UNIVERSIDADE CATÓLICA PORTUGUESA

Rights-based climate litigation

A comparative analysis

Ana Vitória Zanatta

Master in Law

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Para a minha mãe,
por todo o apoio.

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ABSTRACT

This thesis aims to identify limits and possibilities of international rights-based climate litigation. This was achieved through a comparative and critical analysis of four recent high-profile decisions published by international human rights bodies. This allowed a comprehensive view of the precedents set for a variety of procedural and substantive issues, and of the differences in approach between the European Court of Human Rights, United Nations Committee on the Rights of the Child, and Human Rights Committee.

Key words: International law; Human Rights; Climate litigation.

RESUMO

Esta dissertação visa a identificar limites e possibilidades de litígios climáticos internacionais baseados em direitos humanos. Isso foi alcançado através de uma análise comparativa e crítica de quatro decisões recentes de alto perfil, publicadas por organismos internacionais de direitos humanos. Isso permitiu uma visão abrangente dos precedentes definidos para uma variedade de questões processuais e substantivas, e das diferenças em abordagem entre o Tribunal Europeu de Direitos Humanos, o Comitê das Nações Unidas sobre os Direitos da Criança, e o Comitê de Direitos Humanos.

Palavras-chave: Direito Internacional; Direitos Humanos; Litigância climática.

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ACRONYMS

ACHR	American Convention on Human Rights
CBDR	Common but Differentiated Responsibilities
CIEL	Center for International Environmental Law
CoE	Council of Europe
COP	Conference of the Parties
CommRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GA	General Assembly
GHG	Green-house Gases
HR	Human Rights
HRC	Human Rights Committee
IAcHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IEL	International Environmental Law
ICC	Inuit Circumpolar Council
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law

IL	International Law
ILC	International Law Commission
NDC	Nationally Determined Contribution
NGO	Non-Governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
PA	Paris Agreement
SIDS	Small Island Developing States
UK	United Kingdom
UN	United Nations
UNEP	United Nations Environmental Program
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties

INTRODUCTION

Climate change is an existential threat to all of humanity. The universality of this issue is precisely what gives it social relevance. As such, the protection of the environment - namely through the mitigation of the climate change phenomenon - is a legal good of utmost importance.

The scientific community has long agreed regarding the catastrophic potential of the unchecked rise in global temperature, particularly in regard to the rise of the sea level and extreme weather events. It is likewise beyond debate that these repercussions are set to impact most harshly our poorest and most vulnerable populations, many of whom reside in the Global South.

For decades, States have engaged in international cooperation efforts to mitigate the effects of climate change, through *inter alia* the limiting of GHG emissions. Nevertheless, 2024 was the warmest year on record, and the first to break the PA's[1] 1.5ºC limit.[2]

Perhaps unsurprisingly, 2024 was also an eventful year when it comes to mitigation and adaptation efforts. The COP29, held in Azerbaijan in November, saw an "insurance policy for humanity", in the hard-fought agreement to triple finance to developing countries.[3] Furthermore, the growing trend of judicialization of the topic bore fruit through the publication of multiple high-profile decisions at the international level, with others still pending.

These developments have created the need for a new evaluation of the advances made in the field. Thus, the opportunity I intend to seize through this research is uniquely current. This thesis proposes to contribute to existing academic research by comparatively and critically reviewing recent decisions in rights-based climate litigation published by the CommRC, HRC and ECtHR. Through this investigation, I intend to identify not only previous polemic questions that the recent jurisprudence may have answered but also remaining gaps that stand to be addressed by future developments.

[1] PA, Article 2.1(a).
[2] COPERNICUS, 2025.
[3] STIELL, 2024.

As such, the question this investigation seeks to answer is as follows: What are the main advances and shortcomings in rights-based climate change litigation and how have they affected the response to climate change in IL?

Chapter 1 of this thesis contextualizes the problem by reviewing the IL response to climate change and relationship between IEL and IHRL in this context. Chapter 2 critically analyzes the decisions selected. Chapter 3 offers reflections on rights-based international litigation in general.

1. Climate change in International Law

The object of this thesis is international climate change[4] litigation before international HR bodies - more specifically, the ECtHR, CommRC, and HRC.[5] The purpose of this chapter is to review some dimensions that contextualizes the subject: (i) climate change as a global public good, (ii) the legal framework designed to address it, (iii) the first initiative to bring the subject before an international body and its influence, and (iv) the emergence of climate-related international litigation.

1.1. Climate as a global public good

Climate change emerged in the 20th century as a global concern of utmost importance within the larger field of IEL.[6] Perhaps more than any other current issue, it is extremely complex in terms of causes and consequences and, as a result, requires solutions which are multifaceted and innovative.

[4] This thesis utilizes the UNFCCC's definition of climate change, provided in its Article 1.2 as a "change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". It differs from the definition utilized by the IPCC, which encompasses changes in climate attributable both to human activity and natural variability. IPCC, 2023, p. 122.

[5] The object of this thesis is merely a facet of "international climate change litigation", defined by Savaresi as encompassing "lawsuits raising questions of law or fact regarding climate science, policy or law, which are brought before international or domestic judicial, quasi-judicial and other investigatory bodies". SAVARESI, 2024, p. 287. Evidently, this concept includes a wide range of cases, based on a variety of legal arguments. MAYER; ASSELT, 2023, p. 181. It notably differs from traditional conceptions of international adjudication, and of rights-based litigation, in that it includes decisions which are not binding. See ROMANO et al., 2013, p. 4 and EBOBRAH, 2013, p. 1, 10-11.

[6] A "foundational" milestone of this contemporary IEL framework was the 1972 Stockholm Conference on Human Environment, whose ensuing Declaration encapsulates twenty-six principles and which led to the creation of the UNEP. DUPUY.; VIÑUALES, p. 8-11.

In a public lecture before the UK Supreme Court, Sands succinctly explained its status as a unique challenge to IL in asserting that it "transcends classical structure of an international legal order that divides our planet into territorially defined areas over which States are said to have sovereignty".[7] That is to say, neither the GHG emissions that contribute to climate change nor its adverse effects[8] respect national borders; therefore, no single State has the capability of reversing its effects within its territory.[9]

Being an international public good however brings with it complications with regards to international cooperation. That is because the costs and resources associated with effective climate mitigation may often outweigh the benefits for an individual State,[10] especially those which face lower risk.[11] As Mayer explained, certain States may be better served protecting their own citizens through adaptive measures, rather than making sacrifices in favour of the world population.[12]

In addition to this divergence between individual interests and those of the collective, effective collaboration between States is frequently troubled by their differing capabilities, diplomatic relations, and historical responsibility.[13] These dimensions make international cooperation and implementations of multilateral treaty solutions challenging.[14]

1.2. The UNFCCC and the Paris Agreement

[7] SANDS, 2016, p. 6.

[8] The term "adverse effects of climate change" (or "adverse effects") is utilized in this thesis according to the UNFCCC's definition, provided in its Article 1.1 as "changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare".

[9] KNOX, 2020, p. 335. CULLET, 2016, p. 498.

[10] MAYER, 2022, p. 149.

[11] The IPCC speaks of human vulnerability and ecosystem vulnerability, which are interdependent and determine each region's ability to respond to climate risk. Vulnerability of ecosystems is influenced by patterns of "unsustainable consumption and production" and "demographic pressures". Human vulnerability, on the other hand, is related to "marginalisation" and "historical and ongoing patterns of inequity such as colonialism, especially for many Indigenous Peoples and local communities" IPCC, 2023, p. 5, 15, 31.

[12] MAYER, 2022, p. 149.

[13] That is because the effects of climate change present in deeply inequitable ways, in what Rajamani and Werksman call a "mismatch" between those States which are most responsible and those that, despite "negligible" contributions, "are at the frontlines of climate impacts." RAJAMANI; WERKSMAN, 2021, p. 494.

[14] See BODANSKY, 2010, p. 143, and GOLDSMITH; POSNER, 2005, p. 87.

The UN climate regime was established in 1992, through the signing of the UNFCCC by one hundred sixty-six States. It currently unites a total of one hundred ninety-eight parties.[15] Its objective is to "set the parameters"[16] for an effective global response with the aim of stabilising GHG concentration in the atmosphere "at a level that would prevent dangerous anthropogenic interference with the climate system".[17] In doing so, it famously characterized climate change as a "common concern of mankind".[18] It opted for a "precautionary approach" in "urg[ing] action to" to protect life,[19] in spite of the fact that scientific consensus at the time on the causes and potential consequences of climate change was nowhere near what it is today.[20]

Article 3 of the UNFCCC lays out some IEL principles to consider in the context of climate change, *inter alia*: intergenerational equity, which formulates a relation of rights and duties between generations in which each serves as steward of natural planetary resources in benefit of the next;[21] precaution, which essentially dictates that lack of scientific clarity shall not justify inaction in the face of environmental threats;[22] and the more elusive CBDR, which is meant to account for "the deep inequalities between and differing priorities of developed and developing countries".[23][24]

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[15] Information available at https://unfccc.int/process-and-meetings/the-convention/status-of-ratification-of-the-convention (last visited 30 mar. 2025).

[16] CARLARNE et al., 2016, p. 4.

[17] UNFCCC, Article 2.

[18] Ibid, Preamble. The term "common concern of mankind" was first utilized in relation to climate change in the UNGA Res. 43/53 of 6 December 1988, resulting from an initiative by the government of Malta, which endorsed the creation of the IPCC. According to Bodansky et al., the concept implies that "certain environmental processes" are a concern of all States, rather than characterizing global resources as 'commons'. It does not create specific rules for States, instead "suggest[ing] that [S]tates' freedom of action might be subject to legitimate criticism by others, even when other states' sovereign rights are not affected in a manner that would engage the no-harm principle" BODANSKY et al., 2017, p. 51-52. Soltau, who considers it to be a principle that is "emblematic of [IEL] itself", posited that it is comprised of three main elements: (i) interests beyond the individual, (ii) a threat to those interests that is grave and potentially irreversible, and (iii) the necessity of collective action in protecting said interests, entailing collective responsibility. SOLTAU, 2016, p. 206-208.

[19] FREESTONE, 2016, p. 100.

[20] UNFCCC, Preamble. "*Noting* that there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof".

[21] SCHOLTZ, 2021, p. 339.

