards, and to mitigate and adapt to climate change. This is underlined by the Human Rights Committee's General Comment on the right to life, in which it states that States must take positive measures against possible threats.²⁶

Methodology and structure

With regard to practical, real-life consequences, the interconnection between human rights and climate change may be clear, but choosing a specific angle in a theoretical framework is rather complex. To

²¹ Peter Walker, 'Typhoon Haiyan: Millions of Lives Still Blighted One Year On' *The Guardian* (New York, 7 November 2014) <<https://www.theguardian.com/world/2014/nov/07/typhoon-haiyan-millions-lives-blighted-one-year-on>> accessed 8 June 2017.

²² IPCC, 'Summary for Policy Makers' In TF Stocker and others (eds), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press 2013) (AR5) 19.

²³ The World Bank, 'Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided' (2012), xvii, xiii.

²⁴ Simon Caney, 'Climate Change, Human Rights and Moral Thresholds' in: Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2011) 76-78; IPCC, 'Summary for Policy Makers' in Field CB and others (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), 6-8; OHCHR, 'Understanding Human Rights and Climate Change' Submission to 21st COP of the UNFCCC (27 November 2015) 13-14.

²⁵ UNHRC 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General – Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (2009) A/HRC/10/61, 8-9; DARA, 'Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet' (2nd ed) (2012) <<http://daraint.org/wp-content/uploads/2012/09/EXECUTIVE-AND-TECHNICAL-SUMMARY.pdf>> accessed 12 April 2017, 17.

²⁶ OHCHR Report (n 24) 13; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law 'Climate Change and Human Rights' (2015) 13; UNHRC Draft GC No 36 (n 19), para 23.

guide the reader in placing this research within the relevant context, one should be aware of different approaches on a number of levels, which I had to assess to delineate the scope and goal of this thesis.

Conceptually speaking, there are three positions: according to the first, human rights-oriented approach, protecting the environment is an essential pre-condition for and a means to secure the effective universal enjoyment of internationally recognised human rights – especially the right to life and health. The second, environment-oriented approach views protecting certain human rights as an essential instrument to achieve environmental protection²⁷ – for example through procedural human rights. The third, integrative and most recent approach emphasises an indivisible and inseparable link between human rights and environmental protection – for instance through an independent substantive right to a satisfactory environment. These objectives are to some extent complementary and, one could say, thus represent a win-win situation.²⁸ This thesis is written from a human rights perspective, as I focus on protecting human rights *against* violations caused by climate change, but protecting the environment is simultaneously a prerequisite for enjoying one's human rights. I therefore aim to also find a balance and to display the underlying interdependence in reaching this two-fold goal: how can we avert climate change and protect human rights at the same time?

Then concerning the 'subjects' of this research, those affected, one can distinguish three scenarios to view people's – both individually and collectively – need for human rights tools. There is the present generation filing a claim about their own, current (right to) life; the present generation filing a claim about their future (right to) life; and the present generation filing a claim on behalf of future generations' (right to) life. All scenarios will be dealt with in the following chapters.

Finally, the literature roughly speaks of three approaches to protect the environment and human rights. This can be accomplished by greening the existing human rights paradigm; by applying procedural rights; and by recognising a new substantive human right. These approaches can again be assessed at three levels: at the level of international human rights forums, regional human rights courts, and national courts safeguarding human rights. Since my focus is on substantive international human rights law, I will largely leave out the actual procedural rights, but I will naturally have to include certain procedural aspects such as legal standing and access to courts. Moreover, I will predominantly use case law from the international or regional level – cases purely rooted in national law will not be discussed. However, given the fact that the number of international cases on this subject is still rather limited, I have decided to also include national cases in which international human rights or norms are applied in the judgments.

A great deal has already been written about greening existing human rights and creating a new substantive right to the environment. I will therefore critically assess these two human rights tools,

²⁷ Thereby resembling respectively the Stockholm and the Rio Declaration, Principle 10.

²⁸ AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996) 3; Dinah Shelton, 'Human Rights and Climate Change' (2009) Buffett Center for International and Comparative Studies Working Paper Series, Working Paper No 09-002 1, 12.

followed by two other legal avenues that seem to become increasingly prevalent in the (inter)national human rights field: public interest litigation and intergenerational justice for future generations. The structure is as follows. After a brief introductory chapter on the necessity for a human rights-based approach to deal with climate change impacts, I will embark upon the four aforementioned possible legal avenues and/or obstacles to protecting human rights against climate change. First, I will present an analysis of greening existing human rights, what the challenges regarding legal standing are, and if there are successful case-law examples. This is followed by an assessment of the recognition of a new substantive human right, the confusion and doubt regarding its definition and scope, and its viability. Next, I will discuss the options for public interest litigation, and the possibly improper use of the judiciary this entails; and lastly, the viability of protecting future generations through intergenerational justice, followed by a conclusion. All in all, the reader must keep in mind that I have written this thesis as a plea to act. A plea to protect our human rights against the effects of climate change, now and in the future, and a plea to hopefully at the same time strengthen the realisation what climate change will entail for the way we are living our lives now, and why it is so dangerous.

Chapter 1 – The Necessity of a Human Rights-Based Approach

In this introductory chapter, the connection between climate change and human rights will be explained more elaborately, it will be explored why a stronger human rights-based approach is needed, and which initial problems this approach might bring. Firstly, however, it is important to briefly familiarise the reader with the differences between climate change and global warming, and the causal connection with human behaviour.

1.1 The terminology of climate change

The issue of climate change is rapidly climbing the ladder on the international political agenda. It refers to “a broad range of global phenomena created predominantly by burning fossil fuels”. These phenomena include global warming, but also rising sea levels, the loss of ice masses, shifts in biodiversity and extreme weather events. The world’s attention, however, has mostly been focused on curbing global warming, which is “the upward temperature trend across the entire Earth since the early twentieth century, and most notably since the late 1970s, due to the increase in fossil fuel emissions since the industrial revolution”.²⁹ In the 2015 Paris Agreement, the world community committed itself to limiting global warming to “well below” above pre-industrial levels, and aiming to limit the rise to 1.5°C as the average global temperature.³⁰ Governments had already been committed to this goal since the 2010 Cancun Agreements, in which it was officially enshrined for the first time,³¹ but the Paris Agreement also contains a comprehensive global action plan. The 2°C target is widely regarded as the absolute limit to avert the most devastating effects of climate change. In 2015, the global temperature had already risen by 1°C compared to the 1851-1880 pre-industrial base period. 2016 was the warmest year on record, with the global average temperature increase rising to 1.1°C.³² Furthermore, the IPCC

²⁹ NASA, ‘What’s in a Name? Weather, Global Warming and Climate Change’ <<https://climate.nasa.gov/resources/global-warming/>> accessed 21 June 2017

³⁰ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016). Adopted by 196 States during the 21st annual meeting of the Conference of the Parties (‘COP’) to the UNFCCC. Art 2(1)(a): “Holding the increase in 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.” After the recent withdrawal of the United States, the Agreement is now signed by 194 countries.

³¹ Herein governments were committed to “hold the increase in global average temperature below 2°C above pre-industrial levels”. Carbon Brief, ‘Two Degrees: The History of Climate Change’s Speed Limit’ (8 December 2014) <<https://www.carbonbrief.org/two-degrees-the-history-of-climate-changes-speed-limit>> accessed 11 June 2017.

³² Climate Analytics, ‘Global Warming Reaches 1°C above Preindustrial, Warmest in More than 11,000 Years’ <<http://climateanalytics.org/hot-topics/global-warming-reaches-1c-above-preindustrial-warmest-in-more-than-11000-years.html>> accessed 14 June 2017; Global Climate Change, ‘Global Temperature’ <<https://climate.nasa.gov/vital-signs/global-temperature/>> accessed 14 June 2017; NASA, ‘NASA, NOAA Data Show 2016 Warmest Year on Record Globally’ (18 January 2017) <<https://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally>> accessed 14 June 2017; World Meteorological Organisation, ‘Provisional WMO Statement on the Status of the Global Climate in 2016’ (14 November 2016) <<https://public.wmo.int/en/media/press-release/provisional-wmo-statement-status-of-global-climate-2016>> accessed 14 June 2017.

has clarified the connection between human behaviour and climate change unequivocally in its Fifth Assessment Report. “Human influence on the climate system is clear,” it states, “and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems.”³³ This basically means that our human rights are threatened by our own human behaviour.

1.2 Climate change is a human rights issue

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

These words were spoken by Mary Robinson, the former High Commissioner for Human Rights, during a full-day panel discussion on climate change and human rights by the HRC in March 2015.³⁴ What might seem like stating the obvious, the connection between both concepts has only rather recently been widely recognised, predominantly during the past decade.³⁵ In 2008, the HRC paved the way by for the first time adopting a resolution stating that “climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights”.³⁶ The first United Nations’ Special Rapporteur on human rights and the environment moreover stated in his first report that “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights, including rights to life, health, food and water.”³⁷ These days scientists, lawyers and international organisations such as the UN are increasingly acknowledging the impact climate change has on human rights, and it is safe to say that there is now a general consensus that climate change and inadequate environmental conditions hinder the full and effective enjoyment of human rights. It has even been called “a matter of simple observation” that a wide range of human rights are and will be undermined by climate change, such as the right to life, health, food, water, shelter and property, as well as rights associated with culture, migration, personal security and self-determination.³⁸

It is thus clear that the existence of our current lives and thereby our human rights are endangered by the effects of climate change. This threat does however not impact everyone in the same way, as the

³³ IPCC, ‘Summary for Policy Makers’ in Pachauri RK and Meyer LA (eds), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva) 1, 2.

³⁴ UNHRC ‘Summary Report of the Office of the United Nations High Commissioner for Human Rights on the Outcome of the Full-Day Discussion on Specific Themes Relating to Human Rights and Climate Change’ (1 May 2015) 29th session A/HRC/29/19 para 77.

³⁵ The connection between human rights and the environment was already recognised in 1972 during the first UN Conference on the Human Environment, but did not yet refer to climate change. Principle 1 of the Stockholm Convention – for further information see the chapter on a substantive environmental right.

³⁶ UNHRC Res 7/23 ‘Human Rights and Climate Change’ (28 March 2008) UN Doc. A/HRC/RES/7/23

³⁷ UNHRC ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ Preliminary Report, John H Knox (2012) A/HRC/22/43, 12.

³⁸ Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press 2011) 1.

IPCC has stated: “[p]eople who are socially, economically, politically, institutionally, or otherwise marginalized are especially vulnerable to climate change and also to some adaptation and mitigation responses.”³⁹ Exactly this finding might illustrate why the study of climate change has so far mainly been focused in the field of physical sciences and economics, instead of human rights law: those who have to endure the hardest consequences, are usually not the troublemakers.⁴⁰ In other words, the wry outcome is that those mostly responsible for emitting GHG emissions and thus causing climate change, are oftentimes not the ones most vulnerable to the effects, nor the ones with difficult access to justice systems. It is therefore rather cruel and ironic that the GHG emissions *caused by* (indirectly) States, corporations and individuals for their own welfare, simultaneously endanger (often *other*) people’s human rights. This makes one wonder what help the international human rights framework can offer to an individual who is squeezed in between these polluters and whose human rights are being or will be violated.

1.3 The relevance and the necessity of a (stronger) human rights-based approach

What is the necessity of attempting to avert the effects of climate change through a human rights-based approach? The most important reason is the lack of an international environmental court. Despite the often criticised fragmentation in international law and international jurisdictions, a phenomenon with the result that numerous issue-specific regimes, rules and institutions have been established – including human rights courts – international environmental law somehow missed the boat.⁴¹ Some commentators argue that this process of decentralisation is unhelpful as it compartmentalises international law; others submit that decentralisation helps forward communal objectives which would not be achieved through general rules. International environmental law predominantly exists of hundreds, perhaps even thousands of multilateral environmental agreements (‘MEAs’), supplemented by customary norms. This decentralisation helps address matters on for example a regional scale that would not be solved by general international law, but the consequence is also that a fragmentation in legal standards has taken place.⁴² Furthermore, these MEAs can be characterised as soft, non-binding norms, including review mechanisms with judicial features. The focus lies however with compliance and facilitation, not with enforcement and sanctions of environmental norms. There is thus no strong enforcement mechanism in

³⁹ IPCC, ‘Summary for Policy Makers’ in Field CB and others (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014) 6.

⁴⁰ Dinah Shelton, ‘Human Rights and Climate Change’ (2009) Buffett Center for International and Comparative Studies Working Paper Series, Working Paper No 09-002 1, 2.

⁴¹ Evadne Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’ (2015) 6(2) *Journal of Human Rights and the Environment* 156, 158; Dinah Shelton, ‘Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk’ (2015) 6(2) *Journal of Human Rights and the Environment* 139, 139-140.

⁴² Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 304-305.

the form of a judicial body that exercises jurisdiction over the implementation of this disorderly jumble of treaties.⁴³

It is of course understandable why States desire to keep the creation of an international environmental court or other litigation-based compliance mechanisms at bay. It could lead to a possibly dramatic expansion of their obligations – in terms of *ratione temporis* (future generations and intergenerational equity), and *ratione loci* (unlimited geographical scope and extraterritorial responsibility). Moreover, the implementation of MEAs depends on incentives and trade-offs, diplomatic action and self-restraint of governments, and State-reporting; not through State liability or responsibility. This is in stark contrast to human rights treaties, which are implemented through individual petitions and complaints, State reporting and inter-State complaints. All these options lead to (in)direct criticism of non-complying States. According to the human rights regime, the State would also be responsible for harm directly caused by third parties, private actors, and not just for harm caused by the State itself. No wonder States are hesitant for such a regime in the extremely complicated and elusive area of environmental law. For victims, however, the result is that once domestic remedies have been exhausted, there is virtually nowhere to go. That is, except for perhaps a human rights court.⁴⁴

At the moment, however, there is no global binding human rights agreement that explicitly recognises the close interconnection between human rights and the environment, let alone a separate human right to a clean or healthy environment.⁴⁵ Instead, most human rights bodies make use of an interpretative strategy: they apply existing human rights to environmental issues, and environmentally-sensitive strategies to existing human rights norms and jurisprudence. This is leading to a growing body of human rights jurisprudence related to the environment.⁴⁶ It is however less clear what the corresponding obligations of governments to address such human rights implications or violations exactly look like, underlining the necessity to expand and exemplify a human rights approach.⁴⁷

⁴³ Christina Voigt and Evadne Grant, 'Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes' (2015) 6(2) *Journal of Human Rights and the Environment* 131, 131-132.

⁴⁴ The exception is the Aarhus Convention, which offers procedural human rights on a national level – the right to information, public participation and access to justice – but no procedural rights nor a sanction regime. UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, 38 ILM 517 (Aarhus Convention); Svitlana Kravchenko, 'Right to Carbon or Right to Life: Human Rights Approaches to Climate Change' (2008) 9 *Vermont Journal of Environmental Law* 513, 516-517; Shelton (n 41) 141-143.

⁴⁵ The two regional HR treaties that do are the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 363 (ACHPR) art 24; and the Additional Protocol to the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (ACHR) art 11; next to a number of non-binding instruments.

⁴⁶ Voigt and Grant (n 43) 133; Shelton (n 40) 10.

⁴⁷ UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law 'Climate Change and Human Rights' (2015), 11-12.

1.4 Initial problems and concerns in a nutshell

Combining two fields as complex as international human rights law and environmental protection also gives rise to some complicating aspects concerning the legitimacy and appropriateness of human rights law. A number of issues concern the inherent nature of human rights. For one, the anthropocentric character is a fundamental stumble block – human rights have been instigated to protect *humans*, not the environment. What to do when there is a conflict of interests, for instance between economic development and environmental protection? Is it even possible to reconcile both human and environmental interests in one human right? Another essential feature is that human rights protect *individual* claims, while the public interest in environmental matters is of a *collective* nature, affecting entire communities or even peoples on a global scale. Human rights also merely protect humans from each other, meaning that the environment will only be protected if its degradation directly violates an individual right. Thirdly, one could think of concerns regarding standing and access to human rights courts: at the European Court of Human Rights ('ECtHR'), for example, only those directly affected are rights-holders and there is no *actio popularis*. Human rights moreover take a *reactive* stance towards environmental degradation, instead of *preventive*. The consequence is often that the damage must have occurred already, thereby complicating the possibility of standing for future generations. Finally, human rights law aims to remedy *injuries* caused by violations, but it does not cure the *source* of the violation: environmental degradation.⁴⁸

⁴⁸ Grant (n 41) 157; Voigt and Grant (n 43) 134-135.

Chapter 2 – Greening Existing Human Rights

The greening of existing human rights is one of the most prevalently mentioned strategies for climate change litigation. It is consequently necessary to firstly assess the possibilities within the already existing human rights frameworks, before we consider the value of a new substantive environmental right, or the strategies of public interest litigation and intergenerational justice. This chapter thus centres on the question how the right to life has so far been used for protection against climate change and environmental degradation in existing human rights treaties and courts. This will be evaluated on a procedural level, regarding the rules for standing and *actio popularis*, as well as on a substantive level by assessing various cases.⁴⁹ I will focus on the three most important regional courts: the European Court of Human Rights ('ECtHR'), the Inter-American Commission on and Court of Human Rights ('IACCommHR' and 'IACtHR') and the African Commission and Court on Human and Peoples' Rights ('ACommHPR' and 'ACtHPR'). We will discover that there are some significant differences.

Amongst these three systems, only the African Charter contains a substantive environmental human right. Here one can thus bring a claim that one's right to a satisfactory environment has been violated. In the European and American systems, which do not have such a substantive right, cases are mostly based on two accounts: either regarding a public authority failing to enforce *national* environmental rights, or regarding *another right* in the Convention over which the Court has jurisdiction, that has been violated by environmental degradation.⁵⁰ Before we dive deeper into these differences, it is important to notice beforehand that I will again restrain myself to merely discussing the potential endangerment of the (right to) life. This may happen because the actual right to life is violated, or because another right is that indirectly influences the (right to) life, but I will not discuss other potentially violated rights.⁵¹

Two general trends characterise the existing human rights field. The first is that violations resulting from environmental matters are generally conflicts about pollution; not about the depletion of natural resources. In other words, as Shelton says, "these cases are mostly about what human activities are injecting into the biosphere, not what they are taking out."⁵² Secondly, procedural human rights linked to environmental protection tend to receive more attention than substantive environmental rights.

⁴⁹ *Actio popularis* is the Latin term for public interest litigation, literally an action by the people. It is a public right to initiate a lawsuit, brought by a third party, for example an NGO, in the interest of the public as a whole. Oxford Reference, 'Actio Popularis' <<http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-72>> accessed 14 June 2017. For more information, please see Chapter 4.

⁵⁰ Dinah Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6(2) *Journal of Human Rights and the Environment* 139, 145.

⁵¹ This means that I will leave out cases focusing on for example the right to food or right to housing; indirectly, these of course also contribute to the right to life, but to also discuss this is beyond the scope of this thesis.

⁵² The exception to these are cases about the ancestral lands of indigenous peoples, as we will see. Shelton (n 50) 143.

