Reading mitigation obligations in internationally recognised human rights

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1. INTRODUCTION

Over the past two decades, human rights law has increasingly been turned to as a supplementary legal framework in addressing climate change. This has been largely due to the implementation and accountability gaps in international climate change law.[1] Human rights law provides a useful framework for addressing these gaps by providing normative guidance on the ways in which States must respond to threats to, or violations of, internationally protected rights connected with climate change. In this chapter, we outline how obligations on States to mitigate climate change can and have been read into the existing body of human rights law. We will examine these different approaches in detail below. We will also consider how these various approaches relate to each other and how they can be used to inform the development of more effective human rights-based responses to climate change.

[1] M. Wewerinke-Singh, 'Enabling the Right to a Healthy Environment' (2022) 12(10) Nature Climate Change <https://www.nature.com/articles/s41558-022-01487-2> accessed 2 May 2023.

2. LIABILITY- AND NON-LIABILITY-BASED APPROACHES

There are a variety of different ways in which human rights law can be used to address climate change mitigation obligations. Approaches to incorporate human rights law tend to fall across a spectrum of liability. Liability-based approaches hold that States are liable (or, in the language of the general law of State responsibility,[2] internationally responsible) for the consequences of their failure to take adequate action on climate change under existing provisions of international human rights law. Non-liability-based approaches, on the other hand, do not hold States liable for failing to adequately mitigate climate change, but instead seek to provide normative guidance on how they should meet their obligations in this regard. Of course, these two approaches are not mutually exclusive and may be used in combination to establish and enforce climate mitigation obligations. As discussed below, variations of these approaches are also being used to hold corporations to account for their contributions to climate change.

One key type of non-liability-based approach draws on the notion of an 'obligation to prevent human rights harm'. This approach has been used in a variety of contexts and involves holding States responsible for failing to prevent harm to individuals or groups within or outside their territory, or even to future generations. One of the most prominent examples to date is the landmark *Urgenda* case, in which the Supreme Court of the Netherlands found the State of the Netherlands in breach of its obligations under the European Convention on Human Rights (ECHR) as a result of its insufficiently ambitious climate policies.[3] A slew of cases has replicated this approach, with several judgments confirming that States indeed have obligations to protect human rights against the adverse effects of climate change through sufficiently ambitious mitigation action. Section 3 discusses these cases in more detail.

The 'climate change tort' represents another innovative, liability-based approach towards environmental justice, seeking to hold emitters liable for the damage caused by their emissions. This approach has

[2] International Law Commission, 'ILC Articles on State Responsibility' (2001) Supplement No 10 (A/56/10).

[3] *State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. 20 December 2019) (Neth.) (*Urgenda*).

been tested in various jurisdictions throughout the world since the early 2000s,[4] mostly in nuisance-type cases involving individual plaintiffs who have suffered property damage as a result of climate-related events, such as flooding or heatwaves.[5] Thus far the strategy has not met with success, largely due to legal and evidential obstacles.[6] Yet, the rapidly evolving landscapes of scientific discovery and legal interpretation have not left this approach static.[7] While it may be true that tort-based climate damage suits have yet to achieve decisive victories in courts, they have begun to stimulate profound discussions and potential reconfigurations of the conventional boundaries of tort law. This has the potential to make the system more responsive to complex issues surrounding climate mitigation and emissions accountability, a point underscored in legal scholarship.[8] An intriguing development in this legal arena is the emergence of 'hybrid' lawsuits. These meld traditional human rights claims with climate torts, thereby forging a potentially powerful legal basis for compensation. Section 4 will explore the strengths and limitations of these innovative cases, focusing particularly on the judgment of the Hague District Court in the *Milieudefensie v Shell* case. Although it is premature to assess the effectiveness of these cases in addressing climate change, their exploration reflects a dynamic shift in climate litigation against corporate actors, underscoring the continuing promise of this field of law.

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[4] G. Ganguly et al., 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) OJLS 841–868.

[5] See e.g., *Comer v Murphy Oil USA Inc* 607 F.3d 1049 (5th Cir 2010); *Kivalina v ExxonMobil Corporation et al.* 696 F.3d 849, 2012 WL 4215921 (9th Cir 2012).

[6] Michael B. Gerrard and Joseph A. MacDougald, 'An Introduction to Climate Change Liability Litigation and a View to the Future' (2013) 20 Conn. Ins. L. J. 153 <https://scholarship.law.columbia.edu/faculty_scholarship/709/> accessed 15 May 2023.