[22] It is distinct from prevention, which refers to known risks - due to the development in scientific knowledge since the 1990s, climate action under the UNFCCC has transitioned from a precautionary basis to a preventive one. PEEL, 2021, p. 306, 311.

[23] BODANSKY et. al, 2017, p. 52.

[24] Its use in practice however has been a source of no small amount of controversy, particularly when it comes to the Kyoto Protocol. This was due to the stipulation of binding emission targets only for Annex 1 parties - developed States. As a result, some of the world's largest emitters were exempt from hard obligations due to being developing States, such as China, India, South Africa, and Brazil. LEE, 2015, p. 30, 33.

Two legally binding instruments have been signed under the umbrella of the UNFCCC,[25] forming a "nested regime"[26] that is largely governed by the same institutions. The Kyoto Protocol, which was adopted in 1997 and entered into force in 2005,[27] sought to operationalize the UNFCCC's objectives through quantitative and legally binding mitigation duties placed on the State parties classified as developed countries.[28] Due to this aspect, it only covered a portion of global emissions,[29] with key parties opting out over time.[30]

The PA, which was adopted in 2015 and entered into force in 2016,[31] represented a shift away from the Kyoto Protocol's institutional strategy. It opted instead for a bottom-up approach, namely through (i) the submission of NDCs by States,[32] and (ii) norms that vary in legal force and authority.[33] Article 2.1(a) of the PA states its aim to *inter alia* halt the increase in global average temperature to "well below 2°C" and to "pursu[e] efforts" to limit it to 1.5ºC. While this is significant in setting expectations for the implementation of NDCs, it is a symbolic goal that does not "create distinct individual or collective legal obligations for Parties".[34] Overall, the UN climate regime's design significantly emphasizes decision-making through multilateral negotiation, preserving the parties' sovereignty as much as possible.[35]

Current UNFCCC efforts are highly unlikely to prove sufficient to meet the 2ºC temperature increase goal.[36] That is because the NDCs presented by governments, even if fully implemented, are predicted to fall short of that task.[37] As stated by Rajamani and

[25] Article 17 of the UNFCCC determines that instruments within its system are protocols. The PA however was not explicitly adopted under this article, as a result of the American government's wish to nominally distinguish it from the Kyoto Protocol, of which it was not a party. RAJAMANI, 2015, p. 835.

[26] RAJAMANI; WERKSMAN, 2021, p. 497.

[27] Information available at: https://unfccc.int/kyoto_protocol (last accessed 30 mar. 2025).

[28] CARLARNE et al., 2016, p. 4. It was a controversial instrument in this aspect. Lee suggested that it (i) allowed efforts by developed States to be undercut by rising emissions from developing ones, and (ii) wrongly envisioned developing States as a homogenous group, without differentiating between China and island nations such as Tuvalu and Kiribati. LEE, 2015, p. 42, 44, 50.

[29] RAJAMANI; WERKSMAN, 2021, p. 496.

[30] SHISHLOV et al., 2016, p. 768 *apud* RAJAMANI; WERKSMAN, 2021, p. 496.

[31] Information available at: https://unfccc.int/process-and-meetings/the-paris-agreement (last visited 30 mar. 2025).

[32] PA, Article 4.2. "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.".

[33] RAJAMANI; WERKSMAN, 2018, p. 3.

[34] Ibid., p. 5, 10.

[35] See BODANSKY, 2017, p. 7-11.

[36] RAJAMANI; WERKSMAN, 2021, p. 507.

[37] KNOX, 2020, p. 337. See UNEP, 2024.

Werksman however, the UNFCCC "offers a useful hook" for domestic judicial and non-governmental bodies to pressure States to meet their commitments,[38] and the same is increasingly being seen at the international level. This trend has intersected with an emerging recognition of the relationship between climate and enjoyment of human rights, which has culminated in the decisions which are the object of this thesis.

1.3. Human rights and climate

The purpose of this section is to analyse the earliest climate petition filed before a HR body, followed by the development of the IHRL perspective on climate issues that was inspired by it.

1.3.1. Inuit Circumpolar Council petition

In 2005, a petition was filed before the IAcHR on behalf of Sheila Watt-Coutier and sixty-three other Inuk individuals located in Canada and the US who were members of the ICC,[39] alleging a violation of their rights by the US due to the potential extinction of their traditional way of life as a result of climate change.[40] The petition was ultimately not processed, with the IAcHR responding in November 2006 that it was unable to determine whether the facts alleged characterized a violation of the ACHR.[41] A request for a hearing, made in conjunction with Earthjustice and the CIEL,[42] was granted in 2007.[43]

The petition sought the development of IEL and IHRL,[44] arguing *inter alia* that (i) the US's UNFCCC commitments should influence its obligations within the Inter-American system, and that, because Inuit culture was interconnected with their environment, (ii) the effective protection of their human rights entailed the safeguarding of their environment.

[38] RAJAMANI; WERKSMAN, 2021, p. 507.

[39] The Inuit Circumpolar Council is an NGO representing nearly two hundred thousands of Inuit in Alaska, Canada, Greenland, and Chukotka. One of its primary goals is to promote the rights and interests of the Inuit people at the international level. More information available at https://www.inuitcircumpolar.com/about-icc/ (last visited 24 mar. 2025).

[40] ICC, 2005.

[41] IAcHR, 2006.

[42] ICC, 2007.

[43] EARTHJUSTICE, 2007.

[44] See HUNTER, 2009, p. 367-368.

They relied also on the customary obligation to prevent transboundary harm, and on the principle of precaution.[45] Thus, the legal reasoning made was innovative in framing environmental issues through a HR perspective.[46]

It is certain that the ICC petition could have resulted in a more positive outcome, in the form of an official pronouncement from the IAcHR. Nevertheless, the publicity generated and contributions to raising awareness for the hardships faced by the Inuit were its own kind of success.[47] As explained by Osofsky, the impetus behind the petition was not a confrontational one, but rather to foster a dialogue on climate change and human rights.[48]

1.3.2. Report by the Office of the High Commissioner for Human Rights

In November 2007, a meeting was held by representatives of SIDS in Malé, Maldives, where they signed the Declaration on the Human Dimension of Global Climate Change. This was the first official intergovernmental statement on the subject of climate change and human rights.[49] It requested *inter alia* (i) for the HRC to promote a debate on the subject, and (ii) for the OHCHR to conduct a study on it.[50]

These efforts culminated in the publication of the first HRC resolution on climate change and human rights,[51] and in a report by the OHCHR[52] on its impacts on the enjoyment of human rights. The report identified as vulnerable groups such as women, children, and indigenous peoples, highlighting the latter's advocacy efforts through the ICC petition.[53]

It considered the legal recognition of HR violations to be challenging due to (i) the complexity of causal relationships between GHG emissions and adverse effects, (ii) the existence of other contributing factors to extreme weather events, and (iii) the temporal

[45] ICC Petition, 2005, p. 72-75, 91-102.

[46] OSOFSKY, 2009, p. 273. KNOX, 2020, p. 324-325.

[47] OSOFSKY, 2009, p. 290.

[48] OSOFSKY, 2009, p. 288. See also WARNER, 2016, p. 461-463 (on the ICC petition's relation to Inuit oral traditions).

[49] KNOX, 2020, p. 325.

[50] Malé Declaration on the Human Dimension of Global Climate Change. 2007. Available at: https://www.ciel.org/Publications/Male_Declaration_Nov07.pdf. (last visited 24 mar. 2025)

[51] UNHRC. Resolution 7/23 (A/HRC/RES/7/23), 28 mar. 2008.

[52] OHCHR. Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights (A/HRC/10/61), 15 jan. 2009.

[53] OHCHR, 2009, §42-54.

dimension which hampers the recognition of violations based on future harm.[54] It also highlighted the traditional dynamics of IHRL, where the individual relies "first and foremost" on their State for protection, speculating on the greater potential of HR to address the consequences of measures meant to address climate change, rather than the adverse effects themselves.[55]

1.3.3. Human rights in the Paris Agreement

In 2014 and 2015, several joint statements were made by OHCHR mandate holders on the subject, with the aim of suggesting language to be included in the PA draft that included a human rights dimension to it.[56] The text was eventually included in the treaty's preamble,[57] having been moved from its original placement in Article 2.[58]

According to Knox, that makes it the "first global environmental agreement to recognize that human rights obligations are an integral element of the regime it establishes".[59] Indeed, no such mention existed in the UNFCCC or the Kyoto Protocol - according to Cullet, this can be attributed to the "conceptualization of climate change as a global issue together with the traditional structure of [IEL]", which focuses on obligations between States.[60]

1.4. International rights-based litigation and climate

The purpose of this section is to review the scholarly literature's perspective on rights-based international climate litigation, with particular consideration to its goals and to the primary procedural and substantive challenges faced by petitioners.

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[54] Ibid., §70.

[55] Ibid., §72.

[56] See KNOX, 2020, p. 327-328.

[57] PA, Preamble. "[...] Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

[58] See KNOX, 2020, p. 329-330.

[59] Ibid, p. 323.

[60] CULLET, 2016, p. 498.

1.4.1. General considerations

Preliminarily, a basic point recognized by scholars, even the more skeptical of the potential of rights-based climate litigation such as Posner,[61] was that the tendency towards judicialization is motivated by the slow, often stalled, progress of intergovernmental negotiation within the UNFCCC.[62] It has also been placed in the wider context of a "proliferation" of international adjudication that has been observed in several fields, and which has not spared IEL.[63]

Several scholars regard the potential of rights-based litigation to bridge the gaps in the climate regime in a positive manner, if tentatively so.[64] The main potential advantages to be noted were: (i) the existence of persuasive legal arguments in favor of HR obligations,[65] (ii) the relative availability of international *fora* to hear such cases,[66] and (iii) the access of individuals, indigenous communities, and NGOs.[67]

The primary and most relevant reservation shared by scholars related to international bodies' lack of coercive power.[68] Some have also expressed concerns with the risk that litigation may draw States' attention from negotiations,[69] particularly from matters of distributive justice.[70] While these are valid arguments, it is important to note that it is generally understood that climate litigation is not a "silver bullet" that could solve such a complex issue, being instead one among several possible advocacy avenues.[71]

1.4.2. Goals of litigation

[61] POSNER, 2007, p. 1925.

