

## Strategic Climate Change Litigation: Potential for Legal Adaptation

Marie Desaules\*

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### Abstract

With the increasing emergency of climate change and the lack of concrete steps taken by States to adapt to and mitigate climate change effects, several legal and non-legal means of contestation have emerged to accelerate climate action. Climate change litigation is one of them. This contribution will argue that climate change litigation, when used strategically, can have direct and indirect effects favouring effective climate governance. The hypothesis that will be tested is that such cases have an impact that goes beyond verdicts, enhancing the enforcement of existing regulation and influencing novel lawmaking. The effects could be both direct, influencing the State to legislate, or indirect, for instance by co-opting the public opinion or the media. It is therefore a good example of legal adaptation. The contribution will begin with an overview of the scholarship and definitions of climate change litigation. It will carry on with a section on strategic climate change litigation looking at the strategies and trends put in places in climate change litigation, the legal issues and the impacts and potential for climate change litigation. The final section will put in parallel the ideas developed in section 3 with the first climate case, which exhausted all national remedies, brought in front of the European Court of Human Rights (ECtHR): *Union of Swiss Senior Women for Climate Protection v. Switzerland*.

**Keywords:** *Climate change litigation, strategic choices, climate regulations, legal adaptation, KlimaSeniorinnen and Others v. Switzerland, ECtHR.*

### Résumé

Avec l'urgence de plus en plus pressante du changement climatique et l'absence d'avancées concrètes de la part des États pour s'adapter à ses effets et les atténuer, de nombreuses formes de contestation, juridiques et non-juridiques, ont émergées afin d'accélérer la mobilisation pour le climat. L'utilisation du contentieux du changement climatique est l'une d'entre elles. Cet article soutiendra que le contentieux du changement climatique, lorsqu'il est utilisé de manière stratégique, peut avoir des effets directs et indirects favorisant une gouvernance climatique efficace. L'hypothèse qui sera mise à l'épreuve affirme que de tels cas ont un impact qui dépasse leur simple verdict, en renforçant l'application des réglementations existantes et en influençant l'adoption de nouvelles lois. Les effets pourraient être à la fois directs – en influençant l'État à légiférer – ou indirects – par exemple, en s'appropriant l'opinion publique ou les médias. Il s'agit donc d'un bon exemple d'adaptation juridique. Cet article débutera par un aperçu des travaux académiques existants et des définitions en matière de contentieux du changement climatique. Il poursuivra ensuite par une section sur le contentieux stratégique du changement climatique, en observant les stratégies et les tendances mises en œuvre en la matière, ainsi que les problématiques juridiques, les impacts et le potentiel de ce contentieux. La dernière section mettra en parallèle les idées développées en section 3 avec le premier cas dans le domaine climatique ayant épuisé toutes les voies de recours internes, engagé devant la Cour européenne des droits de l'Homme (CEDH) : *Verein KlimaSeniorinnen Schweiz et autres c. Suisse*.

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\* PhD Candidate and Research Assistant at the University of Neuchâtel. Contact : [marie.desaules@unine.ch](mailto:marie.desaules@unine.ch).

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## Introduction<sup>1</sup>

“Climate change is a threat of unprecedented dimensions, both in scope, scale, time and space.”<sup>2</sup> Legal activism has been used as an answer to the lack of action taken by government, as environmental and climate change movements have been advocating for more accountability, better enforcement of international obligations and concrete steps towards legal adaptation for years. To do so they are using a number of tools such as lobbying, protests and direct actions, as well as legal means such as climate change litigation. These initiatives will persist, as Newell states “we can expect the continued and expanded use by civil society groups of all tools and resources available to them: legal and non-legal, national, regional and international, liberal and critical, constructive and coercive.”<sup>3</sup> This claim is supported by the proliferation of all sorts of non-legal actions led by the climate change movements and a continuing process of juridification of discussions surrounding climate change.<sup>4</sup> The law is mobilised at all levels of governance (subnational, national and supranational) to bring grievances related to climate change to national (and international<sup>5</sup>) courts.<sup>6</sup> The certainty and urgency of the climate change crisis that can be grasped from the Intergovernmental Panel on Climate Change (IPCC) reports have never been clearer, and is mirrored in (legal) adaptation.<sup>7</sup> As Voigt highlights, “new law, at all levels, will be an important lever” and “[e]xisting laws and regulations need to be “climate proofed.”<sup>8</sup>

This contribution sets out to evaluate how strategic climate change litigation can have direct and indirect effects to create more effective climate governance. It can notably enhance the

<sup>1</sup> This article results from a presentation at the 2022 McGill Graduate Law Conference and a dissertation submitted in September 2019 for the Master’s degree in International Law at SOAS University of London. I would like to thank Dr. Ernest Caldwell for his supervision during my time at SOAS University of London.