[7] 'If at First You Don't Succeed' (n 4).

[8] Douglas Kysar, 'What Climate Change Can Do About Tort Law' (2011) 41(1) Environmental Law 1–71 <http://www.jstor.org/stable/43267360> accessed 15 May 2023.

3. UNDERSTANDING AND ENFORCING STATES' OBLIGATIONS TO PROTECT HUMAN RIGHTS AGAINST THE ADVERSE EFFECTS OF CLIMATE CHANGE

The application of human rights law to climate change has thus far been primarily concerned with the recognition and enforcement of States' obligations to mitigate climate change.[9, 10] In this section, we shall explore how human rights law is being used in both traditional human rights

[9] For an analysis of this trend, see César Rodríguez-Garavito, *Litigating the Climate Crisis* (Cambridge University Press, Cambridge 2022).

[10] There are some important exceptions – cases that focus on the impacts of climate change on communities today, rather than the prevention of emissions that will contribute to future environmental damage. For example, *Sacchi et al. v Argentina et al.* [2018] IACHR 13, IACHR, Report No 88/18 (6 September 2018); Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change (2019) <http://climatecasechart.com/climate-changelitigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-allegingviolations-stemming-from-australias-inaction-on-climate-change/>; Complaint to the United Nations Human Rights Committee on the Rights of Indigenous People in Addressing Climate-Forced Displacement (2020) <http://climatecasechart.com/non-us-case/rights-of-indigenous-people-in-addressing-climate-forced-displacement/>; *Asghar Leghari v Federation of Pakistan, et al.*, PLD 2018 Lahore 364.

All four incorporate climate adaptation claims, and the Torres Strait Petition and Rights of Indigenous Peoples complaint in particular forefront adaptation. Notably, Indigenous communities and young people have led the way in bringing such adaptation-oriented cases. See also Miriam Cullen, '"Eaten by the Sea": Climate Change and Remote Subnational Minority Communities: A Case Study of the Torres Strait Islands and the Communications Procedure of the UN Human Rights Committee' (2018) 9(2) JHRE; Matthew Rimmer, 'The Torres Strait Eight: Climate Litigation, Biodiversity, Human Rights, and Indigenous Intellectual Property' (1st edn Routledge, Abingdon 2022); Tayanah O'Donnell, 'Climate Change Adaptation Litigation: A Pathway to Justice, but for Whom?' in Anna Lukasiewicz and Claudia Baldwin (eds), *Natural Hazards and Disaster Justice: Challenges for Australia and Its Neighbours* (Springer Singapore, Singapore 2020).

and 'hybrid' human rights and tort law cases to hold States accountable for their action or inaction pertaining to mitigation. The primary source of human rights obligations for States is found in international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as regional human rights treaties such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (ACHPR), and from customary international law.[11] Further, obligations to protect human and fundamental rights can be derived from national and subnational constitutions. Few of these sources refer explicitly to climate change. However, an increasing number of cases build on the premise that the obligations flowing from these sources imply an obligation on States to protect human rights from the detrimental impacts of climate change.[12] While many of these cases are still pending, initial results have included groundbreaking judgments in favour of plaintiffs seeking enhanced climate action. For example, court victories have been secured in cases invoking the rights to life and respect for private and family life as protected under the ECHR.[13]

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[11] See also M. Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing, Oxford 2019).

[12] Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnatl. Environ. Law 37; *Litigating the Climate Crisis* (n 9); Joana Setzer and Lisa Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10:e580 WIREs Clim. Chang. 1; Annalisa Savaresi and Joana Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2021) 13(1) JHRE 7.

[13] These include the *Urgenda* and the *Shell*cases, discussed below. Also: Civ. [Tribunal of First Instance] Brussels (Bel), *VZW Klimaatzaak v Kingdom of Belgium & Others*, 2014, 2015/4585/A, No 167 (n 3); *Neubauer et al. v Germany* (2021). For somewhat sobering reflections on the impact of the European Court of Human Rights (ECtHR) on climate cases beyond *Urgenda* see Jasper Krommendijk, 'Beyond Urgenda: The role of the ECHR and judgments of the ECtHR in Dutch environmental and climate litigation' (2022) 31(1) RECIEL 60–74..