[62] HUNTER, 2009, p. 364-365. VERHENYEN; ZENGERLING, 2016, p. 418. BODANSKY, 2017, p. 11. RAJAMANI; PEEL, 2021, p. 22. MCGAUGHY et al., 2024, p. 97.

[63] BODANSKY, 2017, p. 2.

[64] See FAURE; NOLLKAEMPER, 2007, p. 130, CULLET, 2016, p. 496, and QUIST; KRAFCIK, 2023, p. 421.

[65] BODANSKY et al., 2017, p. 299.

[66] BODANSKY et al., 2017, p. 299-300. MAYER, 2022, p. 143-144.

[67] See FAURE; NOLLKAEMPER, 2007, p. 137, VERHENYEN; ZENGERLING, 2016, p. 435, and MAYER, 2022, p. 130

[68] POSNER, 2007, p. 1927. BODANSKY et al., 2017, p. 300.

[69] BODANSKY, 2017, p. 19-20.

[70] RAIBLE, 2021.

[71] FAURE; NOLLKAEMPER, 2007, p. 178. SANDS, 2016, p. 8.

Given the known limitations faced by international bodies in concretely affecting State behaviour, scholars have identified a number of alternative functions potentially fulfilled by climate litigation. The primary one is to influence domestic litigation,[72] in the sense that such proceedings are more likely to impact the climate policies of their respective States. Secondarily, decisions on climate cases may contribute to the development of IL in a manner that has positive long-term effects.[73]

Even unsuccessful cases are considered to have positive ancillary effects, such as raising the profile of climate change as an issue, thus increasing pressure on governments and possibly forcing the implementation of more ambitious efforts.[74] This awareness-raising effect occurs through a narrative building aspect of major climate cases that serves as a humanizing factor.[75]

1.4.3. Primary challenges

IHRL and IEL as fields have fundamental differences which give rise to a number of potential issues in climate litigation. This is because IHRL concerns the relationship between the individual and the State, while IEL governs interstate obligations.[76] As such, the following obstacles arise:

- victimhood[77] - petitioners must prove their individual rights have already been significantly impacted by climate change (or that said impact is imminent);
- jurisdiction[78] - demonstrating that a petitioner is within a State's jurisdiction is a precondition for establishing responsibility, which forms an obstacle to holding States responsible for transboundary harm;

[72] BODANSKY, 2017, p. 19. LISTON, 2024.

[73] HUNTER, 2009, p. 367-368.

[74] HUNTER, 2009, p. 372. SANDS, 2016, p. 11. MAYER; ASSELT, 2023, p. 183-184. QUIST; KRAFCIK, 2023, p. 421.

[75] HUNTER, 2009, p. 358-360. BURKETT, 2016, p. 447-448. Concrete outcomes would be to encourage UNFCCC negotiations to focus on measures of adaptation and compensation sooner rather than later (HUNTER, 2009, p. 366), and to affirm the role of indigenous peoples as "agents in climate action" (QUIST; KRAFCIK, 2023, p. 421).

[76] BODANSKY et al., 2017, p. 298.

[77] See FAURE; NOLLKAEMPER, 2007, p. 136, VERHENYEN; ZENGERLING, 2016, p. 435, MAYER, 2022, p. 144-146, and LUPORINI; SAVARESI, 2023, p. 274.

[78] See FAURE; NOLLKAEMPER, 2007, p. 130, VERHENYEN; ZENGERLING, 2016, p. 435, RAIBLE, 2021, and LUPORINI; SAVARESI, 2023, p. 273.

- exhaustion of domestic remedies[79] - in relation to the above, petitioners must prove that they are exempt from exhausting domestic remedies, that such remedies do not exist, or that they are objectively insufficient in a given case;
- causation;[80] - the recognition of HR violations depends on the establishment of a causal link between the acts or omissions of the State and the harms suffered by the petitioner;
- share of responsibility[81] - since climate change is a global phenomenon, international bodies must grapple with whether or not it is possible to attribute responsibility for its effects to individual States.

Having identified these particular issues, this thesis will attempt to discern the limits and possibilities of rights-based climate litigation through analysing how HR bodies have dealt with them thus far, and the strategies and arguments adopted by claimants.

2. Analysis of the recent jurisprudence

This chapter constitutes a critical and comparative analysis of the cases of *Chiara Sacchi et al. v. Argentina et al.*,[82] *Daniel Billy et al. v. Australia*,[83] *Duarte Agostinho et al. v. Portugal et al.*,[84] and *Verein KlimaSeniorinnen Schweiz et al. v. Switzerland*.[85] These cases are among the first to be examined by international HR bodies, and thus are considered to be landmarks in climate change litigation. More importantly, they provide the first judicial pronouncements on the controversial topics identified in section 1.4.3.

These are strategic litigation cases which tested a number of innovative arguments in order to overcome procedural hurdles and achieve findings on merits. All four applications employed a similar strategy in order to fulfill the victimhood requirement, by framing its

[79] See LUPORINI; SAVARESI, 2023, p. 272.

[80] See FAURE; NOLLKAEMPER, 2007, p. 157-8, VERHENYEN; ZENGERLING, 2016, p. 438, CULLET, 2016, p. 504, VOIGT, 2016, p. 483-486, and BODANSKY et al., 2017, p. 300.

[81] VERHENYEN; ZENGERLING, 2016, p. 435.

[82] CommRC. *Chiara Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), *Brazil* (CRC/C/88/D/105/2019), *France* (CRC/C/88/D/106/2019), *Germany* (CRC/C/88/D/107/2019), and *Turkey* (CRC/C/88/D/108/2019). For the sake of simplicity, further citations of *Chiara Sacchi* refer to the text of the Argentina decision, unless specified otherwise.

[83] HRC. *Daniel Billy et al. v. Australia* (CCPR/C/135/D/3624/2019).

[84] ECtHR. *Duarte Agostinho and Others v. Portugal and 32 others* (Application no. 39371/20)

[85] ECtHR. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (Application no. 53600/20).

respective authors as belonging to segments of society that are particularly vulnerable[86] to adverse effects of climate change. This was due to age (*Duarte Agostinho*, *KlimaSeniorinnen*, and *Sacchi*), gender (*KlimaSeniorinnen*), and belonging to indigenous groups (*Sacchi* and *Billy*) - the three factors highlighted by the 2009 OHCHR report analysed in section 1.3.2.[87] *Duarte Agostinho* and *Sacchi* made bold claims regarding extraterritorial jurisdiction, by naming multiple States as respondents, and exhaustion of domestic remedies, by affirming their respective authors were exempt from pursuing them. Moreover, *Billy* and *KlimaSeniorinnen* are the first rights-based climate cases to be found admissible by international bodies,[88] thus providing valuable insights in their findings on the merits.

The fact that this selection consists of two admissible cases, and two inadmissible ones, should allow for a comprehensive view of the differences in approach of the ECtHR and the UN treaty bodies. Further, this analysis seeks to build upon an earlier systemic review conducted in 2023. Having preceded the ECtHR's publication of *KlimaSeniorinnen* and *Duarte Agostinho*, Luporini and Savaresi found that outcomes on several issues remained to be seen, particularly regarding multi-state applications, scrutiny of domestic policy, and admissibility requirements.[89]

This chapter will continue with a brief summary of the factual and legal context of the cases selected. The subsequent analysis will tackle procedural issues (victimhood, *locus standi* of associations, extraterritorial jurisdiction, and exhaustion of domestic remedies),

[86] Vulnerability as a concept in IHRL has evolved as a way for it to acknowledge and respond to individuals' lived experiences and how those affect their enjoyment of human rights. Conversely, it has been criticized as encouraging stigmatization of such individuals through a paternalistic attitude, in which they are understood as subjects of protection rather than agents of change. TIMMER et al., 2023, p. 191, 194-199.

[87] Communication n. 3624/2019 was lodged with the CHR in May 2019 by Daniel Billy and seven other members of an indigenous group living on the Torres Strait Islands, Australia. This was done as part of a larger campaign that seeks to preserve their way of life, entitled "Our Islands, Our Home". More information at https://ourislandsourhome.com.au/ (last visited 20 feb. 2025).

Communications n.º 104/2019-108/2019 were lodged with the CommRC in September 2019, on behalf of Greta Thunberg and fifteen other youth climate activists, nationals of several different States.

Application n.º 3937/20 was lodged with the ECtHR by six Portuguese children and young adults against Portugal and thirty-two other States, in September 2020. At the time, the applicants' ages ranged from eight to twenty-one.

Application n.º 53600/20 was lodged with the ECtHR in November 2020 against Switzerland by the association KlimaSeniorinnen Schweiz in conjunction with four of its members. At the time, the individual applicants' ages ranged from seventy-eight to eighty-nine. The eldest of the applicants, Ms. Schaub, passed away during the course of the proceedings, and was represented by her son and heir, Mr. André Seidenberg, for the remainder. On the subject, the ECtHR noted that it would be "contrary to [its] mission to refrain from ruling on the complaints raised by the deceased applicant just because she did not have the strength, owing to her advanced age, to live long enough to see [their] outcome".

[88] CLIENTEARTH, 2022. SAVARESI, 2025, p. 1.

[89] LUPORINI; SAVARESI, 2023, p. 271-274.

and substantive ones (State responsibility, integration with IEL, the right to life, the rights to private and family life, mitigation and adaptation, and children's and indigenous peoples' rights). Finally, it will conclude with reflections on the decisions as a whole.

2.1. Factual and legal context

Regarding the violations alleged, the main commonality is the right to life[90] and, in all but *Sacchi*, the right to enjoyment of private and family life.[91] *Sacchi* and *Billy*, which both encompassed indigenous rights, claimed the right to enjoyment of culture.[92] *Billy* and *Duarte Agostinho*, in turn, both raised the prohibition of discrimination.[93] Additionally, *Sacchi* claimed the child's right to enjoyment of the highest attainable standard of health,[94] *Billy* claimed the child's right to protection,[95] and *KlimaSeniorinnen* raised the rights to a fair trial and effective remedy.[96]

The adverse effects covered by the factual submissions were varied. *Duarte Agostinho* and *KlimaSeniorinnen* focused on rising temperatures and the effects thereof. The young applicants in the first had lived through the wildfires that plagued Portugal in the summer of 2017, and the elderly applicants in the latter were negatively impacted by the heatwaves in Switzerland. The two cases encompassed both physical and mental health conditions.[97] *Billy* concerned primarily the experience of the Torres Strait Islands indigenous group and the constraints placed on their traditional ways of life and subsistence.[98] The islands of Boigu, Masig, Warraber, and Poruma, where the authors continue to live, are low-lying and, as such, particularly susceptible to flooding, erosion, and cyclones.[99] The strategy adopted in *Sacchi* meanwhile was to cover a wide range of adverse effects, with consequences for both physical and mental health. The sixteen applicants were nationals of twelve different

[90] Article 2 of the ECHR, Article 6 of the CRC, and Article 6 of the ICCPR.

