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Climate Law and Human Rights: How Do Courts Treat Rights in Their Decisions?

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I. INTRODUCTION

On December 20, 2019, in *Urgenda Foundation v. State of the Netherlands*, the Supreme Court of the Netherlands ruled that the Dutch government had violated the human rights of 900 citizens by failing to effectively reach greenhouse gas (GHG) emissions reductions targets.[1] In reaching its decision, the Supreme Court of

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1. Netherlands v. Urgenda Foundation, (2019) ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. 2019) (Neth.). Greenhouse gas emissions include common airborne emissions from human activity such as carbon dioxide, methane, and nitrous oxide which trap heat in the atmosphere. Significant increases in the

the Netherlands underscored that states have a positive obligations to protect the lives of those within their jurisdiction, and that if the government knows there is a real and imminent threat to life that it must take precautionary measures.[2] Moreover, the court held these obligations applied to state actions in controlling GHG emissions and their impact on climate change. This was due to the adverse effect of climate change on the financial, health, and housing related well-being of individuals.[3] *Urgenda* provides a window into the importance of how courts treat human rights as they relate to climate change.

Traditionally, a central point of debate in the scholarship regarding the relationship between environmental conditions and human rights has also been whether environmental protection is interpreted as representing a civil-political human right or socio-economic human right. Some scholarship has focused on how environmental protection claims have been brought under claims of civil-political human rights violations, such as under Article 8 of the European Convention on Human Rights.[4] Other work, however, has presented that the relationship between the maintenance of healthy environmental conditions and the protection of human rights as being closer to a socio-economic right.[5] Scholars supporting the position of environmental protections as a socio-economic right have contended that this allows for more effective integration of these protections into everyday concerns of the public and mobilizing public support.[6]

This article argues that the common dichotomous distinction which scholars have debated to this point has not adequately considered court interpretation. Instead, when taking a broad, comparative approach to assessing climate litigation with human rights claims we can observe that civil-political and socio-economic rights may be treated at times as divisible and at other times indivisible, while they can also be treated as interdependent or independent.

Sub-categorizations of human rights are commonly distinguished between those of civil and political rights and those of social, cultural, and economic rights. Civil and political rights are considered those regarding freedoms of expression, religion, and life while social, cultural, and economic rights are those regarding

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emissions of these gases in recent years have overwhelmingly been linked to changing climatic conditions.

2. *Id.* at 12.

3. *Id.*

4. THE BALANCING OF INTEREST IN ENVIRONMENTAL LAW IN AFRICA 1-34 (Michael Faure & Willemien du Plessis eds., 2012).

5. HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996).

6. Karen Bell & Sarah Cemlyn, *Developing Public Support for Human Rights in the United Kingdom: Reasserting the Importance of Socio-Economic Rights*, 18 INT'L J. OF HUM. RTS. 822, 822-23 (2014).

access to education, employment, personal security, and health.[7] Further, civil-political rights tend to be referred to as first generation human rights, while socio-economic rights are referred to as second generation human rights.[8]

An interesting complexity that considerations of environmental conditions and climate change add to these aspects of human rights are that environmental considerations can plausibly fall into either category or even overlap across the two categories. Failure to properly address environmental harms, it could be argued, may violate rights spanning from life to security to health. Therefore, further thorough inquiry into the ways in which civil-political human rights claims in climate litigation have been brought to and assessed by courts remains necessary. This inquiry process conducted in this article will progress our understanding of the relationship between how civil-political rights and socio-economic rights are considered in relation to emerging climate law cases with human rights claims.

The main research question of this article is "how do courts assess how climate laws are designed to protect human rights?". I focus on the treatment of civil-political and socio-economic rights by courts themselves, specifically as they relate to cases of climate litigation with human rights claims. Civil-political rights tend to protect individuals against actions which intrude upon rights while socio-economic rights tend to require actions to be taken to uphold rights. Following from the definition produced by the United Nations Environmental Programme in their report on climate litigation, I define climate litigation as legal cases which relate specifically to climate change mitigation, adaptation, or the science of climate change.[9] More precisely, I consider the divisibility and interdependence of the treatment of these rights. By divisibility, I refer to the necessity of any individual category of human rights to be realized by upholding all other categories of human rights. By interdependence, I refer to the extent to which civil-political rights are reliant on concurrent conditions of socio-economic rights and vice versa.

Whether rights can be treated as divisible or independent from one another remains a part of debate in the literature.[10] For example, some argue that in reference to human rights, the rhetoric

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7. THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 213-35 (Cinnamon P. Carlarne et al. eds, 2016).

8. Carl Wellman, *Solidarity, the Individual and Human Rights*, 22 JSTOR 639, 639-57 (2000).

9. *Global Climate Litigation Report: 2020 Status Review*, U.N. ENV'T PROGRAMME (2020), wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y [perma.cc/RF96-GB33].

10. Gauthier De Beco, *The Indivisibility of Human Rights and the Convention on the Rights of Persons with Disabilities*, 68 INT'L & COMP. L. Q. 1, 141-60 (2019).

of indivisibility can obscure the reality that the fulfilment of specific rights can be in conflict with one another, which can require limitations of a right, reinterpretation of a right, or a choice to be made between fulfilling one right or another.[11] Others have noted that slogans and references to indivisibility and interdependence of human rights serve to obscure the reality that human rights are divided into two sets of rights. One set regards civil and political rights, and the other set regards economic, social, and cultural rights. This division documents and establishes a historical difference between these two categories of rights.[12]

Conversely, other scholars contend that for rights to truly fulfill human rights aims, they must be treated in a holistic manner which sees all human rights values rooted in human history.[13] Similar arguments against the divisibility or independence of human rights are grounded in the necessity of physical security. Professor Henry Shue contends when one right is threatened such threat is likely to create precarity, a state of uncertainty and insecurity, for other rights, reflecting the dependent nature of human rights and inability to divide considerations of one rights category from another.[14] The marginalization of any category of human right, such scholars would argue, creates precarity for all human rights.[15]

This article focuses on providing a better account of how courts, thus far, treat considerations of divisibility and dependence in human rights claims in climate litigation, as well as the relationship of these considerations to success for parties bringing claims of rights violations, in a broader, comparative perspective. I explore whether the interpretation of courts as treating these rights divisibly or interdependently is associated with plaintiff success in case outcomes. I consider the difference between divisibility and interdependence to be relevant as legal scholars and practitioners are not strictly concerned with the ways in which laws are created but are necessarily also concerned with the ways in which courts interpret the language and applications of these laws. By observing

11. Audrey R. Chapman, *The Divisibility of Indivisible Human Rights*. 9. UNIV. OF CONN. HUM. RTS. INST. 1, 5 (2009).

12. DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY 69 (2010).

13. A. Belden Fields & Wolf-Dieter Narr, *Human Rights as a Holistic Concept*, 14 HUM. RTS. Q. 1 (1992). It should be noted that Belden Fields and Wol-Dieter do not view this development as necessarily linear or deterministic, however, and that upholding human rights is the product of a struggle to defend this holistic treatment of rights without the guarantee of success.

14. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (2d ed. 1980). Henry Shue is Professor Emeritus of Politics and International Relations at Merton College of Oxford University. He has published numerous prominent works on ethical issues regarding human rights going back to the 1970s and climate change going back to the 1990s.

15. Melissa Robbins, *Powerful States Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 275 (2004).

court determinations regarding six cases selected from different jurisdictions, countries, and global regions I display how courts may treat civil-political and socio-economic rights categorizations both as divisible and independent as well as indivisible and interdependent in different circumstances. These cases were selected to provide variation in region, country, court level, and case success.[16] Six cases are analyzed to achieve a balance between breadth and depth. In doing so, the variation in region, country, court level, and case success allows for greater generalizability based upon findings. The six cases include two in Europe, two in the Pacific, one in Latin America, and one in Asia. While not an exhaustive or completely balanced regional mix, this still constitutes an expansive geographic context.

Further, applicants may bring claims explicitly categorized as either civil-political or socio-economic rights in legal protocols, yet courts may make determinations regarding both civil-political and socio-economic concerns. The Inter-American Court of Human Rights (IACtHR) used Article 26 of the American Convention on Human Rights (ACHR), categorized under "Economic, Social, and Cultural Rights", to establish justiciability regarding protection against environmental harm, and civil-political and socio-economic rights indivisibly and interdependently.[17] In contrast, the UN Human Rights Committee heard claims brought under Article 6 of the International Covenant on Civil and Political Rights (ICCPR), but focused largely on traditional socio-economic concerns.[18] Establishing standing and justiciability in courts may arise from either civil-political and socio-economic rights violation claims, which may allow parties to have cases determined before the courts on their merits. Yet once courts actively make decisions on the merits of cases, they may assess both civil-political and socio-economic rights.[19]

Success for parties bringing claims of human rights violations in climate litigation does appear, however, to be more likely when

16. This article defines case success as the occurrence of at least one claim made in a given case involving human rights violations related to climate change being determined by courts to have been violated based upon the facts of the case and applicable laws.

17. A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights, Advisory Opinion OC-23/17 (Nov. 15, 2017), Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACrtHR).

18. U.N. Human Rights Committee Views Adopted on Teitiota Communication, CCPR/C/127/D/2728/2016, U.N. Human Rights Committee (HRC) (Jan. 7, 2020). *See* decision at p. 4 for basis of the claim and pp. 5-12 for the Committee's treatment of the facts of the case and ruling.

19. Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?,* 98 AM. J. INT'L L. 462 (2004).

courts treat traditional civil-political and socio-economic rights categorizations as indivisible and interdependent, as opposed to divisible and independent.[20] In all three of the cases assessed here in which parties bringing claims of rights violations were unsuccessful, courts took a divisible and independent interpretation of civil-political and socio-economic concerns. Conversely, in all three successful cases for parties bringing claims of rights violations, indivisible and interdependent interpretations were carried out by the courts. These findings suggest that when courts arrive at determinations in support of claims of human rights violations in climate litigation, they do so through a broader interpretation of human rights law regarding the inclusiveness of civil-political and socio-economic rights considerations. Overall, this article will show that the civil-political and socio-economic distinction regarding climate litigation with human rights claims is a distinction which should be neither wholly ignored, nor treated as ironclad. Instead, as the example opinions provided here illustrate, court decisions can involve different treatment of divisibility and dependence regarding civil-political and socio-economic rights categorizations.

II. CIVIL-POLITICAL VERSUS SOCIO-ECONOMIC HUMAN RIGHTS

Two notable ways in which scholars categorize the protection of such rights are civil-political and socio-economic human rights. The Universal Declaration of Human Rights (UDHR), originally published in 1948, did not explicitly differentiate between dimensions of human rights. Since then, scholars have discussed generations of human rights law, with the first generation typically referring to civil-political rights, more typically considered to be negative rights and the second generation referring to socio-economic rights, considered to be closer to positive rights.[21]

Civil-political rights tend to involve requirements that states refrain from interfering with individual freedoms, including self-determination, fair trial, free speech, freedom from discrimination,

20. Advisory Opinion OC-23/17, *supra* note 17.

21. *Manual for Human Rights Education with Young people: The evolution of human rights*, COUNCIL OF EUROPE (2002). www.coe.int/en/web/compass/the-evolution-of-human-rights [perma.cc/BE5B-K9WH]. *See also*, Adrian Vasile Cornescu, *The generations of human's rights*, *in* DAYS OF LAW: THE CONFERENCE PROCEEDINGS, BRNO: MASARYK UNIVERSITY (1st ed., 2009). In this article, Cornescu focuses specifically on the genesis of human rights and the historical development of categorical generations of rights. Negative rights refer to individual protections against certain actions by other individuals or State actors, such as freedom of speech or freedom from persecution. Positive rights refer to individual protections through the actions of other individuals or State actors, such as the right to adequate education or housing.

and freedom from political repression.[22] Upholding human rights also requires that a safe and healthy environment is present. Climate litigation provides a pathway through which certain rights to environmental protection are classified as civil-political human rights. Since individuals are endowed with a human right to a habitable environment and climate that does not threaten life or well-being, actions of the state which create or exacerbate challenges regarding these rights can arguably be decisions which have been taken to undermine the freedoms, choices of self-determination, or political actions of individuals. Further, scholars have argued that there remains an emphasis on civil-political rights, which hold globally hegemonic influence above those of socio-economic rights.[23] As such, the influence of civil-political rights on a global scale as they relate to human rights concerns may provide greater significance in the determinations of courts regarding climate-based litigation.