It is however questionable if it is always wise to put one's entire trust in the decision-making process alone, instead of also relying on substantive rights.⁵³

2.1 The procedural side: legal standing and *actio popularis*

As was already touched upon in the introduction, *individual* human rights often require *individuals* to apply to a Court. In comparison to the American and African systems, the European system has the strictest limitations in this regard. According to Article 34 ECHR, individuals as well as NGOs and groups of individuals may submit a claim. However, the applicant must be “personally affected by an alleged violation of a Convention right”.⁵⁴ The requirement of being ‘personally affected’ is a *sine qua non*: the applicant has to be a victim. (S)he may also be a potential victim, if there is a serious and imminent risk of being directly affected.⁵⁵ An ‘alleged violation of a Convention right’ moreover entails that the violation must have already occurred.⁵⁶ Regarding *actio popularis*, as is to be expected, the individualistic, victim-centred approach of the ECtHR is reflected in the fact that there is no room for this. A NGO that would apply to the Court, would thus have to prove to have been affected personally and thus to be a victim itself – a requirement that for example turned out to be a stumble block in the *Urgenda* case.⁵⁷ As the Court has stated: “Article 34 does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel it contravenes the Convention.”⁵⁸ As will be discussed later on, it is in certain circumstances possible for an NGO to act as a representative for the actual victim, but in general, one has to be a victim to initiate proceedings at the ECtHR.⁵⁹

The American system already demonstrates more leniency, but is a bit different because it is composed of an Inter-American Court and a –Commission. According to Article 61(1) of the American Convention on Human Rights (‘ACHR’), “[o]nly the States Parties and the Commission shall have the right to submit a case to the Court”. Before the Court, an individual therefore has no *locus standi*. A person, group of persons or NGO may however lodge an individual petition to the Commission, which may then refer the case to the Court when the procedure has been completed – but only when the State party has expressly recognised the jurisdiction of the Court.⁶⁰ The victim requirement is less rigid: as

⁵³ *ibid* 144. Procedural rights are: access to information, participation in the decision-making process and access to justice.

⁵⁴ *Karner v Austria* App no 40016/98 ECHR 2003-IX 199, para 25.

⁵⁵ Christian Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’ (2008) 20(3) *Journal of Environmental Law* 417, 421.

⁵⁶ Thereby making it hard for claims relating to future damage – please see Chapter 5 on Intergenerational Justice.

⁵⁷ Evadne Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’ (2015) 6(2) *Journal of Human Rights and the Environment* 156, 161; FM Fleurke and A de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’ (2016) 42 *Milieu en Recht* 1, 2.

⁵⁸ *Karner v Austria* (n 54), para 24.

⁵⁹ Please see Chapter 4 on Public Interest Litigation for more information.

⁶⁰ The Commission produces one or two reports with recommendations. However, these have no binding force, and if it is also unable to refer a case to the Court, a victim's possibilities end here. American Convention on

long as the complaint is otherwise admissible, one does not have to be a victim to lodge a petition. This means that not only NGOs, but for example also relatives of or people unknown to a victim can submit claims.⁶¹ At the IACtHR, however, it is required that specific and individual victims of a concrete human rights violation can be identified. This requirement was then copied by the IACommHR under Article 44 ACHR.⁶² Consequently, there is also no *actio popularis* in the American system: the applicant must be the victim of a violation or the representative of one. A ‘mere’ violation of the law without a concrete human rights violation to a specific victim, cannot be remedied.⁶³

The African system, finally, is by far the most receptive. There is no victim requirement under the African Charter on Human and Peoples’ Rights (‘ACHPR’): any individual or NGO can communicate a procedure to the Commission or the Court.⁶⁴ NGOs are even specifically permitted to do so, and applicants bringing complaints do not have to be family members of the victim. Since there is no victim requirement, applicants do therefore not have to be directly affected by the alleged violation, nor does the applicant have to be a citizen of a State Party to the Charter, which means that international NGOs can also file complaints. It thus seems as if the Commission and Court allow and even encourage public interest litigation. However, this is not always the case: the admissibility rules do require that victims are identified as far as possible, and evidence that a provision of the Charter is violated by one of the State Parties is also needed.⁶⁵ Another crucial obstacle is that State Parties must expressly declare their acceptance of the competence of the Court to receive petitions of individuals or NGOs. Since very few States have accepted this, in practice this oftentimes means that direct access and public interest litigation is restricted, and that most cases first have to go to the Commission which may eventually pass these on to the Court.⁶⁶

2.2 The substantive side: jurisprudence in the regional human rights systems

Out of the three regional human rights systems, only the ACHPR expressly recognises a substantive right to the environment. Nevertheless, also when looking at the other two systems one can discern a growing body of jurisprudence with a slowly but steadily increasing trend of recognising some environmental dimension to human rights. However, the approach per regional judicial body varies considerably. In the following analysis the most important cases regarding the (right to) life will be

Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (ACHR) art 44, 62.

⁶¹ Grant (n 57) 165.

⁶² Schall (n 55) 423.

⁶³ *ibid* 422-423; Grant (n 57) 165.

⁶⁴ African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 363 (ACHPR) art 55 56; Protocol on the Establishment of an African Court on Human and Peoples’ Rights (adopted 9 June 1998, entered into force 25 January 2004) OAU/LEG/MIN/AFCHPR/PROT.1/rev.2/1997 art 5(3).

⁶⁵ See for example *Free Legal Assistance Group v Zaire* (Admissibility) Communication no 25/89 (1995), para. 36; *Centre for the Independence of Judges and Lawyers v Algeria* (Admissibility), Communication no 104/93 and 109-126/93 (1994) para 2.

⁶⁶ Protocol on the Establishment (n 64) art 34(6); Schall (n 55) 423-424; Grant (n 57) 167-169, 173.

discussed, and their effectiveness will be critically discussed. As we will see, the biggest emphasis lies with the case law of the ECtHR, simply because most relevant cases were adjudicated there.

2.2.1 The European Court of Human Rights

At first sight, it would be most straightforward to directly examine the right to life, which is enshrined in Article 2 ECHR. There have however only been very few environmental cases for Article 2; in reality, it turns out that human rights protection is often more successfully achieved through Article 8, the right to respect for private and family life. The cases for Article 2 and 8 have more overlapping factors than one might expect: often the same facts are of relevance, and the right to information recognised in relation to Article 8 can for example also be applied to Article 2.⁶⁷ Ultimately, applicants have achieved more success in using Article 8, which might thus indirectly be a more effective way to protect one's life and the environment. By exploring both articles more in-depth we will see whether this is true.

It has by now become well-established in the case law of the ECtHR that a State has two types of duties with regard to the protection of human rights. The original duties, often associated with the 'classic' civil and political rights, are negative duties: a State must refrain from actions that infringe upon these so-called first generation rights. The second type, which is generally most prevalent among social, economic and cultural rights but is becoming increasingly important for civil and political rights, are positive duties. This means that a State has a positive obligation to guarantee a certain right, also when this is threatened by third (private) parties. Applied to the environment, it would consequently entail that a State should take all reasonably possible measures to prevent or bring serious environmental harm to an end. Substantively speaking, this means that a legislative framework should be in place; procedurally, one can think of guarantees such as transparency and participation in decision-making processes. Also, the violation should obviously be put to an end. In response to climate change and environmental degradation, the lion's share of the duties will be positive – States will have to actively protect their citizens against the impacts of climate change. It is however important to keep in mind that States generally enjoy a wider margin of appreciation in this regard than compared to negative duties.⁶⁸

The right to life and the environment

Article 2(1) ECHR reads:

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

⁶⁷ *Öneryıldız v Turkey* [GC] App no 48939/99 ECHR 2004-XII 1, para 90.

⁶⁸ Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, Council of Europe 2012) 18; Fleurke and De Vries (n 57) 3-4.

As the wording clearly shows, the primary obligation of a State in relation to the right to life is negative. Additionally, in the jurisprudence the ‘doctrine of positive obligations’ has developed. This means that a State must take appropriate steps to safeguard the lives of those within its jurisdiction, even when the right is threatened by other (private) persons or activities that are not directly connected to the State. Since most infringements on the right to life could be irreversible, the positive obligation to protect may apply in situations where life is at risk, for example with certain dangerous activities that not only endanger the environment but also human life.⁶⁹ It is furthermore relevant to note that even when loss of life has not yet occurred, Article 2 may be invoked, for example in situations of inappropriate use of potentially lethal force.⁷⁰ While there is no exhaustive list of situations in which positive obligations might arise, until today, such cases are very exceptional. From the Court’s case law it has become clear that positive obligations may apply in two situations: regarding dangerous (industrial) activities and natural disasters. Within these contexts, the Court has however dealt with environmental issues in merely four cases, of which again just two cases are truly relevant here.⁷¹

The most important case thus far is *Öneryıldız v Turkey*, which regards the first situation: dangerous (industrial) activities.⁷² This case concerned a methane gas explosion on a municipal rubbish tip in Istanbul on 28 April 1993. In the area surrounding this tip a slum with illegally built rudimentary dwellings had arisen.⁷³ During the explosion, thirty-nine people who had built their houses there died; the applicant lost nine family members. He complained that the accident occurred due to negligence of the municipal authorities, who were therefore responsible for his relatives’ deaths, constituting a violation of Article 2.⁷⁴ This claim was strengthened by the fact that an expert committee’s report had already warned the authorities two years in advance of the danger of explosion, stating that “the waste-collection site in question breached the Environment Act and the Regulation on Solid-Waste Control and consequently pose[d] a health hazard to humans and animals.”⁷⁵ However, no preventive measures had been taken, and the explosion and subsequent landslide demolished ten houses, including the applicant’s dwelling.⁷⁶ In its judgment the Court specifically mentioned industrial activities, including

⁶⁹ *Öneryıldız v Turkey* (n 67), para 71-73.

⁷⁰ Council of Europe (n 68) 35; *Makaratzis v Greece* [GC] App no 50385/99 ECHR 2004-XI 195, para 49.

⁷¹ I will only discuss the two most relevant cases. For the sake of completeness, a brief mentioning of the other two here is in place. *L.C.B. v UK* was a case about the father’s applicant who had been exposed to radiation from nuclear tests. The applicant later contracted leukaemia, which she claimed was caused by the UK’s failure to warn her parents and to monitor her health. The Court however concluded that there was no causal link between the radiation and the leukaemia, plus the State could not have known this at that time, thus there was no violation of Article 2. The other case, *Murillo Saldias v Spain*, was about a positive obligation in the event of a natural disaster. The applicants complained the State had not taken necessary measures to prevent deaths caused by a flood, but the applications were found inadmissible because satisfaction had already been obtained at national level and available domestic remedies had not been exhausted. Both cases are therefore not very helpful in relation to environmental degradation and climate change. Council of Europe (n 68) 36-37.

⁷² *Öneryıldız v Turkey* (n 67).

⁷³ *ibid* para 10.

⁷⁴ *ibid* para 63.

⁷⁵ *ibid* para 13, 15.

⁷⁶ *ibid* para 18.

the operation of waste-collection sites, to be situations in which positive obligations could be invoked.⁷⁷ The Court then based its decision on two criteria: whether there was a *real and immediate risk* to the lives of the people living nearby, and whether the authorities *knew or ought to have known* this. Given the fact that it was widely known that methane has a high risk of exploding, and since the authorities were aware of this, they had a positive obligation to take preventive measures for protection. The Court was furthermore critical of the fact that the authorities had not informed the people living nearby of the risks, nor was the regulatory framework sufficient. It stated that the positive obligation to safeguard the right to life “entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”, which includes taking “practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks”. Consequently, Article 2 had been violated both substantively and procedurally.⁷⁸

The other case worth discussing is *Budayeva and others v Russia*, which is related to the second situation: a natural disaster.⁷⁹ In July 2000, the town of Tynauz was hit by mudslides over the course of a week, and part of the residential area flooded. During the first hit the inhabitants managed to escape, but they claimed there had been no advance warning by the authorities. Once the mudslide struck, according to the applicants, loudspeakers raised an alarm, but afterwards rescue forces or emergency relief were lacking. The day after, a more powerful mudslide hit the town, from which Ms Budayeva and her eldest son managed to escape. Her younger son, however, sustained serious injuries and her husband, Mr Vladimir Budayev, who had stayed behind to help his parents-in-law was killed when the flat building collapsed.⁸⁰ The Court was therefore requested to consider whether Russia had failed its positive obligation to maintain mud-protection engineering facilities, warn the residents, take care of the evacuation and emergency relief, and to carry out a judicial enquiry after the disaster. The resulting dispute was not whether it was likely that mudslides would take place, but rather whether the authorities *had known* that this mudslide would cause devastation on a larger scale than usual, and had thereby put the lives of its citizens at risk by failing to mitigate the consequences.⁸¹ The Court ruled that given the foreseeable threat to the lives of the population in this hazardous area, there was no justification for the authorities’ omissions. Moreover, there had been a causal link between Budayev’s death and the serious administrative flaws. The authorities had failed their obligation to establish a legislative and administrative framework to provide effective deterrence against the endangerment of the right to life. Again, the substantive and procedural aspects of Article 2 had thus been violated.⁸²

⁷⁷ *ibid* para 71.

⁷⁸ *ibid* paras 89-90, 98, 101, 109, 118; Svitlana Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’ (2008) 9 Vermont Journal of Environmental Law 513, 532; Council of Europe (n 68) 36-37.

⁷⁹ *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02, 15343/02 ECHR 2008-II 267.

⁸⁰ *ibid* paras 26-33, 39-46.

⁸¹ *ibid* paras 3, 116, 146, 147, 153.

⁸² *ibid* paras 158-159, 165; Council of Europe (n 68) 37.

To what extent do the outcomes of these cases establish helpful precedent in protecting the right to life and prevent environmental degradation against climate change? In the *Budayeva* case, people were harmed by a natural disaster, whereas the *Öneryıldız* case, in contrast, concerned dangerous human activities. The duty of care did however not differ significantly: in both cases the government knew of the dangers but failed to act upon that knowledge by taking precautionary measures.⁸³ The difference is that the margin of appreciation, already considerable regarding positive obligations, is even broader in response to meteorological events or natural disasters given their unforeseeable nature which is beyond human control, than it is with man-made danger. That is unless the hazard is clearly identifiable or recurrent, or when potential loss of life is at stake; then the State “has a positive obligation to do everything within the authorities’ power in the sphere of disaster relief for the protection of the right to life”.⁸⁴ It is of course difficult to judge whether natural hazards are caused by climate change or are simply ‘normal’ natural disasters, which occur sometimes; something which is also not clarified regarding the mudslides in the *Budayeva* case. Nevertheless, it has been predicted with significant scientific certainty that for example heat waves or floods will increase in frequency and are very likely to be caused by climate change. The question thus remains how a legal claim concerning loss of life from a human-induced natural disaster caused by climate change would turn out. Given the fact that the greenhouse effect is precisely one of the few meteorological events *caused by humans*; and if it could be proven that such a natural disaster is very probably caused by climate change or GHG emissions, and loss of life would be involved, it could be argued that the State would indeed have a strong positive obligation. Applied to future climate change-related disputes, it would mean that States will have to take reasonable measures to mitigate foreseeable consequences. Connecting the omissions of a particular State to a climate change-related disaster could then be accomplished in a way comparable to the *Urgenda* case: if the State’s targets to reduce GHG emissions or its efforts to take mitigation measures are insufficient in relation to international agreements, the State could be held responsible for a violation.⁸⁵

The right to respect for private and family life and the environment

The second optional avenue for human rights and environmental protection is Article 8(1) ECHR, which reads:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

⁸³ Dinah Shelton, ‘Human Rights and Climate Change’ (2009) Buffett Center for International and Comparative Studies Working Paper Series, Working Paper No 09-002 1, 18.

⁸⁴ *Budayeva v Russia* (n 79) paras 135, 174, 175; Council of Europe (n 68) 38-39.

⁸⁵ *Kravchenko* (n 78) 532-533; *Fleurke and De Vries* (n 57) 7.

This includes the quality of private life and the enjoyment of the amenities of one's home. The Court consequently decided that people's well-being and their ability to enjoy their home can to such an extent be affected by severe environmental pollution, that their rights under Article 8 may be violated. Thereby the Court tends to view private and family life and home to be closely connected and refers to these notions as the "private sphere".⁸⁶ It interprets the right to respect for the home to include the right to the physical area, but also the "quiet enjoyment of this area within reasonable limits". This means that not only a clear breach such as breaking into someone's home counts as an interference, but intangible sources such as noise, emissions or smells may also amount to a breach.⁸⁷

For an issue to involve Article 8, the environmental degradation "must directly and seriously affect private and family life or the home".⁸⁸ The following two steps must then be overcome to establish a violation: firstly, the environmental damage must have a direct negative impact on the individual. In other words, there must be a direct causal link between the damage and the effect on the claimant. This was established in *Kyrtatos v Greece*, in which the applicants complained about the destruction of the swamp near their property due to urban development, causing the surroundings to have lost their beauty. The Court however found no violation, because *the applicants'* human rights had not been affected; 'only' the environment had been damaged – and the Convention does not protect the environment as such. The Court said: "[T]he crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment".⁸⁹ The second step is that the negative impact must reach a certain threshold of harm, which depends on the circumstances of the case, such as intensity and duration, physical or mental effects, and the general environmental context.⁹⁰ Probably to curb the number of possible claims, however, the Court said that the "environmental hazards inherent to life in every modern city" do not make an arguable claim.⁹¹ Again, both steps thus show the inherently individualistic approach of the ECtHR: the focus is on individual rights, not on protecting the (collective) environment.⁹²

The first environmental case of the ECtHR was *López Ostra v Spain*, which can in retrospect be seen as a landmark case. Herein it was established that a State's positive obligations regarding the environment also cover activities carried out by private third parties.⁹³ The applicant complained that the fumes, smells, noise and contamination of a waste treatment plant near her home "immediately

⁸⁶ E.g. *Fadeyeva v Russia* App no 55723/00 ECHR 2005-IV 255, para 70.

⁸⁷ Council of Europe (n 68) 45.

⁸⁸ *ibid* 45.

⁸⁹ *ibid* 46; Shelton (n 50) 149; *Kyrtatos v Greece* App no 41666/98 ECHR 2003-VI 257, paras 44, 46-47, 52-53.

⁹⁰ *Fadeyeva v Russia* (n 86) para 69.

⁹¹ *ibid* para 69.

⁹² Grant (n 57) 162-163.