[91] Article 8 of the ECHR, and Article 17 of the ICCPR.

[92] Article 30 of the CRC, and Article 27 of the ICCPR.

[93] Article 2 of the ICCPR and Article 14 of the ECHR. Although *Billy* reached the merits stage, the violation of non-discrimination was dismissed as it is a general provision that does not give rise to violations.

[94] Article 24 of the CRC.

[95] Article 24(1) of the ICCPR.

[96] Articles 6 and 13 of the ECHR.

[97] *Duarte Agostinho*, §14. *KlimaSeniorinnen*, §13-21. The elderly women suffered from cardiovascular and respiratory conditions, while the children had sun allergy, hay fever, sinusitis, asthma, and bronchitis.

[98] *Daniel Billy*, §2.3-2.6.

[99] Ibid., §2.1.

countries, affected by *inter alia* wildfires, air pollution, heatwaves, and drought. It joined *Billy* in raising the jeopardization of traditional subsistence methods utilized by indigenous applicants located in Alaska, the Marshall Islands and in the Sepmi areas of Sweden.[100]

The decisions were published from 2021 to 2024. *Sacchi* was dismissed due to failure to exhaust domestic remedies in November 2021, in five largely identical recommendations by the CommRC. In September 2022, the HRC published its views on *Billy*, finding a violation of ICCPR Articles 17 and 27. Finally, *KlimaSeniorinnen* and *Duarte Agostinho* were published in April 2024, having been examined by the ECtHR's Grand Chamber concurrently with the case of *Carême v. France*.[101] In *KlimaSeniorinnen*, the ECtHR found a violation of Articles 2, 8, and 6§1 in relation to the applicant association. Finally, *Duarte Agostinho* was found inadmissible regarding Portugal due to failure to exhaust domestic remedies, and against the remaining States due to lack of jurisdiction.

2.2. Procedural issues

2.2.1. Victimhood

Both the CommRC and the HRC recognized the victim status of the applicants in their respective cases, while the ECtHR did not.

In *Sacchi*, the CommRC highlighted the vulnerability of children to climate change, deriving from this "heightened obligations to protect children from foreseeable harm". There are two dimensions to this - being susceptible to present effects (both physiologically and mentally) and potentially being affected by future effects for the rest of one's life.[102] This is in line with the applicants' strategy, which was to contextualize climate change as a "children's rights crisis".[103]

[100] *Chiara Sacchi*, §3.4-3.5.

[101] ECtHR. *Carême v. France* (Application no. 7189/21). This was an application by the former mayor of the municipality of Grande-Synthe (which is at high risk of flooding), challenging the French government's climate policies. It was deemed inadmissible *ratione personae*, given that the Mr. Carême no longer resided in Grande-Synthe nor owned property in it. See generally TORRE-SCHAUB, 2024 (arguing that the decision highlights the limited standing for individuals in climate cases and lack of a right to a healthy environment in the ECHR).

[102] *Chiara Sacchi*, §10.13.

[103] Ibid., §3.7.

In *Billy*, the HRC declared the risk of violation in the case to be "more than a theoretical possibility",[104] in reiteration of its understanding in *Ioane Teitiota v. New Zealand*.[105] Factors considered were the authors' heightened vulnerability to adverse effects, limited resources, and assertion that adverse effects had already materialized.[106]

In *KlimaSeniorinnen*, the ECtHR diverged by asserting that it was not enough to belong to a particularly vulnerable group. It was found that applicants 2-4 essentially did not suffer enough from the events described, while applicant 5 was dismissed as providing merely generic complaints.[107] Instead, the general principles set out require a high intensity of harm to the applicant and urgency of protection, both carrying a "specially high" threshold for fulfillment.[108] This was due to an implicit concern with a pool of victims that is too wide - it was stressed that, although victimhood must be applied in an "evolutive" way, the context of climate change demanded for it to be "careful[ly] qualifi[ed]".[109] Notably, the ECtHR asserted the existence of a "legally relevant" causal link between State climate policies and harm experienced by individuals, substantiated by (i) scientific evidence on morbidity and mortality, and (ii) UNFCCC commitments.[110]

In *Duarte Agostinho*, the ECtHR declined to examine the matter, deeming it not necessary in light of the fact that it had already found the case inadmissible on previous grounds.[111] It remarked that the absence of domestic proceedings limited the information available regarding the applicants' situation.[112] In light of the principles set out in

[104] Daniel Billy, §7.10.

[105] HRC. *Ioane Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016). The case concerned New Zealand's refusal to grant Mr. Teitiota refugee status on the basis of the living situation in his home country, small-island developing State Kiribati. It was dismissed by the HRC at the merits stage, on the basis that the living conditions in Kiribati did not present an imminent threat to the author's life or health, despite the 10-15 year projected time-frame for its submergence. It is the first international case featuring a potential "climate refugee", and considered a landmark one due to its findings on admissibility. AMNESTY INTERNATIONAL, 2020. For a critical analysis, see generally BEHRMAN; KENT, 2020 (questioning the reach of the precedent established and whether it has been overstated).

[106] *Daniel Billy*, §5.2, 7.10.

[107] *KlimaSeniorinnen*, §531-535. Applicant 4 was asthmatic, but had never had to seek medical attention for heat-related troubles.

[108] Ibid., §487-488.

[109] Ibid., §482-483.

[110] Ibid., §478.

[111] *Duarte Agostinho*, §230.

[112] Ibid., §229.

KlimaSeniorinnen, it is highly unlikely that these applicants would have been recognized as victims.[113]

When comparing the two jurisdictions, it seems clear that the UN Bodies gave much greater care to analyzing the intersectional qualities that made the applicants in *Billy* and *Sacchi* qualify as victims.[114] The HRC and CommRC have rightfully been praised for several points made in this matter, namely the (i) recognition of the particular vulnerability of indigenous groups[115] and (ii) affirmation that adverse effects were already being experienced in *Billy*,[116] and (iii) the flexible approach to the foreseeability requirement adopted in *Sacchi*.[117]

In contrast, the ECtHR did not engage on a deep enough level with the factors of age and gender and how they qualified the applicants' experience and level of risk.[118] It stated that the applicants in *KlimaSeniorinnen* were not affected in a way that could not be alleviated by "reasonable" personal adaptation, when their written declarations made clear that it was precisely those measures (which were necessary to safeguard their health) that had disrupted their personal and social lives.[119] Moreover, it missed a significant opportunity to reject the State parties' argument that children are not a risk group and examine the subject of children in relation to climate change in *Duarte Agostinho*.[120]

In this section, ECtHR evidently strived to be mindful of State interests. This is evident in its exclusion of the possibility of potential victims, where it is remarked that "virtually anybody" would qualify.[121] It was also explicitly determined to not undermine the ECHR's exclusion of *actio popularis*, having recognized that climate complaints will typically cover

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[113] Ibid., §16, 20. The applicants admitted that they had not been personally injured by the fires, and nor had their families or anyone they knew.

[114] On intersectionality in these cases, see generally HEFTI, 2024 and JONG, 2023, p. 13, 15 ("A potential injustice is not enough to speak of a human rights violation and *locus standi*. The crux is that climate change actualizes such potential injustices.").

[115] VOIGT, 2022.

[116] FERIA-TINTA, 2022.

[117] WEWERINKE-SINGH, 2024.

[118] This view is shared by LUPIN et al., 2024, p. 174-175. This is in contrast to Milanovic's position, who questioned how "little old ladies in Switzerland" are more affected by climate change. MILANOVIC, 2024. I would disagree, given that the applicants not only provided scientific evidence on the elevated levels of heat-related morbidity and mortality in their demographic, but also proved that applicants 2-4 suffered physically from adverse effects, even if not on a level admitted by the Grand Chamber as intense enough to qualify as victims. Thus, they effectively demonstrated that they are affected more both on a collective and individual level.

[119] *KlimaSeniorinnen*, §13-20, 533.

[120] *Duarte Agostinho*, §89.

[121] *KlimaSeniorinnen*, §484-485.

measures that are more "general" and have an effect beyond the claimant.[122] For these reasons, the "sky-high" threshold for individual victim status is institutionally "understandable" as Raible put it.[123] That being said, the choices made by the ECtHR regarding victimhood are best understood in conjunction with its approach to the association applicant, analyzed *infra*.

2.2.2. *Locus standi* of associations

The major point of innovation in *KlimaSeniorinnen* was the ECtHR's unorthodox recognition of *locus standi* of the applicant association in relation to the claims under Article 8.[124] The standards set out regarding future cases involve associations' establishment, dedicated purpose and qualification to represent individuals affected by climate change, once again concerned with curbing *actio popularis*.[125] Most importantly, it will not be required for the associations' members to qualify as victims themselves,[126] significantly easing the way for their effective access to the ECtHR.

Indeed, this matter is framed from the outset as an issue of access to justice and intergenerational equity (or burden-sharing as the ECtHR chose to call it), carrying the reasoning that climate change transcends the individual concern.[127] Another significant factor was the aim of harmonious application of the ECHR with IL, namely with the Aarhus Convention,[128] which was utilized effectively by the ECtHR to bolster its assessment. This was reinforced by a survey conducted by the ECtHR, which found widespread ratification of the Aarhus Convention among CoE member States and that associations "generally" had broad standing in environmental cases.[129]

I find that, in light of the high threshold established for individual victims, this was an appropriate trade-off for the ECtHR to make. While Letwin understandably felt that the bar

[122] *KlimaSeniorinnen*, §479, 481.

[123] RAIBLE, 2024. Savaresi has questioned the reasoning, recalling that being uniquely affected has not barred the ECtHR from examining "widespread and systemic" violations in the past. SAVARESI, 2025, p. 11.