In contrast, socio-economic rights tend to refer to the protection of rights which include guarantees to adequate sustenance, housing, education, health, and employment. Previous work contends that the global protection against environmental degradation is primarily designed to sustain socio-economic progress to align with the UN Sustainable Development Goals (SDGs).[24] This argument is supported by legal scholars who suggest that the most substantive pathway for rights protections arise from the realization of socio-economic rights.[25] The fulfillment of socio-economic rights may also occur through regulatory law and concrete government actions. One example of regulatory law fulfilling such purposes was Regulation (EU) 2020/1998, implemented by the Council of the European Union to establish a legal base for the EU to target individuals, companies, and bodies, including both state and non-state actors, which are responsible for, involved in, or associated with serious human rights violations and abuses.[26] In some cases, concrete government actions take the form of developing the healthcare system to align with human rights principles of available, accessible, acceptable, and quality health

22. U.N. General Assembly, Int'l Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966).

23. Tony Evans & Alison J. Ayers, *In the Service of Power: The Global Political Economy of Citizenship and Human Rights*, 10 CITIZENSHIP STUDIES 3, 289-308 (2006).

24. Nicholas A. Robinson, *Depleting Time Itself: The Plight of Today's "Human" Environment*, 51 ENVTL. POL'Y & L. 6, 361-69 (2021).

25. Laura Pereira, *The Role of Substantive Equality in Finding Sustainable Development Pathways in South Africa*, 10 MCGILL INT'L J. OF SUSTAINABLE DEV. L. & POL'Y 2, 147-78 (2014).

26. Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, EUROPEAN UNION (2022) eur-lex.europa.eu/eli/reg/2020/1998/oj [perma.cc/TBN7-5JXE].

services to uphold the right to health enshrined in Article 12 of the Covenant on Economic, Social and Cultural Rights.[27]

Important to the consideration and distinction of these two generations of rights is also attention to 1) indivisibility and 2) interdependence. The concept of indivisibility states that no human right can be truly realized without realizing all other human rights.[28] The indivisibility of human rights is stated in both documents and resources relating to international law. The Vienna Declaration claims that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".[29]

Documentation from the United Nations Human Rights Office of the High Commissioner (OHCHR) states that "all human rights are indivisible and independent".[30] The United Nations Population Fund claims regarding human rights principles that "Human rights are indivisible. Whether they relate to civil, cultural, economic, political or social issues, human rights are inherent to the dignity of every human person" and that "Human rights are interdependent and interrelated. Each one contributes to the realization of a person's human dignity through the satisfaction of his or her developmental, physical, psychological, and spiritual needs. The fulfillment of one right often depends, wholly or in part, upon the fulfilment of others."[31]

In this article, indivisibility refers to the inability of legal

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27. *Human Rights*, WORLD HEALTH ORG. (Dec. 10, 2022), www.who.int/news-room/fact-sheets/detail/human-rights-and-health [perma.cc/3HEV-R45R]. This was further defined in General Comment 14 of the Committee on Economic, Social, and Cultural Rights.

28. James W. Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 HUM. RTS, Q. 984 (2008).

29. U.N. Human Rights Office of the High Commissioner, *Vienna Declaration and Programme of Action*, U.N. (1993). www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action [perma.cc/2JG9-ULD9]. The Declaration goes on to state "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms". *Id*. Such language underscores the connection of socio-economic rights to the actions of international states.

30. U.N. Human Rights Office of the High Commissioner, *What are human rights?,* U.N. (2022), www.ohchr.org/en/what-are-human-rights#:~:text=All%20human%20rights%20are%20indivisible,economic%2C%20social%20and%20cultural%20rights [perma.cc/6XBR-B6VT].

31. U.N. Population Fund, *Human Rights Principles*, UNFPA (2005). www.unfpa.org/resources/human-rights-principles [perma.cc/X9M4-NU2G]. Also meaningful in describing human rights from this source, The UN Population Fund further states that "For instance, fulfilment of the right to health may depend, in certain circumstances, on fulfilment of the right to development, to education or to information."

arguments and determinations to use civil-political rights in a distinct claim from socio-economic rights and vice versa. Existing work argues that the violation of one right is related to the violation of other rights. For example, recent work proposing normative justifications for the position that collective labor rights derive from the right to the freedom of association suggests rights categories are not strictly divisible.[32] Further, a study conducted in the city of Belo Horizonte, Brazil found that the violation of water and sanitation rights promoted the violation of health and education rights.[33] The authors suggest these findings support that human rights are both indivisible and interdependent. Interdependence is an equally important concept as divisibility. Interdependence focuses on the connection between different types of rights. In this article, then, by interdependence I refer to the extent to which civil-political rights are reliant on concurrent conditions of socio-economic rights and vice versa. While previous studies have primarily argued normatively that both indivisibility and interdependence should be conceptually strengthened to affirm the protection of human rights,[34] or used small case studies,[35] this article assesses the implemented rulings and opinions of courts regarding human rights claims in climate litigation.

Thus, in the existing academic literature, there is a focus on how courts should treat these rights, but a lack of insight into how courts have interpreted the application of these rights and treatment of civil-political versus socio-economic rights to climate litigation. As a result, there remains a limited understanding of how courts treat the civil-political and socio-economic distinction in climate litigation with human rights claims.

III. CASE SELECTION AND DATA COLLECTION

To assess the main research question outlined in the introductory section, I compiled information on six cases of climate litigation with human rights claims. These cases range from numerous global regions, countries, and jurisdictions where claimants received both successful and unsuccessful outcomes. Among these cases, three resulted in successful rulings in favor of

32. Kalina Arabadjieva, *Worker Empowerment, Collective Labour Rights and Article 11 of the European Convention on Human Rights*, 22 HUM. RTS. L. REV. 1, 2-3 (2022).

33. Priscila Neves Silva, Giselle Isabele Martins, & Léo Heller, *Human rights' interdependence and indivisibility: a glance over the human rights to water and sanitation*, 19 BMC INT. HEALTH AND HUM. RTS. 1, 1-8 (2019).

34. Louis J. Kotzé, *The Anthropocene, Earth system vulnerability and socio-ecological injustice in an age of human rights*, J. HUM. RTS. & ENVT. 10, 62-85 (2019); Silva et al., *supra* note 33.

35. Johanne Bouchard & Patrice Meyer-Bisch, *Intersectionality and Interdependence of Human Rights: Same or Different*, 16 EQUAL RTS. REV.186-203 (2016); Silva et al., *supra* note 33.

the plaintiffs while three resulted in unsuccessful rulings. For purposes of this article, case success is defined as the occurrence of at least one claim made in a given case involving human rights violations related to climate change being determined by courts to have been violated based upon the facts of the case and applicable laws. There is also variation in the treatment of divisibility and dependence regarding civil-political and socio-economic rights on the part of the courts.

The essence of comparative research is to situate similarities and differences between cases and contexts to obtain a better understanding of legal conditions and outcomes.[36] Variation in geography, jurisdiction, case success, and treatment of divisibility and dependence regarding civil-political and socio-economic rights allows for a diverse approach to case selection for this qualitative assessment.[37] By assessing not only a larger set of cases, but observing greater variation in aspects of the case, a broader assessment of human rights claims in climate litigation is able to be conducted. This is designed to further support the generalizability of findings to different contexts. By drawing on a more diverse range of sources, the findings from the analysis conducted incorporate more information on the content of court rulings.

Finally, each of these cases was selected because they have written judgments in which the determinations of the courts were expounded upon in enough detail to assess the positions of the justice or justices.[38] In other cases, such determinations may not be extensive enough to adequately discuss matters of divisibility and interdependence in regard to matters of human rights interpretation and application.[39]

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36. Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOB. STUD. L. REV. 451 (2009).

37. Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POL. RSCH. Q. 2, 294-308 (2008).

38. In three cases, decisions were produced in the English language. Three sets of cases, *A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights*, *Greenpeace Nordic v. Government of Norway* and *Urgenda Foundation v. State of the Netherlands*, were not officially ruled upon in the English language. For these three sets of cases, unofficial full translations of the decisions used for public review by the respective courts were used for textual assessment.

39. Ridhima Pandey v. Union of India (Pandey v. India), Original Application No. 187 of 2017, decided on Jan. 15, 2019 (NGT). This was a meaningful instance of climate litigation with human rights claims in which the applicant alleged the Indian government had violated rights under the country's commitments to the Paris Agreement, international environmental law, and the public trust doctrine by not taking sufficient action and threatening in particular youth and future generations. *See id.*, at 1-3. The applicant submitted the claim in March 2017, and the National Green Tribunal dismissed the claim in January 2019. The order of the dismissal was only three paragraphs in length, claiming simply that there was "no reason to presume" that India's

IV. CASES

Table 1 presents each of the six cases collected and analyzed in this study. Additionally, the table provides information on the geographic location, jurisdiction, and history of case determination on the part of the relevant court. Below, I provide further details about the basic issues in question, relevant statutes, regulations, and/or agreements, and court rulings.

Table 1. Collected Cases

Case	Region	Country	Court(s)	Rights-Claim Success
A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights	Latin America	International/Regional	Inter-American Court on Human Rights	Successful
Anonymous Applicant vs Australia Minister for Immigration and Citizenship	Pacific	Australia	Refugee Review Tribunal	Unsuccessful
Asghar Leghari vs. Federation of Pakistan	Asia	Pakistan	Lahore High Court	Successful
Greenpeace Nordic v. Government of Norway	Europe	Norway	Oslo District Court/ Bogarting Appeal Court/Supreme Court of Norway	Unsuccessful
UN Human Rights Committee Views Adopted on Teitiota Communication	Pacific	New Zealand	United Nations Human Rights Committee	Unsuccessful
Urgenda Foundation v. State of the Netherlands	Europe	Netherlands	District Court of The Hague/Appeal Court of The Hague/Supreme Court of the Netherlands	Successful

international commitments to climate change mitigation were not already "reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances." *See Before the National Green Tribunal,* Principal Bench, New Delhi, Original Application No. 187/2017; *Pandey v. India*. Cases such as this could not be adequately assessed, as the insights provided into the considerations of human rights and their relation to climate change and climate law are too limited for proper analysis.

A. A Request for an Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights

In March, 2016, the Republic of Colombia requested an advisory opinion from the Inter-American Court of Human Rights (IACtHR) regarding the scope of states' obligation of responsibility to protect against environmental harm.[40] Colombia sought clarification on the relationship between state obligations under the Cartagena Convention[41] and the American Convention on Human Rights (ACHR).[42] The request for an advisory opinion was based on Article 64(1)1[43] of the ACHR, as well as Article 70(1)[44] and Article 70(2)2[45] of the Rules of Procedure concerning State obligations.

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40. Advisory Opinion OC-23/17, *supra* note 17.

41. The Cartagena Convention is the common name which refers to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region. U.N. Environment Programme, *Cartagena Convention*, U.N. (2022). www.unep.org/cep/who-we-are/cartagena-convention [perma.cc/423T-25LF]. The Cartagena Convention was adopted in Cartagena, Colombia on March 24, 1983, and entered into force on October 11, 1986. *Id*. The Cartagena Convention has been ratified by 26 United Nations Member States in the Wider Caribbean Region and covers the marine area of the Gulf of Mexico, the Caribbean Sea, and the adjacent Atlantic Ocean south of 30 north latitude and within 200 nautical miles of the Atlantic coasts of the ratifying states. *Id*. The Cartagena Convention aims to provide a regional level agreement to provide protection and preservation of this marine environment. *Id*. The Cartagena Convention is supported by three technical agreements, referred to as "protocols", which apply to Oil Spills, Specially Protected Areas and Wildlife (SPAW) and Land Based Sources of Marine Pollution (LBS). *Id*.

42. Ricardo Abello-Galvis & Walter Arevalo-Ramirez, *Inter-American Court of Human Rights Advisory Opinion OC-23/17: Jurisdictional, Procedural and Substantive Implications of Human Rights Duties in the Context of Environmental Protection*, 28 REVIEW OF EUR. COMP. & INT'L. ENVTL. L., 2, 217-22 (2019).

43. Albello-Galvis & Arvalo-Ramirez, *supra* note 42. Article 64(1)1 states that "1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court." Organization of American States, American Convention on Human Rights, Aug. 27, 1979, No. 17955.

44. Albello-Galvis & Arvalo-Ramirez, *supra* note 42. Article 70(1) states that "Requests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought." Organization of American States, American Convention on Human Rights, Aug. 27, 1979, No. 17955.