Successful cases have also invoked a range of socio-economic rights,[14] the right to culture,[15] and the right to a healthy environment.[16] These successes are significant as they clarify the normative content of States' human rights obligations related to climate change, thus assisting States in ensuring that their climate policies and actions are aligned with, and give effect to, their respective obligations under international human rights law.[17] Such precedents also create opportunities for future

[14] Republica de Colombia Corte Suprema de Justicia, *Demanda Generaciones Futuras v Minambiente*, 51 (2018).

[15] *Billy et al. v Australia (Torres Strait Islanders Petition)* (Communication No 25/1998, UN Committee on the Elimination of Racial Discrimination, 11 August 1998) CERD/C/51/D/25/1998.

[16] *Demanda Generaciones Futuras v Minambiente* (n 14).

[17] At the time of writing, several cases pending before the ECtHR relate to climate change, and all are relevant here. These pending cases span different types of plaintiffs – including individual citizens, local politicians, and non-profit organisations – and a range of contexts. Some – *Carême v France* and *Engels and Others v Germany* – involve citizens alleging that their States are violating their human rights as a result of insufficiently ambitious climate targets. Two other pending cases, *The Norwegian Grandparents' Climate Campaign and others v Norway* and *Greenpeace Nordic and Others v Norway*, challenge Norway's decision to grant oil production licences in the Barents Sea. Both suits focus on Articles 2 and 8 of the ECHR – the rights to life and private and family life, respectively – and the latter also alleges violation of the right to effective remedy, the prohibition of torture, and the right to property (Articles 3 and 13 of the ECHR and Article 1 of Protocol No 1 to the Convention). Also among the climate cases pending before the ECtHR are two focused on the health consequences of climate change. In *Müllner v Austria*, an MS patient whose condition is worsened by rising temperatures alleged violations of his rights to life and effective remedy; in *KlimaSeniorinnen v Switzerland* (ECtHR), an organisation of senior women claims human rights violations related to the impact of heatwaves exacerbated by climate change. A third set of the pending cases involves youth and young adults suing numerous States for failing to take sufficient action on climate change. All four of these youth suits invoke Article 14 of the ECHR, the right to not be discriminated against, and allege that States' inaction on climate change is discriminatory against younger generations, who will suffer the consequences of climate change more acutely.

litigation against States (and indeed corporations) who fail to take adequate measures to address climate change.[18]

The judgment of the Supreme Court of the Netherlands in the *Urgenda* case marks one of the most prominent successes in rights-based climate litigation to date. The Court's decision was based on the following reasoning: since the Netherlands has an obligation to protect the rights to life and respect for private and family life, it must not permit excessive greenhouse gas emissions that endanger these rights.[19] It is important to note that the obligation to prevent harm does not arise automatically under international human rights law but rather has to be interpreted in accordance with the general principles of international law and the particular circumstances of each case, most notably the existence of a certain threat to the relevant rights.[20] The implication is that States cannot meet this obligation simply by fulfilling their existing legal obligations on climate change, but must act beyond those obligations by formulating and implementing measures capable of protecting the relevant rights, in accordance with scientific and technological advances.[21] In the context of climate change, the substantive obligation builds on the premise that the adverse effects of climate change are reasonably foreseeable and that these effects, if unmitigated, would violate the human rights concerned.

At the same time, it must be noted that the *Urgenda* judgment did not actually find the State of the Netherlands in breach of its human rights obligations as a result of its contributions to the causes of existing climate change. This is in part the result of the Urgenda Foundation's focus on the prevention of future harm, thus allowing the court to circumvent questions about liability for losses and damage resulting from climate change. However, the Court did make an important pronouncement that could inform future liability-focused cases: it stated that in accordance with the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) embodied in the UN Framework

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18 *Demanda Generaciones Futuras v Minambiente* (n 14).

19 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Arts 2 and 8.

20 *Urgenda* (n 3), para 5.7.5.

21 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740, Article 10.