[124] LETWIN, 2024.

[125] *KlimaSeniorinnen*, §501-502.

[126] Ibid., §502.

[127] Ibid., §489.

[128] Ibid., §490-491, 501.

[129] Ibid., §494.

may have been set too low,[130] the ECtHR has since proven strict in restraining it to the topic of climate change. This was demonstrated in the recent decision in *Cannavacciuolo*,[131] where the ECtHR did not recognize the standing of four associations, because the case encompassed environmental matters unrelated to the concerns that had justified the findings in *KlimaSeniorinnen*.[132]

In my view, ECtHR was aware of the stringency of the victim threshold and considered the more forgiving standards for associations to sufficiently counterbalance them. This can be gleaned from the reference in this section to intergenerational equity, where it is recalled that the most vulnerable are "at a distinct representational disadvantage", carrying an implicit concern for the rights of future generations.[133] While Savaresi has questioned this, due to *Duarte Agostinho*'s dismissal,[134] I would argue that this is one aspect where the two decisions are symbiotic.[135] That is to say, the ECtHR did not feel the need to examine the question of victimhood in *Duarte Agostinho* in light of *KlimaSeniorinnen*, and transposed the intergenerational equity argument made by those applicants to *KlimaSeniorinnen*. As noted by Nolan, this is supported by the fact that the topic was part of the questions posed to the parties in the *KlimaSeniorinnen* oral hearing, in spite of the fact that it had not been raised by the applicants.[136]

2.2.3. Extraterritorial jurisdiction

A common element shared by *Sacchi* and *Duarte Agostinho* was the innovative attempt to hold multiple States accountable for insufficiently addressing climate change through extraterritorial jurisdiction. The *Sacchi* complaint was lodged against Argentina,

[130] LETWIN, 2024. A concern shared by Judge Eicke in his dissenting opinion.

[131] ECtHR. *Cannavacciuolo and Others v. Italy* (Applications nos. 51567/14 and 3 others). The case concerned pollution caused by illegal dumping of hazardous waste in the Campania region of Italy - the so-called *Terra dei Fuochi* - causing congenital malformations and high rates of cancer in the local population. The ECtHR found, unanimously, that there was a violation of the right to life, for the first time in an environmental case.

[132] Ibid, §220-221. The issue was decided by six votes to one, generating separate opinions from Judges Krenc (concurring) and Serghides (dissenting).

[133] *KlimaSeniorinnen*, §484. NOLAN, 2024. LETSAS, 2024, p. 451. BRUCHER; SPIEGELEIR, 2024, p. 118.

[134] SAVARESI, 2025, p. 11.

[135] NOLAN, 2024.

[136] Ibid. In fact, the applicants' counsel makes this clear by answering that the issue "[did] not arise" in the case. *KlimaSeniorinnen*, Oral Hearing, 2:39:02.

Brazil, France, Germany, and Türkiye,[137] while *Duarte Agostinho* named thirty-two States alongside Portugal.[138] The eventual responses by the CommRC and the ECtHR, however, differed quite starkly.

In *Sacchi*, CommRC ultimately welcomed the applicants' arguments and utilized the jurisdiction test envisioned by the IACtHR in its Advisory Opinion OC-23/17, according to which effective control over the activities that cause environmental damage gives rise to jurisdiction over transboundary harm.[139] This is noteworthy due to representing the first major instance in which said jurisdiction test was implemented, which is a positive contribution to the development of IEL and IHRL.[140] It was also in line with the HRC's understanding, which had also been raised by the applicants.[141]

Notably, the CommRC went even further than the IACtHR's test, given that it required the existence of a causal link between the source-activity and the damage suffered,[142] having been designed for more conventional instances of environmental harm. This was indeed the objection made by Argentina[143] and Brazil.[144] As such, I consider that *Sacchi*'s groundbreaking character in this aspect is derived not from its use of the IACtHR's jurisdiction test, but rather from the implicit affirmation that the effects of climate change satisfy its causal link requirement.[145]

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[137] On the subject of the States selected, Nolan noted the exclusion of Tunisia and the Marshall Islands and inclusion of Türkiye (the one State without a corresponding national applicant), remarking that this was likely because they are "major historical emitters and influential members of the G20". NOLAN, 2021. The original complaint's reference to the respondents' G20 status suggests she was correct. *Sacchi*, Communication, §18-22.

[138] The thirty-three States involved are collectively responsible for up to 15% of global GHG emissions. *Duarte Agostinho*, §81. When questioned by Judge Kucsko-Stadlmayer, the applicants' counsel explained the choice as resulting from evidentiary factors, as there was not enough evidence available to determine fair share assessments of the remaining ECHR Member States when the application was lodged. *Duarte Agostinho*, Oral Hearing, 3:05:17, 4:08:08.

[139] *Chiara Sacchi*, §10.7, 10.12.

[140] This view is shared by several commentators. Wewerinke-Singh framed the complaint as an invitation to "conceive of sovereignty as a basis for [HR] obligations rather than as a shield against [HR] accountability". WEWERINKE-SINGH, 2021. Nolan regarded it as an advancement of the understanding of the scope of State obligations that "leaves the door open" to further claims. NOLAN, 2021. Tigre likewise highlighted the potential for "cross-fertilization" amongst HR bodies. TIGRE, 2021.

[141] HRC, 2019, §63. *Sacchi*, Communication, §249.

[142] OC-23/17, §103-104.

[143] *Chiara Sacchi*, §4.3.

[144] *Chiara Sacchi v. Brazil*, §7.3.

[145] This is in contrast to Suedi's view, in that she considers the CommRC's findings to be predictable due to particularities of the CRC and the approach given to jurisdiction by UN bodies. SUEDI, 2023, p. 550-552.

In contrast, the ECtHR took a far more conservative approach in *Duarte Agostinho*, finding the complaint inadmissible regarding all States but Portugal.[146] Although the application predated *Sacchi*'s publication, there was hope among commentators that it could positively influence its outcome.[147] Nevertheless, the ECtHR succinctly explained that it was not bound to interpretations by other bodies,[148] focusing instead on the applicants' remaining points. These ranged from creative legal arguments - that States controlled individuals' interests[149] and that climate change was an exceptional circumstance that created a connection between them[150] - to weaker utilitarian ones - that Portugal's sole jurisdiction was insufficient due to its low GHG emissions and that it was unadvisable to wait for each State to have their domestic remedies comparatively tested.[151]

The ECtHR ultimately rejected all lines of reasoning, asserting *inter alia* that (i) climate change cannot in and of itself justify an abrupt expansion of extraterritorial jurisdiction by way of judicial interpretation;[152] (ii) it is not the ECHR's purpose to provide general environmental protection and, thus, extraterritorial jurisdiction cannot be established purely as a means of facilitating climate change litigation;[153] and (ii) there is no support in the case-law for the "control over interests" criterion.[154]

The ECtHR welcomed the States' concerns regarding a limitless extension of the ECHR's scope and an ensuing lack of foreseeability, stating that it could not become a "global climate-change treaty".[155] Some have questioned the validity of this reasoning, suggesting that this issue could be circumvented through the use of procedural tools.[156] To this I add the ECtHR could have admitted extraterritorial jurisdiction while emphasizing the necessity of exhausting domestic remedies, in line with the outcome in *Sacchi*. However, it

[146] *Duarte Agostinho*, §214.

[147] See MURCOTT et al., 2022 (arguing that evolving the ECtHR's conception of extraterritoriality was necessary for an effective response to climate injustice).

[148] *Duarte Agostinho*, §209.

[149] Ibid., §126.

[150] Ibid., §122-124, 126. Namely, its multilateral dimension, the gravity of its impacts, the nonexistence of alternative means to hold the States accountable, and the urgency of avoiding the PA's 1.5ºC limit.

[151] Ibid., §125.

[152] Ibid., §191-195.

[153] Ibid., §201.

[154] Ibid., §205-208.

[155] Ibid., §83, 208.

[156] See WINTER, 2024, p. 463-464, 496 (suggesting the use of both substantive and procedural limiting tools) and HERI, 2024, p. 59 (suggesting an analogy to pilot judgements).

seems clear that underneath the concern with "opening the floodgates" - a logistical limitation - lies a wish to safeguard the ECtHR's legitimacy.[157]

There has also been discussion on the question of whether or not this outcome was a foregone conclusion. Milanovic posited that it was, and even that it may have done more harm than good in precluding more "modest" claims.[158] I would instead agree with Heri in the sense that it was, while predictable, not inevitable. As she aptly recalled, the Grand Chamber "is not in the business of considering cases that are 'inevitable' inadmissible", opting instead for summary proceedings.[159]

Duarte Agostinho was a necessary step in testing and identifying limits in climate litigation.[160] The applicants presented ambitious arguments - in particular the "control over interests" criterion and "the content of the obligation justifies jurisdiction"[161] - to a court that is notoriously cautious.[162] Nevertheless, the "control over source-activity" criterion (*i.e* the CommRC's understanding) was their strongest argument, and it did not persuade the Grand Chamber.

Thus, while the outcome was no surprise, it has its value in helping to shape the strategy of future applications.[163] It is true also that the ECtHR had reason to be pragmatic in leveraging its institutional needs against other interests.[164] Ultimately, however, this understandable resolution to *Duarte Agostinho* creates a significant mismatch between the ECHR system and the IACtHR and CommRC, which further isolates the most historically responsible States from Global South applicants.[165] This disappointment is compounded by the fact that the ECtHR has barely addressed the inequities inherent to climate change.[166]

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[157] RAIBLE, 2024. Additionally, some have suggested that the ECtHR may have also been concerned with the consequences that such an expansive precedent on jurisdiction would have in other fields *e.g* cyber-activities. MILANOVIC, 2024. ROCHA, 2024, p. 91.

[158] MILANOVIC, 2024.

[159] HERI, 2024, p. 59. Under Articles 27.1 and 28.1(a) of the ECHR, summary proceedings are utilized when an application can be dismissed "without further examination". This has already occurred in previous climate cases before the ECtHR, such as *Plan B. Earth and Others v. the United Kingdom* (Application no. 35057/22) in 2022.

[160] RAIBLE, 2024.

[161] *Duarte Agostinho*, §196-198. Pedersen fittingly termed this a "putting the cart before the horses" claim. PEDERSEN, 2024.