⁹³ Francesco Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) The European Journal of International Law 41, 49.

caused health problems and nuisance”. After three years of suffering from health problems, the family moved away upon recommendation from the daughter’s paediatrician.⁹⁴ The government recognised that the noise and smells negatively impacted the applicant’s quality of life, but held that the threshold of harm to breach her fundamental rights was not reached.⁹⁵ The Court then did not confirm a positive duty to prevent the pollution, but did find that the government did not strike a fair balance between the town’s economic interests and the applicants rights. Even if severe environmental pollution does not seriously endanger individuals’ health, it can still affect their well-being and the enjoyment of their rights enshrined in Article 8. Consequently, the Court found a breach and ordered a compensation sum.⁹⁶ Similarly, in *Fadeyeva v Russia* the applicant lived near a steel plant that was Russia’s largest iron smelter. She alleged that the extent of air pollution at her home “was and remains seriously detrimental to her health and well-being”.⁹⁷ The Court held that over a long period of time the concentration of toxic elements in the air had exceeded safe limits, and that the government had failed to strike a fair balance by not offering an effective solution. Since there was actual detriment to the applicant’s health and well-being⁹⁸ which had reached the threshold of serious harm, and her quality of life at home was adversely affected, the Court concluded that Article 8 was violated.⁹⁹ This case thus established that State responsibility is invoked for industrial activities with a large environmental impact, when the failure to regulate the private industry results in environmental degradation affecting fundamental human rights.¹⁰⁰

As is the case with Article 2, with respect to Article 8 it is important whether the authorities knew or ought to have known that a violation could or would take place. In order to establish, this the Court often bases itself on scientific reports, for example environmental impact studies. Notably, even if it is impossible to establish a direct causal link, but there is a serious and substantial *risk* that one’s well-being may be violated which the government knew or ought to have known, the State can still have a positive duty to take protective measures. With regard to dangerous activities, the Court often refers to the precautionary principle, for example in *Tătar v Romania*. In this case the applicants claimed that their well-being was interfered with after a large quantity of polluted water from a gold ore extraction plant spilled into a number of rivers, crossing various borders. Even though the applicants failed to establish a causal link between the pollution and their health symptoms, environmental impact assessments still indicated a substantial threat to the applicant’s well-being. Thus the State had violated its positive obligation to take reasonable preventive measures to respect the parties’ private lives and home, and most notably, their ability to enjoy a safe and healthy environment. The Court hereby

⁹⁴ *López Ostra v Spain* (1994) Series A no 303-C, paras 8, 19.

⁹⁵ *ibid* para 40.

⁹⁶ *ibid* paras 51, 58, 65; Kravchenko (n 86) 529-530; Council of Europe (n 68) 47.

⁹⁷ *Fadeyeva v Russia* (n 86) paras 10-11, 71.

⁹⁸ The ECHR does not recognise a right to health; instead, it is solved by incorporating it into the protection sphere of other rights – just as is done for the environment.

⁹⁹ *Fadeyeva v Russia* (n 86) paras 87-88, 133-134; Kravchenko (n 78) 530; Council of Europe (n 68) 48.

¹⁰⁰ Francioni (n 93) 49.

emphasised the importance of the (originally stemming from international environmental law) precautionary principle.¹⁰¹

Moreover, a significant risk that is *likely* to happen, even if no actual harm has taken place yet, may also lead to a violation.¹⁰² This was established in *Taşkın and Others v Turkey*: pollution which “may affect” individuals or dangerous activities to which they are “likely to be exposed” is also covered by Article 8, because otherwise the State’s positive obligation would be “set at naught”. The duty to adopt appropriate environmental measures of protection, which was established in *Öneryildiz v Turkey*, is herein elaborated as these measures must also be enforced effectively. The case is furthermore exemplary for the procedural duties that extend the scope of positive obligations, such as the right to information and consultation.¹⁰³

Two promising examples of combining Article 2 and 8

The only case thus far in which the Court discussed both Article 2 and 8, is the *Guerra v Italy* case.¹⁰⁴ The forty applicants lived one kilometre from a high-risk chemical factory, where in the past accidents due to malfunctioning had occurred, at one point resulting in the hospitalisation of 150 people. The applicants, invoking Article 2 and 8, did not complain about the authorities’ actions, but about their omissions to act. The Court then judged that public authorities must control emissions from industrial activities in order to prevent smells, noises or fumes. They had also violated the positive obligation to provide the public with information about the risks of continuing to live there. The Court did not consider Article 2 because it had already found a violation of Article 8, but two concurring opinions offer interesting new approaches on the applicability of the right to life in such situations.¹⁰⁵ Judge Walsh said that Article 2 “has also been violated” because it “also guarantees the protection of the bodily integrity of the applicants”.¹⁰⁶ According to Judge Jambrek: “The protection of health and physical integrity is, in my view, as closely associated with the ‘right to life’ as with the ‘respect for private and family life’.” Withholding information about health may namely also amount to *intentionally* depriving someone of his life – a requirement of Article 2. “It may therefore be time for the Court’s case-law on Article 2 to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life ... [It] also appears relevant and applicable to the facts of the instant case in that 150 people were taken to hospital with severe arsenic poisoning.”¹⁰⁷

¹⁰¹ *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009) (French translation) paras 107, 120; Council of Europe (n 68) 49-50.

¹⁰² Grant (n 57) 162; Fleurke and De Vries (n 57) 4-5.

¹⁰³ Through its interpretation the Court hereby introduced the requirements of informed process and consultation from the 1998 Aarhus Convention. *Taşkın and Others v Turkey* App no 46117/99 ECHR 2004-X 179, paras 107, 113, 119; Francioni (n 93) 49-50; Council of Europe (n 68) 51; Fleurke and De Vries (n 57) 5.

¹⁰⁴ *Guerra and Others v Italy* 116/1996/735/932 Reports of Judgments and Decisions 1998-I 210.

¹⁰⁵ *ibid* paras 12-16, 41, 60-62; Kravchenko (n 78) 531-532; Council of Europe (n 68) 52-53.

¹⁰⁶ Judge Walsh, Concurring Opinion in: *Guerra v Italy* (n 104) 22.

¹⁰⁷ Judge Jambrek, Concurring Opinion in: *Guerra v Italy* (104) 24.

Eighteen years later, a new and possibly revolutionary case made its entrance at the international human rights stage. Although the case is still dealt with in the Swiss legal system, it may proceed to the ECtHR given its heavy reliance on the rights in the ECHR. On 25 November 2016 *Verein KlimaSeniorinnen Schweiz* ('Senior Women for Climate Protection Switzerland') submitted a legal request to the Swiss government "to stop omissions in climate protection". The request was however rejected, and in response the Association launched an official legal complaint to the Federal Administrative Court on 26 May 2017, which is the first climate case ever to be heard by the Swiss judiciary. The group, with the apt nickname 'Swiss Grannies', consists of over 770 women of 65 years and older. The group aims to highlight the failures in climate protection by the government; wrongful omissions that they claim put their lives and future generations at risk. According to their claim, the government's climate policies are unlawful, because global warming will not be limited to the internationally agreed levels. They demand that the government will take all necessary measures to reduce GHG emissions to such an extent that Switzerland will meet the "well-below-2-degree-C-target", or does at least not succeed this target. In order to do this, Switzerland must accomplish a reduction of at least 25% below the 1990 baseline levels by 2020 (instead of 20%), and 50% by 2030 (instead of 30%) and implement more stringent mitigation measures. The claim is based on the national constitutional principles of precaution and sustainability, and on the human rights of Article 2 and 8 of the ECHR – with a focus on positive duties. Their reasoning is based on scientific research showing that older women are among the most vulnerable groups with regard to global warming and are most susceptible to heatwaves, through which their health is more severely impacted. They specifically stated that they refuse to wait until the moment when they have actually suffered harm, before they start proceedings.¹⁰⁸ Therefore, if this case makes it to the ECtHR via the Swiss domestic courts, it may come to a ruling in which both the right to life and the right to private life are combined with environmental protection and future generations.

2.2.2 The Inter-American Commission on and Court of Human Rights

The American institutions are famous for the protection of indigenous peoples, and it is in this context that most of the environmental jurisprudence has been developed. Their right to life is often indirectly protected through group claims for their right to property, cultural identity and environmental protection. These group claims oftentimes focus for instance on the ancestral use of their lands, which is simultaneously vital to their survival and which protects the environment.¹⁰⁹ For clarity's sake, this research is not concerned with the rights of indigenous peoples specifically, but since these cases happen

¹⁰⁸ *Klage Verein KlimaSeniorinnen Schweiz*, 25 October 2016; English summary of application; Press release Greenpeace, 25 October 2016, accessed at <<http://www.greenpeace.org/international/en/press/releases/2016/Swiss-Grannies-launch-legal-challenge-to-demand-stronger-climate-action/>>, <<http://www.lse.ac.uk/GranthamInstitute/litigation/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>>

¹⁰⁹ Grant (n 57) 166.

to deal with both the right to life and environmental protection, it does seem fit to briefly discuss the most important outcomes.

One case that deserves to be highlighted for its impact and because it directly concerns the right to life, is a petition that was filed by Inuit people. It is in general deemed to be one of the two key events that triggered the international dialogue on human rights and climate change.¹¹⁰ On 7 December 2005, the Inuit peoples of Alaska and Canada, represented by the Chair of the Inuit Circumpolar Conference, submitted a petition to the IACommHR requesting relief for violations of their human rights, which resulted from global warming and climate change. These violations were specifically alleged to be caused by “acts and omissions of the United States”,¹¹¹ because they then were (and still are) one of the largest cumulative emitters of GHG, and also refused to join the Kyoto Protocol. Because the United States had failed to adopt adequate GHG regulations within its jurisdiction, the resulting adverse impacts of climate change on the Arctic wildlife and environment violated a number of the Inuit peoples’ human rights, amongst which the right to life. They were forced to change their diet and were more prone to life-threatening accidents, drinking water was disappearing, heatwaves started to occur, and especially coastal communities were at risk. The Inuit people aimed for immediate and effective action to protect their rights, thereby invoking the American Declaration on the Rights and Duties of Man and several other international instruments.¹¹²

In November 2006, the Commission dismissed the Inuit people’s petition, because there was not enough information to determine whether the alleged facts truly caused violations of any of the rights in the Declaration. However, the petitioners’ request for a ‘thematic’ hearing was honoured in March 2007, with the goal of investigating the connection between climate change and human rights violations. The Inuit peoples had the opportunity to present evidence in demonstration of this link. It soon became clear that especially issues regarding the attribution of responsibility to specific States and transnational accountability, turned out to be very difficult to prove. The impact, however, does not lie in the outcome of the petition, but in the amount of attention it received. While back then the request seemed “quixotic”, in retrospect, “the Inuit petition was the first harbinger of a sea-change in how the international community thinks about climate change”.¹¹³ It also represented the first group attempt to directly link internationally recognised human rights to climate change, and as such serves as an inspiring precedent.¹¹⁴

¹¹⁰ The other one is the Male’ Declaration on the Human Dimension of Global Climate Change, adopted by the Small Island Developing States (SIDS) in 2007. UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, ‘The Status of Climate Change Litigation – A Global Review’ (2017) 12.

¹¹¹ Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005) 1.

¹¹² Such as the UNFCCC, the ICCPR and the ICESCR. The US are subject to the American Declaration as an Organization of American States member state; Article 1 is the right to life. Other rights amongst others: right to property, culture, health, a means of subsistence and residence. *ibid* 5-8.

¹¹³ UNEP Report (n 110) VII.

¹¹⁴ Kravchenko (n 78) 534-536; Shelton (n 83) 16-17.

Another interesting example is the case of the *Yanomami Indians* in Brazil before the Inter-American Commission. They accused the government of violating the American Declaration of the Rights and Duties of Men, by constructing a trans-Amazonian highway through their territory and by authorising the exploitation of resources. The Commission stated that the construction of a highway through a wild area in the petitioners' ancestral lands led to a violation of their right to life and physical integrity. The right to life provision in the ACHR was thus used to extend human rights protection to a community threatened by environmental destruction. In other words: the destruction of the environment affected their ability to enjoy their human rights.¹¹⁵

2.2.3 The African Commission and Court on Human and Peoples' Rights

Compared to the European and American system, not only procedurally but also substantively the African system seems to be the most receptive to connecting the right to life and environmental protection. The African Charter on Human and Peoples' Rights ('ACHPR') is the only regional instrument to provide for a substantive environmental human right, which, notably, is formulated as a peoples' right:

"All peoples shall have the right to a general satisfactory environment favourable to their development." (Article 24)

Moreover, the ACHPR protects both civil and political and social and economic rights, putting them on an equal basis and stressing their interrelationship. However, to date there has only been one case on the environmental human right before the Commission: the case of *SERAC v Nigeria*.¹¹⁶ Two NGOs complained on behalf of the Ogoni people, who were suffering from environmental degradation and subsequent human rights abuses from oil operations in the Niger Delta.¹¹⁷ It was alleged that the Nigerian government violated amongst others the right to life¹¹⁸ and the right to a satisfactory environment, through the actions of its agents and by its omission to protect these rights. Not only did the Commission uphold these specific rights, but it also read the right to food and the right to housing therein, which are both not explicitly provided for in the ACHPR. The ACommHPR thus set a precedent by emphasising the indivisibility, interdependence and interrelatedness of human rights, and focused specifically on the relationship between the environmental right and other rights. It also used a great deal of jurisprudence

¹¹⁵ Francioni (n 93) 52; *Yanomami Community v Brazil* (1985) Case 7615, IACommHR Report No 12/85 OEA/Ser L/V/II.66 doc 10 Rev 1, para 2.

¹¹⁶ Communication 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) Case no ACHPR/COMM/A044/1, OAU Doc CAB/LEG/67/3 rev 5.

¹¹⁷ The reader will note that this is again, as was the case with the Inter-American system, a complaint submitted on behalf of a minority people. Minority rights are not the focus, but it just happens to be the only case regarding the right to life and the right to satisfactory environment.

¹¹⁸ ACHPR art 4; *SERAC v Nigeria* (n 116) para 64.

of other international human rights bodies, and applied the environmental right as a peoples' right.¹¹⁹ The case may therefore serve as a precedent for a government violating human rights by not averting the negative consequences of climate change, as it did not fulfil its duty to protect its people and the environment, and for having to compensate and resettle the victims.¹²⁰

2.2.4 Concluding thoughts

In conclusion, it is interesting to see that the more flexible a human rights system seems to be in connecting the protection of the right to life and the environment from climate change, the less cases it has adjudicated. Moreover, generous requirements on standing do not always seem to play out in practice. The ECtHR, for one, has by far the strictest requirements on standing and *actio popularis*, and the Convention does not contain a specific environmental right. Nevertheless, it has managed to decide on a large number of cases, and has extended the interpretation of Article 2 and 8 in quite creative ways to ensure environmental protection. A considerable degree of progress has been made in recognising an environmental dimension in human rights. It however remains to be seen whether the right to life really is the most effective approach for this, since *Öneryildiz v Turkey* and *Budayeva v Russia* only concerned the lives of humans, not the environment itself. The right to respect for the private sphere turns out to be more successful on both accounts, although I find it doubtful that environmental degradation which interferes with one's physical integrity, still does not invoke the right to life. The IACommHR, then, where the standing requirements are a bit less stringent, manages to achieve a great deal by combining the right to life and environmental protection for indigenous communities. No matter how important that is, it does leave us with the question if individual people, who are not part of a minority group, could also successfully invoke a case. The ACommHPR, finally, has very loose standing criteria, but is again dependent on States' declarations of acceptance, severely limiting its sphere of influence. Moreover, the *SERAC v Nigeria* case has shown us how effective a substantive environmental right can be, but if the number of cases remains this limited, it does not add too much.

¹¹⁹ *ibid* paras 50-52, 54, 57, 61-63, 65, 67.

¹²⁰ A similar case was brought before the ECOWAS Court, *SERAP v. Nigeria*, in which the Court emphasised the connection between the quality of human life and the quality of the environment. *Kravchenko* (n 78) 536-537; *Grant* (n 57) 167-170.

Chapter 3 – The Lack of a Substantive Environmental Right

As has been shown in the previous chapter, the current framework of international human rights law is not completely adequate in effectively protecting people's human rights against the impact of environmental degradation and climate change. Admittedly, human rights courts have found creative ways to expand the scope of protection to some extent, but oftentimes the existing structures fall short of what individuals actually need – let alone that the environment itself is protected in some way. The case law of the regional bodies discussed illustrates that a certain environmental dimension is now recognised in the commitments and obligations of various treaties and conventions. However, this dimension has only originated as an extension of other human rights. It is always regarded within the structure of an individual right, not a collective one with a communal dimension (the African Charter being the exception), let alone as a potential right belonging to future generations. As Francioni argues, whilst sometimes operating as a provisional and damage control solution, the current human right framework is not well-equipped to deal with environmental degradation and its spread-out effect on communities and societies. Moreover, it “remains blind to the intrinsic linkage between the individual and the collective interests of society”. We therefore need jurisprudence that acknowledges the collective dimension and the *sine qua non* of a clean environment for human security and welfare. Alternatively, it also makes one wonder whether human rights are the proper and most effective legal tools in this regard.¹²¹

If the current human rights approach is apparently unsatisfactory to achieve human rights and environmental protection, perhaps an explicit, substantive human right to a clean or healthy environment is.¹²² Would that not make things much easier for the protection of one's human rights against climate change, with possibly the indirect benefit of protecting the environment as well? This leads us to the question why such a right is not yet in existence, and more importantly whether it would result in more effective legal protection. Simply extending the human rights catalogue is not that easy and possibly not desirable, and if such a right would only have been beneficial, it would likely have been established already. Instead, there is a great deal of confusion and discussion amongst legal scholars about the right to a clean environment. For example, why is such a right lacking, is that really a problem, what should it look like and what are some of the stumble blocks and (dis)advantages? Additionally, is human rights law really the most suitable framework to support the link between the individual and the collective interests of a society in a clean environment? This chapter aims to create some clarity and cover the most important lines of reasoning. The idea of a substantive right is not something of the past years, but has already been in the making for a few decades at UN level. We will therefore start with a brief overview of the most formative developments.

¹²¹ Francesco Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) *The European Journal of International Law* 41, 42-44 (quote 44).

¹²² Since there is no consensus about the precise formulation of such a right – as will be illustrated in section 3.2.2. on definitions – I will use terminology such as 'clean' or 'healthy' interchangeably.

3.1 Historical background

Whilst the urgency of climate change and its consequences for human rights has only been a realisation of predominantly the past decade,¹²³ the link between the protection of the environment and human rights was established no less than 45 years ago. In 1972, the first UN conference on the environment took place in Stockholm, where the foundation was laid for recognising concrete links between the enjoyment of human rights and the environment and which is by many seen as the birth of modern international environmental law. Two extracts of the Stockholm Declaration on the Human Environment are particularly important:

“Preamble: Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.

Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹²⁴

The Declaration presented an innovative approach as it aimed to safeguard human rights and human dignity *through* environmental protection. Principle 1 may sound like a separate human right, but it is not – it recognises that in order to enjoy freedom, equality and adequate conditions of life, one needs an environment of a particular quality. That is rather different from recognising an independent right to a clean environment. Nevertheless, the Declaration did influence how other human rights would be interpreted and extended, it introduced the concept of intergenerational responsibility, and combined human rights and ecological approaches. It moreover resonated to the language of human rights treaties: Principle 1 can be seen as a commitment *erga omnes* for the protection of a public good, and not just an inter-State reciprocal obligation.¹²⁵ However, the Declaration is not legally binding, and the UN General Assembly did not endorse the ‘right’ in Principle 1 as customary international law, in contrast to for example principles 21 and 22.¹²⁶

¹²³ See for example the first HRC resolution on human rights and climate change (n 36).

¹²⁴ Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) UN Doc A/Conf.48/14/Rev. 1, 11 ILM 1416 (Stockholm Declaration) Principle 1.

¹²⁵ One of the fundamental differences between public international law and human rights law is that the former is based on a reciprocal relationship between States, whereas the latter is dependent on State duties and obligations towards individuals. Francioni (n 121) 44; Conor Gearty, ‘Do Human Rights Help or Hinder Environmental Protection?’ (2010) 1(1) *Journal of Human Rights and the Environment* 7, 12; Stephen J Turner, *A Global Environmental Right* (Routledge 2014) 25.