Convention on Climate Change,[22] the distribution of climate mitigation measures must be based on two factors: on the one hand, 'responsibility for past emissions by a country' and on the other hand, 'the possibilities for countries to reduce their emissions'.[23] The Court found that these two factors were based on one 'underlying principle', namely that 'partial fault also justifies partial responsibility'.[24] Such consideration of States' respective contributions to atmospheric greenhouse gases can serve to ensure that States whose industrial and colonial activities have contributed disproportionately to climate change bear relatively more responsibility for mitigation. Further, it entails acknowledgement of developed States' obligations to provide the financial and technical assistance that enables developing States to enact mitigation pathways aligned with the 1.5°C temperature limit while simultaneously realising economic, social, and cultural rights.[25]

Courts in other jurisdictions have likewise given significant consideration to equity and CBDR-RC in discerning mitigation obligations from human rights sources. This was true in *Marangopoulos Foundation for Human Rights v Greece*, in which petitioners successfully sued for a declaration that Greece's operation and partial ownership of lignite coal mines and coal-fired power plants led to climate change-related human rights violations.[26] Another recent success was won by a group of Torres Strait Islanders who petitioned for the UN Human Rights Committee to recommend that Australia escalate its climate mitigation plans and aim for net zero emissions by 2050, while also phasing out thermal coal.[27] In its views on the petition, the Human Rights Committee found that Australia's actions constituted human rights violations against Torres Strait Islanders and that the State must both take steps towards reparation and plan preventative measures to avoid similar rights violations in the future. ClientEarth, the same group that represented the Torres Strait

[22] UNFCCC, Article 3(1).

[23] *Urgenda* (n 3), para 5.7.6.

[24] Ibid.

[25] See Juan Auz, 'Two Reputed Allies: Reconciling Climate Justice and Litigation in the Global South' in César Rodríguez-Garavito (ed.), *Litigating the Climate Emergency* (Cambridge University Press, Cambridge 2022).

[26] Complaint No 30/2005 *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (ESCR, 10 October 2005).

[27] *Billy et al.* (n 15).

Islanders in *Billy et al. v Australia*, also persuaded the General Court of the European Union to order the European Investment Bank (EIB) to review its decision to finance a biomass power plant.[28]

Other cases related to climate mitigation and its global burden-sharing dimension are still pending. For example, a petition filed in 2013 by members of the Athabasca Chipewyan First Nation seeks a declaration by the Inter-American Commission on Human Rights (IACHR) that Canada's failure to regulate black carbon emissions and resulting Arctic warming constitute a violation of the human rights of the Athabaskan people.[29] Also relevant are the climate change cases pending before the ECtHR, discussed at length in footnote 17. Each of these pending cases, although they involve different States and contexts, is relevant to burden sharing because of the influence the forthcoming decisions will have on States' obligations to mitigate climate change – obligations which necessarily exist in an international context. Of particular importance to burden sharing is *Duarte Agostinho and Others v Portugal and 32 Other States*,[30] which proposes employing the Climate Action Tracker (CAT) methodology ('an independent scientific analysis that tracks government climate action and measures it against the globally agreed Paris Agreement'[31]) to address burden sharing by attempting to assess the relative fairness of different States' mitigation contributions.[32] Rulings on these and other petitions in the coming years will be key in further defining the landscape of climate law and litigation.

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[28] Case T-9/19 *ClientEarth v European Investment Bank* (GC, 27 January 2021).

[29] *Petition to the IACHR Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, *supra* note 62 at 86.

[30] See Complaint filed in Case 39371/20 *Duarte Agostinho and Others v Portugal and 32 Other States* before the ECtHR (2 September 2020).

[31] Climate Action Tracker, 'About' <https://climateactiontracker.org/about/> accessed 16 May 2023.

[32] For further discussion of CAT methodology, see Gerry Liston, 'Enhancing the Efficacy of Climate Change Litigation: How to Resolve the "Fair Share Question" in the Context of International Human Rights Law' (2020) 9(2) CILJ <https://www.elgaronline.com/view/journals/cilj/9-2/cilj.2020.02.07.xml?rskey=8aheNk&result=1#bib-118> accessed 16 May 2023.

The premise that States' obligations to reduce emissions under international human rights law must take account of their past contributions to climate change and level of development has been further confirmed in the views of regional human rights courts, UN human rights treaty bodies, and Special Rapporteurs of the Human Rights Council. The Inter-American Court of Human Rights (ICtHR), for example, recognised the obligation of States to mitigate climate change as part of their obligation to protect human rights in its landmark Advisory Opinion OC-23/17 on 'The Environment and Human Rights', requested by Colombia.[33] The Opinion states that 'the existence of [the obligation to avoid activities harmful to the environment] does not depend on the level of development; in other words, the obligation of prevention applies equally to both developed and developing States'.[34] At first glance, this might appear in contradiction to incorporating States' relative contribution to climate change into mitigation and prevention obligations. But in fact, the recognition that both developed and developing States each have an obligation of prevention merely dispels the idea that developing countries have no obligation to prevent harm. The Court simultaneously recognises that the *substance* of States' obligation to prevent and mitigate climate change may well differ based on relative contribution to climate change and relative ability to reduce emissions without sacrifice of other human rights. This is established implicitly via the opinion's finding that 'the principles, rights and obligations contained in [different instruments on environmental law] make a decisive contribution to establishing the scope of the American Convention',[35] which indicates that international environmental law (and thus, implicitly, the principle of common but differentiated responsibilities) must inform the interpretation of international human rights law.