[162] See HERI, 2025, p. 315-316.

[163] RAIBLE, 2024.

[164] HERI, 2024, p. 62.

[165] RAIBLE, 2024.

[166] As noted by Heri, this is both in the sense that even some European countries are at greater risk than others, and that some populations are more susceptible to heat-related mortality. HERI, 2024, p. 60. See also

2.2.4. Exhaustion of domestic remedies

This requirement was successfully bypassed in *Billy*, where the State party freely admitted that no such remedies were available in the present case due to its understanding that no ICCPR rights had been breached.[167] Indeed, the application had challenged this gap, citing the Australian High Court's understanding that state administrative organs do not owe a duty of care for failing to regulate environmental harm.[168] These assertions were not contested by the State party, and thus admitted by the HRC.[169]

The ECtHR and the CommRC were united in rejecting the arguments made in *Sacchi* and *Duarte Agostinho*, which proved fatal for both cases.

Duarte Agostinho had already been declared admissible only in regard to Portugal, so the ECtHR limited its analysis accordingly.[170] It did so rather swiftly, rejecting the applicants' doubts regarding the effectiveness of the Portuguese Constitution's provisions and asserting that it could determine no special reason for exempting the applicants, referring to the principle of subsidiarity.[171] The argument regarding the unreasonable burden of pursuing domestic proceedings for children[172] was not explicitly refuted, likely because it concerned the thirty-three respondent States as a whole.

Having reviewed the State parties' submissions regarding their respective legal systems in *Sacchi*, the CommRC dismissed the authors' arguments as "mere doubts or assumptions" regarding the success of a claim.[173] This is because the exemption requirements found in Article 7(e) of the Optional Protocol to the CRC, according to which remedies must be "unreasonably prolonged or unlikely to bring effective relief", must be proven objectively.[174]

LISTON, 2024 (questioning the appropriateness of requiring every State to reach net-zero in the same timeframe).

[167] *Daniel Billy*, §6.6.
[168] *Daniel Billy*, § 2.9.
[169] Ibid., §7.3.
[170] *Duarte Agostinho*, §216.
[171] Ibid., §217-228.
[172] Ibid., §132.
[173] *Chiara Sacchi*, §10.17-10.20.
[174] Ibid., §10.17.

In the original complaint, the exemption was sought on the basis that domestic remedies were "unduly burdensome for the petitioners".[175] However, this burdensome nature seemed to be substantiated mainly by the number of States and claimants involved,[176] with only a mention made to the high cost of litigation in relation to the Marshallese petitioner. Further, the unlikelihood of effective relief is raised specifically in regard to one of the remedies requested, and the question of delays only in general terms. Overall, I agree with the CommRC in finding these claims generic, as they did not delve into specific elements of each States' legal system that made them inaccessible to the authors. This was only done at a later stage, in reply to the State parties' commentary on admissibility, which likely placed the applicants in a weaker strategic position.

That being said, there are valid criticisms to be made regarding the CommRC's examination of some of the more specific arguments, even if they should have been raised earlier:

- Regarding Brazil, the CommRC does not convincingly explain why its notoriously slow judiciary would not fulfill Article 7(e)'s requirement, in face of the applicants' reference to the Belo Monte dam case, which was pending for nineteen years.[177] In light of *Teitiota*, such a period would indeed be an unreasonable delay for the applicant who is a SIDS national;[178]
- Regarding Türkyie, the CommRC did not sufficiently engage with the evidence presented concerning its judiciary's standing requirements in environmental cases. According to Çali, who contributed to the applicants' counsel team with an expert report, both the Administrative and Constitutional Courts' settled case-law is that such complaints are only admissible when the applicant lives near the source-activity;[179]
- In any event, the CommRC missed an opportunity to distinguish the particular situation of the SIDS-national applicant, for whom any kind of domestic remedies may indeed come too late.[180]

The CommRC's choice to give a unified approach to the five recommendations is understandable, but consequently it may not have employed enough nuance in dealing with

[175] *Sacchi*, Communication, §309-318.
[176] SUEDI, 2023, p. 562.
[177] *Chiara Sacchi v. Brazil*, §10.20.
[178] *Teitiota*, §9.10, 9.12.
[179] *Chiara Sacchi v. Türkyie*, §5.5, 9.15-9.17. ÇALI, 2021
[180] WEWERINKE-SINGH, 2021.

the States involved. This is particularly significant because Türkyie was the only respondent which is not home to any of the authors. In fact, this may be an element of *Sacchi* where the wide range of applicants served to harm their case rather than bolster it - it may be plausible to conjecture that an application that focused on the indigenous authors or the Marshallese one might have had a greater chance at proving their inability to access the five States' courts.[181]

Taken as a whole, however, I find that the CommRC and ECtHR's approach to exhaustion of domestic remedies was correct. More so than jurisdiction, this requirement is key to the functioning of IHRL, being rooted in the principle of subsidiarity,[182] and arguably a greater concern when it comes to risking HR bodies' legitimacy, to the detriment of future cases.[183]

2.3. Substantive issues

2.3.1. State responsibility and the "drop in the ocean" argument

A common line of reasoning among the State parties in all cases was that (i) climate change cannot be attributed to individual States due to complex causal relationships between GHG emissions and adverse effects,[184] and that (ii) it is impossible for individual States to meaningfully reverse diffuse adverse effects through their own actions (*i.e* such efforts would only be 'a drop in the ocean').[185] They derived from these that States cannot be held

[181] See HEFTI, 2024, p. 630-631 (arguing that the children in *Sacchi* were wrongly perceived as a homogenous group).

[182] SUEDI, 2023, p. 564. The State parties in *Duarte Agostinho* argued extensively that the ECHR system guarantees them the chance to address eventual HR issues at the domestic level before answering to an international body, that it is indeed of vital importance to test existing remedies, and that the ECtHR is not well-equipped to be a court of first instance. The ECtHR implicitly highlighted the latter when stating the difficulty of ascertaining victim status without the previous fact-finding conducted by domestic courts. *Duarte Agostinho*, §84, 87, 229.

[183] Nolan identified multiple challenges arising from this - acceptance by the CommRC of the authors' arguments would apply to all further communications, potentially creating a "first instance of preference" in future cases. Furthermore, there was a risk of undermining multiple ongoing judicial proceedings in national courts. Thus, she asserted that the complaint could not be accepted in its terms without "effectively gutting" admissibility requirements. NOLAN, 2021. See also SUEDI, 2023, p. 560-565 (explaining the risk of undermining the CommCRC's own jurisprudence and legitimacy).

[184] *Duarte Agostinho*, §82. *KlimaSeniorinnen*, §346. *Chiara Sacchi*, §4.3. *Daniel Billy*, §4.3. In the latter, Australia notably referred to the 2009 OHCHR report in substantiating this. A/HRC/10/61, 2009, §70 According to Knox however, this understanding is outdated, highlighting also that the report did not limit accountability to particular responsibility. See KNOX, 2020, p. 334.

[185] *Daniel Billy*, §6.3. *Duarte Agostinho*, §81. *KlimaSeniorinnen*, §361

responsible for failure in implementing mitigation and adaptation measures. In *Billy*, Australia went so far as to call the imposition of such obligations "perverse".[186]

These arguments were rejected in all jurisdictions analysed. The HRC cited Australia's position as a large GHG emitter and developed country in admitting the claims regarding mitigation. As to adaptation, it merely issued a reminder that the ICCPR articles invoked give rise to a positive duty of protection.[187]

In *KlimaSeniorinnen*, the ECtHR affirmed that the (past and present) conduct of other States cannot exempt any one of them from responsibility.[188] Both it and the CommRC notably inferred from the CBDR principle that each State has its fair share of responsibility.[189] This is noted to be consistent with the ECtHR's own case-law concerning State responsibility and with general IL.[190] It also rejected Switzerland's "drop in the ocean" argument, based on its own case-law and the precautionary principle.[191]

The recognition that individual States can indeed be held accountable for adverse effects, upon identification by the claimants of specific acts and omissions, is a key feature in these decisions.[192] As Savaresi noted, the rejection of the "drop in the ocean" argument is in line with emerging domestic case-law.[193] This is important because these were the most significant arguments against the recognition of HR mitigation obligations, and it is promising for future cases that all three bodies analyzed - including the CommRC in the otherwise inadmissible *Sacchi* - consistently rejected them.

2.3.2. Integration with international environmental instruments

Across the decisions analyzed, IEL instruments played a significant role in shaping the scope and content of the positive obligations recognized.

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[186] *Daniel Billy*, §6.7.

[187] Ibid., §7.7-7.8.

[188] *KlimaSeniorinnen*, §439, 442-443.

[189] *Chiara Sacchi*, §0.10. *KlimaSeniorinnen*, §442.

[190] *KlimaSeniorinnen*, §443. Article 47 of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts states that partial responsibility arises in situations of partial causation. According to Tavares, the Draft Articles may be considered an expression of pacifically accepted customary norms. TAVARES, 2020, p. 633.

[191] *KlimaSeniorinnen*, §444.

[192] FERIA-TINTA, 2022. TIGRE, 2022.

[193] SAVARESI, 2025, p. 4.

Although *Sacchi* did not reach the merits stage, the CommRC utilized the UNFCCC and the signing of the PA as evidence that the harmful effects of GHG emissions were reasonably foreseeable to States.[194] The line of reasoning developed by the authors - that key UNFCCC principles must shape HR obligations[195] - was generally vindicated in *KlimaSeniorinnen*.

In *Billy*, the HRC deemed itself competent to interpret ICCPR obligations in reference to other treaties, recognizing that the authors did not seek relief for violations of those instruments.[196] It thus rejected Australia's argument that it could not do so due to the instruments' differing aims and scopes,[197] and validated the authors' claim that commitments made under the UNFCCC and the PA were part of an "overarching system" that informs obligations under the ICCPR.[198]

In *KlimaSeniorinnen*, the ECtHR largely anchored State duties to the UNFCCC standards and IPCC's findings, in line with the applicants' reasoning, and reinforcing what Jahn has coined the "Paris effect".[199] It repeatedly utilized the UNFCCC language - of climate change as a "common concern of mankind" - to bolster its reasoning.[200] Lastly, and as seen in section 2.2.2, it relied significantly on the principle of intergenerational equity, most notably in justifying the possibility of judicial review of climate matters.[201]

The integration of HR obligations with IEL standards is undoubtedly a positive development.[202] It would not be desirable for HR bodies to establish their own separate standards, as this would contribute to the fragmentation of IL and have a detrimental effect in undermining the PA and UNFCCC at large, instead of reinforcing it.[203] Furthermore, the

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[194] *Chiara Sacchi*, §10.11.