¹²⁶ UNGA Res 2994 (XXVII) ‘United Nations Conference on the Human Environment’ (1972) General Assembly Official Records Twenty-seventh Session, Supplement No. 30 (A/8730) 42; UNGA Res 2996 (XXVII) ‘International Responsibility of States in Regard to the Environment’ (1972) General Assembly Official Records

This flying start unfortunately got halted at the United Nations Conference on Environment and Development in Rio in 1992. Here ‘sustainable development’ emerged as the core concept, meaning that the link between human rights and environmental protection receded into the background (only human *beings* and the environment were connected). Conspicuously, Principle 1 proclaims:

*“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”*¹²⁷

Compared to the Stockholm Declaration, this is a far cry from human rights language.¹²⁸ The Convention mainly concerned itself with controlling the impact of sovereign power, and with reconciling economic development and environmental protection – which is arguably still the prevalent focus in the international community today. It consequently has been heavily criticised for its “delirious anthropocentrism”.¹²⁹ This is not to deny the huge progress that was made in the field of sustainable development thanks to the Rio Declaration, which has also helped improve the advancement of human rights. Indeed, human rights are about putting *humans* at the forefront. However, specifically in light of the freshly established connection between human rights and environmental protection, it is quite a blow.

Two years later, Madame Fatma Zohra Ksentini, Special Rapporteur on Human Rights and the Environment for the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities, submitted her Final Report in which she aimed for the adoption of a “right to a satisfactory environment” at UN level.¹³⁰ Included in the report were a set of Draft Principles on Human Rights and the Environment, wherein both concepts are again explicitly linked, and basically represent an elaboration of Principle 1 of the Stockholm Declaration. The most important principles are:

1. *“Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.”*

Twenty-seventh Session, Supplement No. 30 (A/8730) 42-43; Günther Handl, ‘Human Rights and Protection of the Environment’ in A Eide C Krause and A Rosas A (eds), *Economic, Social and Cultural Rights: A Textbook* (Brill Nijhoff 2001) 307; Sumudu Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law’ (2002-2003) 16 *Tulane Environmental Law Journal* 65, 74

¹²⁷ Rio Declaration on Environment and Development (12 August 1992), United Nations Conference on Environment and Development 3-14 June 2012 A/CONF.151/26 (vol 1) / 31 ILM 874.

¹²⁸ Notice for example the different wording: “entitled to” versus “the fundamental right to”.

¹²⁹ Quote: Pallemmaerts, in Handl (n 126) 308; Atapattu (n 126) 78; Francioni (n 121) 45; Gearty (n 125) 18; Turner (n 125) 25.

¹³⁰ UN ECOSOC ‘Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned Human Rights and the Environment – Final Report Prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur (1994) E/CN.4/Sub.2/1994/9, para 261.

2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.

4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.”¹³¹

In subsequent provisions the right to a healthy environment is integrated with other human rights. As a corollary the right to be free from pollution and environmental degradation, and to protection of different parts of the environment are added.¹³² Besides these substantive rights, the Draft Principles also contain procedural rights, and it is advocated that sustainable development connects the right to development and the right to a healthy environment.¹³³ The latter is obviously still part of *lex ferenda*, not *lex lata*. However, the Report is not devoid from criticism: Ksentini argues that since it has been recognised that certain environmental problems are global, requiring communal effort, this should then logically lead to the recognition of an individual right. In reality, however, while the link between human rights abuses and environmental damage is nowadays recognised, one thing clearly does not necessarily lead to another – there is still no such right. No substantive action has been taken to further develop this soft-law instrument, not by the Human Rights Commission nor at inter-State level. This is partially understandable, since for example the formulation of especially Principle 4 is rather far-fetched and may even be deemed a failing legal construct. It is completely unclear how such a right could ever be invoked in a court. This therefore concludes the progress made so far at the international level on a new substantive human right.¹³⁴

3.2 Formulating a substantive right

There are currently three major lines of thought in the debate on the right to environment, and whether human rights and environmental protection can complement each other or merely conflict. The first group of theorists argues that the goal of environmental protection is to improve the quality of human life (in general, not referring to the right to an adequate standard of living), which means that environmental issues are part of human rights. Opponents contend that the complex global ecosystem, of which humans are just one element, should be preserved for its own sake. Their main goal is thus to accomplish environmental protection. A third and final group holds that human rights and the environment represent differing but overlapping values – which is the most prevalent view currently

¹³¹ *ibid* Annex 1, 22-23.

¹³² Draft Principles on Human Rights and the Environment (‘Ksentini Draft Principles’) in: *ibid*, principles 5-10.

¹³³ Thereby making an attempt to solve the criticism of the Rio Declaration.

¹³⁴ Handl (n 126) 308; Atapattu (n 126) 79-83, 92, 97 Francioni (n 121) 45; Gearty (n 125) 18-19.

reflected in law and policy. Shelton agrees with this last view and submits that since environmental and human rights protection share a core of common objectives, despite the possible conflicts, an overlapping approach could boost both fields simultaneously. To this end, a clearly and narrowly defined right to a healthy environment would contribute.¹³⁵

3.2.1 The added value of a new substantive right

According to Shelton, “[n]ot every social problem must result in a claim which can be expressed as a human right”.¹³⁶ The question is thus why problems caused by environmental degradation and climate change should be translated into a human right, and what the actual benefits would be with the currently existing legal spectrum kept in mind. The legal architecture is organised in such a way that the legal status of an actual human right to the environment would provide it with the weight that is needed to balance it against other human rights. Normally, when two human rights are clashing, the practice in courts is to equilibrate them to determine which one should prevail in a specific case. As a prerequisite, both interests need to have the status of a right – one cannot equally balance two interests of a different status. If a clean environment is thus not recognised as a common interest in the form of a human right, it is likely that it will succumb to other interests that do have the status of a right. For example, in the ICESCR the essential features of a clean environment are to some extent already protected through the right to an adequate standard of living and the right to health.¹³⁷ At the same time, however, the Covenant stipulates in Article 1 the right of people to “freely pursue their economic, social and cultural development” and to “freely dispose of their natural wealth and resources”. If it would thus come to a conflict between economic development – which is enshrined as a human right – and natural resource exploitation or environmental protection – which is ‘only’ an interest, the former would probably prevail. Thus in order to be able to equally balance the necessity of a clean environment and its effects on human rights against other human rights, it must be elevated by turning it into a distinct right.¹³⁸

Secondly, in line with the previous argument, a separate right would furthermore be of great value to victims. It would prevent them from having to rely on another existing human right and prove that specifically this has been violated by environmental degradation – not rarely a difficult challenge, which is also dependent on the court’s willingness to establish that connection. For example, in case of pollution caused by industry, if a substantive right would exist a victim would only have to prove that the pollution has exceeded a particular level; not necessarily that his health or private sphere has already been infringed with by this pollution. Thus instead of having to wait for injury to take place, the victim

¹³⁵ Dinah Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’ (1991-1992) 28 *Stanford Journal of International Law* 103, 104-106.

¹³⁶ *ibid* 121.

¹³⁷ Respectively Art 11 and 12 ICESCR. Only in the latter “the improvement of all aspects of environmental and industrial hygiene” is mentioned.

¹³⁸ Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23(3) *The European Journal of International Law* 613, 628-629.

could take immediate and preventive action. This would be especially of relevance to protecting future generations, which is inherently dependent on preventive action. This will, however, be extensively discussed in chapter 5. In short, a right to a healthy or clean environment will provide victims with a much stronger legal basis, and would function as an extra tool to seek redress for wrongs committed.¹³⁹

Thirdly, on a more conceptual level, a new human right represents a crucial ethical component in the response to climate change: striving to avoid that the poorest and most vulnerable people will suffer the most. The moral weight and insistence of human rights on equality and individual dignity forces decision-makers to look at both human and global consequences of their actions, thus it may add to political pressure. In other words, a new human right will help in reinforcing universal empathy.¹⁴⁰

3.2.2 What should a new substantive right look like?

Presuming we agree on the necessity of establishing a new right, the next question would be how exactly this would be defined and delineated. Legal scholars have awarded the right to environment with a wide variety of adjectives: healthy, clean, safe, secure, adequate, decent, viable, satisfactory – to just name a few. It is not my goal to establish the best definition here, but this plethora of options does demonstrate the dilemma. Atapattu, for example, argues in favour of the right to a healthy environment, since this would be a simple, flexible approach that is easily adapted to various situations. Claimants would only have to prove that a certain activity caused an unhealthy environment to live *in*, not necessarily that actual damage to their health has already manifested itself at that point. The problem of establishing causation is thereby also circumvented. A drawback of this approach is its inherently anthropocentric character, as it does not include any ecocentric elements.¹⁴¹

Another approach is followed by the Ksentini Draft Principles, in which not only a new right is formulated but also the rights flowing from this. These include, besides the right to health, food and water, working conditions and adequate housing: freedom from pollution, protection and preservation of the environment, and timely assistance in case of a natural or other disaster.¹⁴² Thus instead of stumbling upon the precise definition of a right to environment, it is rather based on corollaries: if you have a right to a healthy environment, you, amongst others, also need a right to be free from pollution (because not having the latter would impair the former). A right to environment then is not only based on preventing pollution, but also on conservation, which thus represents the other side of the coin.¹⁴³

Others argue in favour of taking a more economic-social direction. Boyle submits that a new right should address the environment as a public good. In this form, it is best established in the context of economic and social rights, as it would complement the already existing safeguards. The ICESCR's

¹³⁹ Atapattu (n 126) 90-91, 98-99, 114.

¹⁴⁰ Boyle (n 138) 633; Gearty (n 125) 14, 21-22.

¹⁴¹ The ecocentric approach entails that environmental issues do not only concern human beings, but a much larger category of species – the entire ecosystem, so to speak. Atapattu (n 126) 111-112.

¹⁴² Ksentini Draft Principles (n 130) art 5-12.

¹⁴³ Atapattu (n 126) 97.

UN Committee on Economic, Social and Cultural Rights would then be the best platform to review such a right, and to balance it against competing economic objectives.¹⁴⁴

A right to a healthy environment is often categorised as a so-called third-generation right, which group encompasses solidarity rights.¹⁴⁵ According to the inventor of third-generation rights, Karel Vasak, this is simply based upon the realisation that certain rights are more prone to affect groups of people than individuals – hence the need for solidarity. This could be a very fruitful approach for protecting the rights of future generations – who we cannot help but see as a group, since they cannot be split up as individuals yet (but again, the reader is referred to Chapter 5 for this). Vasak envisioned that solidarity rights can only be realised through the joint efforts of various actors (individuals, the State, public and private bodies, and the international community), and that these can be invoked against the State as well as demanded from it. The former feature in particular is according to Vasak what distinguishes third-generation rights.¹⁴⁶ While a right to the environment does seem to fit within this description, Shelton does not regard this feature as distinguishing at all: she claims that all human rights are to some extent dependent on concerted efforts of different actors, and that most human rights violations have an impact on more than one individual.¹⁴⁷

Despite the controversial nature of third-generation rights, many scholars nevertheless do seem to agree on some sort of a collective dimension regarding the beneficiaries of a new right to the environment. A human right is naturally inherently individualistic, but one could approach it from a more collective standpoint if one considers the environment to be a public good. Simply put: if an individual is affected, it functions as an individual right; and if many individuals are affected, it functions as a collective right – which does not immediately translate it into a solidarity right. It ultimately is about taking into consideration the collective dimension of human rights affected by environmental degradation – albeit in the form of existing human rights or a new one – as opposed to the reductionist, individualistic use of most human rights.¹⁴⁸

Concerning the identification of obligations, as goes for all human rights, the State is the main protector and also has a due diligence obligation to take positive action to protect individuals' rights against infringements by third parties. This positive duty encompasses enacting laws and regulations, overseeing their implementation and ensuring effective remedies; in combination with disclosing information, encouraging public participation in decision-making processes and providing environmental impact assessments. All in all: the substantive right would have to be complemented by procedural rights and safeguards, in combination with an ecocentric approach.¹⁴⁹

¹⁴⁴ Boyle (n 138) 628, 632-633.

¹⁴⁵ This in addition to first-generation – civil and political – and second-generation rights – economic, social and cultural. I do however not wish to go into the discussion about the value of different 'generations', it is simply one of the ways to consider an environmental right.

¹⁴⁶ Vasak, in: Atapattu (n 126) 109-110.

¹⁴⁷ Shelton (n 135) 124-125.

¹⁴⁸ Atapattu (n 126) 113; Francioni (n 121).

¹⁴⁹ Please see footnote 141 for a brief explanation of ecocentrism. *ibid* 113.

3.3 Inherent problems with a substantive right

Unfortunately it is not that simple nor self-evident to establish a new human right, let alone a new human right for something as complex as the environment. The following three problems are the most important ones to consider.

3.3.1 Anthropocentrism

The term anthropocentrism means that matters are considered from a human-centred point of view. It entails that human beings are the most significant entities of the universe and are superior to nature: our lives have intrinsic value while nature and the environment merely consist of resources that can be exploited – a view that is opposed to for example ecocentrism.¹⁵⁰ The shared objection to a new right amongst environmentalists consequently is that the *human* right to the environment, as goes for all human rights, is inherently focused on humans, leading to the exclusion of other species. If we were to expand for example the right to life by establishing such a new right to preserve human welfare and well-being, the natural environment is “treated as instrumental means to a distinctly human end”.¹⁵¹ This may be deemed morally incorrect, since human beings are part of an ecosystem and not the only species living in this world. The outcome of this discussion naturally depends on the envisioned purpose of the right: whether one aims to protect humans or the environment. Since the objective of this thesis is also anthropocentric, as it focuses on using human rights as an instrument for protection against climate change, a new human right grounded in anthropocentrism does not necessarily pose a considerable problem from this viewpoint. It is an inevitable characteristic of a human-made legal system.¹⁵²

Could such an anthropocentric right also benefit the environment in some way? A human rights approach to environmental protection does not necessarily exclude or deny rights to the natural world, but could function as complementary tool. Perhaps the anthropocentric nature of human rights is not black-or-white, but more a matter of degree. It is unavoidable that environmental awareness focuses in the first place on humans and their rights, but this may be expanded to concerns for the wider ecosystem. Even if there is a growing perception that the existence of primarily *our* lives is threatened through the destruction of the environment, instead of us being concerned about the ecosystem for its own sake, we nevertheless achieve the same goal: protecting both ourselves and the environment. The premise is that by holding governments accountable for human rights violations caused by climate change, with that extra protection the environment will indirectly also be taken care of. Moreover, it is uncertain if an

¹⁵⁰ Jonathan Padwe, ‘Anthropocentrism’ *Oxford Bibliographies* (19 May 2015) <<http://www.oxfordbibliographies.com/view/document/obo-9780199830060/obo-9780199830060-0073.xml>> accessed 7 June 2017.

¹⁵¹ Michael R Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’ in AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996) 1, 14.

¹⁵² *ibid* 14-15; Atapattu (n 126) 113-114.

ecological rights-based approach truly is the best way for protecting the natural world, non-human species and non-sentient entities. Perhaps this is more effectively achieved through an anthropocentric approach than an ecological one. Indeed, we can discern a shift towards weak anthropocentrism, in which we exercise a human rights approach while simultaneously taking into account the intrinsic value of the environment. It is about reconciling the two agendas.¹⁵³

3.3.2 Indeterminacy and scope

As has been shown in the previous part, there is no general consensus yet how to define a right to the environment. This is for one caused by the difficulty of translating environmental standards into a right: the exact (technical) qualitative and quantitative dimensions of environmental protection are not easily translated into legal terms. A correlating problem is then to agree on these standards: what standard of life do we envision, and do we only aim to protect human life and health or also the aesthetic value of nature? These are all moral choices. Another question is whether such a right merely encompasses remedies, or also has a preventive function.¹⁵⁴

These questions are too complex to solve here, but is it truly a problem if the indeterminacy surrounding the precise definition remains? On the one hand, Handl submits that the cause of environmental- and human rights protection will not be improved by proposing a generic human right to the environment. This will only add to the confusion and vagueness.¹⁵⁵ On the other hand, Boyle contends the same vagueness surrounds for example the concept of sustainable development, but this has not prevented the UN from promoting this as a central objective in its policies. In other words: “Indeterminacy is thus a problem, but not necessarily an insurmountable one.”¹⁵⁶ Anderson pleads in favour of detailed textual definitions, and recommends asking oneself in every particular situation what exactly constitutes a violation of the right. Despite these dilemmas, one should also keep in mind that the main drive behind the evolution of human rights law is judicial interpretation. Several human rights are broadly formulated, but the judiciary is there to refine and interpret such rights – as we have seen with the ECtHR. Furthermore, human rights continuously confront us with questions of morality, thus the judiciary is already skilled at evaluating competing moral claims.¹⁵⁷

¹⁵³ Anderson (n 151) 14; Atapattu (n 126) 113-114; Catherine Redgwell, ‘Life, The Universe And Everything: A Critique Of Anthropocentric Rights’ in AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996) 71, 73-74, 83, 86-87.

¹⁵⁴ Anderson (n 151) 10-12.

¹⁵⁵ Handl (n 126) 313.

¹⁵⁶ Alan Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’ in Rights’ in AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996) 43, 51.

¹⁵⁷ Atapattu (n 126) 112-113; Anderson (n 151) 11-12.

3.3.3 Redundancy

Lastly, some commentators have voiced their fear that the recognition of new rights detracts attention from existing rights. On the one hand, these new rights might overpower and devalue the ‘old’ ones. Adding new rights to the catalogue does not help, nor do they contribute to the credibility and integrity of the system. This has often been said because some rights have been hastily proclaimed, with the result that their desirability, form and scope was not carefully deliberated upon.¹⁵⁸ That again results in vague language, meaning that States can for example vote in favour of a resolution, without committing themselves to any specific formulation or measure. A new substantive should furthermore be formulated in such a way to not confuse it with procedural rights, or be contradictory to already existing case law – but rather be a completely new right. On the other hand, it may be plainly necessary to translate new claims into rights if emergent threats are touching upon human dignity and -well-being, and if these cannot be solved anymore through individual self-help or at domestic level. The human rights system is dynamic, and should be able to respond to changing needs and perspectives.

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

3.2.4 Concluding thoughts

A new human right to environment is still a rather controversial measure. Although there are enough convincing arguments in its favour – an equal status for the environment compared to other human rights, enhanced protection for victims – the problems of individualism and anthropocentrism put spikes in the wheels of a new right. More practical problems, such as its definition and redundancy, are easier to overcome. If however a new right were to be introduced in the future, it should be drafted in a thorough manner, for example supplemented by comments and advice from (non-)governmental organisations. Given the urgency of the problem that climate change is, it seems that in this case a new human right would not be an unwanted luxury – just perhaps not the fastest solution.¹⁵⁹

¹⁵⁸ Such as, besides the right to environment in the Stockholm Declaration, the right to development or the right to peace.

¹⁵⁹ Philip Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 *American Journal of International Law* 607, 609, 613; Shelton (n 135) 121; Atapattu (n 126) 110; Boyle (n 138) 628.