In addition to explicitly addressing the question of differential contributions to climate change, the Advisory Opinion also takes into account that private actors housed in developed States often conduct environmentally harmful activities within the borders of developing States. In writing the opinion, the ICtHR clarifies that States that exercise 'effective control' over environmentally damaging activities

[33] Inter-American Court of Human Rights, The Environment and Human Rights, Advisory Opinion OC 23/16, Series A, No 23 (2017).
[34] Ibid, para 142.
[35] Ibid, para 44.

in other States (for instance, States may have regulatory power over private actors located in their jurisdiction who conduct environmentally damaging activities in other jurisdictions) *and* those that conduct harmful activities whose effects are felt primarily in other States are responsible for preserving human rights in relation to those activities.[36]

By addressing this key question of jurisdiction, the Advisory Opinion set the stage for future rulings on State responsibility for human rights violations resulting from climate change. For example, building upon IACtHR's guidelines for determining jurisdiction in transboundary forms of environmental harm, the UN Committee on the Rights of the Child (CRC) found in its admissibility decision on *Sacchi v Argentina* that the child authors of the suit did in fact fall into the jurisdiction of the respondent States, even when the harm occurred outside the respondent States' territories.[37] Moving forward, this legal determination will help plaintiffs, attorneys, and judges better parse extraterritoriality in the context of interjurisdictional activity and impact.

Another set of human rights obligations related to climate mitigation involves international cooperation and assistance, both financial and technological, to enable developing States to undertake ambitious climate action while simultaneously meeting sustainable development objectives. The importance of these obligations has been widely recognised, for instance in a joint Statement on Human Rights and Climate Change by UN human rights treaty bodies stating specifically that, 'high-income States should support adaptation and mitigation efforts in developing countries by facilitating transfers of green technologies and by contributing to financing climate mitigation and adaptation'.[38] Additionally, the UN Special Rapporteur on Human Rights and the Environment set out a range of State obligations in his report on the right to a safe climate as a component of the right to a healthy environment,

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[36] Ibid, paras 81, 97.

[37] *Sacchi et al. v Argentina et al.* [2018] IACHR 13, Inter-American Commission on Human Rights, Report No 88/18 (6 September 2018).

[38] UN Human Rights Treaty Bodies, 'Joint Statement: Human Rights are Essential for Climate Action' (Press Release, 6 December 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27951&LangID=E> accessed 7 December 2021. Of course, the use of the verb 'should' here should not distract from the legally binding nature of related obligations of these States under the UNFCCC and the Paris Agreement.

including an obligation of States to cooperate internationally to achieve a 'low-carbon, climate resilient, and sustainable future'.[39] The Special Rapporteur on Climate Change and Human Rights has reaffirmed these obligations in his first and second reports, which came out in June and July 2022, respectively. The first report[40] echoes the safe climate report in advocating that States incorporate a rights-based approach into their adaptation plans and pay particular attention to ensuring that such approaches reflect a 'gender-responsive, age-sensitive, disability-inclusive and social-inclusion' perspective[41] The second report[42] focuses largely on documenting the inequities between developing and developed nations in the climate change and human rights context. It also addresses how developed nations have wielded their influence at climate conferences to avoid making major funding pledges, concluding that 'the major emitting countries have abandoned their duty to cooperate in line with the principles of international cooperation'.[43]

In sum, the burgeoning jurisprudence and accompanying normative developments in this area provide a robust legal groundwork for further legal action. This solid foundation encourages the pursuit of more ambitious and equitable mitigation measures. It affirms that States have legal obligations to prevent human rights harms associated with climate change, and it suggests that they could face legal liability for failing to do so. Additionally, it suggests that these obligations extend to international

[39] UN Special Rapporteur on Human Rights and the Environment, 'Right to a Safe Climate as a Component of the Right to a Healthy Environment' (Report to the Human Rights Council, 16th sess, UN Doc A/HRC/16/49, 10 February 2011) para 68.