45. Albello-Galvis & Arvalo-Ramirez, *supra* note 42. Article 70(2)2 states that "Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates." Organization of American States, American

In its ruling in November 2017, the IACtHR recognized an undeniable relationship between environmental protection and the realization of human rights under the ACHR, stating that under the Inter-American human rights system, the right to a healthy environment is established in Article 11 of the San Salvador Protocol, as well as citing Article 26 of the American Convention, which relates to economic, social, and cultural rights.[46] More specifically, Article 26 concerns progressive development, which refers to the requirement that State Parties adopt measures relating to both domestic and foreign policy which aim to achieve the realization of rights implicit in established economic, social, education, scientific, and cultural standards set out in the Charter of the Organization of American States.[47]

The court determined that states would be required to, at a minimum, regulate, supervise, and monitor activities that would lead to significant environmental harm, require environmental impact assessments.[48] Additionally, the court required that contingency plans designed to be implemented in the case of environmental harm must be put in place for states to achieve their duties regarding environmental protection and this realization of human rights.[49]

Further, the court ruled on the definition of "jurisdiction" under Article 1(1) of the ACHR. The court determined that the scope of the term "jurisdiction" included the obligation for states to protect against cross-border environmental harm.[50] The language of Article 1(1) establishes that parties to the ACHR "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."[51] The court determined that this specific wording

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Convention on Human Rights, Aug. 27, 1979, No. 17955.

46. *Id*. at 221. Article 11 of the San Salvador Protocol relates to the right to a health environment. Article 11 states that "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment." *Id*. *See Protocol of San Salvador*, ORG. OF AM. STATES (1988) www.oas.org/en/sare/social-inclusion/protocol-ssv/docs/protocol-san-salvador-en.pdf [perma.cc/G6PR-P4PL] (providing the full text of the San Salvador Protocol). *See also* Inter-American Commission on Human Rights, *American Convention on Human Rights*, ORG. OF AM. STATES (1969) www.cidh.oas.org/basicos/english/basic3.american%20convention.htm [perma.cc/ME6F-WZEB] (providing the full text of the American Convention).

47. *See* at Chap. III, Art. 26, OAS, *Treaty Series*, No. 36; United Nations, Treaty Series, vol. 1144, No. I-17955. The Convention entered into force on 18 July 1978. States parties to the American Convention on Human Rights have also established the 1988 Additional Protocol, which has been in force since 1999, as well as the 1990 Protocol, which has been in force since 1991.

48. Advisory Opinion OC-23/17, *supra* note 17, at 56-60.

49. *Id.* at 60-69.

50. *Id.* at 32.

51. *Id.*

could include extraterritorial obligations on the part of states regarding environmental harm.[52] This was notable as it was a question of first impression, establishing clarity regarding extraterritorial obligations to protect against cross-border harm and connecting this to the fulfilment of human rights.

In addition to this, the IACtHR established that states align their action with the "precautionary principle".[53] The precautionary principle is defined under the Rio Declaration on Environment and Development, establishing that when there is a lack of full scientific certainty in regards to environmental damage, states cannot use this lack of certainty as a justification for inaction to prevent environmental degradation.[54] As such, when interpreting the ACHR, states must act in keeping with the precautionary principle.

Finally, the court outlined three types of obligations which would be assessed under future decisions, including 1) the obligation of preventions, 2) the obligation of cooperation, and 3) the obligation to life and personal integrity.[55] The obligation of prevention involves multiple duties requiring states to sufficiently protect against environmental harm.[56] States are obligated to regulate, supervise, and monitor instruments which are designed to prevent or minimize harmful impact to the environment, as well as human life and personal integrity. States must require and approve environmental impact assessments (EIAs), designed to allow for due diligence on the part of the state to determine whether activities which may cause significant harm to the environment are allowable under international standards and best practices, and safeguard against harms to the environment and personal rights.[57] Further, states must establish contingency plans and must take actions to mitigate environmental damages which occur under environmental disasters.[58]

The obligation of cooperation relates to the duty of one international state to other international states. The IACtHR determined that states have a duty to notify, consult and negotiate with, and exchange information with other states regarding activities, projects, or incidents which could potentially cause transboundary environmental harm.[59] The court ruled that this was enshrined in Article 26 of the ACHR, which established an obligation of international cooperation, along with the San Salvador

52. *Id.* at 33-36.

53. *Id*. at 69-72.

54. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), Principle 15 (Aug. 12, 1992).

55. Advisory Opinion OC-23/17, *supra* note 17, at 49-90.

56. *Id.*

57. *Id.* at 56-66.

58. *Id.* at 67.

59. *Id*. at 74-75.

Protocol also referring to cooperation among states.[60]

The duty to notify requires official and public knowledge to be provided regarding work being carried out by states within their national jurisdiction which may potentially have significant adverse transboundary environmental affects to states.[61] The purpose of the duty to notify is to create conditions for successful cooperation between parties to avoid the potential harm that a project may cause.[62] Consultation and negotiation builds upon the requirement of notification. The duty would oblige states to communicate with potentially affected states in advance of possible significant transboundary environmental effects and consider rearranging actions when other states contend, in good faith, that they would be adversely affected. The exchange of information obliges states to engage in the inter-state exchange of knowledge and other relevant information.

The obligation of life and personal integrity primarily involves access to information, public participation, and access to justice. The court determined that access to information is enshrined in Article 13 of the IACtHR, which stipulates the right to seek and receive information, as well as protects the right of individuals to request access to information that is held by the state.[63] Public participation was found to be established under Article 23(1)(a) of the IACtHR by the court.[64] This is designed to oblige states to integrate public concerns into environmental matters and ensure that citizens have a right to voice positions regarding actions which affect environmental conditions.

Access to justice was deemed to arise from Article 8(1) of the IACtHR, relating to rights of individuals to due process of the law, as well as the obligation of states under Article 1(1) to ensure the free and full exercise of rights.[65] The obligation of access to justice allows individuals a means of redressing human rights violations relating to state actions with regards to environmental harm and/or inability to protect environmental conditions.

B. Anonymous Applicant vs Australia Minister for Immigration and Citizenship

In August, 2009 an anonymous applicant filed for a review of a

60. *Id.* at 72.

61. *Id.* at 74. *See also* G.A. Res. 2995 (XXVII) Cooperation between States in the Field of Environment (Dec. 15, 1972); Rep. of the World Comm'n on Env't and Dev. "Our Common Future" (Brundtland Rep.) Annex to U.N. Doc. A/42/427, Principle 16 (June 16, 1987).

62. *Id.* at 75. *See also* ICJ, Case of Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment (Apr. 20, 2010), ¶¶ 102 & 113.

63. Advisory Opinion OC-23/17, *supra* note 17, at 82-83.

64. *Id.* at 88.

65. *Id.* at 90.

decision made by the Australian Minister for Immigration and Citizenship refusing to grant the applicant a Protection (Class XA) visa under Section 65(1) of the Migration Act 1958 in the Australian Refugee Review Tribunal.[66] The applicant, a citizen of the small, Pacific island nation of Kiribati, last arrived in Australia in December 2007, and had applied to the Department of Immigration and Citizenship for a Protection (Class XA) Visa in May 2009.[67] The applicant applied for the Protection (Class XA) visa claiming that it was becoming increasingly untenable to live in Kiribati as a result of difficulty to earn a living associated with sea level rise and climate change, as well as challenges in obtaining fresh water.[68] While the applicant noted that climate refugees were not a recognized group under Australian law, they argued that under the Migration Act, Section 36(2) (a), they are entitled to a protection visa as they have a well-founded fear of persecution stemming from their membership in a social group, namely those from Kiribati who are unable to earn a livelihood based upon the effects of climate change and that the requirement of serious harm as defined in Section 9lR(1)(c) and Section 9 in the Migration Act is satisfied.[69]

The Tribunal determined that the Minister for Immigration and Citizenship did not err in the decision to deny the applicant a Protection (Class XA) visa based upon the merits of the case.[70] Specifically, it determined that "persecution must involve systematic and discriminatory conduct."[71] The applicant, as determined by the Tribunal, did not meet this definition as it was unable to identify an agent of persecution, meaning that there was an absence of motivation for persecution.[72] Thus, the Tribunal affirmed the refusal of a Protection (Class XA) visa to the applicant.

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66. Anonymous Applicant v. Australia Minister for Immigration and Citizenship, 0907346 [2009] RRTA 1168 (Dec. 10, 2009). The Protection (Class XA) visa is a permanent visa provided for those who are able to show that they require protection obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 amendments. Section 65(1) outlines the powers of the Minister for Immigration and Citizenship to make decisions regarding the granting and refusal of visas. Additional criteria to grant Protection (Class XA) visas are established under Part 866 of Schedule 2 of the Migration Regulations 1994.

67. *Id.* at 2.

68. *Id.* at 4. Of additional importance, the applicant mentioned that the future of the country, affected negatively by climate change, was "frightening" and that seeking refuge in Australia would provide a home in which they could achieve "peace of mind and good health". *Id.*

69. *Id.* at 6-7.

70. *Id.* at 12. *See also, id.* at 10 (stating the tribunal wrote that it did not believe that the applicant's fear of persecution met the standards required by the Refugees Convention).

71. *Id.* at 3. The cases of *Applicant A & Anor v. MIEA* and *Anor* (1997) 190 CLR 225 and *Ram v. MIEA & Anor* (1995) 57 FCR 565 were cited by the tribunal to support this interpretation of the Refugees Convention.

72. 0907346 [2009] RRTA 1168, at 31.

C. Asghar Leghari vs. Federation of Pakistan

Asghar Leghari, an agriculturist from Pakistan, filed suit against the Pakistani government in the Lahore High Court.[73] The petitioner alleged that the Pakistani government had violated his fundamental rights by failing to properly carry out the National Climate Change Policy of 2012 (NCCP), as well as the Framework for Implementation of Climate Change Policy (FICCP).[74] Leghari claimed that the inaction to carry out the fulfilment of these policies violated international environmental principles, including the public trust doctrine, sustainable development goals, the precautionary principle, and intergenerational equity.[75]

Further, by not carrying out implementation of the NCCP and FICCP, the government had violated Articles 9 and 14 of the Pakistani Constitution, regarding the right to life and the right to dignity, as well as a clean and healthy environment, respectively.[76] The petitioner also noted that within the FICCP there were 734 action points, of which 232 points are designated as those of particular priority.[77]

On September 4, 2015, in the initial decision of the Lahore High Court, as well as in the supplemental decision on September 14, 2015,[78] the court agreed with the applicant that there is sufficient scientific evidence that climate change is real, and that the threat of climate change is an issue which the Pakistani government must address.[79] The court supported the petition, stating that the applicant's rights had been violated as a result of inaction on the part of the Pakistani government to sufficiently carry out measures outlined in the NCCP and FICCP.[80]

Finding that no tangible measures had been taken to effectively implement these policy outlines, the court ruled a "Climate Change Commission" (CCC) be established, with the powers to carry out necessary measures to achieve policy framework goals and required to file interim reports on progress.[81] In addition to this, the High Court determined that numerous relevant ministries and commissions had not fulfilled their duties to satisfactorily carry out adaptation measures established under the FICCP. The Court ruled that these ministries and commissions would be required to nominate a person within their offices to focus

73. Asghar Leghari v. Federation of Pakistan, (2015) W.P. No. 25501/2015, (Lahore) (Pak.).
74. *Id.*at 2.
75. *Id.* at 6.
76. *Id.* at 5.
77. *Id.* at 4.
78. *Id.*
79. *Id.* at 5-6.
80. *Id.* at 7-8.
81. *Id.* 14-15.

on more rapidly achieving framework action points.[82]

In January 2018, the CCC submitted a report to the High Court, which delivered an additional judgement based upon the substance of actions taken following the 2015 decision.[83] The federal and provincial governments requested access to additional funds budgeted to improve water accessibility.[84] Improved access to water was argued to help work towards the realization of climate justice and water justice, as well as align with Articles 9 and 14 of the national constitution.[85]

Additionally, the Court dissolved the CCC, and established a new committee, the Standing Committee on Climate Change (SCCC).[86] The Standing Committee would act as a link between the Court and the Executive, providing assistance to government agencies to ensure that NCCP and FICCP actions were carried out.[87] The Standing Committee would be required to appear before the Court again for necessary enforcement of upholding rights regarding the issue of climate change.[88]

D. Greenpeace Nordic v. Government of Norway

Unlike the last case which focused on whether the government of Pakistan had failed to properly implement measures of the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy, this next case concerns whether the government of Norway violated the fundamental rights of Norwegian citizens by licensing new blocks of the Barents Sea for development of deep-sea oil and gas extraction.