Chapter 4 – Public Interest Litigation

Our analysis thus far, on the options of greening existing human rights or establishing a new substantive right to the environment, has confronted us with mixed results. One point of criticism that came forward is the individualistic focus of the current human rights system, while the effects of climate change are more often than not collective, rather affecting groups of people.¹⁶⁰ An alternative approach or possible solution for this could be Public Interest Litigation ('PIL'). In this legal strategy, a group of people is represented by for example an NGO with the goal of protecting a public interest – in this case, the protection of human rights and the environment. Ostensibly this may sound very promising, but as will become clear the matter is not entirely straightforward. In the following chapter I will therefore explore what PIL exactly entails, its current legal status before human rights courts, (dis)advantages and the suitability of human rights courts, other options or solutions, and finally discuss relevant case law that supports PIL. The emphasis of this discussion will be on the judicial review of acts and omissions by public authorities, since our focus is on PIL before human rights courts, to which only States are party and who are thus the guarantors of these rights. However, in light of the due diligence obligation of States to protect their citizens' fundamental rights against violations caused by third parties, such as companies, a case related to this will also pass in review.

4.1 PIL explained in a nutshell

Broadly speaking, PIL may be defined as litigation in the interest of and for the protection of the public in general. The status quo in most national and international law systems used to be that only an aggrieved party that was personally affected could appear before a court to seek a remedy. Thus even if an action was in violation of the law, without a demonstrable victim nobody could remedy such actions. This changed with the coming into force of the Aarhus Convention – focusing on access to environmental information, public participation in decision-making and access to justice in environmental matters – which also allowed NGOs to bring claims.¹⁶¹ Nowadays, PIL is used as a strategy by claimants to try and coerce the safeguarding of a public interest and the changing of the status quo via the judiciary. PIL cases are instigated in light of an alleged shortcoming by the government, and are as such an important weapon for marginalised groups. They are often focused on the future and put emphasis on idealistic aspects. However, complicating factors prevalently popping up are scientific uncertainty surrounding the assumed risks and the increase of transboundary issues –

¹⁶⁰ This is explained in more detail in sections 2.2 and 3.2.2.

¹⁶¹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, 38 ILM 517 (Aarhus Convention) art 9(2); Christian Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?' (2008) 20(3) *Journal of Environmental Law* 417, 419.

two problems that are oftentimes at stake in PIL cases concerning climate change and the environment.¹⁶²

On behalf of what or whom are PIL claims made? One can think of public interests, public values or principles, or the interests of a particular group. The literature is awfully quiet on a definition of PIL, or what does (not) count as such. It seems therefore most reasonable to try and establish what a PIL case is in the particular context of this research. Firstly, it is important to make a distinction between group actions and PIL actions. In the former category, the persons whose interests are to be promoted can be individualised. One could for example think of PIL actions initiated by a particular indigenous groups, as frequently happens in the Americas or Africa. In the latter category, the interests cannot be individualised since these are of such a general nature that they concern many or even all members of a society. The protection of human rights and the environment that we are concerned with, falls in the second category.¹⁶³ Admittedly, one could argue that some PIL cases are in the interest of a particular group, such as present and future generations, or senior women. The size of these groups however prevents them from turning into a group claim – they concern a large group in a society, and as long as their interest is in something as comprehensive as curbing climate change or dealing with human rights violations, it counts as a case in the public interest. Next, public values or principles seem to have an inherent value judgment – how can one decide for others what a public value or principle is? Rather, protecting the environment, now and for future generations, seems to be a public interest: there is no value judgment in curbing climate change, it really is in everyone’s interest.

The follow-up question is of course what then exactly is of public interest, because “[n]ot everything that is of interest to the public is of public interest”. One could think of a couple of criteria to establish a case of PIL, such as: a public interest in the outcome of the litigation has to be discerned; there is no personal, proprietary or pecuniary interest in the outcome of the case for the claimant (or it at least does not economically justify the litigation); and the litigation raises issues of importance beyond the immediate interests of the parties.¹⁶⁴ If we apply this to environmental litigation, the requirements seem to be complied with quite easily. The importance of the environment has been elaborated on before; moreover it has been referred to as a “common concern” or “common heritage” of mankind, thereby covering the first and third requirement.¹⁶⁵ Regarding the second criterion, the European Commission has stated that “the frequent lack of a private interest as an enforcement driving force” is a characteristic

¹⁶² Liesbeth Enneking and Elbert de Jong, ‘Regulering van Onzekere Risico’s via Public Interest Litigation?’ (2014) 23 *Nederlands Juristenblad* 1, 1-3; Rob van Gestel and Marc Loth, ‘Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?’ (2015) 37 *Nederlands Juristenblad* 1, 6.

¹⁶³ Berthy van den Broek and Liesbeth Enneking, ‘Public Interest Litigation in the Netherlands, A Multidimensional Take on the Promotion of Environmental Interests by Private Parties Through the Courts’ (2014) 10(3) *Utrecht Law Review* 77, 83.

¹⁶⁴ Schall (n 161) 419.

¹⁶⁵ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Preamble and art 136; UNEP Convention on Biological Diversity (1992) 1760 UNTS 79, 31 ILM 818, Preamble.

of environmental law.¹⁶⁶ Therefore, it is safe to say that litigation instigated with the aim of protecting the environment – and thereby protecting human rights – is in light of the public interest.

A crucial role in PIL is played by NGOs, who are of great importance to the protection of both human rights and the environment, using the law as a tool to seek policy changes. It is increasingly accepted that they not only play a role in the negotiation of treaties and protocols and partake in compliance mechanisms, but also bring matters to court – matters which are often in the public interest. The already discussed *Urgenda* case represents a clear example of this. It is consequently important to include NGOs in this analysis.¹⁶⁷

4.2 The current legal status of PIL before human rights courts

PIL sounds like a promising and empowering concept, but has thus far not promulgated itself convincingly at the international level – most (successful) examples originate from national jurisdictions.¹⁶⁸ The question therefore is if there is a possibility to bring forward PIL cases before the international human rights courts – the ECtHR, IACtHR and ACtHPR – and if not (directly), if we can think of alternatives. The requirements to initiate and continue PIL proceedings depend on two pillars: firstly, the procedural side regarding the rules of admissibility, which represent the law of standing *in abstracto*. This is then however closely linked to the second pillar of the protected substantive rights. The following analysis will thus show how the outcome of the admissibility rules can be applied concretely to the substantive side, which helps in assessing the consequences for PIL.

As a short recap of the procedural rules of admissibility in Chapter 2, one should note that the victim requirement is key. At the ECtHR, the claimant must according to Article 34 ECHR be a victim, and a bearer of one of the Convention's substantive rights. It is thus impossible to initiate a PIL if one is not a right-bearing victim. The requirements before the IACtHR are somewhat more liberal: the claimant does not have to be a victim him/herself, but there must be a concrete human rights violation and specific victims must be identified. Here too, *actio popularis* is not an option. In the African system, the claimant does not have to be a victim him/herself, but only needs to show that a concrete human rights violation has taken place and has to identify victims as far as possible. PIL is therefore surely welcomed here. The differences between these three systems are interestingly enough reflected in the substantive rights, because the smaller and the more individualistic the range of protected rights is, the stricter the requirements for standing are. The ECHR, for one, has very rigid rules for standing and only protects civil and political rights; the ACHR is a bit more flexible regarding standing, and has formulated

¹⁶⁶ European Commission, 'Implementing Community Environmental Law' COM (1996) 500 final <<http://aei.pitt.edu/4117/1/4117.pdf>> accessed 21 June 2017, para 38.

¹⁶⁷ Schall (n 161) 420; Otto Spijkers, 'The Urgenda Case: A Successful Example of Public Interest Litigation for the Protection of the Environment?' (2017) 1 (forthcoming) 3.

¹⁶⁸ For example, many organisations in India, South Africa and the United States used PIL to force governments to take care of their needs, such as housing or healthcare. Enneking and De Jong (n 162) 3.

some economic, social and cultural rights; whereas the very receptive ACHPR protects both strands of rights, including specifically peoples' rights.¹⁶⁹

What then happens if we look more closely at the concrete application of these rules to substantive rights, does that leave any room for PIL? Three major rules can be deducted from the case law. First of all, as has been discussed before, the European system does not have a right to protect the environment nor does it address these issues specifically, but tends to do so indirectly through other rights. A handful of cases strikingly illustrate the Court's approach to standing. It has made very clear that it does not allow room for PIL if the victim is not undeniably determinable. In *Balmer-Schafroth v Switzerland and Athanassoglou v Switzerland*, the Court held that the parties must show they were personally exposed to a not only serious, but also specific and imminent danger. Since there merely was a general danger in relation to nuclear power plants, neither the necessary link nor the imminent danger were proven. Relying on Article 6 ECHR was also not an alternative, since there was no unlawful interference with their rights, as the judges decided in their eagerness to avoid *actio popularis*.¹⁷⁰ Secondly, the Court ruled in *Kyrtatos v Greece* that the Convention does not protect the environment itself from general deterioration, but it simultaneously made a peculiar categorisation of the environment: if the case had not been about a swamp but about a forest, the outcome could have been different. The deliberation seemed to be based on the value of this particular environment to humans.¹⁷¹ Finally and more promising, in *Asselbourg and Greenpeace v Luxembourg*, regarding the part of the claim that belonged to Greenpeace, the Court held that even though the NGO was not itself a victim, it could nevertheless represent its members or employees. However, it also decided that the risk of a future violation does not confer the victim status on an individual applicant, thereby dismissing a precautionary approach.¹⁷² All in all, a clear violation of the law cannot be remedied by PIL if a discernible victim or a direct link is lacking, and one may only have a legitimate interest in those type of environmental resources with an objective use value and direct impact on the individual. The European system, we may conclude, is thus far from being susceptible to PIL.

Furthermore, in case of environmental degradation the American system also mainly operates through already existing rights. Its frequent reliance on the European jurisprudence is echoed in the case law examples. An important case is the abovementioned *Yanomami Indians v Brazil*, in which the right to life was at stake. Here the case was not filed by the Indians themselves, but by several individuals

¹⁶⁹ Schall (n 161) 420-425.

¹⁷⁰ As Pavoni shows in his chapter, invoking Article 6 ECHR (the right to a fair trial) is also a viable way for environmental decisions. Riccardo Pavoni, 'Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight' in F Lenzerini and AF Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014) 334, 344-350; *Balmer-Schafroth and Others v Switzerland* Reports of Judgments and Decisions 1997-IV, para 40; *Athanassoglou and Others v Switzerland* [GC] App no 27644/95 ECHR 2000-IV 173, para 52.

¹⁷¹ *Kyrtatos v Greece* App no 41666/98 ECHR 2003-VI 257, para 53.

¹⁷² *Asselbourg and Others v Luxembourg* (dec.) App no 29121/95 ECHR 1999-VI, para 1.

who were implicitly recognised as their representatives, and who also won.¹⁷³ In *Metropolitan Nature Reserve v Panama*, however, a petition by an individual on behalf of his fellow citizens regarding the construction of a public roadway through the nature reserve, was declared inadmissible since no individual victims had been identified.¹⁷⁴ Lastly, the African system mainly stands out because of a distinct right for the environment that was defended in the aforementioned *SERAC v Nigeria* case, underlining the ample room for PIL. This is illustrated by the fact that the case was initiated by two NGOs which were not affected themselves, broadening the *locus standi*, and the Commission's flexibility in acknowledging human rights violations.¹⁷⁵

4.3 The (dis)advantages of a PIL approach

In line with the Rio Declaration and the three pillars of the Aarhus Convention,¹⁷⁶ PIL helps to legitimise and might even improve the quality of decisions. Moreover, it is a tool to exercise control over the public authorities, and to strengthen the rule of law through judicial review. Since many regulations concerning the environment especially suffer from a lack of interest in enforcement, PIL is a particularly relevant addition to this sector. It may also help in pushing marginalised groups or cases of urgent matters to the forefront, and forces public authorities to be accountable and not stand by idly. Regarding access to justice for NGOs, specifically, PIL conduces to objective and impartial lawsuits, and improves the rationalisation of litigation relevant for the environment and human rights. Oftentimes NGOs have the advantage over individuals of being better involved in the subject matter and they have better access to resources, which increases their capabilities of effectively instigating a lawsuit.¹⁷⁷

These are however general advantages, which do not all necessarily apply to PIL before the ECtHR or IACtHR. Hence the need is underlined to critically assess whether PIL would genuinely add something to the human rights systems, and whether the courts are the right forum to address such issues in this structure. A first, rather crucial, worry concerns the suitability of the human rights courts: are they the right forum to address PIL issues regarding the environment? It has for example been postulated that the judges lack sufficient expertise for deciding on environmentally technical cases. More importantly, one must keep in mind that the rights systems of the ECHR and ACHR are in first instance to be protected by national courts – one can only bring a case to the human rights court if all available national remedies have been exhausted. Perhaps contradictory, but improving democratic access should happen at the national level; “[b]ringing a claim before these international bodies can thus not be said

¹⁷³ *Yanomami Community v Brazil* Case (1985) 7615, IACommHR Report No 12/85 OEA/ Ser L/V/II.66 doc 10 Rev 1.

¹⁷⁴ *Metropolitan Nature Reserve v Panama* Case (2003) 11.522, IACtHR Report no 88/03 OEA/SerL/V/II.118 Doc 70 Rev 2 at 524, para 34.

¹⁷⁵ Communication 155/96: *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) Case no ACHPR/COMM/A044/1, OAU Doc CAB/LEG/67/3 rev .

¹⁷⁶ The Aarhus Convention seeks to implement Article 10 of the Rio Declaration.

¹⁷⁷ Schall (n 161) 444.

to constitute a major gain in democracy".¹⁷⁸ A second concern, which has also been touched upon in the chapter on a new substantive right, is the anthropocentricity of the rights protected by the courts. Even if the rights present an indirect possibility to achieve environmental protection, these norms are not posited in terms of the general public interest we are concerned with – a clean environment. Another interesting dilemma raised by anthropocentricity relates to the relation between procedural and substantive rights, because if procedural rights would allow a broader standing (for example allowing NGOs to appear before the ECtHR), but substantive rights would remain the same, would this not lead to the litigation of other people's rights? This clashes with a fundamental concept in human rights law: the autonomy of the person.¹⁷⁹ The core of human rights focuses on protecting the interests of the *individual* against the majority, and safeguarding these is also the primary function of human rights courts. PIL however overrules this by representing the rights and interests of a group of people, with the danger of stepping (unintentionally) on other people's rights – something that the Courts have precisely been founded for to prevent. Is PIL thereby then not abusing the human rights system through the judiciary? On the one hand, some argue that NGOs in a democratic society should not identify themselves with interests they see as collective, thereby forcing their views on other members of society. On the other hand, collective actions such as PIL represent one of the few ways in which citizens and NGOs can exercise counter pressure to the powerful government and other big players. Primarily these final two dilemmas must be considered carefully when instigating a PIL procedure.¹⁸⁰

4.4 Other solutions and views on PIL in human rights courts

However, it is also not true that no public interest elements at all are present in the European and American systems. The ECtHR for example, in a case concerning noise caused by an environmentally friendly wind turbine, let the public interest in the environment vindicate, over the alleged violation of Article 8 ECHR. These were thus two competing interests regarding the environment.¹⁸¹ This does however not seem too revolutionary – the Court has more often let the public interest prevail. More promising, perhaps, is the fact that the ECtHR can push forward environmental protection in national contexts. When authorities fail to implement a ruling at national level, which is then taken to the ECtHR, the Court can enforce said decision in favour of the environment (e.g. *Okay v Turkey*), thereby exercising some influence after all.¹⁸²

Moreover, two legal constructs have been specifically instigated for the public interest. Both the ECtHR and the IACtHR accept *amicus curiae* – a petition from an individual or organisation who is not a party to, but has an interest in the case and aims to make an impact on the Court's position by putting

¹⁷⁸ *ibid* 446.

¹⁷⁹ *ibid*, p. 445

¹⁸⁰ Jos Teunissen, 'De Ironie van de SGP-Vrouwenzaak Schrap de Algemeen Belang-Actie uit 3:305a BW!' (2008) 25 *Nederlands Juristenblad* 1, 5.

¹⁸¹ *Fägerskiöld v Sweden* App no 37664/04 (ECtHR, 22 October 2004) (inadmissible).

¹⁸² Schall (n 161) 449-450; *Okay and Others v Turkey* App no 36220/97 ECHR 2005-VII 125 para 68, 73-75.

forward matters of fact or law. This is similar to PIL, since the rationale behind the *amicus* briefs is usually the public interest, and courts often allow *amici* to participate on the basis of a general interest. Applied to the criteria of a PIL, an *amicus curiae* brief also usually regards a public interest, that is of importance beyond the immediate interests of the parties, and the NGO will not be financially involved. An indirect way to influence the status quo. Moreover, it is often easier for NGOs to participate as an *amicus* than as a party in a case, because the interest requirement is less strict, and it is less costly and time-consuming. In Europe this road is increasingly used by NGOs who manage to have quite some influence.¹⁸³ Nevertheless, NGOs lose a great deal of direct influence through an *amicus* brief compared to being a party in Court. They can't control the direction of the action, nor can they offer evidence or be heard.¹⁸⁴ As Pavoni explains, *amicus curiae* can help highlight the PIL dimension of environmental complaints, but it does not alter anything to the individualised-justice approach of the ECHR. For NGOs, *amicus curiae* briefs merely represent a palliative.¹⁸⁵ The second construct is the inter-State petition for the ECHR's Member States. A State may bring a case before the Court regarding a violation by another State, possibly for the public interest, without having to show a special interest or a victim-status. However, States are obviously rather reluctant to submit these in fear of an escalating dispute. We can therefore not say that these two options truly substitute PIL.¹⁸⁶

4.5 Successful cases

As has become clear by now, there are very few examples of successful PIL cases at international human rights courts. Stringent requirements of standing simply bar this possibility. At the national level, however, there is a slowly but steadily emerging trend of PIL cases concerning the environment. These are still a far cry from becoming customary law, but present some interesting examples of how judges apply international legal norms. It is therefore worthwhile to discuss these national cases, but only insofar as international human rights law is used.¹⁸⁷

4.5.1 The *Urgenda* case

An interesting example in this regard is the Dutch *Urgenda* case, because it is a classic example of a PIL case and because international human rights law is dealt with by the Court in a rather particular manner. As a foundation together with hundreds of co-plaintiffs, *Urgenda* instigated the case in light of the public interest of curbing climate change for present and future generations, in the Netherlands and abroad (the latter only if they are affected by Dutch transboundary (in)action). It meets the most

¹⁸³ Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88(4) *The American Journal of International Law* 611, 611-612.

¹⁸⁴ *ibid* 611-612.

¹⁸⁵ Pavoni (n 170) 351.

¹⁸⁶ Schall (n 161) 450-451.