[40] UN Special Rapporteur on Climate Change and Human Rights, 'Report of the Special Rapporteur on Climate Change and Human Rights: Initial Planning and Vision of the Mandate' (Report to the Human Rights Council, 50th sess, UN Doc A/HRC/50/39, 9 May 2022) <https://www.ohchr.org/en/documents/thematic-reports/a5039-report-initial-planning-and-vision-mandate> accessed 8 June 2022.

[41] Ibid, para 16.

[42] UN Special Rapporteur on Climate Change and Human Rights, 'Report of the Special Rapporteur on Climate Change and Human Rights' (Report to the General Assembly, 77th sess, UN Doc A/77/255, 11 July 2022) <https://www.ohchr.org/en/documents/thematic-reports/a77226-promotion-and-protection-human-rights-context-climate-change> accessed 20 July 2022.

[43] Ibid, para 69.

cooperation and assistance aimed at facilitating a global response to climate change premised on equity and CBDR-RC. Moreover, it paves the way for future rights-based litigation that could potentially find States or corporations liable for climate damage.

4. THE CONTRIBUTION OF *MILIEUDEFENSIE V SHELL*

Much of the debate surrounding the use of human rights law in addressing the contributions of businesses to climate change has focused on the UN Guiding Principles on Business and Human Rights (the 'Guiding Principles'),[44] which were adopted by the UN Human Rights Council in June 2011 and which apply to all business enterprises operating anywhere in the world. One of the key objectives of the Guiding Principles is to 'promote the integration of respect for human rights with the activities of business enterprises'.[45] Another objective of the Guiding Principles is to assist businesses in preventing and addressing adverse impacts on human rights and to encourage greater corporate accountability in this regard.[46] While the Guiding Principles are not legally binding, they play an important role in setting the agenda for corporate responsibility and transparency. They also serve to raise the visibility of human rights issues in the private sector and to encourage companies to adopt a more proactive approach towards minimising their environmental impacts and protecting the rights of workers and others affected by their operations. The UN Human Rights Council also addressed the importance of corporate contributions to climate change by scheduling a June 2024 session to focus on corporate accountability with respect to human rights and climate change.[47]

Most business and human rights scholars agree that the Guiding Principles constitute an important step towards establishing an internationally recognised legal framework for business-related activities

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[44] OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc. A/HRC/17/31 (2011).

[45] Ibid, 8.

[46] Ibid.

[47] Report of the Special Rapporteur on Climate Change and Human Rights: Initial Planning and Vision of the Mandate (n 40), para 7.

around the world.[48] However, it could be argued that the Guiding Principles do not go far enough in protecting the right to a healthy environment from the impacts of business operations. For example, the Guiding Principles do not include any explicit reference to the duty to respect and protect the right to a healthy environment, which is one of the most relevant rights in connection with climate change. While the Guiding Principles do include some provisions relating to environmental protection, they are not sufficiently detailed to address the specific risks posed by climate change. It is therefore hugely significant that courts have started to interpret standards derived from tort law in light of the Guiding Principles to identify new duties to protect human rights from climate change.

Milieudefensie v Shell[49] provides the leading judgment in this area. The plaintiff was a Dutch NGO known as the Milieudefensie Foundation. The Foundation brought an action against Royal Dutch Shell, claiming that the company needed to align its policies with the goals of the Paris Agreement in order to prevent damage caused to the environment by the production of fossil fuels. The Foundation alleged that Shell's failure to do so would result in severe damage to agricultural land in the Netherlands relating to rising sea levels and coastal erosion.[50] The legal principle applied in *Milieudefensie v Shell* is known as the 'duty of care' under Dutch tort law.[51] The Court found that there was a strong basis to infer a breach of the duty of care on the part of Shell. In particular, it held that the company's actions had contributed to an increase in greenhouse gas emissions, which in turn had led to global warming and sea level rises.[52] Based on these factors, the Court concluded that Shell had a responsibility to take measures to reduce the level of emissions – notably

[48] J. Bonnitcha and R. McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) EJIL 899, 899.

[49] *Milieudefensie et al. v Royal Dutch Shell plc*. ECLI:NL:RBDHA:2021:5337 (Dis. Ct. Hague 26 May 2021) (*Shell*).