<sup>2</sup> Christina Voigt, “Introduction: Climate Change as a Challenge for Global Governance, Courts and Human Rights” in Wolfgang Kahl and Marc-Phillipe Weller (eds), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021) 2.

<sup>3</sup> Peter Newell, ‘Civil Society, Corporate Accountability and the Politics of Climate Change’ (2008) 8 *Global Environmental Politics* 122, 130–134, 150.

<sup>4</sup> Juridification means that there is a generalized and repeated recourse to law to solve any conflicts or issues. Legalisation and judicialization are two other processes that are close to juridification. To see more literature on subject *see*: Lars Chr Blichner and Anders Molander, “Mapping Juridification” (2008) 14 *European Law Journal* 36; Anne Mette Magnussen and Anna Banasiak, “Juridification: Disrupting the Relationship between Law and Politics?” (2013) 19 *European Law Journal* 325.

<sup>5</sup> See for instance: Maiko Meguro, ‘Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy’ (2020) 33 *Leiden Journal of International Law* 933.

<sup>6</sup> Hari M Osofsky, “Climate Change Litigation as Pluralist Legal Dialogue?” (2007) 43 *A Stanford Journal of International Law* 181, 182; Ivano Alogna, Christine Bakker and Jean-Pierre Gauci, *Climate Change Litigation: Global Perspectives* (Brill | Nijhoff 2021) <<https://brill.com/view/title/59537>>; Wolfgang Kahl and Marc-Phillipe Weller (eds), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021) <<https://www.bloomsbury.com/us/climate-change-litigation-9781509948734/>> accessed 13 April 2022.

<sup>7</sup> “Climate Change 2022: Mitigation of Climate Change.” (Cambridge University Press 2022) Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change <[10.1017/9781009157926](https://www.ipcc.ch/report/6th-assessment-report/)>.

<sup>8</sup> Voigt (n 2) 3.

implementation of existing regulation or increase the effectiveness of legal adaptation. In this contribution, the argument presented is that strategic litigation will not be the only solution to resolve the climate crisis, but that as one tool among others, it will increase the pressure on governments into designing a more comprehensive and coordinated response to climate change.

This article will be divided into three parts. The first part will address the developments and drivers of both litigation and scholarship since the 2000s. It will include a brief overview of the definitional debate to set the focus of this contribution to *strategic* climate change litigation. The second part, on strategic litigation, will be further subdivided into three sections. The first focuses on the strategies and tools used in legal climate activism, the second addresses legal issues that arise in litigation and the third looks at the impacts and potential of climate change. The final part will compare the previously developed ideas with the first climate case, which exhausted all national remedies, brought in front of the European Court of Human Rights (ECtHR) Swiss case: *Union of Swiss Senior Women for Climate*.

## 1. Scholarship Development: Defining and Classifying Climate Change Litigation

As of 1 May 2022, the *Sabin Center Climate Change Litigations Database* reported 1970 cases which occurred in 55 different jurisdictions (States and international courts); among them, 1407 cases took place in the USA.<sup>9</sup> The increase in climate change litigation started in the 2000s and has been driven by the generalised non-compliance and lack of effective implementations of States' international obligations. This implementation gap or climate inaction is particularly caused by the lack of universality in the adhesion to international treaties,<sup>10</sup> and the financial or technical difficulties in the implementation of obligations.<sup>11</sup> The lack of national regulations in some jurisdictions could also have led to an increase in the amount of litigation brought to courts.<sup>12</sup> Furthermore, the international climate change regime also has an important role to play in the

<sup>9</sup> 'Climate Change Litigation Databases - Sabin Center for Climate Change Law' (*Climate Change Litigation*) <<http://climatecasechart.com/climate-change-litigation/>> accessed 3 May 2022.

<sup>10</sup> Countries like the US, Australia or Canada have refused to ratify treaties or implemented their obligations badly, mostly arguing that it would cause an economic recession. Shi-Ling Hsu, "A Realistic Evaluation of Climate Change Litigation through the Lens of a Hypothetical Lawsuit Natural Resources and Environmental Law Issue" (2008) 79 *University of Colorado Law Review* 701, 705–707.

<sup>11</sup> Mary Ellen O'Connell, "Enforcement and the Success of International Environmental Law" 3 *19*, 53–54; Nele Matz, "Financial And Other Incentives For Complying With Mea Obligations" in U Beyerlin, Peter-Tobias Stoll and Rüdiger Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements* (Brill 2006) 305 <<http://booksandjournals.brillonline.com/content/books/10.1163/ej.9789004146174.i-394.102>> accessed 24 March 2019.