¹⁸⁷ In most cases only constitutional norms or other domestic law is used. No matter how interesting, these cases unfortunately fall outside the scope of this research.

important requirements for a PIL case: it serves a public interest of importance beyond immediate interests of an idealistic nature, it is future-oriented and organised by a small societal organisation, nor are there any pecuniary interests involved.¹⁸⁸ Regarding standing for a legal person such as a NGO, the boundaries in Dutch law are rather flexible. Article 3:305a of the Dutch Civil Code specifically regulates PIL, as it allows a foundation or association, which is a legal person, to submit a claim for the protection of the general interest or collective interest of other persons, insofar its by-laws promote these interests. The Court consequently allowed Urgenda's admissibility based on this article.¹⁸⁹

Not only does the judge refer to international norms, such as the UNFCCC and agreements made at the European level, but also to the European human rights system. According to Urgenda, the State is (also) violating Article 2 and 8 ECHR with its substandard emission reduction targets. The Court held that invoking these Articles is in line with the objectives of Urgenda's by-laws, since both aim to protect the same interests. However, it was also declared right away that Urgenda cannot be regarded as an (in)direct victim in light of the requirements set by Article 34 ECHR, since a legal person cannot be violated in its physical integrity or interfered with its private life. Even if Urgenda's by-laws are explained in such a way to also encompass the protection of the society against a violation of Article 2 or 8 ECHR, Urgenda would still not be a potential victim. It therefore cannot invoke the ECHR, nor do the articles directly attribute rights to Urgenda. Nevertheless, the judge did use the articles as a source of inspiration for the realisation and interpretation of private law norms and the discretionary power of the State, thereby extensively quoting the Council of Europe's 'Manual on Human Rights and the Environment'. The Court hereby referred to the wide 'margin of appreciation' enjoyed by ECHR Member States in implementing climate policies, but it did put some limit to this discretion.¹⁹⁰ Some commentators call this an example of the horizontal effect of European human rights jurisprudence, opposed to adopting a vertical obligation. Apparently, the articles still have influence as the Court deemed the interpretations offered convincing enough to implicitly rely on them. Such informing by the ECHR of the judicial review of executive and legislative acts has been used more often in the Netherlands.¹⁹¹

Several commentators are quite enthusiastic about this approach, as it does give the ECHR some influence but avoids a difficult discussion about the State's exact boundaries of discretion.¹⁹² Nevertheless, I can't help but notice that the Court brushed the question of applying the ECHR rather

¹⁸⁸ Marc Loth, 'Climate Change Liability After All: A Dutch Landmark Case' (2016) 21 *Tilburg Law Review* 5, 21.

¹⁸⁹ 3:305a BW; *Stichting Urgenda v Staat der Nederlanden* Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, C/09/456689 / HA ZA 13-1396, paras 4.4-4.9.

¹⁹⁰ *Urgenda v Staat der Nederlanden* (n 28) paras 4.45, 4.46; Roger Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands' (2016) 34(2) *Journal of Energy & Natural Resources Law* 1, 5; Loth (n 188) 15-16.

¹⁹¹ Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (2016) 34(2) *Journal of Energy and Natural Resources Law* 1, 5.

¹⁹² For example: *ibid* 5; FM Fleurke and A de Vries, 'Urgenda: Convergentie tussen Klimaat en Mensenrechten?' (2016) 42 *Milieu en Recht* 1, 7-8.

swiftly aside, only spending a few paragraphs on its explanation. It consequently does not become clear why it so briskly declares that Article 34 ECHR may not be used within the Dutch legal system. In fact, this is a procedural norm, but the judge turns it into a substantive issue. Urgenda also elaborates on this objection in its reply to the State's appeal. Article 34 is a formal rule, only applicable to individual admissibility at the ECtHR. This does however not automatically entail that Urgenda is unable to invoke the substantive norms of Article 2 and 8 ECHR before a Dutch Court. In principle, these articles are inherently limited to being invoked by natural persons, and only a victim can initiate a complaint. However, the exception to this rule in Dutch law is the abovementioned Article 3:305a of the Dutch Civil Code, according to which associations or foundations can collectively ask for legal protection on behalf of a group of people with similar interests. The effectivity of this legal protection would be annulled if the groups of natural persons on behalf of whom Urgenda has instituted proceedings, *can* invoke Article 2 and 8 because their rights may be interfered with, whilst Urgenda may institute these proceedings on their behalf but *cannot* invoke these same substantive rights. In other words: whether a legal person is deemed admissible according to procedural rules, must be seen separate from the question which substantive rights it can invoke. Whether Urgenda would be admissible before the ECtHR, does therefore not influence the possibility to invoke ECHR provisions in a Dutch procedure.¹⁹³

4.5.2 PIL all over the world

Another good example is the commencement of legal proceedings in the Philippines. In 2015 Greenpeace Southeast Asia, together with thirteen civil society organisations and eighteen survivors of the typhoon Haiyan, submitted a petition to the Commission on Human Rights of the Philippines, a constitutional body which can investigate human rights violations and make recommendations to the government. Herein they requested an investigation of the responsibility of a group of 47 so-called Carbon Majors for (threats of) human rights violations resulting from the effects of climate change.¹⁹⁴ They are alleged to have violated several (inter)national human treaties and human rights norms, including for example the right to life in the ICCPR.¹⁹⁵ The petitioners referred to all the international human rights treaties the Philippines have signed or ratified, and requested the Commission to monitor the government's compliance with these. If the government's responsibility could be invoked for safeguarding these rights, it would also be responsible for the actions of the Carbon Majors as third parties violating the rights of the Filipinos.¹⁹⁶ The Commission sent an order to the companies in July

¹⁹³ *Stichting Urgenda v Staat der Nederlanden* Memorie van Antwoord [Reply to the Appeal] Gerechtshof Den Haag [Court of Appeal The Hague] April 2017 Case no 200.178.245, paras 11.3-11.13.

¹⁹⁴ Meaning industrial carbon producers: oil, coal, cement and mining companies. *Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, CHR-NI-2016-0001, 7-10, 31.

¹⁹⁵ ICCPR art 6.

¹⁹⁶ *Petition To the Commission on Human Rights of the Philippines* (n 33) 6-7; Annex A presents a list of international human rights treaties to which the Philippines are a State Party:

2016 with a request for a response, to which the petitioners responded again in February 2017. Hearings are expected to start sometime this year. This marks the first climate change-related complaint submitted to a national human rights institution, and it also relies on international human rights norms.¹⁹⁷

Then there is of course the *Swiss Grannies* case, instigated by an association consisting of hundreds of elderly women (539 to be precise). The structure of the applicants is similar to the *Urgenda* case: next to the association, representing the women but also “the general public and future generations”, there are four co-plaintiffs. In this sense, it classifies as a PIL case, but for the fact that the Swiss legal system does not have a general right to popular action. Instead, it is argued that the senior women the association represents – most of them will be 75 years old by 2020 – classify as a particularly vulnerable population group (a “most vulnerable group”), because of their significantly increased probability of mortality. As such they are especially affected in their legitimate interests by climate change-induced heat waves. Consequently, in the capacity of the association they have the right to take this to Court, just as the four individual applicants do. Additionally, this case draws heavily on human rights norms from the ECHR, but for this the reader is referred to Chapter 2, where this has already been elaborately discussed.¹⁹⁸

In a case known under the name of *The People v Arctic Oil*, Greenpeace and the environmentalist organisation Nature & Youth are suing the Norwegian State over oil drilling licenses in the Norwegian Arctic. They argue that the go-ahead that was given to companies to start drilling, violates the constitutional human right to a healthy environment for future and present generations. Especially interesting is the connection the applicants make with international human rights law. They argue that the Licensing Decision to drill for oil also jeopardises a number of human rights protected in the ECHR, in particular Article 2 and 8. The limitations of constitutional principles such as Article 112 must be determined in accordance with international human rights obligations, but this has not been done with

http://www.greenpeace.org/seasia/ph/PageFiles/735291/Petitioners-and-Annexes/Annex_A-Non-Exhaustive_List_of_International_Human_Rights_Treaties_Signed_and_or_Ratified_by_the_Philippines.pdf; Environmental Law Alliance Worldwide (ELAW) *amicus curiae* brief, 7 November 2016, 6-7.

¹⁹⁷ John Vidal, ‘World’s Largest Carbon Producers Face Landmark Human Rights Case’ *The Guardian* (New York, 27 July 2016) <<https://www.theguardian.com/environment/2016/jul/27/worlds-largest-carbon-producers-face-landmark-human-rights-case>> accessed 29 June 2017; LexisNexis, ‘Climate Change Litigation – Philippines Investigates Carbon Majors’ Responsibility for Human Rights Beaches’ (16 August 2016); Megan Darby, ‘Carbon Majors Respond to Climate and Human Rights Inquiry’ *Climate Home* (27 October 2016) <<http://www.climatechangenews.com/2016/10/27/carbon-majors-respond-to-climate-and-human-rights-inquiry/>> accessed 29 June 2017; Maria L Banda and Scott Fulton, ‘Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law’ (2017) 47(2) *The Environmental Law Reporter* 1, 12; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, ‘The Status of Climate Change Litigation – A Global Review’ (2017), 21-22. For the Petition and other documents please see: Greenpeace, ‘The Climate Change and Human Rights Petition’ *Greenpeace USA* (28 July 2016) <<http://www.greenpeace.org/seasia/ph/press/releases/Worlds-largest-carbon-producers-ordered-to-respond-to-allegations-of-human-rights--abuses-from-climate-change/The-Climate-Change-and-Human-Rights-Petition/>> accessed 24 May 2017.

¹⁹⁸ For more information on this please see Chapter 2.2.1.3. *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council [Verein KlimaSeniorinnen Schweiz v Bundesrat]* 25 November 2016; paras 18-20; Banda and Fulton (n 197) 4.

regard to the Licensing Decision. In February 2017, the lawsuit was approved by the Court, and hearings will start in November, thus we will have to wait how the Court will assess this claim.¹⁹⁹

Finally, the *Leghari v Federation of Pakistan* is a famous example of a successful PIL case, as it was filed by a farmer against his government for failing to execute its adaptation commitments. However, only constitutional human rights were referred to – as is the case for many national cases.²⁰⁰

In conclusion, we can say that although many climate change litigation cases have been filed,²⁰¹ of which many were PIL cases, most of them rely on constitutional human rights instead of the international human rights law framework. Many of the PIL cases that are relevant, are still pending or hearings still have to start. It is thus hard to draw general conclusions; one can only hope for more of such cases in the future.

4.5.3 Concluding thoughts

Despite the still uncertain aspects surrounding PIL – what exactly is a public interest, should a NGO be enabled to represent the interests of a large group of people – I find it highly desirable that this strategy will be allowed to become more prevalent at the international human rights stage. It fits very well with the collective dimension of the environment that should be recognised anyway in human rights litigation, and it would effectively enhance the empowerment of victims. Although I do realise that this requires broadening the criteria for standing at the European and American Courts, the success and importance of the national cases that have been discussed hopefully illustrates the importance of PIL.

¹⁹⁹ *Greenpeace Nordic Association and Nature and Youth v Ministry of Petroleum and Energy*, Oslo District Court, 18 October 2016, Foreword, 36-38; Banda and Fulton (n 197) 3; Vilhelm Carlström, ‘Greenpeace’s Historical Lawsuit Against Norway for Arctic Drilling Has been Approved by Court’ *Business Insider Nordic* (15 February 2017) <<http://nordic.businessinsider.com/greenpeaces-historical-lawsuit-against-norways-government-for-arctic-drilling-has-been-approved-for-court-2017-2>> accessed 29 June 2017; Greenpeace, ‘Climate Lawsuit Against Arctic Oil Goes to Court’ *Greenpeace USA* (15 February 2017) <<http://www.greenpeace.org/international/en/press/releases/2017/Climate-lawsuit-against-Arctic-oil-goes-to-court/>> accessed 28 June 2017; UNEP Report (n 197) 19. For those interested, Article 112 of the Norwegian Constitution reads: “Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well. The authorities of the state shall take measures for the implementation of these principles.”

²⁰⁰ For example *Rabab Ali v Pakistan*, which is also a PIL case. Both cases will be more elaborately discussed in Chapter 5 on Intergenerational Justice.

²⁰¹ As of March 2017, 884 cases in 24 countries had been filed (out of which 654 in the United States), compared to 2014 when cases had been filed in just 12 countries. UNEP Report (n 197) 10-14.

Chapter 5 – Intergenerational Justice

In order to find an answer to the research question if we can protect the (right to) life of not only individuals of the present, but also of future generations, it is indispensable to consider the concept of intergenerational justice.²⁰² There is a whole range of legal scholars who have explored this intriguing possibility and necessity of granting future generations a right to a green future, and whether this is theoretically and legally viable. As is to be expected, one of the biggest issues in this regard is whether future generations can have legal standing. This chapter will therefore focus on the question whether standing can be granted to future generations in climate change litigation and human rights law, if it is feasible to demonstrate the future effects of human rights violations, and if this legal adaptation would be a solution for protecting the (right to) life from climate change, thereby accomplishing intergenerational equity.²⁰³ In other words: how may international human rights law accommodate the rights of future generations?

5.1 A few introductory words

Before we embark on our critical analysis, it is important to briefly touch upon the definitions of the concepts used. Firstly, the notion of future generations raises some ambiguity within legal discourse. Future generations – or to be more precise, the individuals comprising the future generations – are not a distinct group of generations succeeding each other in a linear order, but rather a patchwork of generations overlapping one another. Obviously, none of the members of future generations are alive yet – but this does not mean that future generations will by definition not overlap with our contemporary generation.²⁰⁴ More precisely, future generations do not refer to particular individual people, since they are non-existing, nor does it refer to ‘all’ people, since this designation is too broad. Rather, Herstein proposes the term refers to a *type* of future person. It is also important to note that rights of future generations are not group rights, because human rights are concerned with individuals – thus future generations *as such* do not matter.²⁰⁵ Connected to this is the concept of intergenerational justice: future generations having legitimate claims or rights against present generations, who in turn have duties towards future generations.²⁰⁶ Such a claim concerns distributive justice: “the level of mitigation the

²⁰² When talking about generations, I mean *individuals* comprising generations. To make this read as accessible as possible, I will often just mention the word ‘generation’.

²⁰³ The terms ‘equity’ and ‘justice’ will be used interchangeably, since they basically mean the same.

²⁰⁴ Joerg Chet Tremmel, *A Theory of Intergenerational Justice* (Earthscan 2009), 19, 24.

²⁰⁵ About this type of future person, Herstein contends that if we let future generations refer to all people, “it steers us away from the entities that are of moral significance – the individual future people”. With the word ‘type’ he attempts to find a balance between the particular individual on the one hand and the indeterminable concept of all future people on the other hand. Ori J Herstein, ‘The Identity and (Legal) Rights of Future Generations’ (2008-2009) 77 *George Washington Law Review* 1173, 1180.

²⁰⁶ Stanford Encyclopedia of Philosophy, ‘Intergenerational Justice’ (10 August 2015) <<https://plato.stanford.edu/entries/justice-intergenerational/index.html#note-1>> accessed 9 June 2017.

current generation must bear in order to offset the harmful climate change impacts and higher adaptation costs that would impact future generations”.²⁰⁷

Secondly, in light of delimiting the scope of this chapter, one should realise that climate change litigation concerns different types of distributive justice on three levels. One type is intergenerational justice, which entails equity between people of current and future generations. This should not be confused with the other dimension called intra-generational justice, which concerns justice between people of the same generation, and, finally, international justice – between countries. This spectrum is further thwarted by the extra-territorial and cumulative impacts of GHG emissions, which complicate the distribution of responsibilities. Regarding intra-generational and international justice, however, legal remedies have already been established within the climate change regime. Examples are the carbon emissions trading scheme, and principles such as ‘common but differentiated responsibilities’ and ‘the polluter pays’. We will therefore only focus on intergenerational justice and a human rights-based approach in order to consider the needs of present and future generations.²⁰⁸

Finally, whereas the consequences of climate change have already been discussed in the introduction, it is useful to dedicate a few words to its effects on intergenerational justice specifically. Members of future generations will be more susceptible to the long-term effects of climate change, due to the aggravating impact which will bear disproportionately on them. This injustice will be caused by the fact that future generations will suffer the effects of current and past emissions, despite them contributing relatively little or even no emissions at all. Additionally, the so-called time lag nature of climate change – meaning that the most exacerbating effects will manifest themselves sometime after they have been caused, in line with the often-mentioned tipping point²⁰⁹ – will hit future generations even harder. It is also important to realise that not only will the consequences of climate change interfere directly with the enjoyment of human rights; so might indirectly the (side-)effects of measures of adaptation and mitigation. A large deal of climate injustice will thus arise, and a human rights-based approach in climate change litigation could help tackle this problem.²¹⁰

²⁰⁷ Rachel Johnston, ‘Lacking Rights and Justice in a Burning World: The Case for Granting Standing to Future Generations in Climate Change Litigation’ (2016) 21 *Tilburg Law Review* 31, 33-34.

²⁰⁸ *ibid* 34; Bridget Lewis, ‘Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice’ (2016) 34(3) *Netherlands Quarterly of Human Rights* 206, 207-208.

²⁰⁹ A critical, likely irreversible threshold when the global or regional climate changes from one stable state to another. Irreversibility means that the recovery period is much longer than the time it takes for the climate to reach such a state, talking in hundreds or thousands of years. IPCC, ‘Annex II: Glossary’, Pachauri RK and Meyer LA (eds), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva) 117, 124, 128.

²¹⁰ Such as the rising sea levels, droughts, floods, and transmittable diseases. Johnston (n 207) 35-36; Lewis (n 208) 206-207, 212-213, 220.

5.2 Theoretical framework: rights and the distribution of burdens

Intergenerational justice concerns the distribution of burdens between present and future generations that will have to be endured to tackle climate change.²¹¹ In essence an ethical discussion about responsibility, a discourse based on (philosophical) theories of justice and ethics will help us to understand better how using this notion can be justified to address climate change. Various theories have been put forward, of which the most important ones will be discussed here.²¹²

The philosopher John Rawls is one of the pioneers in the discussion of obligations to future people. He came up with his famous theory of distributive justice to the injustice of climate change on future generations. He submits that *justice* originates from an equitable (meaning fairly, thus not the same as equal!) sharing of burdens and benefits. Elaborating on this approach, the opposite is the case regarding the *injustice* of climate change: future generations will have to bear the *consequences* of GHG emissions, which are not their responsibility; and they will not (or at least not directly) enjoy the *benefits* generated by those GHG emissions.²¹³ Climate injustice thus resembles the discrepancy between the historical responsibility and future impact of emissions.²¹⁴ The question is then how to justify or explain that present generations have obligations towards future generations in distributing these burdens. Rawls's answer is the principle of "just savings". Simply put, this is what a generation needs to save in light of justice. It provides us with an understanding of 'intergenerational sufficientarianism', which is basically an interpretation of a threshold notion of harm. This threshold consists of "the conditions needed to establish and to preserve a just basic structure over time", and provides guidance to current people's obligations towards future people.²¹⁵ The principle exists of two stages: the 'accumulation stage', in which present generations must only save for future people what is necessary to allow them to reach this sufficientarian threshold, with the underlying assumption that other generations have saved or will have saved in the same manner.²¹⁶ This is followed by the 'steady-state stage', in which just institutions have been established and present generations do not need to save anything, but rather maintain these institutions and allow future generations the equivalent of what they have received from past generations. However, why should current generations agree to save for future generations, if they do not know what was saved for them by previous generations? On the basis of a 'motivational assumption': current generations care and concern for their descendants, thus they agree to save for

²¹¹ Some theorists also include justice towards past generations in this notion, but I will align with the majority of scholars in only discussing future generations.

²¹² Before, it has been based on discourses of industrialism, ecological modernisation or intra-generational equity. These have however largely displaced future generations' interests. Peter Lawrence, 'Justice for Future Generations: Environment Discourses, International Law and Climate Change' in Jessup B and Rubenstein K (eds) *Environmental Discourses in Public and International Law* (Cambridge University Press 2012), 23-24.

²¹³ To some extent future generations *will* benefit from the emissions, as our current generation enjoys the benefits from the Industrial Revolution – emissions do also entail an improvement of the quality of life. However, many of our current GHG emissions only have short-term advantages.