[195] Ibid., §3.2.

[196] *Daniel Billy*, §7.5.

[197] Ibid., §4.1.

[198] Ibid., §5.6. The authors had highlighted several aspects of the PA's text and their relation to the State party's obligations, namely that States should employ "maximum available resources" and "all appropriate means" in fulfilling them. Highlighted as well are the Preamble's characterization of climate change as a "common concern of mankind" and emphasis on the rights of indigenous peoples, children, and other vulnerable groups. *Billy*, Communication, p. 38.

[199] JAHN, 2024, p. 107, 109. The applicants had set the 1.5C° global average temperature forward as a point of reference for the adequacy of a given State's emission reduction goals, referring *inter alia* to (i) the principles of prevention and precaution, the "highest possible ambition" standard, and CBDR in ascertaining what would be a fair contribution level. *KlimaSeniorinnen*, §303, 320-321, 332, 546.

[200] *KlimaSeniorinnen*, §451, 489, 499

[201] This was in spite of Switzerland's argument that it is not yet recognized as part of customary IL, and that it was irrelevant to the case. Ibid, §364, 410, 419, 420, 484, 489, 499.

[202] FERIA-TINTA, 2022. QUIST, S. E.; KRAFCIK, A., 2023, p. 439.

[203] VOIGT, 2023, p. 239.

ECtHR's approach was consistent with the principle of systemic integration under Article 31.3(c) of the VCLT.[204]

2.3.3. The right to life

Neither the HRC nor the ECtHR recognized a violation of the right to life. The ECtHR did not engage extensively with the Article 2 claims in *KlimaSeniorinnen*, limiting itself to establishing general principles to be applied in future climate cases.[205] It considered that a violation exists where the risk is real - "serious, genuine, and sufficiently ascertainable" - and imminent - "in physical [and] temporal proximity.[206]

In *Billy*, the HRC found no indication of current impacts to the authors' health or a concrete risk of a situation of "physical endangerment or extreme precarity" that might threaten their lives.[207] Perhaps unintuitively, its analysis began with an extensive defense of a non-restrictive interpretation of the right to life that includes a life with dignity.[208] This extends to "reasonably foreseeable threats" that are not attributable to the State ("general conditions of society"), contrary to the position defended by the State party.[209] This interpretation was understood to be consistent with Article 31 of the VCLT, because the inherent dignity of the human person is recognized as the source of human rights in the ICCPR's preamble, which forms the context for its interpretation.[210]

Furthermore, the HRC affirmed a growing understanding among regional HR bodies regarding the connection between the right to life and environmental degradation, to which it contributed through the landmark case of *Portillo Cáceres*.[211] Recalling *Teitiota*, it recognized both the state of vulnerability experienced by those with no alternative to subsistence livelihoods and the "extreme" threat posed by the rising sea level upon low-lying islands.[212] It concludes that this phenomenon "may" threaten the right to life in the

[204] SAVARESI, 2025, p. 6.
[205] *KlimaSeniorinnen*, §507-513, 536.
[206] Ibid., §512.
[207] *Daniel Billy*, §8.6.
[208] Ibid., §8.3.
[209] Ibid., §6.9, 8.3.
[210] Ibid., §8.4.
[211] Ibid., §8.5. The case of *Portillo Cáceres v. Paraguay* (CCPR/C/126/D/2751/2016) concerned a violation of the right to life due to environmental pollution caused by toxic agrochemicals.
[212] Ibid., §8.6.

absence of international and national efforts, and that living conditions "may" become incompatible with the right to a life with dignity even sooner.[213] Notably, it did not clarify the circumstances under which this would be characterized as a violation, an aspect of the decision that has been rightfully criticized.[214]

All these considerations notwithstanding, it was reasoned that the 10–15-year projected timeframe still allows for the employment of adaptation measures described by the State party (considering also the measures put into effect following the complaint).[215] Thus, it implicitly accepted the State party's argument that the adaptation measures being implemented made any risk to life "too remote".[216]

What is most curious is that the Committee recognized and defended the "life with dignity" construction within the ICCPR, and yet did not find it necessary to explicitly take note of and reject the interpretation given to it by the IACtHR, which had been raised by the authors in their communication. As such, it unfortunately applies a far more restrictive reasoning than the IACtHR, which includes in its conception of a "life with dignity" the ability of indigenous groups to exercise their traditional subsistence activities and access natural resources connected to their cultural identity.[217] This has rightfully been considered to be another major shortcoming.[218]

This outcome is troubling, if rather unsurprising given the findings in *Teitiota*.[219] The HRC disappointingly reproduced the same interpretation of imminence, wherein the timeframe for the disappearance of the authors' homes does not make the cut.[220] In the same sense, both cases consider that the State - Kiribati and Australia - is putting in place

[213] Ibid., §8.7.

[214] KAHL, 2022.

[215] *Daniel Billy*, §8.7. This can be attributed to a change in the Australian Government that took place in 2022, which was marked by a visit from new Climate Change Minister Chris Bowen to the claimants. As of September 2023 however, the government had not yet paid the claimants the compensation they were owed. CLIENTEARTH, 2022.

[216] *Daniel Billy*, §4.7.

[217] *Billy*, Communication, p. 35. *Yakye Axa Indigenous Community v. Paraguay*, §162.

[218] FERIA-TINTA, 2022 (considering that to be an "inherent contradiction" in the HRC's reasoning). QUIST, S. E.; KRAFCIK, A., 2023, p. 415. KAHL, 2022.

[219] The findings also highlight *Teitiota*'s ambiguous legacy in the sense that, despite being regarded positively upon publication, it was invoked multiple times by Australia in its defense. *Daniel Billy*, §4.2, 4.7.

[220] KAHL, 2022 ("reflects once more how the phenomenon of climate change does not easily fit into the human rights terminology of violation"). See also LOPES, 2020. (analysis of the interpretation of the "imminent threat" criterion in *Teitiota*). This had even been explicitly called out by the authors, who stated that "if the State party's interpretation of imminent were followed, the authors would be forced to wait until their culture and land have been lost in order to submit a claim". *Daniel Billy*, §5.3.

adaptation measures, even though those same measures were considered inadequate for the purposes of Article 17. To make matters worse, it is baffling that the possibility of relocation is implicitly considered to be a viable means of protection of the authors' right to a life with dignity.[221] The ultimate result was that the CHR sadly applied the right to life threshold in an unreasonable manner, as was understood by no less than five of its members.[222] It would have been more appropriate to apply the standard utilized in *Portillo Cáceres* ("reasonably foreseeable threat"), rather than the one in *Teitiota* ("real and foreseeable risk"), due to the different context of the latter case, as convincingly argued by CHR members Bulkan, Kran, and Sancin.[223]

2.3.4. Private and family life

Both the ECtHR and the HRC found violations of the right to private and family life.[224] This is in line with the established case-law in human rights and the environment - in the absence of an established right to a healthy environment, private and family life has typically been used as a substitute, in what Knox termed as a "green[ing]" of existing rights.[225]

The HRC applied *mutatis mutandis Benito Oliveira*,[226] considering that a violation occurs when climate change impacts the right to one's home with serious adverse consequences in intensity or duration.[227] Recalling *Portillo Cáceres*, it was considered that

[221] *Daniel Billy*, §8.7. KAHL, 2022 ("could rather constitute its proper violation"). QUIST, S. E.; KRAFCIK, A., 2023, p. 434 ("defies reason")

[222] In this sense, Muhumuza affirmed that the people of Torres Strait Islands have effectively lost their livelihoods, resulting in a threat to their lives that is indeed imminent. *Daniel Billy*, Annex I, §12, 16. He notably issued a similar dissenting opinion in *Teitiota*, his view being that the living circumstances in Kiribati should have met that risk to life standard (highlighting the lack of fresh water, the health hazards suffered by the author's child, and the difficulty in growing crops). *Teitiota*, Annex I, §5.

[223] *Daniel Billy*, Annex III, §2-3, 6. Sancin also issued a dissenting individual opinion in *Teitiota*, where she argued in favor of finding an Article 6 violation due to the distinction between potable and safe drinking water. Her view was that it should have fallen to the State party to prove that the author had access to either. *Teitiota*, Annex II. Additionally, Sancin and Bulkan joined Hélène Tigroudja in issuing a partly concurring opinion in *Benito Oliveira*, where they argued that the majority should have raised the question of an Article 6 violation *proprio motu*, relying on the extended "life with dignity" interpretation. *Benito Oliveira*, Annex I.

[224] *Daniel Billy*, §8.12. *KlimaSeniorinnen*, §573-574.

[225] KNOX, 2020, p. 331-332.

[226] The case of *Benito Oliveira et al. v. Paraguay* (CCPR/C/132/D/2552/2015) concerned a violation of Articles 17 and 27 due to a failure by the State to regulate environmental pollution caused by toxic agrochemicals that harmed the traditional means of subsistence of the Ava Guaraní indigenous people.

