**Submission to the UN Special Rapporteur on Human Rights and Climate Change regarding “Enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergenerational justice”**

**May 2023**

The Climate Litigation Network welcomes the opportunity to provide input to the UN Special Rapporteur on Human Rights and Climate Change (UN Special Rapporteur) to inform the forthcoming report on ‘enhancing climate change legislation, support for climate change litigation and advancement of the principle of intergenerational justice’ which will be presented to the UN General Assembly in October 2023 (Report).

The [Climate Litigation Network](https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/) (CLN) is a project of the Urgenda Foundation, a Dutch sustainability non-profit organisation. We provide legal and scientific expertise to support litigation by communities around the world to challenge States’ inadequate mitigation efforts.

**Summary**

Our submission addresses questions 5 and 6. Specifically, we consider:

* How are human rights being incorporated into climate change litigation *against governments regarding their mitigation efforts*? (Questions 5)
* Are *courts facing* issues with making the link between human rights and climate change litigation *in such cases*? (Question 6)

In short, we outline that:

* There is a growing body of rights-based climate litigation, which has primarily focused on States’ human rights obligations to *mitigate* climate change – with other aspects receiving growing attention.
* In these cases, numerous national courts and UN human rights institutions have recognised that States have legal obligations to mitigate climate change in order to protect human rights.
* Nevertheless, this field remains at an early stage of development. To date, only a handful of national courts have analysed the *content* of States’ human rights obligations to mitigate climate change, namely: what constitutes ‘reasonable’ and ‘appropriate’ mitigation efforts to protect human rights from the harm posed by climate change?

We would greatly welcome further ‘soft law’ guidance on this issue from the UN Special Rapporteur, and we include some suggestions below.

# How are human rights considerations being incorporated into climate change litigation? (Question 5)

Over the past decade, a growing number of individuals, communities and organisations in countries around the world have turned to the courts to challenge the persistent and serious inaction by governments (and companies) on all aspects of climate action. A large, and growing number, of these cases are based on obligations to respect and/or protect human rights (herein, **rights-based climate litigation**). There are now more than 100 rights-based climate cases globally[[1]](#endnote-2) — of which the vast majority have been brought against governments.[[2]](#endnote-3)

In terms of their *focus*, rights-based climate cases fall into several categories:

1. ‘Framework’ mitigation cases: concern a State’s (or company’s) *overall* efforts to mitigate climate change;
2. Project-based cases: concern the conduct of a State (or its organs) with respect to a specific project with GHG implications;
3. Adaptation and loss and damage cases; and
4. ‘Just transition’ cases: concern the design or implementation of a State’s mitigation measures.

The largest group of rights-based cases fall into this first category[[3]](#endnote-4) – which we will focus on, drawing upon the findings of our peer-reviewed [article](https://www.elgaronline.com/view/journals/jhre/13/1/article-p35.xml) ([open-access](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3955144))[[4]](#endnote-5) and other research.[[5]](#endnote-6)

We **attach** to our submission: a copy of our peer-reviewed article; and our summary of national court decisions that have upheld ‘framework’ cases against governments.

How have courts adjudicated rights-based ‘framework’ mitigation cases against national governments?

In the past decade, national[[6]](#endnote-7) and regional[[7]](#endnote-8) courts and UN human rights institutions[[8]](#endnote-9) have developed a rapidly growing body of norms regarding States’ legal obligations to mitigate climate change (among other aspects) in order to protect the human rights of current and future generations. In the context of climate change mitigation, such courts and institutions have recognised that:

* climate change is *already* having, and *will* have, a significant impact on the enjoyment of a wide range of human rights;
* governments have an *individual* responsibility to prevent further dangerous climate change by reducing their GHG emissions, *notwithstanding* that (i) climate change is a global problem, which cannot be solved by any individual country, and (ii) many of the worst impacts of climate change have not yet occurred;[[9]](#endnote-10)
* in interpreting States’ obligations to protect human rights in the context of climate change, it is instructive to refer to norms of international environmental law and best available science;[[10]](#endnote-11) and
* failure to take measures to prevent foreseeable human rights harm caused by climate change can constitute a violation of States’ human rights obligations.

Apex courts in the [Netherlands](http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/),[[11]](#endnote-12) [Germany](http://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/),[[12]](#endnote-13) [Colombia](http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/),[[13]](#endnote-14) [Nepal](http://climatecasechart.com/non-us-case/shrestha-v-office-of-the-prime-minister-et-al/),[[14]](#endnote-15) [Brazil](http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/),[[15]](#endnote-16) and a first instance court in [Belgium](http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/)[[16]](#endnote-17) have determined that the respective State must adopt more ambitious GHG mitigation efforts (or, in the case of Brazil and Belgium, implement its existing commitments) in order to protect human rights and freedoms. In the German and Colombian decisions, the respective courts drew, in particular, on the concept of intergenerational justice in making their decisions.