²¹⁴ John Rawls, *A Theory of Justice* (Harvard University Press 1971), 58-59; Lewis (n 208) 210-211.

²¹⁵ Stanford Encyclopedia of Philosophy (n 206).

²¹⁶ Hereby Rawls means an accumulation of capital – not only in the sense of factories or technology, but also knowledge, culture and the skills that enable just institutions and freedom.

them. By following the just savings-principle, every generation contributes to future generations, and receives from its predecessors. It is an agreement between generations to give an equitable contribution to establish and maintain a just society.²¹⁷

Edith Brown Weiss extends upon Rawls's theory of justice. Her idea of intergenerational equity rests on three pillars. Firstly, there is the 'conservation of options': each generation should conserve the diversity of nature and cultures, so it does not restrict available options for future generations. New technological developments may be part of this. Secondly, the 'conservation of quality' entails that each generation, if it did not know when it would be alive, would rationally choose a principle whereby it would want to inherit the planet in a condition that is no worse than it was when the previous generation inherited it. In other words, each generation is required to maintain the quality of the planet at the level received to pass it on to future generations. This will lead to trade-offs: for example, an area may be passed on in a polluted state, but future generations will have a higher level of income or knowledge that enables them to remove this pollution. Finally, she submits the 'conservation of access': every generation should be awarded equitable rights of access to the legacy of past generations, and should conserve this for the future. These pillars are thus based on two main elements: one is the notion of trust, whereby each present generation functions as a trustee of the planet to care for it for the beneficiaries, the future generations, and to not pass it on in a worse condition. The other is that future generations have rights – whereby present generations have corresponding duties: what Brown Weiss calls the 'planetary rights and obligations'.²¹⁸ It has of course been questioned whether future generations can have rights in the first place, but this depends on the theory one adopts. According to the choice theory of rights, one possesses a right not because of the benefits it may bring, but because one is in a position to claim the performance of a duty by another. Based on the interest theory of rights, however, it is sufficient to have certain interests that will be affected in the future by actions today. Despite the lack of knowledge of future generations' interests or who exactly will be harmed, the duty to not cause harm still applies.²¹⁹ This latter notion resembles the harm avoidance principle: an ethical obligation to not undertake behaviour that will cause future harm to other human beings. It supports the need for taking action to address climate change, and is connected to the equality principle: a person's value should not depend on when (s)he is born.²²⁰

A very different way of looking at the distribution of burdens, is through the lens of a sociological framework: the debate between presentism versus rights-based ethics. On the one hand, presentism is characterised by the present generation favouring policy decisions that do not take into

²¹⁷ Rawls (n 214) 306-317; Richard P Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press 2009) 12; Stanford Encyclopedia of Philosophy (n 206).

²¹⁸ Edith Brown Weiss, 'Intergenerational Equity and Rights of Future Generations' in AAC Trindade (ed), *Human Rights, Sustainable Development and Environment* (2nd ed) (Instituto Interamericano de Derechos Humanos, 1995) 71, 75-76; Lawrence (n 212) 36-38, 40; Johnston (n 207) 47.

²¹⁹ Lawrence (n 212) 38-40.

²²⁰ *ibid* 42-43; Johnston (n 207) 44.

account the effects on future generations. Compared to the costs that would have to be made now, the future mitigation benefits would be too small to justify imposing these. The rights-based argument, on the other hand, has as a key component the idea of equal opportunity between current and future generations. This results in a moral duty to at least ensure that future generations are entitled to protection from harm.²²¹ The latter approach is connected to the so-called ‘capabilities approach’, a social justice theory advocating that exactly this equal opportunity means obligations are also owed to future generations. Failing to mitigate climate change will limit the ability of future generations to fulfil their core capabilities.²²²

It is clear that in order to achieve justice, current generations must take steps now instead of leaving all the problems for future generations. Human rights law presents one way to address the distribution of burdens, since the impacts of climate change interfere with human rights. It has until now proven useful in *describing* the future impacts of climate change, but the next dilemma is whether it can be *used* to achieve justice. This brings us to the following questions: can future generations have legal standing to protect their rights? Does our generation – in the form of States – have duties towards future generations and owe them corresponding obligations? And is it possible to prove that our current actions are violating their rights?²²³

5.3 Legal framework

No matter how logical or necessary it may seem, establishing a legal framework to achieve intergenerational justice and to protect the rights of future generations is a daunting task. There are no clear mechanisms in human rights law yet to bring a claim on their behalf, or to prove a violation. Some scholars even say that the current legal framework is inadequate. By respectively attending to rights and standing, duties and obligations, and violations, we will deal with this challenge in a step-by-step approach.

5.3.1 Standing for future generations

As Johnston states, in our current legal system “rights can only be protected by those who have standing”.²²⁴ Assuming that future generations have rights, as has been discussed in the theoretical framework, the first question we now need to answer is: do future generations have legal standing? This can basically be divided into two sub-questions, namely what exactly entails standing, and who can have this? Standing is having a legally protectable stake or interest in a dispute that allows one to bring it before a court to obtain judicial relief. Two conditions must be fulfilled to have this. Firstly, the concerned party must prove to have a concrete, even “special and long standing” interest in the matter.

²²¹ Johnston (n 207) 40-41.

²²² The concept of equal opportunity finds broader resonance in international environmental law, as it can also be retraced to the notion of sustainable development formulated in the Brundtland Report. Johnston (n 207) 42.

²²³ Lewis (n 208) 213.

²²⁴ Johnston (n 207) 36.

A general interest in the environment or in human rights will thus not suffice. Future generations' concrete interest is in the first place illustrated by the bigger effects and costs they will suffer from because of climate change.²²⁵

Two objections have been raised to this interests-argument. The first is that future generations can't have legal standing, because there is no legal persona to represent. In other words: how can one represent someone who does not exist? This argument however ignores the important distinction that a person can have legal interests independently of one's actual lifetime. It has after all also been allowed to submit claims on behalf of deceased or unborn babies. Being alive is therefore not a prerequisite for legal representation.²²⁶ Moreover, it is virtually certain that future generations *will* exist and they *will* have interests which need to be represented (as opposed to foetuses, for example). An argument against this is the so-called non-identity problem: since our current actions do not only influence people's lives in the future, but also *which* people will be alive in the first place, it is impossible to say whether our actions actually harm 'those' future people. However, if we stick to the definition of future generations as a type of future person instead of particular individuals, we do not need to know their exact identity in order to know that they will possess rights and interests. One could also argue that there is something morally wrong about knowingly acting in a manner that will deteriorate the quality of life of future generations.²²⁷

Opponents' second objection is that since we cannot be certain what future generations' precise interests will be, they cannot be represented. This is true in the sense that both environmental problems and the scientific knowledge about this develop very quickly, making it hard to determine future environmental priorities. However, the fact that we cannot predict the *exact* interests of future generations should not bar their right to representation. It is reasonable to assume that all future individuals will have a common interest in preserving their most vital human rights such as the right to life, and "in having clean air, potable water, biodiversity, and places of natural beauty". The fact that climate change threatens the ability to enjoy their human rights, is enough of an interest.²²⁸ We can therefore conclude that the first requirement has been fulfilled.

The second condition for legal standing is a threshold test: is there a real threat that the harm will occur? Critics, while not denying the contribution of human activities on global warming, would argue that it is unclear how precisely these harms will manifest themselves exactly. In response it could be said that climate science is increasingly developing; the links between certain extreme weather events and anthropogenic emissions, and the effects this will have on human rights, are becoming increasingly clear. More importantly, even merely a *risk* of harm – remote but real – is enough for establishing standing if that would lead to the possibility of reducing that risk. Clearly, the risks of climate change

²²⁵ Johnston (n 207) 37.

²²⁶ Ted Allen, 'The Philippine's Children Case: Recognizing Legal Standing for Future Generations' (1993-1994) 6 Georgetown International Environmental Law Review 713, 729-730; Johnston (n 207) 39; Lewis (n 208) 213.

²²⁷ Allen (n 226) 730; Johnston (n 207) 39; Lewis (n 208) 214-215.

²²⁸ Allen (n 226) 730-731; Johnston (n 207) 37-38.

for human rights are real, and having a legal standing would increase the probability of reducing these.²²⁹ So far, the two requirements for legal standing have been met.

A final but obvious dilemma is who can represent the standing of future generations, since they themselves are not able to do so. It makes one wonder how this can be fitted within the human rights framework, since claims are normally brought when violations have already occurred, instead of predicted future violations. Four ideas have been identified. One example becomes apparent in the *Swiss Grannies* case, wherein living persons also represent future generations. Another option is through NGOs, who could be allowed to represent potentially injured parties which would include future generations. However, as we have seen this is not a possibility at the ECtHR, where the bar for legal standing for NGOs has been put rather high. A third possibility is to integrate future generations' needs with actions to protect the global commons. This would resemble the *erga omnes* actions available under international law. Finally, courts could appoint an ombudsman or a legal guardian and empower him/her to protect human rights law on behalf of future generations. Other variations of this idea are a UN Commissioner for Future Generations, a Commissioner for Sustainable Development or a Parliamentary Committee for Future Generations. A sort of proxy-type of representation, so to speak. Nevertheless, especially the last two options require a change to the legal framework, which will not happen that easily. Until then, the first two possibilities seem the most viable in the short-term. A lot more can be said about this rather crucial issue of representation, and even about the question whether human rights law is the right framework, but I will have to leave this for future research.

5.3.2 Duties to future generations

Until now, it has been argued that future generations do have standing, for one because they have concrete interests regarding their human rights which can be affected by the actions of current generations. Since human rights are based on human interests, it can then also be said that current actions will influence the enjoyment of future human rights. Present generations therefore have an obligation to refrain from acting in a way that would negatively influence these interests – and thus also the human rights – of future generations. The question is then: how do we translate these obligations into legal duties and how can these be used to address climate change?²³⁰

As is well-known, under international human rights law States have the tripartite, both negative and positive, obligations to respect, protect and fulfil human rights. Traditionally, States have these duties towards citizens under their jurisdiction. This limitation thus brings up questions of territoriality, and similarly of temporality – are these duties also owed to future generations? A strict interpretation would deny this: people who are not yet born, do not fall under a State's jurisdiction. However, it has been argued that jurisdiction includes anyone who is under the control of, falls within the jurisdiction

²²⁹ Johnston (n 207) 37-38.

²³⁰ Lewis (n 208) 214-216.

of, or is affected by the operation of a State's laws. Here jurisdiction thus functions extra-territorially. Since the focus is more on the person, instead of the territory, this could be extended in a similar manner to future generations.²³¹ As long as a State has the ability to affect the rights of future generations, who will be considered citizens of the State or falling under its jurisdiction, the State must exercise its powers and execute its duties in a way that is consistent with human rights law. Whether the consequences are of a short- or long-term time span is irrelevant.

Applied in practice, the duty to respect means that a State must refrain from taking action that has a high chance of negatively impacting the human rights of future generations – a minimum standard. Practically, this could entail not contributing to GHG emissions, or at least implementing strategies that do not interfere with human rights. Based on the duty to protect a State must take adaptation measures against the damaging effects of climate change, and adopt regulations to control the emissions of private actors. Finally, the duty to fulfil requires States to address the negative impacts, which naturally is the most uncertain and unpredictable one. However, where impacts can be predicted with some certainty, States can take measures to minimise these and at least establish conditions that are most receptive to human rights.²³²

5.3.3 Proving a violation

If we agree that future generations have rights, that current generations/States have obligations towards them, and that a claim can be brought forward, the next question is: when will a State have *violated* such a duty? In other words: can we prove the causal connection between the breach of a human right and the impacts of climate change, and how do we balance competing obligations? The answer to this question will have a big influence on the usefulness of a human rights approach.²³³

The first challenge is proving that a State caused the alleged harm and has thereby violated its legal duties. This is extremely complicated when the harm results from climate change 'at large' – as opposed to particular mitigation or adaptation measures – and consists of two steps. The first one is: how to attribute the specific harm to climate change? This is dependent on the complex causal links and the delay in time between cause and effect. Since quite some time passes between the emissions and the manifestation of actual harm, the latter criterion is already complicated in relation to present generations, let alone the future ones. Regarding the former, climate change is caused by a combination of global warming, GHG emissions and natural sources, thus it is often only one of the many interrelated and contributing factors to particular harm. In some instances establishing this is fairly easy – concerning the rising sea level in the Maldives, for example, there is virtually scientific consensus that this is caused by GHG emissions, but this is an exception. However, one must keep in mind that with the development

²³¹ This has been established in the ICJ's *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) in Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *The European Journal of International Law* 613, 636-638, 640.

²³² Lewis (n 208) 215-218.

²³³ *ibid* 218.

of scientific knowledge, uncertainty about such causal connections will increasingly be solved. The second, arguably even harder, step is tracing the causal connection between the emitters and the victims, thus how to attribute the harm to the actions or omissions of a specific State. With multiple contributors and the cumulative effect of GHG emissions, this is basically impossible. Again, this goes for current generations, but even more so for harm that is still to manifest itself in the future.²³⁴

The second, perhaps less acute, challenge is how a State should balance competing rights. Environmental changes are not the only human rights impacts of climate change; so are effects caused by mitigation and adaptation measures. A precarious balance must thus be found between protecting human rights in the short term, while not violating long-term human rights, and the other way around. Another dilemma in this regard is the link between advancing human rights and economic development. Economic development is forwarded by cheap and reliable energy sources, which again improve human rights in the short-term. However, these emissions also negatively impact the rights of future generations. This illustrates the difficulty of establishing a violation of the rights of future generations, caused by harm which simultaneously advances the rights of current generations.²³⁵

5.4 Examples of case law

In the regional human rights courts, standing to future generations has not yet been awarded. Comparable to the chapter on PIL, we will thus look at a number of national cases where this has been accomplished, or where the principle of intergenerational responsibility is alluded to. Again, this should not be viewed as international customary law, but rather are inspiring examples for the regional systems in the future. The first worldwide landmark case in which future generations were granted the right to a healthy environment, is the *Minors Oposa v Factoran* case, also known as the *Philippine Children's case*. In this case a group of children, who acted on their own behalf as well as that of future generations, and were represented by the NGO Philippines Ecological Network, requested their government to cancel timber licenses to stop logging in the country's rainforests. They claimed this would cause irreparable damage to their generation and future ones, and would violate their constitutional right to a healthy environment.²³⁶ The case however mainly turned out to evolve around legal standing. The Supreme Court ruled in favour of the applicants both substantively and procedurally: it granted them standing to

²³⁴ Johnston (n 207) 40; Lewis (n 208) 219-220.

²³⁵ Lewis (n 208) 220-221.

²³⁶ The happenings leading to the *Minors Oposa* case are truly fascinating. This case was initiated by Antonio Oposa, a lawyer from Manila. Inspired in Norway, his vision from the start was that the real parties in such a case had to children and children yet unborn. However, out of fear for the powerful logging companies and the corrupt government, no one dared to join him. Hence he decided to let his children appear as applicants – the oldest was three and a half years old, the youngest nine months. Thus the case was filed on behalf of Oposa and his children, other parents and children and children of the future. Hence the name: *Minors Oposa*. – Juan Antonio Oposa et al v the Honourable Fulgencio Factoran Jr, Secretary of the Department of the Environment and Natural Resources et al Supreme Court of the Philippines, 30 June 1993, GR No 101083; Oliver A Houck, 'Light from the Trees: The Stories of *Minors Oposa* and the Russian Forest Cases' (2007) 19 Georgetown International Environmental Law Review 321, 334.

preserve their generation's right to a healthy environment, and the obligation to ensure its protection on behalf of future generations based on the principle of intergenerational justice and – responsibility. It marked the first time a Supreme Court anywhere explicitly granted standing for the representation of future generations, and the case reflected the emerging principle of intergenerational equity. The case is mentioned in virtually all literature and case law on standing for future generations, and serves worldwide as an important precedent.²³⁷

5.4.1 Future generations awarded standing in the *Urgenda* case

As discussed before, the *Urgenda* case is a very interesting case on many accounts; not in the least because standing for future generations was explicitly granted to them by the Dutch District Court. *Urgenda* had initiated proceedings on behalf of three groups of people: current generations of Dutch citizens, future generations of Dutch citizens, and current and future generations of citizens abroad. The State did not dispute that *Urgenda* could represent the first group, current generations of Dutch citizens, against the emissions of GHG from Dutch territory, but it disagreed with the standing for the other two groups. There is of course some logic to this, because anyone living in the Netherlands is under Dutch jurisdiction, contributes to climate change and has an interest in reducing GHG emissions. Then all Dutch citizens could be represented by *Urgenda* or the State, and this would be impossible. The Court, however, interpreted the notion of sustainability to include a global and intergenerational dimension and put the State in the wrong on both accounts. It took a closer look at *Urgenda*'s by-laws, in which it is stated that she aims to “stimulate and accelerate the transition processes towards a more *sustainable society, beginning in the Netherlands*” (emphasis added).²³⁸ The latter part suggests that the focus on Dutch territory is a prioritisation, not a limitation – the issues are in first instance, but not exclusively, Dutch interests. Furthermore, for the definition of the concept of sustainability, *Urgenda* refers to the definition in the Brundtland-report, which is as follows: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”²³⁹ Inherent to the notion of a sustainable society is an international and global dimension, thereby covering standing for citizens abroad. Even more importantly, however, is that the Court declared the concept to have an intergenerational dimension. When *Urgenda* is representing the right of current and future generations to live in a safe and healthy environment and to have availability to natural resources, it is just as well pursuing the interest of a sustainable society. It would simply not be feasible for *Urgenda* to be able to represent national interests, but no future or transnational interests. Consequently, *Urgenda*

²³⁷ Allen (n 226) 713; Houck (n 38) 333-338.

²³⁸ By-laws art 2 in *Stichting Urgenda v Staat der Nederlanden* Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, C/09/456689 / HA ZA 13-1396, para 4.7.

²³⁹ World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future (Brundtland report)* (1987)

was allowed standing for future generations, and the case could be assessed in its entirety.²⁴⁰ This did however not put an end to the discussion about representation. In its appeal, the State claimed that Urgenda failed to indicate which future generations they exactly represent, nor that this can be deducted from their by-laws. This would therefore make their interest in the case insufficiently concrete and delineated. In reply, Urgenda again explained how they understand the notion of a sustainable society to include future generations, which can be found in their by-laws. The legal norms it moreover invokes, amongst others Article 2, 3 and 4 UNFCCC, explicitly refer to future generations and thus also to the interests it aims to defend according to the by-laws. It remains to be seen how the Court of Appeal will decide upon this issue.²⁴¹

5.4.2 Pakistan, the Philippines and Switzerland

On the other side of the world, in *Rabab Ali v Pakistan* a petition was filed by a seven-year-old girl through her father, on behalf of present and future generations. She challenges various government (in)actions relating to the continued exploitation of Thar coal, which is very high-emitting fuel source. This would drastically increase Pakistan's GHG emissions, worsening air pollution and global warming. Consequently, she amongst others alleged that the constitutional right to life of herself and future generations would be violated. In June 2016 the Supreme Court overruled a registrar's objection regarding her right as a minor to file a PIL case and regarding the representation of future generations. The case is still pending, but this first step seems promising.²⁴²

The *Urgenda* case focused on climate change *mitigation*, as opposed to a number of cases dealing with *adaptation* commitments. One of these is *Leghari v Federation of Pakistan*. Ashgar Leghari, a Pakistani farmer, filed a PIL case against his national and regional governments. He alleged that the national government failed to carry out the 2012 National Climate Change Policy and the Framework for Implementation of Climate Change Policy, nor did it address vulnerabilities associated

²⁴⁰ It was decided that the State does not have liability for harms suffered by future generations of foreign citizens, but it does have a duty of care towards current and future generations in the Netherlands, and current generations abroad in as far as the transboundary (in)action of the Dutch State would affect them. *Stichting Urgenda v Staat der Nederlanden* Rechtbank Den Haag, 24 June 2015, ECLI:NL:RBDHA:2015:7145, C/09/456689 / HA ZA 13-1396, paras 4.4.-4.10; Roger Cox, 'A Climate Change Litigation Precedent: Urgenda Foundation v the State of the Netherlands' (2016) 34(2) *Journal of Energy & Natural Resources Law* 1, 5; Marc Loth, 'Climate Change Liability After All: A Dutch Landmark Case' (2016) 21 *Tilburg Law Review* 5, 13, 21; Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (2016) 34(2) *Journal of Energy and Natural Resources Law* 1, 4.