In 2016, two environmental NGOs, the Greenpeace Nordic Association and Nature and Youth, filed for declaratory judgement against the Norwegian government in the Oslo District Court.[89] The applicants alleged that the decision by the Ministry of Petroleum and Energy to issue the twenty-third of round deep-sea oil and gas extraction in the Barents Sea in that year was contrary to Article

82. *Id.* at 5.

83. Asghar Leghari v. Federation of Pakistan, (2018) PLD (Lahore) 364 (Pak.). The court noted that climate change posed a particular threat to the supply and availability of water. Changing rain patterns and climate-associated threats to water access would further threaten food security; *See*, at 24.

84. *Id.* at 15.

85. *Id.* at 22-24.

86. *Id.* at 24-25.

87. *Id.* at 25-26.

88. *Id.*

89. Greenpeace Nordic Ass'n v. Ministry of Petroleum & Energy (People v. Arctic Oil), (2016) HR-2020-846-J (Oslo Dist. Ct. 2016). Case citation found at climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-casedocuments/2016/20161018_HR-2020-846-J_petition.pdf [perma.cc/UJ23-B5PS].

112 of the Norwegian Constitution.[90] Article 112 establishes that "[e]very person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.[91] Natural resources should be expended on the basis of comprehensive long-term considerations whereby this right is safeguarded for future generations as well."[92] Additionally, the applicants contended that when interpreting Article 112, Norway's international obligations must be considered relevant, including obligations under the European Convention on Human Rights (ECHR).

In January 2018, the district court ruled in favor of the Norwegian government.[93] The court found that the decision to issue the twenty-third round of permits was not contrary to Article 112. Specifically, the court argued that Article 112 cannot be understood as an individual rights provision.[94] Instead, the provision protects collective rights. In this context, the court determined that Article 112 did not therefore establish a duty for the Norwegian government to "take measures with respect to emissions abroad, nor emissions stemming from the export of oil and gas from Norway".[95] Further, the court stated that Article 112 must be interpreted independently, creating international obligations, including those under the ECHR.

The case was appealed and in January 2020, the Borgarting Court of Appeal issued a judgement.[96] The appellants further contended that procedural errors were made for the licensing decision. The court of appeal found that Article 112 grants rights which can be reviewed before the court and that international obligations may be relevant regarding claims, but that the risk is so low and harm is not imminent under the assessment of emissions that the decision to issue permits is not contrary to the Constitution.[97] In regard to Article 2 of the ECHR, the court of

90. *Id*.

91. Kongeriket Norges Grunnlov (The Constitution of the Kingdom of Norway) Art. 112, lovdata.no/dokument/NLE/lov/1814-05-17 [perma.cc/D3NN-2CQX].

92. Norwegian Constitution, art. 112, as amended in 1992.

93. Greenpeace Nordic Association v. Ministry of Petroleum & Energy, (2018) Case No. 16-166674TVIOTIR/06 (Oslo Dist. Ct. 2018).

94. *Id*.

95. *Id.* at 10. Specifically, the court noted that the claims did not present a clear causal link between expected emissions abroad from the export of Norwegian oil and the domestic rights of those under Norwegian jurisdiction. *Id*.

96. Greenpeace Nordic Association v. Ministry of Petroleum & Energy, (2020) Case No. 18-060499ASD-BORG/ 03 (Borgarting Ct. of App. 2020). In the appeal, the environmental NGOs once again contended that the decision was contrary to Article 112, as well as contrary to Article 93 and 102 of the Norwegian Constitution, and Article 2, regarding the right to life, and Article 8, regarding the right to private and family life, of the ECHR. *Id.* at 8.

97. *Id.* at 33; 36-37; 41-43.

appeal found that the decision to award oil and gas production licenses does not involve the right to life in a matter protected under Article 2.[98] For Article 8, the court of appeal similarly determined that there was no specific relationship between the granting of oil and gas licenses and direct and immediate encroachments upon the right to a private life, family life, or home.[99]

Articles 93 and 102 of the Norwegian Constitution correspond to the rights from Articles 2 and 8 of the ECHR. The court stated that these constitutional articles do not extend beyond the ECHR, meaning the same interpretation is reached regarding Article 2 and 8 of the ECHR.[100] Finally, the court of appeal found no substantive grounds for the argument that procedural errors in providing the licenses occurred.[101]

The case was once again appealed, with the Supreme Court of Norway issuing a judgment in December 2020.[102] Regarding Article 112 of the Constitution, the Supreme Court determined that it may be asserted in court regarding environmental issues not considered by the legislature, but will have less weight regarding issues with clearer legislative answers.[103] Relating to the ECHR and international obligations, the Supreme Court noted that the ECHR has been incorporated into Norwegian law and takes precedence over Sections 2 and 3 of the Human Rights Act.[104]

Similarly, the Supreme Court found that the effects of future GHG emissions associated with the licenses did not meet the threshold of a direct and immediate threat to private life, family, or home under Article 8 of the ECHR.[105] The Supreme Court also dismissed the judgement in *Urgenda*, stating that the case before the Dutch Supreme Court did not transfer to this case, as it did not relate to prohibiting a measure of possible future emissions or

98. *Id.* at 34-35. The court stated that the global consequences of climate change are beyond the obligations of the Norwegian government, and that GHG emissions associated with the licenses do not result in a real or immediate risk for life.

99. *Id.* at 36.

100. *Id.* Additionally, the court of appeal noted Article 6 of the International Covenant on Civil and Political Rights on the right to life, but dismissed this as an encouragement, not an obligation and that the language of Article 6 of the ICCPR was too general to apply to the case at hand.

101. *Id.* at 45.

102. Greenpeace Nordic Association v. Ministry of Petroleum and Energy (People v. Arctic Oil), (2020) Case No. 20-051052SIV-HRET (Norwegian S. Ct. 2020).

103. *Id.* at 25-26.

104. *Id.* at 28. While the Supreme Court did contend that "there is no doubt" that the consequences of climate change may lead to the loss of lives, they found that in connection with approving the licenses it did not meet the requirement for a clear and immediate risk to life in relation to Article 2 of the ECHR. *Id.* at 29.

105. *Id.* at 30.

challenge the validity of an administrative decision.[106] Finally, the Supreme Court found that providing the licenses did constitute a breach of international obligations, as identification of the contents of rights on the basis of international agreements constituting "common ground" between Member States does not apply as the ECHR does not have an established environmental provision.[107]

E. UN Human Rights Committee Views Adopted on Teitiota Communication

Ioene Teitiota, a citizen of Kiribati, filed a communication in the United Nations Human Rights Committee in September 2015.[108] In 2012, the applicant applied for asylum in New Zealand claiming he had to migrate from Tarawa, an island in the Republic of Kiribati, to New Zealand as a result of the effects of climate change, including sea level rise.[109] These claimed effects led to a scarcity of freshwater, a crisis of housing availability, and land disputes resulting in violence and numerous casualties.[110] As such, the applicant was required to flee and seek asylum in New Zealand. In 2013, the applicant's claim for asylum was refused by the New Zealand Immigration and Protection Tribunal on appeal after the initial claim was denied by a Refugee and Protection Officer.[111] While the Immigration and Protection Tribunal denied the applicant's claim for asylum, it did note that environmental degradation could credibly serve as a pathway for international protection under the Refugee Convention or protected people jurisdiction.[112] The applicant then filed challenges in the court of appeal and Supreme Court in New Zealand, with both courts upholding the decisions to refuse the applicant's claim for asylum.[113]

In January 2020, the United Nations Human Rights Committee determined that the claim was admissible before the Committee.[114] The defendant, representing the New Zealand government, claimed that under Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights the filing should not be admissible, as the applicant's claims to facing imminent risk of being arbitrarily deprived of his life had not been

106. *Id.*
107. *Id.*
108. U.N. HRC, CCPR/C/127/D/2728/2016, *supra* note 18.
109. *Id.* at 2.
110. *Id.*
111. *See* AF (Kiribati) [2013] NZIPT 800413 (June 25, 2013), at [2]. The decision is available in the New Zealand Legal Information Institute (NZLII) databases, at www.nzlii.org/nz/cases/NZIPT/2013/800413.html [perma.cc/JEJ9-GTRE].
112. *Id.*
113. *Id.*
114. U.N. HRC, CCPR/C/127/D/2728/2016, *supra* note 18, at 10.

sufficiently substantiated.[115] The Human Rights Committee, however, argued that the applicant had sufficiently demonstrated that he faced a real risk of impairment to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) due to the impacts of climate change and associated sea level rise in Kiribati for the purposes of admissibility before the Committee.[116]

Regarding the merits of the claim itself, the Committee found that the government of New Zealand subjected the applicant to risk of life in violation of Article 6 of the ICCPR and failed to properly assess risk levels associated with his removal from New Zealand.[117]

Despite recognition of the challenges to the right to life resulting from climate change and environmental degradation, the Human Rights Committee determined that the applicant's removal to Kiribati did not violate his rights under Article 6(1) of the ICCPR.[118] As a result, the Human Rights Committee determined that it was unable to rule that the applicant's rights had been violated under Article 6(1) since it was only tasked with determining whether arbitrariness, error, or injustice had occurred during the judicial process conducted in the evaluation by the government of New Zealand.[119]

F. Urgenda Foundation v. State of the Netherlands

The Urgenda Foundation ("Urgenda"), an environmental NGO, along with 900 citizens of the Netherlands, filed suit against the Dutch government in December 2012.[120] The suit was filed in the District Court of The Hague seeking declaratory judgement and injunction which would compel the Dutch government to reduce GHG emissions. Urgenda argued that the Dutch government should reduce CO_2 emissions in the Netherlands by forty percent by 2020, as compared to emissions levels in 1990.[121] In not doing so, Urgenda argued that the Dutch government had violated its commitments, with the most relevant to this study being those under international

115. *Id.*

116. *Id.* at 10-11.

117. The Committee noted that the right to life cannot be interpreted in a restrictive manner, and that it requires states to adopt and carry out positive obligations which allow individuals the opportunity to live a life with dignity; *Id.* at 11. Further, they stated that the right to life extends to foreseeable threats, and environmental degradation can lead to threats to the right to life, with climate change and unsustainable development being pressing and serious threats to the right of life for present and future generations; *Id.* at 12.

118. *Id.* at 16. Based upon the facts of the case, the Committee also contended that there was no information displaying that judicial proceedings regarding the applicant's case were arbitrary or amounted to a denial of justice.

119. *Id.* at 13.

120. Urgenda Foundation v. Netherlands, (2015) ECLI:NL:GHDHA: 2018:2610 (Dist. Ct. The Hague 2015) (Neth.).

121. *Id.* at 5-6.

law commitments, invoking the United Nations Framework Convention on Climate Change (UNFCCC), the United Nations Climate Change Convention, the Kyoto Protocol, and the "no harm principle", as well as Articles 2 and 8 of the European Convention on Human Rights (ECHR).[122]

In June 2015, the district court issued a ruling stating that the Dutch government was required to take more action to reduce GHG emissions in the Netherlands, ensuring that GHG emissions in the Netherlands would be at least twenty-five percent lower in 2020 than in 1990.[123] The court noted that within the meaning of Articles 2 and 8 of the ECHR, in which Article 2 of the ECHR protects a right to life and Article 8 of the ECHR protects the right to private life, family life, home, and correspondence, Urgenda could not be designated as a victim as it did not hold an individual right under these Articles.[124] In spite of this, the court determined that obligations made by the Dutch government under Article 191 of the Treaty on the Functioning of the European Union (TFEU). This contributed to a standard of care required under Book 6, Section 162 of the Dutch Civil Code which Urgenda invoked towards the state.[125]

The Dutch government appealed the ruling by the District Court of The Hague, and in October 2018, The Hague Court of Appeal made a determination, upholding the decisions from the district court.[126] The court of appeal determined that the Dutch government had failed to fulfill its duty of care under Articles 2 and 8 of the ECHR by not seeking to reduce emissions by a minimum of twenty-five percent by the end of 2020 in relation to 1990 levels.[127] Further, the court stated that a twenty-five percent reduction should be considered the minimum, and that wariness on the part of the state to reach even this level is in violation of the state's duty of care.[128]

Once again, the Dutch government appealed the ruling, and the final decision was made on December 20 2019, as the case

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122. *Id.* at 13-30.