These cases form part of a “wave of … climate change litigation across the world”, which has followed landmark decisions issued by courts in the Netherlands[[17]](#endnote-18) and Pakistan[[18]](#endnote-19) in 2015.[[19]](#endnote-20) These legal developments have offered a new avenue of accountability for States’ weak climate action. As the Intergovernmental Panel on Climate Change (IPCC) recently identified, “[t]he outcomes of climate litigation can affect the stringency and ambitiousness of climate governance”.[[20]](#endnote-21)

# Are there issues with making the link between human rights and climate change litigation? (Question 6)

Rights-based climate litigation remains at an early stage of development. To date, only a handful of national courts have analysed in detail the *content* of States’ human rights obligations to mitigate climate change,[[21]](#endnote-22) namely: what constitutes ‘reasonable’ and ‘appropriate’ mitigation efforts to protect human rights from the harm posed by climate change?

Such elaboration is essential in order to ensure that States adopt the ambitious climate action that will protect the human rights of current and future generations.

Authoritative guidance from the UN Special Rapporteur on this issue in the Report could make a significant contribution to ongoing accountability efforts globally.

Soft law standards provide invaluable guidance to courts in determining the content of States’ human rights obligations in the context of climate change. The Dutch Supreme Court in *Urgenda v. the Netherlands* referred to a report by the UN Special Rapporteur on Human Rights and the Environment when determining the content of the State’s obligations to mitigate climate change under the European Convention on Human Rights.[[22]](#endnote-23)

We have outlined below emerging best practice regarding the *content* of States’ human rights obligations to mitigate climate change, based on national court decisions, international environmental law and best available science (with further detail in our article).[[23]](#endnote-24) Scholars have similarly examined international environmental law and best available science, and have identified obligations and principles regarding States’ mitigation obligations (under human rights law or other legal bases).[[24]](#endnote-25)

What follows is a summary of these standards:

*In order to discharge its legal obligations to take reasonable measures to protect persons or things within its jurisdiction from the foreseeable and severe harm posed by climate change, a State**must adopt**measures to mitigate climate change by reducing its greenhouse gas emissions.*

*Such mitigation measures should:*

1. *be based on a long-term temperature goal of at least 1.5°C;*
2. *be informed by the principles of equity and common but differentiated responsibilities (CBDR), on the basis of which each country needs to do its ‘fair share’ as informed by best available science;*
3. *include a date by which to achieve carbon neutrality, which for developed countries should be well before 2050;*
4. *be internally consistent (that is, short-term mitigation measures should be scientifically consistent with long-term mitigation measures);*
5. *represent a ‘progression over time’, with regular increases in ambition;*
6. *not rely excessively on negative emissions technology or carbon dioxide removal; and*
7. *be sufficiently detailed to indicate how emissions reductions will be achieved.*

The basis of each standard is outlined in the table:

|  |  |
| --- | --- |
| **Standard** | **Legal and scientific bases** |
| *based on a long-term temperature goal of at least 1.5°C* | * International law: Long-term temperature goal in the Paris Agreement, and subsequent recognition by States Parties in the Glasgow Climate Pact (2021) that “the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and resolve[d] to pursue efforts to limit the temperature increase to 1.5°C”.[[25]](#endnote-26) * Science: consensus regarding the heightened risks to individuals and societies at large of exceeding 1.5°C global warming (IPCC’s Special Report on 1.5°C and Sixth Assessment Report). * Judicial recognition: District Court of the Hauge, *Milieudefensie v Royal Dutch Shell*;[[26]](#endnote-27) Dutch Supreme Court, *Urgenda*;[[27]](#endnote-28) Irish Supreme Court, *Friends of the Irish Environment v Ireland;*[[28]](#endnote-29)Administrative Court of Paris, *Notre Affaire à Tous v France;*[[29]](#endnote-30)First Instance Court of Brussels, *Klimaatzaak v Belgium*.[[30]](#endnote-31) |
| *informed by the principles of equity and CBDR* | * International law: legal obligation of States Parties to the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement to undertake mitigation measures consistent with the principles of equity and CBDR-RC and the duty of developed countries to “take the lead” in mitigating climate change.[[31]](#endnote-32) * Science: range of scientific sources which can indicate whether a State’s mitigation efforts are in line with its ‘fair share’ (e.g. effort-sharing literature; Climate Action Tracker (CAT),[[32]](#endnote-33) and Rajamani et al (2021)[[33]](#endnote-34)). * Judicial recognition: Dutch Supreme Court, *Urgenda*;[[34]](#endnote-35) German Constitutional Court, *Neubauer*;[[35]](#endnote-36) Supreme Administrative Court (Council of State), *Commune de* *Grande-Synthe v France*;[[36]](#endnote-37)Administrative Court of Paris, *Notre Affaire à Tous v France*.[[37]](#endnote-38) |
| *carbon neutrality* | * International law: States Parties’ commitments in the Paris Agreement (Art 4(1)), as reiterated in the Glasgow Climate Pact.[[38]](#endnote-39) * Science: consensus that all States must design their mitigation policies around goal of reaching carbon neutrality (IPCC)[[39]](#endnote-40). * Judicial recognition: German Constitutional Court, *Neubauer*.[[40]](#endnote-41) |
| *internally consistent (short-term measures should be scientifically consistent with long-term measures)* | * Science: delays in emissions reduction reduce the overall remaining global carbon budget due to the cumulative nature of climate change. * Judicial recognition: German Constitutional Court, *Neubauer*.[[41]](#endnote-42) |
| *‘progression over time’* | * International law: State Parties’ commitment under the Paris Agreement,[[42]](#endnote-43) and reiterated in Glasgow Climate Pact, including to “strengthen” 2030 targets by 2022.[[43]](#endnote-44) * Judicial recognition: German Constitutional Court, *Neubauer*.[[44]](#endnote-45) |
| *no excessive reliance on negative emissions or carbon dioxide removal* | * International law: precautionary principle (UNFCCC, Art 3(3)) * Science: Well-documented risks and uncertainty involved in the use of negative emissions technology (IPCC),[[45]](#endnote-46) as well as well-documented human rights violations in their implementation in certain contexts.[[46]](#endnote-47) * Judicial recognition: German Constitutional Court, *Neubauer*;[[47]](#endnote-48) Dutch Supreme Court, *Urgenda*;[[48]](#endnote-49) Irish Supreme Court, *Friends of the Irish Environment*.[[49]](#endnote-50) |
| *sufficiently detailed to facilitate public engagement* | * International law: public participation and access to information are central to the UNFCCC and the Paris Agreement.[[50]](#endnote-51) * Judicial recognition: German Constitutional Court, *Neubauer*;[[51]](#endnote-52) Irish Supreme Court, *Friends of the Irish Environment.*[[52]](#endnote-53) |

# Conclusion

Thank you for the opportunity to contribute to the call for input.

We would be very happy to elaborate on any of the matters addressed in this submission.