²⁴¹ *Staat der Nederlanden v Stichting Urgenda* Memorie van Grieven [Statement of Appeal] Gerechtshof Den Haag [Court of Appeal The Hague] 12 April 2016 Case no 200.178.245 18, paras 11.6-11.18; *Stichting Urgenda v Staat der Nederlanden* Memorie van Antwoord [Reply to the Appeal] Gerechtshof Den Haag [Court of Appeal The Hague] April 2017 Case no 200.178.245, paras 5.16-5.30.

²⁴² *Rabab Ali v Pakistan*, Constitutional Petition No ___ / 1 of 2016, Supreme Court of Pakistan, April 2016, paras 1, 6-7, 31, xviii; Maria L Banda and Scott Fulton, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) 47(2) *The Environmental Law Reporter* 1, 4; UNEP, in cooperation with Columbia Law School Sabin Center for Climate Change Law, 'The Status of Climate Change Litigation – A Global Review' (2017) 19.

with climate change. The Lahore High Court agreed with him: the rights to life and dignity were violated, but again the Court hereby only referred to constitutional rights, not international human rights norms. What makes it interesting, however, is that the Court included in its judgment that these rights must be read in light of, *inter alia*, the environmental principle of intergenerational equity. In its Court Order, the Court directed ministries to name a “climate change focal person” and to create a Climate Change Commission, which was given shape in the later supplemental decision.²⁴³ Internationally, this is deemed a successful case in climate change litigation, and one of the few cases directly mentioning intergenerational responsibility. However, besides this brief mentioning it does not provide us with ample material to discuss.²⁴⁴ Furthermore, in the *Petition of Greenpeace Southeast Asia et al.* intergenerational equity is also briefly referred to, but without an explanation. Since the hearings still have to start, it is impossible to say anything substantial about this.²⁴⁵

Additionally, the association of senior women in the *Swiss Grannies* case expressly states in its by-laws to commit itself to climate protection “in the interest of older women, but also in the interest of the general public and of future generations”.²⁴⁶ The logic behind the standing for the association itself has already been discussed in Chapter 4,²⁴⁷ but the petition does not go into the precise standing of the association on behalf of future generations. Nevertheless, it seems to be very similar to the reasoning used in the *Urgenda* case regarding standing for future generations, which the Swiss Court might use as a source of inspiration. However, it remains to be seen how this will be dealt with in Court.²⁴⁸

²⁴³ *Ashgar Leghari v Federation of Pakistan* (2015) WP NO 25501/2015 Lahore High Court Green Bench, 4/14 September 2015 para 8; Environmental Law Alliance Worldwide (ELAW) ‘Asghar Leghari v. Federation of Pakistan’ (25 September 2015) <https://elaw.org/pk_Leghari> accessed 10 April 2017; Jessica Wentz, ‘Lahore High Court Orders Pakistan to Act on Climate Change’ *Climate Law Blog, Columbia Law School, Sabin Center for Climate Change Law* (New York, 26 September 2015) <<http://blogs.law.columbia.edu/climatechange/2015/09/26/lahore-high-court-orders-pakistan-to-act-on-climate-change/>> accessed 17 May 2017; UNEP Report (n 242) 15-16.

²⁴⁴ UNEP Report (n 242) 15-16.

²⁴⁵ *ibid* 21.

²⁴⁶ *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council [Verein KlimaSeniorinnen Schweiz v Bundesrat]* 25 November 2016, para 19.

²⁴⁷ Please see Chapter 4.5.2.

²⁴⁸ A case some readers might think of in this respect is the case of *Juliana v United States* (2016), which was filed by a group of youths. However, in its judgment the Court did not address the standing of future generations. Although it is an important case in global climate change litigation, it is unfortunately irrelevant to discuss here.

5.4.3 Concluding thoughts

Establishing standing for future generations is theoretically supported, but establishing a legal framework in practice is a very complicated matter. In particular the question of who will represent future generations proves to be problematic. However, the fact that theoretically speaking future generations can have standing and governments have duties towards them, is a first but very important step. Also, the *Urgenda* case is a welcome example of how courts may interpret the rights of future generations. In my opinion, recognising and protecting the rights of future generations is a very necessary improvement in light of climate change, thus I really hope this notion will be developed further.

Conclusion

*“[T]hat which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. ... [E]verybody is more inclined to neglect the duty which he expects another to fulfil” – Aristotle*²⁴⁹

This thesis has attempted to identify ways to prevent Aristotle’s claim from becoming reality: how can different strategies of international human rights law be used to protect the (right to) life of individuals of present and future generations in light of climate change? Based on the literature and on recent developments in (inter)national jurisprudence, four options have been critically assessed regarding their benefits and drawbacks. Out of this large amount of information and analyses, I will try to discern the main themes and present some overall concluding thoughts, especially regarding the four tools in relation to one another. Moreover, a number of focus points and limitations will be discussed, ended with a final plea for the need of a human rights-based approach.

The four legal tools

Greening the already existing human rights paradigm is by far most often advocated for by scholars. It obviously is the most simple and uncomplicated way: a widely accepted human rights framework is already in place, and the analysis of the regional courts’ jurisprudence has shown that judges increasingly often find creative ways to incorporate the environment within human rights litigation. There is a growing acceptance that many human rights have some environmental dimension. Whereas the American and African systems have traditionally been more receptive to environmental (group) claims, especially the ECtHR has proven to be innovative in connecting individual human rights and the environment. Let us first look at the application of substantive rights. Especially concerning the ECtHR case law, however, I keep finding it difficult to grasp that the effects of environmental degradation or climate change almost never seem to infringe an individual in his/her physical integrity, as Article 2 ECHR demands. Regarding claims of noise, smell or pollution nuisances, it makes sense to adjudicate via Article 8, but in the future climate change will surely force the Court to engage Article 2 more often. The *Urgenda* and *Swiss Grannies* cases have already paved the way for this, or have at least attempted to do so. Moreover, thanks to the Aarhus Convention which is slowly incorporated into the ECtHR jurisprudence, reliance on procedural rights to influence decision-making and gain access to the Court has become more prevalent. This “proceduralisation of environmental rights” is becoming a trend: whereas Article 6 ECHR obviously specially provides for access to justice, both Article 2 and 8 ECHR

²⁴⁹ Book Two in: Aristotle, *Politics* (350 B.C.E), translated by Benjamin Jowett. <<http://classics.mit.edu/Aristotle/politics.html>> accessed 30 June 2017.

have been explicitly interpreted to include a right to information regarding environmental matters. This expands the State's positive obligations, but it is not an entirely beneficial development: although it enhances environmental protection, the option of solving a violation by invoking procedural rights could be a welcome alternative for States instead of addressing the actual risks and damage.²⁵⁰ Then with regard to the procedural requirements, especially at the ECtHR the strict limitations on standing, particularly the victim requirement, and on *actio popularis* truly obstruct the possibilities for applicants at human rights courts. There is virtually no room to safeguard future generations and oneself against future violations. It really would be a great improvement if the Court would widen its standards, also with regard to NGOs as will be discussed below. Nevertheless, I have to admit that despite these stringent requirements, the European system has in the end managed to adjudicate on a large number of cases and provides the best access for individuals to proceed to a Court that also delivers binding judgements. The American and African systems may be more receptive to environmental and group claims, but their systems with (non-binding) Commissions and dependence on State acceptance of individual complaints, do hinder access to justice for victims.

The human rights framework has also revealed to suffer from some inherent limitations, which are hard to ignore and question its suitability. These apply both in relation to greening human rights and a new substantive right to the environment. The first is the individualistic focus of human rights: their primary function is protecting the *individual*, not the *collective*. This is quite understandable given the founding thoughts behind human rights, which serve to protect the individual against the majority and the powerful State. Nevertheless, if human rights adjudication only considers the effects of the environmental dimension on an individual and his/her particular right, the inherent connection between the interests of the individual and the collective interests of communities in having a healthy environment is ignored.²⁵¹ As Pavoni explains: “[I]ndividualised justice in environmental disputes is somehow fictitious, ie, suggested by the specific requirements of human rights litigation, but out of tune with the nature of most environmental problems.”²⁵² Just as this is a problem with greening human rights, the same goes for a new substantive right. It is therefore doubtful whether the latter would actually add something to the current issues. An option would be to try and frame this as a collective right, but at least in the European system, for one, access to use it would be impeded by procedural requirements for standing. A second limitation, which might even be called an existential problem with human rights at large, is the inherently anthropocentric character. Human rights really are about protecting humans, not the environment. Still, in light of the rapidly changing environmental circumstances it is of crucial

²⁵⁰ Evadne Grant, ‘International Human Rights Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms’ (2015) 6(2) *Journal of Human Rights and the Environment* 156, 163; FM Fleurke and A de Vries, ‘Urgenda: Convergentie tussen Klimaat en Mensenrechten?’ (2016) 42 *Milieu en Recht* 1, 5.

²⁵¹ Grant (n 250) 159.

²⁵² Riccardo Pavoni, ‘Public Interest Environmental Litigation and the European Court of Human Rights: No Love at First Sight’ in F Lenzerini and AF Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014) 334, 332.

importance that we start recognising the connection between humans and the environment – both have to be protected against climate change. As long as that does not happen, both greening human rights or a new substantive right will not make much of a difference. Nevertheless, on a more positive note, it is worthwhile to keep in mind that the articulation of rights is one thing; the judicial interpretation, elaboration and application are what truly induces the development of rights and environmental protection.²⁵³

This thwarting individualistic focus leaves us in need of “more advanced jurisprudence in the field of human rights which recognises the collective dimension of the right to a decent and sustainable environment as an indispensable condition of human security and human welfare”.²⁵⁴ Luckily we already have a solution ready for this cry for collectivism: public interest litigation. A broader allowance for PIL at human rights courts – in particular the ECtHR – is therefore desired. It would simply make much more sense given the collective nature of environment-related human rights problems, and it is important to allow NGOs more space to hold governments accountable. Frequently voiced objections point out the disadvantages of an increased caseload for the already overburdened ECtHR. Admittedly, the *ratione materiae* competence of the Court would be expanded, the role for NGOs would be enhanced, and the right of individual petition might be endangered – “the cornerstone of the ECHR system”.²⁵⁵ However, there is no substantial evidence for this connection, nor that the Court will suddenly be flooded with PIL cases. Quite the opposite, it would be an opportunity for the ECtHR to modernise its jurisprudence, to consider the protection of the environment as a public good and align it with current global environmental risks. Ultimately, one does not exclude the other: human rights courts could take up cases involving the protection of the environment as a common good *and* adjudicate on the usual cases concerning impacts on the personal sphere of individual victims.²⁵⁶

Finally, that leaves us with the protection of future generations. Intergenerational justice has proven to be quite a pickle. However logical it may seem to protect these individuals, in practice it turns out that it is quite hard to find a way to establish standing and prove a violation. Based on philosophical and sociological theories, the theoretical framework is there – filling this in with concrete legal norms is another thing. Standing for future generations, for one, is quite easy to establish: they must have a concrete interest and there must be a real threat that the harm will occur. Practically speaking, however, it becomes problematic: who is then entitled to represent them? And till how far in the future does such a generation extend? Next, States clearly have duties towards generation, but proving a violation of such a duty is another obstacle. The complicated nature of climate changes makes establishing a causal connection hard. More fundamental is the dilemma how to balance needs of current and future generations. Nevertheless, national case law has shown us the various possibilities of protecting future

²⁵³ Grant (n 250), 159-160.

²⁵⁴ Francesco Francioni, ‘International Human Rights in an Environmental Horizon’ (2010) 21(1) The European Journal of International Law 41, 44.

²⁵⁵ Pavoni (n 252) 332.

²⁵⁶ *ibid* 332-333.

generations, and how judges generally have adapted a receptive attitude towards this – most notably in the *Urgenda* case. If this case will continue to live up to its status of a worldwide ground-breaking judgment, standing for future generations will hopefully become more commonly accepted and might serve as an inspiration for the regional human rights courts.

The interplay between the four strategies

Examined one by one, each tool has its benefits and drawbacks. What if the effects of combining them are examined; does one strategy negatively or positively influence another one? For one, the tendency towards greening the traditional human rights is of little help for PIL – that is, for the general public interest in environmental protection. Although this tool is widely recommended by many commentators, the fact remains that these norms concern human rights – not environmental norms. Even if the right to a clean environment is indirectly accomplished through another right, it is still not framed as a general public interest in the environment. That is a serious disadvantage, because it would damage the awareness we need to create about the environment: that in the long run we can only use our human rights to defend ourselves against climate change, if we also protect the environment. The inherently anthropocentric character thus hinders PIL.²⁵⁷ A new substantive human right also clashes with PIL, due to its inherent individualism and anthropocentrism. Again, the public interest in the environment would not be strengthened. Also the standing criteria with the current requirement of identifiable victims cannot be reconciled with PIL. With respect to the ECHR, Schall states: “An individual right to environment construed under the ECHR may, in cases where the public at large is affected, be too diffuse and the individual concern too small to grant access to the ECtHR.”²⁵⁸ Then again, intergenerational justice would likely benefit from a right to the environment, as becomes apparent from the many national cases which were deemed unfit to discuss here but of which many evolved around a constitutional right to the environment. Intergenerational justice would also be an ideal combination with PIL, as this would simplify the requirements of standing on behalf of future generations.

In my opinion, the key is in combining PIL and intergenerational justice, complemented by a broadening of the *locus standi* of the victim requirement. This would allow the ECtHR, IACtHR and ACtHPR to adjudicate cases more boldly, and accept PIL claims, which would underline a new emphasis on collectivism, besides the individualism of human rights which will remain the focus in many cases. Even better, it might make the Courts more receptive to recognising the rights of future generations. If not, it has been shown that an increasing number of domestic courts provide a viable alternative for intergenerational justice.

²⁵⁷ Christian Schall, ‘Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?’ (2008) 20(3) *Journal of Environmental Law* 417, 445.

²⁵⁸ *ibid* 448.

Limitations and future research

The most important restriction in doing this research was the limited number of cases specifically adjudicating on (the right to) life and climate change. A plethora of theory on human rights and climate change lies awaiting to be consulted, but no matter how innovative, this does not necessarily translate into practice. It is naturally encouraging that so many scholars and organisations emphasise the need to connect the two concepts, but that is a hard deal to sell to the victims who really depend on courts to adjudicate on the matter. However, the limited number of directly relevant cases on an international level was partly compensated by the many national cases. Although most of them deal with domestic human rights clauses instead of national ones, it does show a trend of courts at least willing to let such cases proceed. One can only hope that more national cases invoking human rights law, and obviously more cases in the regional courts, will appear in the future.

At times another limitation, or obstacle, was the focus on (the right to) life. Initially this seemed a logical approach to keep the scope of this research concise – and right to life is a precondition for all other human rights. However, even though the parentheses left room to discuss alternative strategies which not directly concerned *the right to life* but protected *life* nonetheless, especially the case law of the ECtHR showed that this focus was not always the most effective one. Oftentimes protection is simply more efficiently accomplished through other rights. For example, the right to food or water enshrined in the ICESCR might be more effective to protect life, or via protection of indigenous communities as the American system has portrayed. Such a comparison might be interesting for further research.

Lastly, I embarked upon this thesis with the premise that the human rights framework is suitable for protecting human rights against climate change. Although in my opinion it still is in important ways, as has been discussed in the previous chapter, it does leave open the question if another, perhaps even non-legal, framework could be just as or even more effective. However, this is again beyond the scope of this thesis, but might be worthwhile to dive into for future research. The more strategies, the better.

The vital need for human rights adjudication

“Human rights form a central part of the thought system of many people in the world. ... The enforcement of ‘rights’ in the legal system does not, by itself, change government policy, but the embedding of rights in our thought systems can.”²⁵⁹

Besides all legal advantages, practically speaking, a hugely important reason for a stronger focus on a human-rights based approach is the potential to influence policy. If we begin to acknowledge that climate change violates fundamental human rights, and will do so on an incalculable scale, possibly

²⁵⁹ Svitlana Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’ (2008) 9 Vermont Journal of Environmental Law 514.

leading to numerous lawsuits and compensation claims against governments, this might contribute to a direly needed breakthrough in politics. Human rights law could thus function as a political and ethical imperative: emphasising the effects climate change will have on the lives of people – our lives, for that matter – and the resulting (political) costs, besides reaching scientific consensus, could be another way to force the world to act. Actions can turn into legal obligations, thereby again providing a way to influence or even improve climate policy.²⁶⁰

All in all, in absence of an international environmental tribunal and a compulsory dispute resolution mechanism, it is very important to develop some process of adjudication for the development and recognition of international environmental rules and principles. International human rights law can do this and especially add value by complementing national legislation, by offering a united forum for addressing global problems, and naturally by ensuring accountability of governments regarding their obligations and thereby the rule of law. Most importantly is that at the moment international human rights bodies are presenting the only adjudication procedures and enforcement mechanisms available to individuals at the international level to challenge governmental (in)action related to their human rights and environmental issues.²⁶¹ This is ultimately what human rights are all about: to safeguard fundamental values and empower people to defend these by relying on their fundamental rights in Court.

As Francioni aptly states:

*“My plea is for a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and technique of human rights discourse to the enhanced risk posed by global environmental crises to society and, indeed, to humanity as a whole.”*²⁶²

To this inspiring quote I would like to add a plea for intergenerational justice. Finally, we must start to see the environment again as a public good, a *sine qua non* for the welfare of humanity. More and more individuals seem to realise this, given the inspiring cases popping up all over the world sparked by the *Urgenda* judgment – let us hope governments will soon too. International human rights law presents a very influential tool to reach this objective; surely not the only viable tool, but a very powerful one indeed.

²⁶⁰ Dinah Shelton, ‘Human Rights and Climate Change’ (2009) Buffett Center for International and Comparative Studies Working Paper Series, Working Paper No 09-002 1, 5.

²⁶¹ Christina Voigt and Evadne Grant, ‘Editorial: The Legitimacy of Human Rights Courts in Environmental Disputes’ (2015) 6(2) *Journal of Human Rights and the Environment* 131, 132; Grant (n 250) 158.

²⁶² Francioni (254) 55.

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