123. The goal set to reduce emissions in Annex I countries, of which the Netherlands is a part, between a twenty-five and forty percent reduction of 2020 emissions levels in comparison to 1990 levels. The district court stated that it set the level at the minimum of twenty-five percent in the interest of judicial restraint; *See* Urgenda Foundation v. Netherlands, ECLI:NL:RBDHA:2015:7196. English translation available at uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196#:~:text=The%20Hague%20District%20Court%20has,lower%20than%20those%20in%201990 [perma.cc/9WND-T2QR].

124. *Id.* at 17-24, 40.

125. *Id.*

126. Urgenda Foundation v. Netherlands, (2018) ECLI:NL:GHDHA:2018:2610 (Ct. App. The Hague 2018) (Neth.).

127. *Id.* at 18-19.

128. *Id.*

reached the Supreme Court of the Netherlands.[129] The Supreme Court ruled in favor of the lower court decisions. The Supreme Court contended that this case involved exceptional circumstances, as climate change poses a clear threat and urgent measures are necessary.[130] Further, the Dutch government is required to act in the interests of residents of the Netherlands, as well as those living abroad, which follows from Articles 2 and 8 of the ECHR.[131] Finally, the Supreme Court held that the Dutch government acted in a way in which measures to sufficiently reduce emissions were postponed for prolonged periods of time, in conflict with the established goals of reducing GHG emissions levels, and served as a basis for the violation of rights.[132]

V. COMPARING DIVISIBILITY, DEPENDENCE, AND SUCCESS

Considering these six cases of climate litigation with human rights claims from different global regions and jurisdictions, what do they reflect in regard to the divisibility and interdependence of civil-political and socio-economic rights, as well as their relationship to case success? In the cases presented above, while all are tied together through the common theme climate litigation with human rights claims, there is diversity in what we learn from them. The following section is divided into three subsections, each discussing two cases which provide useful findings when considered in tandem.

The first subsection focuses on the *Request for an Advisory Opinion from the Inter-American Court of Human Rights* and *Asghar Leghari v. Federation of Pakistan*. In these two cases, civil-political and socio-economic rights were treated as indivisible and interdependent by the courts, and the results were successful for applicants.

The second subsection focuses on *Urgenda Foundation v. State of the Netherlands* and *Greenpeace Nordic v. Government of Norway*. While both cases were primarily focused on Article 2 and Article 8 of the ECHR, we observe a successful ruling for the applicants in *Urgenda*, while applicants in *Greenpeace Nordic*, were unsuccessful. This subsection provides important insights into court interpretations and determinations regarding the right to life and the right to private life, family, and home as established under Articles 2 and 8 of the ECHR.

Finally, the third subsection focuses on *Anonymous Applicant vs Australia Minister for Immigration and Citizenship* and *UN Human Rights Committee Views Adopted on Teitiota Communication*. These two cases occurred in the Pacific region,

129. Netherlands v. Urgenda Foundation, (2019) ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. 2019) (Neth.).

130. *Id.* at 37-39, 42.

131. *Id.* at 38-39.

132. *Id.* at 42.

involving applicants seeking international protection in Australia and New Zealand respectively. In both cases, applicants were unsuccessful. These cases, however, occurred under different jurisdictions and importantly, the courts' treatment of the interdependence of civil-political and socio-economic rights differed.

We observe in this subsection two similar cases involving climate change and human rights concerns regarding forced displacement. Additionally, these courts faced questions requiring interpretation of civil-political and socio-economic rights and arrived at similar decisions. Importantly, however, it is seen that one court interpreted these rights as independent while another interpreted them as interdependent.

A. When Civil-Political and Socio-Economic Rights are Treated as Indivisible and Interdependent in Successful Cases

In each of these cases, applicants were successful, and courts explicated the view that civil-political and socio-economic rights are indivisible and interdependent as they relate to climate law. In the *Request for an Advisory Opinion from the Inter-American Court of Human Rights*, we observe an opinion in which the court clearly interpreted civil-political and socio-economic rights as indivisible and interdependent. In the opinion of the court, the ruling contains a section entitled, "The relationship between human rights and the environment." Here we observe this treatment in explicit terms.

This section of the court's opinion began with interpretation of the San Salvador Protocol. The court stated that that the Protocol:

> emphasizes the close relationship between the exercise of economic, social and cultural rights – which include the right to a healthy environment – and of civil and political rights, and indicates that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human being. They therefore require permanent promotion and protection in order to ensure their full applicability; moreover, the violation of some rights in order to ensure the exercise of others can never be justified.[133]

This is necessary for both legislators and courts alike. Further, regarding interdependence, the court asserted that "there is extensive recognition of the interdependent relationship between protection of the environment, sustainable development, and human rights in international law," citing principles established under the Stockholm Declaration on the Human Environment, Rio Declaration on Environment and Development, and Plan of Implementation of the World Summit on Sustainable

133. Advisory Opinion OC-23/17, *supra* note 17, at 21.

Development.[134]

The court goes on to determine that "[n]umerous points of interconnection arise from this relationship of interdependence and indivisibility between human rights, the environment, and sustainable development," pointing out that climate change threatens rights to life, health, food, water, housing, and self-determination.[135] Lastly, it is reiterated in the following section of the opinion, entitled "[h]uman rights affected by environmental degradation, including the right to a healthy environment," that "the interdependence and indivisibility of the civil and political rights, and the economic, social and cultural rights, because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities."[136]

In the case of *Asghar Leghari v. Federation of Pakistan*, this treatment is present in the initial judgement in September 2015,[137] as well as the final judgement from January 2018.[138] From the initial judgement, it is stated that "fundamental rights, like the right to life (Article 9 of the Constitution of Pakistan) which includes the right to a healthy and clean environment and right to human dignity (Article 14 of the Constitution of Pakistan) read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine."[139]

The judgment goes on to highlight that the order of the court to reform action and address delay on the part of the federal government and government of the Punjab province in Pakistan will represent a process moving from localized action towards a broader "Climate Change Justice" movement.[140] Fundamental rights are determined to be part of values applying to "political, economic and social justice," which must be applied in government policies.[141]

Then, in the final judgment from January 2018, the written opinion of the court is particularly telling of this interpretation. The centrality of human rights concerns within the decision are telling, as the judgment begins with a quote from UNEP director, Achim

134. *Id.* at 25.
135. *Id.* at 24.
136. *Id.* at 25.
137. Asghar Leghari v. Federation of Pakistan, (W.P. No. 25501/2015) Lahore High Court Green Bench.
138. Asghar Leghari v. Federation of Pakistan, (2018) PLD (Lahore) 364, at 5-6.
139. *Id.*
140. *Id.* at 6.
141. *Id.*

Steiner, stating "[c]limate change is one of the greatest threats to human rights of our generation, posing a serious risk to the fundamental rights to life, health, food and an adequate standard of living of individuals and communities across to world."[142] The judgement continues to tie the orders made to government ministries to principles of climate and water justice grounded in a human rights perspective which treats civil-political and socio-economic rights as indivisible and interdependent.

Climate justice, as part of the court orders to the government, are argued by the court to link human rights and development to embrace multiple dimensions covering "agriculture, health, food, building approvals, industrial licenses, technology, infrastructural work, human resource, human and climate trafficking, [and] disaster preparedness."[143] Water justice combines the interpretation of rights to life and human dignity, traditionally categorized as civil-political rights, with socio-economic matters.

The final judgment states that water justice "demands that all communities be able to access and manage water for beneficial uses, including drinking, waste removal, cultural and spiritual practices, reliance on the wildlife it sustains, and enjoyment for recreational purposes", while it continues with the determination that the "Right to life and Right to human dignity under Articles 9 and 14 of the Constitution protect and realize human rights in general, and the human right to water and sanitation in particular."[144]

Taken together, in both *Request for an Advisory Opinion* and *Asghar Leghari*, the interpretation of climate change as a threat to human rights is connected through an indivisible and interdependent relationship between civil-political and socio-economic rights. In these determinations, the courts regarded concerns stemming from climate issues as necessarily involving a broad view containing protections against threats to life, dignity, and self-determination alongside those such as health, food, water, work, and housing. As such, these interpretations presented a comprehensive, inclusive approach to civil-political and socio-economic issues.

Despite these similarities, certain notable differences did arise in the two cases. First, in *Request for an Advisory Opinion*, although

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142. *Id.* at 1; quoting *Climate Change and Human Rights*, UNEP (Dec. 2015), wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf.pdf?sequence=2&amp%3BisAllowed=.

143. *Leghari*, (2018) PLD (Lahore) 364, at 23. This quote is taken from a report by the Asian Development Bank. *See* Briony Eales, Ama Francis, Michael Burger, Romany M. Webb, Jessica A. Wentz, Dena Adler, Gregorio Rafael P. Bueta, & Francesse Joy J. Cordon-Navarro. "Climate Change, Coming Soon to a Court Near You–Report Two: Climate Litigation in Asia and the Pacific and Beyond." *Asian Development Bank*, (2020). https://dx.doi.org/10.22617/TCS200027-2.

144. Advisory Opinion OC-23/17, *supra* note 17.

the court explicitly stated its interpretation of the indivisibility and interdependence of civil-political and socio-economic rights regarding climate issues, and provided extensive support for this interpretation, the interpretation itself was drawn from a section of the ACHR which was categorized specifically as "economic, social, and cultural rights."

Article 26 of the ACHR, under which the IACtHR established justiciability and state responsibility regarding protection from environmental degradation and the right to a healthy environment, relates to "Progressive Development" and states that:

> [t]he States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.[145]

This is a particularly significant aspect of the ruling, as it reflects the breadth through which the IACtHR takes in determination of the indivisible and interdependent nature of civil-political rights and socio-economic rights as they relate to the effects of climate change. While established principles may be documented under one of the given categories, this treatment shows that courts may conceptualize these rights as indivisible and interdependent even under conditions in which explicit expounded categorization occurs in the protocol. The interpretive power of the courts, then, may be quite broad when civil-political and socio-economic rights are approached from an indivisible and interdependent perspective.

Second, in *Asghar Leghari* the court drew an indivisible and interdependent treatment of civil-political and socio-economic rights stemming from claims which are traditionally strictly categorized as civil-political. Article 9 of the Pakistani Constitution relates to the right to life and Article 14 relates to human dignity, along with international obligations. The Lahore High Court was tasked primarily with deciding whether the federal and provincial government had violated the applicant's rights because of inaction on not implementing the National Climate Change Policy and the Framework for Implementation of Climate Change Policy. This was argued to be threatening life and dignity as a result of inaction regarding both adaptation[146] and mitigation[147] relating to the negative effects of climate change. Still, the High Court ruled in favor of the applicant, and found that within these principles of the right to life and human dignity, enshrined in Article 9 and Article

145. Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art. 26.

146. *Leghari*, (2018) PLD (Lahore) 364, at 6-10, 15, 23.

147. *Id.* at 7-10, 15, 23.

14 of the Constitution of Pakistan, respectively, were necessarily connected considerations of the effects of climate change on water access and quality, agriculture, and financial well-being.[148]

This presents a different situation than in *Request for an Advisory Opinion* where an indivisible and interdependent treatment arose from traditionally socio-economic claims categorization. Instead, it reflects how such treatment can run both ways, with courts possibly taking on indivisible and interdependent interpretations from written law otherwise categorized strictly within a civil-political or socio-economic rights claim. Thus, in certain instances courts may treat civil-political and socio-economic rights as indivisible and interdependent, even under conditions in which the claims are brought expressly under documentation which establishes the claim or claims as categorized only as civil-political or socio-economic.

Finally, the *Asghar Leghari* case also shows the explicit integration of international obligations[149] with constitutional law and takes this integration to support the treatment of indivisibility and interdependence in relation to civil-political and socio-economic rights in climate litigation. Claims were drawn from both claims to constitutional law and international obligations. In the judgment in the Lahore High Court in 2018, the court expounded that such constitutional principles to fundamental rights had become directly tied to international environmental obligations and principles, stating that:

> Our environmental jurisprudence from Shehla Zia case to Imrana Tiwana case…has weaved our constitutional values and fundamental rights with the international environmental principles. The environmental issues brought to our courts were local geographical issues, be it air pollution, urban planning, water scarcity, deforestation or noise pollution. Being a local issue, evolution of environmental justice over these years revolved around the national and provincial environmental laws, fundamental rights and principles of international environmental laws.[150]

Further, the High Court refers to precedent in two cases regarding the weaving of fundamental rights with international environmental principles, establishing international human rights

148. *Id.* at 8-11.