Kind regards

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1. For a comprehensive review of rights-based climate litigation, see A. Savaresi & J. Setzer, ‘Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers’ (2022) 13(1) JHRE, pp.7-34. The authors draw upon data from the world’s most established climate litigation databases – those compiled by the Sabin Centre for Climate Change Law at Colombia Law School and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics. [↑](#endnote-ref-2)
2. Ibid, p 14. As at 2022, of the 112 rights-based cases that have been filed, 16 cases were filed against corporations. [↑](#endnote-ref-3)
3. Ibid: pp. 15, 19: 83 out of 112 rights-based cases concern mitigation, 9 concern adaptation, and 20 both mitigation and adaptation. [↑](#endnote-ref-4)
4. Lucy Maxwell, Sarah Mead and Dennis Van Berkel, ‘Standards for Adjudicating the next Generation of Urgenda-Style Climate Cases’ (2022) 13(1) Journal of Human Rights and the Environment. <<https://www.elgaronline.com/view/journals/jhre/13/1/article-p35.xml>> [↑](#endnote-ref-5)
5. For further analysis of government ‘framework’ climate cases, see Higham C, Setzer J and Bradeen E (2022) *Challenging government responses to climate change through framework litigation*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. < https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/09/Challenging-government-responses-to-climate-change-through-framework-litigation-final.pdf> [↑](#endnote-ref-6)
6. For detailed analysis, see Maxwell, Mead and Van Berkel (n 4). This includes: S*tate of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (2019) ECLI:NL:HR:2019:2007 (official translation) (Supreme Court of the Netherlands, Civil Division) (‘*Urgenda’*); *Future Generations v Ministry of the Environment and Others “Demanda Generaciones Futuras v Minambiente*” [2018] 11001 22 03 000 2018 00319 00 Unoff Transl (Colombia Supreme Court). (‘*Future Generations*’); *Ashgar Leghari v Federation of Pakistan* [2015] Case No WP No 255012015 (Lahore High Court) . (‘*Leghari*’); *VZW Klimaatzaak v Kingdom of Belgium & Others* [2021] Belgium, Court of First Instance of Brussels (unofficial translation) ('*Klimatzaak*'). *Neubauer and Others v Germany* [2021] German Federal Constitutional Court 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (official translation) ('*Neubauer*'). *Shrestha v Office of the Prime Minister et al* Decision no 10210, NKP, Part 61, Vol 3 (Supreme Court). (‘*Shrestha*’). *PSB et al v Brazil (on Climate Fund)* [2022] ADPF 708 (Federal Supreme Court of Brazil) (‘*PSB et al’*). [↑](#endnote-ref-7)
7. See e.g. The Inter-American Court of Human Rights, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) (Advisory Opinion) OC-23/18* (2017) (ser A) No 23 Inter-Am Court Hum Rights (IACtHR) [47, 54]. [↑](#endnote-ref-8)
8. See e.g. ‘Joint Statement of Five UN Human Rights Treaty Bodies on Human Rights and Climate Change’ (2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>. *Billy et al v Australia* (2022) UN Doc CCPR/C/135/D/3624/2019*.*  *Sacchi et al v Argentina et al* (2021) UN Doc CRC/C/88/D/104-108/2019 Commun No 1042019 Argent Commun No 1052019 Braz Commun No 1062019 Fr Commun No 1072019 Ger Commun No 1082019 Turk (Committee on the Rights of the Child). UN Human Rights Committee (HRC), ‘General Comment No. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35’. UN Human Rights Committee (HRC), *Communication submitted by Ioane Teitiota* [2015] Human Rights Committee Communication No 2727/2016, UN Doc CCPRC127D27282016 7 January 2020. [↑](#endnote-ref-9)
9. See Maxwell, Mead and van Berkel (n 4), Part 3.2, pp 44 – 46 (noting that since publication, the Ontario Superior Court of Justice has *not* upheld the claim in the case of *Mathur v. His Majesty the King in Right of Ontario*, and the case is on appeal. Judgment available here: <https://ecojustice.ca/wp-content/uploads/2023/04/Reasons-for-Judgment-Mathur-v.-His-Majesty-the-King-in-Right-of-Ontario.pdf>.  [↑](#endnote-ref-10)
10. See ibid, pp 47-49 [footnotes 76 and 89]. [↑](#endnote-ref-11)
11. *Urgenda* (n 6). [↑](#endnote-ref-12)
12. *Neubauer* (n 6). [↑](#endnote-ref-13)
13. *Future Generations* (n 6). [↑](#endnote-ref-14)
14. *Shrestha* (n 6). [↑](#endnote-ref-15)
15. *PSB et al* (n 6). [↑](#endnote-ref-16)
16. *Klimatzaak* (n 6). [↑](#endnote-ref-17)
17. *Urgenda Foundation v The State of The Netherlands* (2015) ECLI:NL:RBDHA:2015:7196 (English translation) (District Court). [↑](#endnote-ref-18)
18. *Leghari* (n 6). [↑](#endnote-ref-19)
19. IPCC, Sixth Assessment Report (AR6), Chapter 13, 13.4.2. [↑](#endnote-ref-20)