[50] See 'Unofficial English summary of the summons by plaintiff organisation' *Climatecasechart* (5 April 2019), available at: <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_press-release-1.pdf>.

[51] See Dutch Civil Code ('DCC'), article 6:162.

[52] *Shell* (n 49).

from Scope 1 through to 3 – in order to prevent further environmental damage. It specifically noted that emission-reduction measures and policies must be consistent with the general aim of achieving the global reduction in greenhouse gas emissions necessary to limit the global temperature increase to well below 2°C, and preferably below 1.5°C.[53]

Significantly, the Hague District Court considered the tort-based duty of care to be closely linked to Articles 2 and 8 of the ECHR.[54] While the obligations enshrined in the ECHR do not apply directly to private actors, the Hague District Court did rely on the treaty in interpreting the general duty of care under Dutch tort law. This creative way of relying on the ECHR in a climate case against a corporation underscores the relevance of human rights treaties for understanding the rights and duties of companies in the context of climate change. These duties may not only involve harm prevention, but also reparations for harm that has already been caused. Indeed, the Court's reasoning in *Milieudefensie v Shell* can be read as suggesting that if the business activities of a company cause actual or foreseeable harm to people and the environment, then the company may be in breach of its obligations under the duty of care related to human rights.

In sum, the *Milieudefensie v Shell* decision is an important step in the development of human rights law as it relates to climate change and corporate accountability. It provides guidance to States around the world on how they should regulate the activities of companies that emit significant amounts of greenhouse gases. While the decision does not provide a blueprint for the development of legislation in this area, it does show that the courts may be willing to impose liability on companies that fail to protect the environment. The practical implications of this development are very significant for States and businesses around the world. By clarifying the legal obligations of companies like Shell with reference to both human rights and the Paris Agreement, the case suggests that climate change liability for non-State actors can be based on norms derived from both human rights and climate change law.

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53 Ibid.
54 Ibid.

5. CONCLUSION

This chapter has embarked on a comprehensive exploration of the intricate interplay between human rights obligations and climate change mitigation. The focus has been on the vast and intricate tableau of international human rights treaties, regional instruments, and national constitutions that collectively function as the cornerstone of these obligations. The recognition and enforcement of these obligations within the context of climate change are reshaping our understanding of the role of human rights law in addressing the climate crisis, demanding a novel and comprehensive approach to accountability.

In our discussion of liability-based and non-liability-based approaches to enforcing human rights obligations related to climate change, we have elucidated the inherent interdependence and overlap between these two perspectives. While initially appearing as distinct strategies, a deeper examination reveals a nuanced reality where the boundaries blur, and the two approaches converge. Non-liability-based approaches, despite their seemingly distinct orientation, inherently gesture towards the establishment of liability. When pursued to their logical conclusion, these mechanisms inevitably lead to the attribution of responsibility and the imposition of duties to redress climate change-related harms. As such, non-liability-based approaches are not, as might first appear, a divergence from liability-based strategies, but rather an integral part of a broader and more encompassing approach to enforcing climate change mitigation obligations.

The landmark ruling in *Milieudefensie v Shell* illustrates this intricate interplay. The case has helped redefine corporate responsibility to respect human rights in the context of climate change, effectively showcasing how innovative interpretations of existing legal instruments can establish liability for contributions to climate change. This case, and others like it, underscore the critical role of the judiciary in demystifying and enforcing these obligations.

Overall, human rights law increasingly emerges as an indispensable tool in unravelling and addressing the multidimensional challenges of climate change mitigation. Not only does it provide a robust legal structure for climate-related litigation, but it also incentivises more equitable responses to climate change, including through international cooperation. Moreover, human rights law extends its reach beyond the judiciary, offering valuable normative guidance, such as that provided

by the Special Procedures of the UN Human Rights Council and human rights treaty bodies. This guidance, alongside the growing corpus of climate jurisprudence, is pivotal in cultivating a culture of accountability for climate-related action and inaction.

In conclusion, human rights law, in its expansive and dynamic ambit, is a potent instrument in the global response to climate change. It provides an essential legal and moral compass for States and corporations, while empowering those most acutely impacted by climate change to hold these actors to account for the consequences of their actions. As we forge ahead, the continuous evolution and refinement of these rights-based approaches to climate change will be critical in meeting the ever-evolving demands of climate justice.