149. The reference to international obligations by the court in this decision did not directly reference specific treaty law, although at the time of the first decision, which took place in 2015, the government of Pakistan ratified the Kyoto Protocol, and at the time of the final order in 2018 the government of Pakistan ratified the Paris Agreement. Pakistan is a Non-Annex I party to the Paris Agreement, primarily consisting of developing countries which are deemed to be particularly vulnerable to the adverse impacts of climate change. *See Parties: Pakistan*, U.N. (2022), unfccc.int/node/61134 [perma.cc/PP68-E8EL] and *Parties & Observers*, U.N. (2022), unfccc.int/parties-observers [perma.cc/8KQE-RFLK].

150. *Leghari*, (2018) PLD (Lahore) 364, at 3.

to climate justice; and *Ms. Shehla Zia and others v. WAPDA*[151] and *Ms. Imrana Tiwana and others v. Province of Punjab and others*.[152] The *Shehla Zia* case dealt with challenges to the establishment of an electricity grid on the grounds that it would cause health risks and raise potential hazards, with the court taking a broad interpretation of "life" in Article 9 and 14 of the Pakistani constitution and ordering a review and subsequent report of the grid project before it proceeded. In *Imrana Tiwana,* five citizens sought a stay against the construction of a signal-free corridor[153] in Lahore, which was being built by the Lahore Development Authority on the grounds that it violated local regulatory legislation,[154] with the court ultimately granting the stay.

While in the European Union, EU law generally holds primacy over national law[155] and has been integrated into national law of member states,[156] the establishment of legal integration between national law and international environmental law is less clear in other geographic and legal contexts. Precedent may then be influential in not only integrating international law relating to climate change with national and sub-national legislation and case law, but with influencing the interpretation of courts.

As we see in *Asghar Leghari*, when courts interpret civil-political and socio-economic human rights as indivisible and interdependent in climate cases, it is established that the integration of international environmental law with national and sub-national legislation and case law is connected to an inclusive interpretation of the relationship between human rights and climate law. Specifically, that a distinct legal application does not exist between civil-political and socio-economic rights, and instead that interpretation must involve an approach which perceives a necessary interconnectedness between civil-political and socio-economic principles.

151. Shehla Zia v. WAPDA, (1994) PLD (SC) 693 (Pak.).

152. Imrana Tiwana v. Province of Punjab, (2015) PLD (Lahore) 522 (Pak.).

153. Signal-free corridors are roadways which allow motorists to travel at higher speeds without stop signs or lights.

154. The legislation was specifically the Lahore Development Act (LDA), 1975.

155. *European Commission reaffirms the primacy of EU law*, EUROPEAN COMM'N (Oct. 7 2021), ec.europa.eu/commission/presscorner/detail/en/statement_21_5142 [perma.cc/2C9E-H8QV].

156. Geoffrey, R. Garrett, Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, national governments, and legal integration in the European Union*, 52 INTL. ORG. 1, 149-176 (1998); Sionaidh Douglas-Scott, *The European Union and human rights after the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 4, 645-682 (2011).

B. Differing Outcomes Regarding Article 2 and Article 8 of the ECHR

In both *Urgenda Foundation v. State of the Netherlands* and *Greenpeace Nordic v. Government of Nordic*, the courts were tasked with interpreting Article 2 and Article 8 of the ECHR in regard to climate litigation. However, in *Urgenda*, we observe a successful case for the plaintiffs, while in *Greenpeace Nordic*, we observe an unsuccessful case for the plaintiffs. Article 2 establishes the right to life, while Article 8 establishes the right of respect to family life, private life, and home. As such, these two Articles are more closely related to what would be categorized as civil-political rights, as opposed to socio-economic rights.[157]

In the Appeal Court of The Hague and the Supreme Court of Netherlands rulings regarding the *Urgenda* case indivisibility and interdependence of civil-political and socio-economic rights was present in determinations. In the Appeal Court of The Hague, it was stated that both "financial interests" and "idealist interests" are relevant in the case, as class action suits may be filed to protect the interests of directly affected people, which can include a group of individuals.[158] The court connected these to positive obligations designed to protect citizens under the jurisdiction of both Article 2 and Article 8 of the ECHR.

The Hague Court of Appeal took a broad view through this interpretation of positive legal obligations, public and private concerns, and economic activity. Specifically, the court wrote that these obligations under both Article 2 and Article 8 apply to:

> all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.[159]

Considering these determinations in tandem, the Appeal Court found that the Dutch government had acted unlawfully in contravention of their duty of care under Articles 2 and 8 by failing to reduce emissions to sufficient levels.[160]

The Dutch Supreme Court, citing *Kiliç v Turkey* [161] and *Centre*

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157. Jean-François Renucci, *Introduction to the European Convention on Human Rights: the rights guaranteed and the protection mechanism*, COUNCIL OF EUROPE (June 2005), www.echr.coe.int/documents/d/echr/Pub_coe_HFfiles_2005_01_ENG [perma.cc/SP9Y-76QY].

158. Urgenda Foundation v. Netherlands, (2018) ECLI:NL:GHDHA:2018:2610 (Ct. App. The Hague 2018) (Neth.), at 1.

159. *Id.* at 12.

160. *Id.* at 19.

161. Kilic v. Turkey, No. 22492/93 Eur. Ct. H.R. (Mar. 28, 2000).

for Legal Resources on behalf of Valentin Câmpeanu v Romania,[162] contended that Article 2, protecting the right to life, encompassed positive obligations on the result of the state and that this in part is an obligation which applies to questions of both hazardous industrial activities and situations involving natural disasters.[163] Regarding Article 8, protecting the right to respect for private and family life, the court further argued that although the ECHR does not specifically protect the natural environment.[164] Article 8 protection can derive from the obligations to take actions to protect health in regards to a risk of serious environmental contamination, connecting this to an adverse threat to private and family life, and that such a risk may exist in the long-term, not only in the short-term.[165] Further, in relation to both Articles 2 and 8, the Dutch Supreme Court determined that these protections are afforded to the whole of society.[166]

Visible in these determinations is that the courts ruled on Articles 2 and 8 in ways in which considerations of respect to life and privacy of family and home were associated with both civil-political state threats to individual autonomy and socio-economic concerns of financial interests, industrial activity, and health. This approach to interpretation reflects considerations of Articles 2 and 8 and necessarily includes questions before the court which address threats to individual autonomy intertwined with considerations of economic conditions and health. These considerations are not to be approached as separate, but those which are indivisible and interdependent upon one another for application to climate cases.

By contrast, the Borgarting Court of Appeal and Norwegian Supreme Court treated interpretations of civil-political and socio-economic rights as associated with Articles 2 and 8 of the ECHR in a way which was divisible and independent. In the Borgarting Court, it was determined in relation to Article 2 that although this provision can provide for positive duties on the part of the state, the protection of a right to life was not associated with production licenses which would lead to GHG emissions in this case as it presented no real and immediate threat to the loss of human life.[167] Further, the Borgarting Court noted similar positive duties regarding Article 9, but that it was primarily limited to highly localized contamination.[168] In their determination, they observed

162. Valentin Campeanu v. Romania, No. 47848/08 Eur. Ct. H.R. (July 17, 2014).

163. Netherlands v. Urgenda Foundation, (2019) ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. 2019) (Neth.), at 23.

164. *Id.*

165. *Id.*

166. *Id.* at 24.

167. Greenpeace Nordic Association v. Ministry of Petroleum & Energy (People v. Arctic Oil), (2020) Case No. 18-060499ASD-BORG/ 03 (Borgarting Ct. of Appeal), at 34.

168. *Id.* at 35.

that there was "clearly no "direct and immediate link" between the emissions that might result from the decision and serious consequences for the rights under Article 8 for the inhabitants of Norway at a general level" and no "direct and immediate connection be shown regarding emissions that might result from the decision when seen in connection with other greenhouse gas emissions."[169]

The Norwegian Supreme Court reached the same conclusion. The Court acknowledged that climate change can lead to death through natural hazard, but limited the scope to the link between oil and gas production licenses and this cause of death.[170] The Court additionally noted that the link between production licenses and the cause of death through natural hazardmust be a "real and immediate" risk.[171] The determination, however, was that any discernible impacts from climate change would only be present in the distant future and that any real and immediate risk to the loss of life for Norwegian citizens would not apply under Article 2.[172] On determination of Article 8, the Supreme Court reiterated the positions of the Borgarting Court of Appeal, contending that environmental harm must be highly localized and immediately threatening "rights and liberties".[173] The Supreme Court also argued that there was nothing present in existing case law which made them believe that climate cases will differ from those concerning general environmental harm.[174]

Thus, in *Greenpeace Nordic*, we can see that considerations of economic activity or well-being and health are not treated as indivisible from threats to civil or political autonomy, nor is it treated as necessarily interdependent with these threats. In discussing Articles 2 and 8 in relation to rights protections regarding climate change, the courts placed their focus on the necessity of direct and immediate threat to life through contamination in highly localized contexts. Ignoring broader consideration of climatic change, emissions were cast aside, and considered to not be applicable. Neither were long-term effects of climatic change associated with economic or health threats associated with Articles 2 or 8. The treatment, instead, was strictly on threats to individual autonomy and immediacy, reflecting civil-political concerns, which were rejected without necessary considerations of socio-economic concerns. This divisibility between these two rights categorizations stands beside a treatment of independence between the court's treatment of the two as well.

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169. *Id.*

170. Greenpeace Nordic Association v. Ministry of Petroleum & Energy (People v. Arctic Oil), (2020) Case No. 20-051052SIV-HRET (Norwegian S. Ct.)., at 29.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 30.

Through comparison of the determinations in *Urgenda* and *Greenpeace Nordic*, in both appeals and supreme courts, the court's ruling on the *Urgenda* case interpreted Articles 2 and 8 of the ECHR in a manner in which traditional civil-political rights to life and privacy regarding family and home were connected to socio-economic concerns of the effects of economic activity and interests on human rights. By contrast the court's ruling on *Greenpeace Nordic*, in both appeals and supreme courts as well, did not treat Articles 2 and 8 in the same way. This also appeared to affect the success of the party making claims to violations of human rights in the cases.

In *Urgenda*, the treatment of indivisibility and interdependence was connected to the rulings through determinations of credible and serious threats resulting from the climate-based claims. As such, measures were urgently needed, and the Dutch government must do its part in actively achieving climate-related measures.[175] Further, these courts connected rights of individual autonomy and protection against state threat to live with those of disruption to economic conditions and health, which were established in relation to both Article 2 and Article 8 of the ECHR. Such threats were thus interpreted as a real and immediate risk to Dutch residents, putting life and welfare in jeopardy.[176]

In *Greenpeace Nordic*, the Borgarting Court of Appeal and Supreme Court of Norway both came to the same determination that the party making claims to human rights violation had not established rights violations under either Article 2 or Article 8 of the ECHR. In contrast to *Urgenda*, however, the party claiming human rights violations were unsuccessful. Most notably, the courts in *Greenpeace Nordic* were more skeptical towards the claims of direct and immediate risk stemming from emissions contributions brought by the party claiming human rights violations.

Throught its interpretation of Article 2, the Borgarting Court of Appeal focused primarily upon precedent from the case of *Öneryildiz v. Turkey*[177] in the European Court of Human Rights.[178] *Öneryildiz v. Turkey* involved applicants submitting that Turkish authorities had caused the death of their relatives and property damage as a result of a methane explosion which occurred in their living quarters in Istanbul. The ECtHR ruled in favor of the applicants, deciding that the Turkish authorities had violated the applicants' rights under Article 2 of the ECHR for not taking actions to prevent the deaths. From *Öneryildiz v. Turkey*, the Court of Appeal contended that risk must be "real and immediate," as

175. Netherlands v. Urgenda Foundation, (2019) ECLI:NL:HR:2019:2007 (S. Ct. Neth. 2019) (Neth.), at 42.

176. *Id.* at 26.

177. Öneryıldız v. Turkey, No. 48939/99 Eur. Ct. H.R. 657 (Nov. 30, 2004).