[227] *Daniel Billy*, §8.12.

the authors' indigenous customs fall into the scope of protection of Article 17.[228] Further factors considered were the unexplained delay in seawall construction described by the authors, the reduction in marine and vegetative food resources, the inundation damage to homes, and the anxiety and distress experienced in relation to erosion and its potential effects on their homes and graveyards.[229] Thus, the HRC rejected the State party's argument, affirming that serious and foreseeable events not attributable to the State are included in this obligation, and that it demands the adoption of positive measures rather than merely vetoing arbitrary interference by the State.[230]

The ECtHR meanwhile considered that the margin of appreciation afforded to States in the context of climate change must differ in scope. Thus, States should enjoy a reduced margin in regard to the "setting of aims and objectives", and a broader one in regards to the means intended to achieve those goals. This was substantiated by the robust scientific evidence presented regarding climate change's urgency and irreversibility. Notably, the ECtHR also highlighted the "scientific, political and judicial recognition" of the link between climate change and the enjoyment of human rights, making it clear that UNGA Res. n.º 76/300, though non-binding, was a key influencing factor in this decision. Further elements cited were (i) the global nature of GHG emissions, as opposed to localized environmental harm; (ii) States' "generally inadequate track record" in lowering emissions; and (iii) the UNFCCC's overarching goal.[231]

The recognition of positive obligations to protect private and family life has rightfully been recognized as a key aspect of these decisions,[232] along with the temporal dimension employed by both - the measures taken must be timely in order to be adequate.[233] As stated *supra*, the interpretative work done largely constituted an extension of existing environmental case-law to a subject that is novel because of its special characteristics.[234]

[228] Ibid., §8.10.
[229] Ibid., §8.12.
[230] Ibid., §8.9.
[231] *KlimaSeniorinnen*, §542-543.
[232] HOFFMANN, 2024, p. 97.
[233] VOIGT, 2022.
[234] See HOFFMANN, 2024, p. 96 (the ECtHR is "hardly a pioneer" in the climate field) and LETWIN, 2024 (arguing that the ECtHR's findings cannot be termed as groundbreaking and merely represent an incremental evolution of its case-law).

It was argued by Judge Eicke that the ECtHR is "ill-equipped and ill-suited" to assess the suitability of mitigation measures due to technical reasons.[235] However, I would agree with the rebuttal given by Hoffmann, who recalled that (i) climate change is far from the only subject where courts are tasked with dealing with technically complex matters, and that (ii) it is not a compelling reason to shy away from engaging substantively with the present climate emergency.[236]

2.3.5. Mitigation and adaptation

There was a mismatch between the ECtHR and the HRC in their willingness to address the topic of mitigation measures in comparison to adaptation.

The content of general State obligations set out in *KlimaSeniorinnen* focused squarely on GHG emission reduction targets.[237] Adaptation measures were recognized as being of a supplementary character and their standards comparatively less detailed.[238] This is a comprehensive approach that focuses on the root of the issue while acknowledging the value of alleviating existing adverse effects. It is also understandable, given that the concrete situation of the applicants in *KlimaSeniorinnen* cannot be easily remedied with further adaptive measures.

In contrast, however, the HRC was noticeably unsure of how deeply it was willing to address mitigation, resulting in a partially disjointed decision and the issuing of a separate opinion.[239] The *Billy* complaint encompassed both dimensions, centering around a failure by the Australian authorities to effectively implement adaptation measures, and a lack of timely response to repeated requests for funding and assistance. Nonetheless, the authors also challenged Australia's poor track record as the nation with the second highest *per capita* GHG emissions in 2017. These claims were explicitly found to be admissible, and yet became conspicuously absent in the merits stage.

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[235] *KlimaSeniorinnnen*, Separate Opinion, §67.

[236] HOFFMANN, 2024, p. 97.

[237] *KlimaSeniorinnen*, §550.

[238] "[...] must be effectively applied in accordance with the best available evidence." *KlimaSeniorinnen*, §552.

[239] This was also widely recognized as a shortcoming by commentators. VOIGT, 2022. QUIST; KRAFCIK, 2023, p. 415. LENTNER; CENIN, 2024, p. 143.

Feria-Tinta, who acted as Counsel for the authors, considered the order for the State party to "take steps to prevent further similar violations in the future"[240] to carry as a legal consequence the obligation to employ mitigation measures, as a guarantee of non-repetition.[241] I find this to be a stretch however, given the fact that the respective substantiation focused on the delay in adaptation measures and that Gentian Zyberi felt strongly enough about this absence to pen a separate opinion.

2.3.6. Children's and indigenous peoples' rights

The HRC found a violation of Article 27,[242] in regards to Australia's delay in responding to a threat that was reasonably foreseeable as early as the 1990s. Factors considered were the impairments placed on the authors' traditional fishing and farming practices, the fact that their cultural ceremonies can only be properly performed in their lands, and the close link between the health of the Torres Strait Islands' ecosystem and the group's cultural identity.[243] Overall, it is emphasized that a temporal delay in the employment of adaptation measures constitutes an inadequate response by the State. This outcome has rightfully been recognized as a major historic win, which is only made more significant in light of the IAcHR's rejection of the ICC petition sixteen years earlier.[244]

On the flipside however, the HRC also passed over the opportunity to evaluate the question of indigenous children's rights in examining the claims under Article 24(1), deeming it not necessary in light of the violations already found.[245] This represented a valuable chance to incorporate the principle of intergenerational equity, which had been raised by the authors, into the decision, particularly in light of the findings in *Sacchi*.[246] It would have been particularly pertinent to explicitly examine this question in *Billy* given the

[240] *Daniel Billy*, §11.

[241] FERIA-TINTA, 2022.

[242] According to the HRC, Article 27 encompasses the indigenous peoples' association to their land and the "survival and continued development of the cultural identity", referring similarly to *Benito Oliveira*. Analyzed in light of the United Nations Declaration on the Rights of Indigenous Peoples, this Article establishes a "inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity". *Daniel Billy*, 3.13.

[243] *Daniel Billy*, §8.14.

[244] QUIST; KRAFCIK, 2023, p. 419. WARNER, 2016, p. 467.

[245] *Daniel Billy*, §10.

[246] QUIST, S. E.; KRAFCIK, A., 2023, p. 436.

context of rise of sea level and the threat it poses to the children of the authors, who very likely will not get to live in the Torres Strait Islands as adults.[247]

It was also an opportunity to integrate into the decision the IACtHR jurisprudence brought in the complaint, which highlighted the question of indigenous groups' ability to transmit their cultural identity to their children when facing the threat of displacement.[248] As explained by the authors, many of their cultural traditions are inextricably tied to their lands, meaning that their children may grow disconnected from their indigenous identities.

2.4. Overall reflections

The cases analyzed were ambitious and highly publicized, seeking not only the systemic development of climate action, but also to increase pressure on governments and bring awareness to the struggles of affected populations. As such, they successfully capitalized on the potential IHRL has to promote the humanization of this global issue through the storytelling characteristic of cases. This was thanks to the advocacy efforts of indigenous peoples, of elderly women like Elisabeth Stern, and of youth activists such as Greta Thunberg and Alexandria Villaseñor.[249]

Overall, both the ECtHR and the UN bodies have shown themselves willing to overcome "tricker" substantive issues that make climate change a uniquely complex issue, engaging substantively with applicants' arguments. The CommRC sought to promote the development of climate law in *Sacchi* despite its inadmissibility, and the ECtHR incorporated a significant portion of the arguments raised in *Duarte Agostinho* into its reasoning in *KlimaSeniorinnen*. They were also ready to think creatively in overcoming certain procedural hurdles. This is clear in the CommRC's understanding of extraterritorial jurisdiction, and in the ECtHR's generous extension of *locus standi* to associations.

Conversely, some hard limits have been identified. Both jurisdictions have shown they are not willing to compromise on exhaustion of domestic remedies, and the ECtHR took a conservative approach to jurisdiction and individual victimhood. Furthermore, they

[247] The indigenous identity is tied to historical antecedence, which primarily takes place through the territory (though it can also relate to language and culture). See LOPES, 2001, p. 177-183.

[248] *Billy*, Communication, p. 46-47. *Yakye Axa*, Dissenting Opinion, §19.

[249] UNICEF, 2019. SHALBY, 2019. NOLAN, 2021. CLIENTEARTH, 2022. STERN, 2023.

struggled in dealing with future risks in general.[250] This is evident in the missed opportunities by the HRC and ECtHR to address children's rights, the interpretation given to the "imminent threat" criterion, and the HRC's failure to concretely address mitigation measures. Ultimately, however, it is clear that they found themselves in a delicate position, finding a balance between evolving their case-law constructively while also safeguarding their legitimacy and reputation.[251]

The outcomes in *Sacchi* and *Duarte Agostinho* were understandably met with disappointment.[252] Nevertheless, they have also prompted commentators to question what can be considered a success in climate litigation.[253] As such, even those developments are sure to inform and shape future strategies, much in the same way that the successful cases of today were built on the foundation laid down by the ICC petition nearly twenty years ago.[254]

3. Rights-based climate litigation in perspective

This brief final chapter offers brief final reflections on rights-based climate litigation considering the investigation conducted.

In all decisions analyzed, State parties consistently argued that international HR bodies are not the proper avenue for addressing climate change and its effects.[255] They were, of course, correct - that is best done through effective international negotiation and cooperation. It has been shown, however, that negotiation between states has not been enough.

As affirmed by the UN Special Rapporteurs in their third-party intervention in *KlimaSeniorinnen*, in the 2020s "the question [is] no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights".[256] As such, for them to have refused to rise to this challenge would have been to ignore the factual and legal reality they are inserted in.

[250] QUIST; KRAFCIK, 2023, p. 419.
[251] NOLAN, 2021. REICH, 2024, p. 46.
[252] EARTHJUSTICE, 2021.
[253] HERI, 2024, p. 61-62.
[254] QUIST; KRAFCIK, 2023, p. 414.
[255] *KlimaSeniorinnen*, §352.
[256] Ibid., §379.

It is true that IHRL was not designed to address global, collective, or transboundary issues. Because of that, there will always be limits to what it can achieve. Nevertheless, the cases analyzed showcase some significant advantages of rights-based climate litigation, and IHRL's potential in adapting its framework to the climate emergency.

CONCLUSION

The aim of this thesis was to evaluate the limits and possibilities of rights-based climate litigation, and contribute to the literature in critically reviewing the resulting contemporary jurisprudence.

In order to achieve this, I selected cases that touched upon the most controversial procedural and substantive topics rights-based climate litigation. These are rightfully considered to be landmark decisions

Thus, this thesis opened by considering the dimensions that contextualize the international response to climate change, leading to the emerging integration between IEL and IHRL. This was a natural consequence of a global failure to prioritize collective interests and implement sufficiently ambitious measures.

I continued by offering a comprehensive critical analysis of the decisions selected, which showcased both critical shortcomings and historic victories. This allowed for a satisfactory view of the differences in approach between different jurisdictions, as well as the current scenario climate law and its existing gaps.

As such, it is my understanding that these first four landmark cases in rights-based climate litigation have shown that HR bodies have both the tools and the willingness to engage with the climate emergency substantively and adapt existing frameworks in order to promote the development to international law.

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