20. Ibid. See also, SPM-59 E.3.3. [↑](#endnote-ref-21)
21. On the test of ‘reasonable’ and ‘appropriate’ measures, See Maxwell, Mead and Van Berkel (n 4) 40 at [2.2]. On the small number of courts, see ibid 46 at [3.3]. This remains the same since the publication date. [↑](#endnote-ref-22)
22. See *Urgenda* (n 6) [5.7.9], footnote 37. The Supreme Court refers to the opinion of its independent legal advisors, the Procurator General and Advocate General, which contained detailed analysis of UN human rights materials (see para 2.79-2.80, 2.31-2.33, 2.70-2.73). An English translation of this opinion is available here: <<https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>> [↑](#endnote-ref-23)
23. See Maxwell, Mead and Van Berkel (n 4), p 51 onwards. [↑](#endnote-ref-24)
24. See Lavanya Rajamani and others, ‘National “Fair Shares” in Reducing Greenhouse Gas Emissions within the Principled Framework of International Environmental Law’ [2021] Climate Policy. [↑](#endnote-ref-25)
25. Glasgow Climate Pact, 1/CMA.3 [21]. See also CP.26 [16]). [↑](#endnote-ref-26)
26. *Shell Milieudefensie v Royal Dutch Shell* [2021] District Court of the Hague ECLR:NL:RBDHA:2021:5339 (official translation) [2.3.3].: a “safe temperature increase should not exceed 1.5°C”. [↑](#endnote-ref-27)
27. *Urgenda* (n 6) [4.3]. [↑](#endnote-ref-28)
28. *Friends of the Irish Environment CLG v The Government of Ireland (Irish Climate Case)* [2020] Supreme Court of Ireland Appeal No. 2015/19 [3.4] ('*Irish Climate Case'*). [↑](#endnote-ref-29)
29. *Notre Affaire à Tous and Others v France* [2021] Administrative Court of Paris N°1904967, 1904968, 1904972 1904976/4-1 (unofficial translation) 28 at [16].: “a warming of 2°C rather than 1.5°C would seriously increase these various phenomena and their consequences”. [↑](#endnote-ref-30)
30. *Klimaatzaak* (n 6) 66. [↑](#endnote-ref-31)
31. UNFCCC, Art 3.1, Art 4.1; Paris Agreement, Preamble, Art 4.1, 4.2 and 4.4. [↑](#endnote-ref-32)
32. For details, see Maxwell, Mead and van Berkel (above n 4), p 53 ff. [↑](#endnote-ref-33)
33. Rajamani et al (n 24). [↑](#endnote-ref-34)
34. *Urgenda* (n 6) para [6.3]. For more details, see Maxwell, Mead and Van Berkel (n 1) p 48. [↑](#endnote-ref-35)
35. *Neubauer* (n 6) para [29], [225]. [↑](#endnote-ref-36)
36. *Commune de Grande-Synthe v France* [2021] (France, Council of State) N° 427301, 8 at [12]. [↑](#endnote-ref-37)
37. *Notre Affaire à Tous* (n 29) 29 at [18]. [↑](#endnote-ref-38)
38. Glasgow Climate Pact, CMA/3 [32] and [22]. See also CP.26 [17]. [↑](#endnote-ref-39)
39. IPCC Special Report, ‘Global Warming of 1.5°C' (2018) p 108 [↑](#endnote-ref-40)
40. *Neubauer* (n 6) [155]. [↑](#endnote-ref-41)
41. ibid [117] and [183]. [↑](#endnote-ref-42)
42. Paris Agreement, Arts 3 and 4(3). [↑](#endnote-ref-43)
43. Glasgow Climate Pact, 1/CMA.3 [27]. See also [22]-[29]. [↑](#endnote-ref-44)
44. *Neubauer* (n 6) para 167. :“ever-increasing reduction quotas”. [↑](#endnote-ref-45)
45. See e.g. IPCC (n 39) 95 (Chapter 2, Executive Summary).; IPCC Sixth Assessment Report, WGIII, 12.3, p 1263-4: “There are concerns that the prospect of largescale [carbon dioxide removal] could, depending on the design of mitigation strategies, obstruct near-term emissions reduction efforts, mask insufficient policy interventions, might lead to an overreliance on technologies that are still in their infancy, could overburden future generations, might evoke new conflicts over equitable burden-sharing, could impact food security, biodiversity or land rights” (internal references not included). [↑](#endnote-ref-46)
46. See e.g. Centre for International Environmental Law, *Rights, Carbon, Caution: Upholding Human Rights under Article 6 of the Paris Agreement* (published February 2021) (online, accessed 11 February 2022) < https://www.ciel.org/reports/rights-carbon-caution/>; Nature-Based Solutions Initiative, *On the misuse of nature-based carbon offsets* (online, accessed 11 February 2022) <https://www.naturebasedsolutionsinitiative.org/wp-content/uploads/2021/04/Greenwashing-response-final-version.pdf>. [↑](#endnote-ref-47)
47. *Neubauer* (n 6) para 33. [↑](#endnote-ref-48)
48. *Urgenda* (n 6) para 7.2.5. [↑](#endnote-ref-49)
49. *Irish Climate Case* (n 28) para 3.4. [↑](#endnote-ref-50)
50. UNFCCC, Art 4(1)(h)(i)(j), (2)(b), Art 6; Paris Agreement, preamble, Art 4(8), Art 12, Art 13. [↑](#endnote-ref-51)
51. *Neubauer* (n 6) paras 253 and 251. [↑](#endnote-ref-52)
52. *Irish Climate Case* (n 28). In this case, the need to specify was a statutory requirement. [↑](#endnote-ref-53)