178. Greenpeace Nordic Association v. Ministry of Petroleum & Energy, (2020) Case No. 18-060499ASD-BORG/ 03 (Borgarting Ct. of App.)., at 34.

paragraphs from 100-101 from the judgement in *Öneryildiz* concluded that the "Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons."[179]

In regard to Article 8, the Court of Appeal cited another case from the European Court of Human Rights, *Atanasov v. Bulgaria*,[180] in reaching their determination. *Atanasov v. Bulgaria* concerned a resident of Bulgaria, who contended in their application that their rights had been violated under Article 8 of the ECHR as a result of the approval by state authorities and subsequent occurrence of industrial waste-water sludge being laid in a pond near their home and agricultural land.[181] The ECtHR determined that there was no violation of rights under Article 8, as the applicant could not establish a sufficient link between the adverse impact of industrial sludge on their home, private, or family life.[182]

Citing paragraph 66 of the decision in *Atanasov v. Bulgaria*, which stated, in part, that "[t]he State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life", the Court of Appeal argued that effects must meet a certain threshold or direct and immediate risk to apply.[183] As the Court of Appeal sees it, there was neither a "real and immediate" nor "direct and immediate" link between the emissions that might result from the allowance of oil and gas production licensing permits to substantiate rights violations under Article 2 or Article 8 of the ECHR for the residents of Norway.

The Supreme Court followed the same interpretation as the Court of Appeal. Using the same precedent from *Öneryildiz v. Turkey* on claims to Article 2 violation, the Supreme Court determined that it was "uncertain whether or to which extent the decision will actually lead to greenhouse gas emission" and that this impact on the climate would not be until "the more distant future".[184] On Article 8 claims, the Supreme Court similarly relied on ECtHR precedent in *Atanasov v. Bulgaria*, stating that they were of the opinion that with the significance with which the ECtHR has ascribed to the term "direct and immediate", that the effects of emissions due to the licensing of oil and gas production did not fall within Article 8 of the ECHR.[185]

The courts in *Greenpeace Nordic* treated civil-political and

179. *Öneryıldız*, No. 48939/99 Eur. Ct. H.R. 657, at para. 101.

180. Atanasov v. Bulgaria, No. 7328/01 Eur. Ct. H.R. 1266.

181. *Id.* at paras. 7-21.

182. *Id.* at para. 66.

183. Greenpeace Nordic Association v. Ministry of Petroleum & Energy (2020), Case No. 18-060499ASD-BORG/ 03 (Borgarting Ct. of App.) at 35.

184. Greenpeace Nordic Association v. Ministry of Petroleum & Energy (People v Arctic Oil), (2020) Case No. 20-051052SIV-HRET (Norwegian S. Ct.) at 29.

185. *Id.* at 9-30.

socio-economic rights divisibly and independently. In the case at hand, focus was placed upon the connection of real, immediate, and direct risk to Norwegian residents. The courts determined that allowing the oil and gas production licenses did not display a causal connection to effects on life, family, or home. From this, the courts did not draw on how possible effects of allowing these production licenses may create long-term effects on lives, whether it be regarding a sense of autonomy or dignity, or health, housing, and economic conditions.

Therefore, in interpreting Article 2 and Article 8 of the ECHR in climate litigation, success is largely dependent on how courts treat the directness and immediacy of risk stemming from climate change. This in part follows from the literature noting the challenge of establishing sufficient causality that climate litigation can face.[186]

The specific interpretation of precedent appears to play an equally meaningful role as precedent itself as well. For example, in both *Urgenda* and *Greenpeace Nordic*, the courts cite the case of *Öneryildiz v. Turkey*. In *Urgenda*, the Court of Appeal in The Hague uses this case precedence as support for the interpretation that state have a positive obligation to protect the lives of those within its jurisdiction.[187] This precedence was also determined to apply broadly to public life, private life, and industrial activities, and that if the government knows there is a real and imminent threat to life that they must take precautionary measures.[188]

The Dutch Supreme Court further used precedent from *Öneryildiz v. Turkey* to establish that states must take due diligence into account when establishing satisfactory measures to protect life and use scientific and generally accepted standards into account.[189] In *Greenpeace Nordic*, by contrast, both the Borgarting Court of Appeal and Norwegian Supreme Court used *Öneryildiz v. Turkey* to establish the significance of "real and immediate" risk to life in making determination of rights violations, and employed this as a basis to conclude that future emissions stemming from oil and gas licensing did not pose such a risk.[190]

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186. *See, e.g.,* Tobias Pfrommer et al., *Establishing causation in climate litigation: admissibility and reliability,* 152 CLIMATIC CHANGE 1, 67-84 (2019); Joana Setzer & Lisa C. Vanhala, *Climate change litigation: A review of research on courts and litigants in climate governance*, 10 WILEY INTERDISCIPLINARY REVIEWS: CLIMATE CHANGE 3 (2019); Abby Rubinson Vollmer, *Mobilizing human rights to combat climate change through litigation*, *in* ROUTLEDGE HANDBOOK HUM. RTS. & CLIMATE GOV. 359, 359-71 (2018).

187. Urgenda Foundation v. Netherlands, (2018) ECLI:NL:GHDHA:2018:2610, Judgement (Ct. App. The Hague 2018) (Neth.), at 12.

188. *Id.*

189. Netherlands v. Urgenda Foundation, (2019) ECLI:NL:HR:2019:2007, Judgement (Sup. Ct. Neth. 2019) (Neth.), at 24-25.

190. Urgenda Foundation v. Netherlands, (2018)

Finally, we also observe that court interpretation of how closely the rights to life and family, home, and private life relate to other socio-economic conditions such as health, housing, and economic well-being is important as well in success for the party arguing that rights violations have occurred regarding climate-based concerns. While in *Urgenda,* the courts tied in considerations of the social costs of climate change on conditions regarding the well-being of financial, health, and housing related conditions, in *Greenpeace Nordic*, there was no connection between socio-economic considerations in the case on the part of the courts. Considering these two cases here displays difference in how courts interpret the inclusiveness of indivisibility and interdependence of civil-political and socio-economic rights in climate litigation.

C. Unsuccessful Claims to Climate Refuge in the Pacific Region

In both the case of *Anonymous Applicant vs Australia Minister for Immigration and Citizenship* and *UN Human Rights Committee Views Adopted on Teitiota Communication*, the party making claims of human rights violations regarding climate concerns was unsuccessful. Further, both cases involve claims to international protection as a result of the effects of climate change on life in Kiribati, a small island nation in the Pacific. Despite these similarities, differences arise regarding the treatment of divisibility and dependence in considerations of civil-political and socio-economic categorization of rights.

The applicant in *Anonymous Applicant v. Australia Minister for Immigration and Citizenship* grounded claims in both civil-political and socio-economic principles. They contended, in relation to their application, that climate change should be viewed as a form of persecution involving serious harm and that the government of Kiribati was able to protect residents from persecution, a traditionally civil-political issue, as well as that sea level rise, salination of freshwater, flooding, and creation of economic hardship, traditionally socio-economic issues, were all occurring.[191]

In the determination, however, the Refugee Review Tribunal stated that they did not agree with the applicant's argument. In its rejection of the application, the Tribunal was primarily concerned with disagreement regarding the claims of persecution.[192] Specifically, the Tribunal contended that fear of persecution as

ECLI:NL:GHDHA:2018:2610 (Ct. App. The Hague 2018) (Neth.)., at 34; Netherlands v. Urgenda Foundation, (2019) ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. 2019) (Neth.), at 29.

191. 0907346 [2009] RRTA 1168 (Dec. 10, 2009), at 7. Here, the applicant argued that serious harm, as defined in s9lR(1)(c) and s9 in the Migration Act, was clearly met given the circumstances.

192. *Id.* at 11.

claimed by the applicant does not apply to the 1951 Refugee Convention. The Tribunal pointed to wording from the Refugee Convention that requires fear of persecution to be "for reasons of race, religion, nationality, membership of a particular social group or political opinion".[193] The Tribunal argued that although it is not necessary to show malignant intent, persecution must involve a discriminatory element.[194]

The Tribunal further cited the case of *Ram v. MIEA & Anor*,[195] in which Justice Burchett wrote in regard to the rejection of protection visas on the part of the applicant that:

> [p]ersecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.[196]

Based upon this interpretation in *Ram v MIEA & Anor*, while persecution need not be carried out with enmity, there must nonetheless be a specific attitude or motivation behind the persecution.[197]

As such, while the Tribunal stated that there may be many possible social groups to which the applicant is a member, it believed that there was a lack of the element of motivation regarding harm on the part of a possible agent of persecution.[198] Further, the cause of any harm was not a result of the applicant's membership to any particular social group.[199] As a result of this, it did not believe that the applicant held a well-founded fear of persecution stemming from belonging to a given race, religion, nationality, membership of any particular social group or political opinion.[200]

In *UN Human Rights Committee Views Adopted on Teitiota Communication*, the applicant claimed that the climate change effects of both climate change and rising sea levels forced the applicant to migrate from Kiribati to New Zealand.[201]

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193. *Id.*; *see also*, U.N. General Assembly, Convention Relating to the Status of Refugees, 189 U.N.T.S. 152 (July 28, 1951).

194. *Applicant*, 0907346 [2009] RRTA 1168, at 11.

195. Ram v. Minister for Immigration (1995) 57 FCR 565.

196. *Id.* at 568.

197. *Applicant*, 0907346 [2009] RRTA 1168, at 11.

198. *Id.*at 12.

199. *Id.*

200. *Id.* at 13.

201. U.N. HRC, CCPR/C/127/D/2728/2016, *supra* note 18, at 2. These effects of climate change and sea level rise had led to unstable and precarious conditions in Kiribati, with a scarcity of freshwater, less habitable land, a housing crisis, land disputes, and civil unrest. The applicant further claimed the government of Kiribati was not taking sufficient actions to protect against these changes.

The Human Rights Committee, however, ultimately ruled against the applicant. The Committee did make note of acknowledging the precarity of the applicant, stating that the government of New Zealand had subjected the applicant to risk by removal to Kiribati and did not properly assess the risk of the applicant's removal.[202]

Finally, the Committee acknowledged the harmful effects of climate change, noting that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life,"[203] and that

> [b]oth sudden-onset events, such as intense storms and flooding, and slow-onset processes, such as sea level rise, salinization, and land degradation, can propel cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the [ICCPR].[204]

In spite of these acknowledgements, the Committee determined that they were limited to assessing whether arbitrariness, error, or injustice had occurred in the evaluation on the part of the New Zealand government in assessing the applicant's claim that he faced the threat of right to life under Article 6 of the ICCPR.[205] While the Committee accepted the applicants claim that sea level rise caused by climate change is likely to render life in Kiribati uninhabitable, it was determined that there was sufficient time for the government of Kiribati and the international community to act before these effects cause such a change.[206]

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202. *Id.* at 11. In addition to this, the Committee stated that the right to life and human dignity should not be interpreted in a restrictive manner, with states being required to take positive measures to protect residents from reasonably foreseeable threats and life-threatening situations. *Id.* at 12.

203. *Id.* at 12-13.

204. *Id.* at 15.

205. *Id*. at 13.

206. *Id.* at 15. The Committee also cited Sufi & Elmi v. U.K., No. 8319/07 Eur. Ct. H.R. (June 28, 2011), at paras. 218, 241 and Sufi & Elmi v. U.K., No. 11449/07 Eur. Ct. H.R. (Nov. 11, 2011) in stating that claims under Article 6 or 7 of the ICCPR must involve a situation of violence in extreme cases where there is a real risk of harm, as well as that individuals must be in a "particularly vulnerable situation". *Id*. (citing Jasin v. Denmark, U.N. HRC, CCPR/C/114/D/2360/2014 (Sep. 25, 2015) at paras. 8.8, 8.9, and Warsame v. Canada, U.N. HRC, CCPR/C/102/D/1959/2010 (Sep. 1, 2011), at para. 8.3, by virtue of the individual being exposed to this violence. Although the Committee discussed concerns of both threats to life as a result of civil conflict as well as access to food, water, and livelihood, ultimately the majority determined that the review on the part of the Immigration and Protection Tribunal in New Zealand was not arbitrary, erroneous, or inject on these grounds; *See* U.N. HRC,

In addition to the majority judgement in the case, there were two dissenting opinions, In the first dissent, Committee member Vasilka Sancin stated that she could not join the majority decision that measures taken by the government of Kiribati would suffice in protecting the applicant's right to life under Article 6 of the ICCPR.[207] Specifically, Dr. Sancin argued that the New Zealand government had failed to present evidence that it had conducted proper assessment of the applicant and their dependent children's access to safe drinking water in Kiribati, and that the review of the applicant's case amounted to a denial of justice, being arbitrary or erroneous.[208] Dr. Sancin noted that expert reports had suggested that water policies had failed to be implemented in Kiribati during this time period,[209] and that the government of New Zealand had not sufficiently demonstrated that the applicant had access to safe, or even potable, drinking water.[210]

In the second dissenting opinion, Committee member Duncan Laki Muhumuza, presented even broader reasoning for his disagreement with the position reached by the majority of the Committee. Mr. Laki noted that there was evidence that sea level rise had affected conditions such as water contamination, crop destruction, health issues, particularly for children, and flooding of land in the home village of the applicant.[211]

While noting, in agreement with Committee member Sancin, that the inability of the applicant to sufficiently access freshwater should have been enough to reach the threshold for threat to life under Article 6 of the ICCPR, the evidence that there had been threat to life as a result of significant health hazards and inability to sufficiently make a living further support the applicant's claim.[212] Thus, in his dissent Mr. Laki contended that the conditions of the applicant were significantly grave, that they posed real, personal, and foreseeable risk, and that the Committee needed to handle critical and irreversible issues of climate change to uphold the sanctity of human life.[213]

Considering the cases of *Anonymous Applicant v. Australia Minister for Immigration and Citizenship* and *UN Human Rights Committee Views Adopted on Teitiota Communication*, we observe both important similarities and differences. Both cases involve

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CCPR/C/127/D/2728/2016, *supra* note 18, at 11.

207. U.N. HRC, CCPR/C/127/D/2728/2016, *supra* note 18, at 17, annex 1.

208. *Id.*

209. *See* U.N. Human Rights Office of the High Commissioner, *Press Statement United Nations Special Rapporteur on the human right to safe drinking water and sanitation Ms. Catarina de Albuquerque Mission to the Republic of Kiribati*, U.N. (July 25, 2010).

210. U.N. HRC, CCPR/C/127/D/2728/2016, *supra* note 18, at 17-18, annex 1.

211. *Id.* at 20, annex 2.

212. *Id.* at 20-21, annex 2.

213. *Id.* at 21, annex 2.

applicants from the island nation of Kiribati seeking international protection in a larger Pacific nation, Australia and New Zealand respectively, as a result of the effects of climate change. Applicants were also seeking protection as a result of threat to their lives and human dignity resulting from changes in weather conditions and sea level rise in Kiribati, and the inability of the government to take sufficient action to protect them.

Anonymous Applicant v. Australia Minister for Immigration and Citizenship, however, focused on the obligation of Australian authorities under s9lR(1)(c) and s9 in the Migration Act in connection with the 1951 Refugee Convention, while *UN Human Rights Committee Views Adopted on Teitiota Communication* centered around interpretation of Article 6 of the ICCPR. These obligations, although they concerned different laws between the two cases, were categorized as civil-political rights, as opposed to socio-economic rights. In both cases as well, the applicant seeking international protection under human rights claims associated with climate change was unsuccessful.

Regarding the divisibility of civil-political and socio-economic rights, each court treated these rights as divisible, while taking different approaches to this divisibility. The Tribunal in *Anonymous Applicant v. Australia Minister for Immigration and Citizenship* ignored socio-economic considerations in its judgement, instead limiting the scope of its focus strictly upon civil-political considerations of the source of persecution. While the applicant noted a number of socio-economic concerns, including rising sea levels, freshwater salinization, flooding of lands, and economic hardship, the court determined that such matters did not amount to persecution as a part of any specific social group.

In *UN Human Rights Committee Views Adopted on Teitiota Communication*, the Committee did consider both civil-political and socio-economic issues within the claim. The applicant claimed that both the conditions of civil unrest over land disputes, alongside concerns of sea level rise, lack of potable water, flooding, and economic precarity. The Committee discussed both concerns but referred to them separately and did not refer to any necessary connection between concerns over government inability to protect against civil unrest stemming from land disputes and other concerns regarding environmental changes stemming from climate change on conditions regarding access to water, food, economic security, or health.

Additionally, in the two dissents in *UN Human Rights Committee Views Adopted on Teitiota Communication*, focus was placed in both opinions on socio-economic conditions of the applicant. In neither dissent were concerns of civil-political rights violations raised concerning land disputes. This is of particular interest, as the claim was brought in regard to the ICCPR, which is expressly categorized as civil-political.

In both cases, the courts also treated civil-political and socio-economic considerations as independent. Lack of incorporation of socio-economic consideration in *Anonymous Applicant v. Australia Minister for Immigration and Citizenship* reflects a disconnect between civil-political and socio-economic rights treatment on the part of the Tribunal. Explicit focus strictly upon the definition of fear of persecution as a result of belonging to a particular social group within the determination that the applicant was not eligible for protection resulting from inability to remain in Kiribati as a result of the effects of climate change present an independent handling of a civil-political rights concerns aside from possible exploration of socio-economic rights concerns.

The Committee in *UN Human Rights Committee Views Adopted on Teitiota Communication* placed consideration upon socio-economic concerns as submitted by the applicant yet did not establish a connection between these as the civil-political concern of land disputes. Yet in this case we see that civil-political and socio-economic rights can be treated independently by courts, but socio-economic claims can also be considered under declarations expressly categorizing claims as civil-political, similarly to what we observe in *A Request for an Advisory Opinion from the Inter-American Court of Human Rights*.

The applicant filed the complaint presented before the Human Rights Committee in *UN Human Rights Committee Views Adopted on Teitiota Communication* specifically alleging that the applicant's human rights had been violated as a result of being removed to Kiribati under Article 6(1) of the International Covenant on Civil and Political Rights regarding the inherent right to life and protection against arbitrary deprivation of life. In the application and judgement, however, the majority of attention was paid to socio-economic concerns, such as potable water access, health, and agriculture.

In contrast to the interpretation of the IACtHR, in *A Request for an Advisory Opinion from the Inter-American Court of Human Rights*, though, in *UN Human Rights Committee Views Adopted on Teitiota Communication* we do not see the UN Human Rights Committee contend that there is necessarily an indivisible or interdependent relationship between civil-political and socio-economic rights. Instead, we see divisible and independent consideration of these rights, but with both arising out of international law categorized under civil-political rights.

We can further observe, regarding the rulings in favor of the state parties, in both cases that treatment of civil-political and socio-economic as divisible and independent can limit the success of those bringing claims of human rights violations in climate litigation. It is not necessary that courts treat civil-political and socio-economic as indivisible and interdependent to arrive at a successful judgement for those bringing claims of human rights

violations in climate litigation. Evidence from these cases suggests, however, that when courts interpret these rights as divisible and independent this can limit the success of those bringing such claims.

This appears to be the result of divisible and independent treatment narrowing the interpretation of courts. We also observed this in *Greenpeace Nordic*, where the courts handled civil-political and socio-economic rights considerations as divisible and independent, limiting the breadth of the court's interpretation and limiting their ability to rule in favor of the party bringing the claim of human rights violations. Assessment of *Anonymous Applicant v. Australia Minister for Immigration and Citizenship* and *UN Human Rights Committee Views Adopted on Teitiota Communication* provides further support for this argument.

In both of these cases involving applicants seeking international protection as a result of the effects of climate change, the courts expressed a divisible and independent interpretation of civil-political and socio-economic rights categorizations, and the applicants were both unsuccessful. These cases also involved determinations in sub-national, federal, and international courts. While similar cases of climate litigation involving human rights claims in which the courts treat civil-political and socio-economic rights as divisible and independent will need to continue to be assessed, these findings suggest that such a treatment will be associated with a lower likelihood of success for parties claiming rights violations.

VI. CONCLUDING REMARKS

While uncertainty remains regarding how climate litigation with human rights claims will be treated by plaintiffs, defendants, courts, and organizations at various levels of government, the findings from this article show that treating these rights claims as necessarily indivisible or interdependent is inaccurate. Nor is it accurate that such claims will be necessarily divisible or independent. Instead, determinations made by courts are diverse, and commonly vary in their approach to interpretation of these rights.

Theoretically, it is quite sensible that courts would commonly treat civil-political and socio-economic rights in both an indivisible and interdependent manner. Looking at the International Covenant on Civil and Political Rights (ICCPR) from 1966, we see that in Article 1 it clearly states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."[214] This suggests that there has long been a

214. *See International Covenant on Civil and Political Rights,* G.A. Res. 2200A (XXI) (Dec. 16, 1966), mechanisms/instruments/international-covenant-

recognized interdependent relationship between civil-political rights and their connections to pursue socio-economic goods.

Yet it also would be sensible to believe that such rights would be treated in a divisible and independent manner. The United Nations established separate documents explicitly delineating civil-political rights in the International Covenant on Civil and Political Rights (ICCPR) from socio-economic rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR). If these rights were not to be treated indivisibly and independently of one another, it would be unclear as to why separate declarations would be necessary. Further, cases can be brought to court specifically arguing that rights have been violated regarding rights outlined in these declarations but not the other.[215]

Previous work contending that climate litigation with human rights claims should be viewed through a lens beginning with consideration strictly of positive rights[216] should be reconsidered in light of the insights of this study. Normative claims about how human rights claims in climate litigation should be assessed must not necessarily be shaped by how courts make determinations. It is inaccurate, however, to understand courts as strictly beginning with the consideration of positive rights when making determinations regarding human rights claims in climate litigation. Additionally, it has been suggested that socio-economic obligations of the state are the central pathway through which climate litigation with human rights claims can extend human rights.[217]

While existing legal scholarship has suggested that the separation of civil-political and socio-economic rights are artificial and simply legal fiction,[218] it is clear that this is not the way in which courts always treat human rights claims in climate litigation. When conducting regionally diverse comparative analysis, we observe that while some courts have treated cases in ways which clearly treat civil-political and socio-economic rights as indivisible and interdependent, many other courts have instead treated these rights as divisible and independent.

Further, we see in previous work arguing that narrowness in

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civil-and-political-rights [perma.cc/4TB5-FWMK].

215. *See*, e.g., U.N. HRC, CCPR/C/127/D/2728/2016, *supra* note 18.

216. Katharina Franziska Braig & Stoyan Panov, *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?,* 35 J. ENVTL. L. & LITIG. 261 (2020).

217. *See*, e.g., Laura Pereira, *The Role of Substantive Equality in Finding Sustainable Development Pathways in South Africa*, 10 MCGILL INTL. J. SUSTAINABLE DEV. L. & POL'Y 2, 147-178 (2014); Camila Perruso, *Perspectives D'humanisation des Changements Climatiques: Réflexions Autour de l'Accord de Paris*, REV. DROITS FONDAMENTAUX (2016).

218. Mónica Feria Tinta, *Justiciability of Economic, Social, and Cultural Rights in the Inter-American system of protection of human rights: Beyond traditional paradigms and notions*, 29 HUM. RTS. Q. 431 (2007).

the approach to interpreting the right to life in climate litigation has created setbacks in the success of rights-based climate change litigation.[219] Taking a comparative approach, in this article we see that the extent to which courts treat traditional civil-political and socio-economic rights categorizations as indivisible and interdependent appears to be related to case success in climate litigation. Cases in which courts determine these rights to be indivisible and interdependent are more likely to result in success for the party bringing claims of rights violations. Thus, the treatment of civil-political and socio-economic rights as indivisible and interdependent appears to tend to be more amenable to successful decisions for parties bringing claims of human rights violations in climate litigation.

Finally, while previous work suggests that there has been a significant "rights turn" at the national levels in countries such as the Netherlands,[220] regarding climate litigation,[221] this article shows that such a rights turn may not apply in other contexts. For example, this appears not to be applicable to the Norwegian context as well as observing judicial determinations in *Greenpeace Nordic*. In this case we observed not only a divisible and independent interpretation of civil-political and socio-economic rights, but a narrow interpretation of the short- and long-term effects of emissions productions and climate change on the right to life, privacy, family, and home. As such, it should continue to be assessed to which extent a rights turn in climate litigation has occurred in different national contexts, and the treatment of divisibility and dependence regarding rights claims as they relate to case success.

219. Victoria Adelmant, Philip Alston, & Matthew Blainey, *Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court*, 13 J. HUM. RTS. PRAC. 1, 1-23 (2021).

220. Jasper Krommendijk, *Beyond Urgenda: The Role of the ECHR and Judgments of the ECtHR in Dutch Environmental and Climate Litigation*, 31 REV. EUR. COMP. & INTL ENVTL. L. 1, 60-74 (2022).

221. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?,* TRANSNAT'L ENVTL. L. 1, 37-67 (2018).