<sup>12</sup> The hostile political environment of some governments, for instance those of Australia and the US, could explain why they have the highest number of climate change litigation, but this is debated in the literature. Joana Setzer and Lisa Vanhala, "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance" (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* 1, 7; Newell (n 3) 130.

growth in litigation. A multitude of treaties, agreements and protocols were developed for more than 20 years<sup>13</sup>: the United Nations Framework Convention on Climate Change (UNFCCC) (1992),<sup>14</sup> the Kyoto Protocol (1997),<sup>15</sup> and the Paris Agreement (2016), which builds on the previous conventions to lay down a second framework for the management of climate change from 2020 onwards.<sup>16</sup> The drafting of the Paris Agreement has especially influenced and driven climate change litigation, as we witness a significant growth of cases based on this instrument from 2015 onwards.<sup>17</sup> The latter facilitated the creation of legal arguments in domestic courts because of States' responsibility to implement their commitments – such as Nationally Determined Contributions.<sup>18</sup> Even if international law or IPCC reports are not fully justiciable and are only used indirectly, they still play an important role in reinforcing legal arguments presented in courts.<sup>19</sup> Furthermore, landmark cases, such as the Urgenda cases (*see infra*) can drive further climate litigation.<sup>20</sup>

The scholarship on climate change litigation has grown contemporaneously with the amount of litigation cases, and the literature often takes an interdisciplinary approach for a better understanding of the phenomenon.<sup>21</sup> Three main approaches, also called “waves” of scholarship,<sup>22</sup>

<sup>13</sup> Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015) 10–11 <<https://www.cambridge.org/core/books/climate-change-litigation/DB1A948D69FE080EBFFB938EE2D58545>> accessed 2 November 2021; Setzer and Vanhala (n 12) 2–3.

<sup>14</sup> “Status of Ratification of the Convention | UNFCCC” <<https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention>> accessed 6 May 2022; Kevin R Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 4–8 <<https://www.oxfordhandbooks.com/view/10.1093/law/9780199684601.001.0001/oxfordhb-9780199684601>> accessed 6 May 2022.

<sup>15</sup> Gray, Tarasofsky and Carlarne (n 14) 8.

<sup>16</sup> Daniel Bodansky, “The Paris Climate Change Agreement: A New Hope?” (2016) 110 *American Journal of International Law* 288, 289.

<sup>17</sup> Several countries have had the Paris Agreement used in the courts to “push for concrete action.” Michael Burger and Justin Gundlach, *The Status of Climate Change Litigation: A Global Review* (United Nations Environment Programme 2017) 8; Wendy J Miles and Nicola K Swan, “Climate Change and Dispute Resolution” (2017) 11 *Dispute Resolution International* 117, 124.

<sup>18</sup> On the implementation of the Paris Agreement and Nationally Determined Contributions (NDCs), see notably: “Nationally Determined Contributions (NDCs) | UNFCCC” <<https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs>> accessed 3 May 2022; Lennart Wegener, “Can the Paris Agreement Help Climate Change Litigation and Vice Versa?” (2020) 1 *Transnational Environmental Law* 17, 19; Bodansky (n 16); Brian J Preston, “The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)” (2021) 33 *Journal of Environmental Law* 1; Claudio Franzius and Anne Kling, “The Paris Climate Agreement and Liability Issues” in Wolfgang Kahl and Marc-Phillippe Weller (eds), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021).

<sup>19</sup> Wegener (n 18) 25–36.

<sup>20</sup> Setzer and Vanhala (n 12) 2–3.

<sup>21</sup> *Ibid* 2; Jacqueline Peel and Hari M Osofsky, “Climate Change Litigation” (2020) 16 *Annual Review of Law and Social Science* 21, 28.

<sup>22</sup> In 2015, the authors first described “distinct but overlapping waves”, and in 2020, added a layer of complexity by discussing trends of both scholarship and the caselaw as “a harmonic made up of multiple standing waves.” Peel and Osofsky, ‘Climate Change Litigation’ (n 21) 29–31; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13).

have been identified. The first approach to the study of climate change litigation focused on carrying out specific case studies, both in a national and international context. The second wave surveyed and classified climate change litigation in a systematic manner, first in the USA, and then in other jurisdictions.<sup>23</sup> Subsequently, the surveying effort was taken up by two research institutes collaborating on both sides of the Atlantic: the Sabin Center for Climate Change Law (Sabin Center), attached to Columbia University (USA) and the Grantham Research Institute on Climate Change (Grantham Research Institute) of the London School of Economics and Political Science (UK).<sup>24</sup> A third angle of research, much more diverse, builds on data collected by those institutes, further discussing climate change litigation's potential as well as its effectiveness and future.<sup>25</sup> In short, this third wave of scholarship goes beyond the idea that there is an absolute need to win a case for it to have an impact, keeping in mind that climate change litigation is “unique in being able to harness the apparatus of the state (i.e., courts as the third branch of government) to achieve regulatory change.”<sup>26</sup>

A question that is still very much alive in the scholarship is *how to define* climate change litigation.<sup>27</sup> As Hilson stated, because of the polycentric nature of climate change, all human actions can be linked to climate change, thus, “virtually all litigation could be conceived as CCL [climate change litigation].”<sup>28</sup> Multiple conceptualisation and definition approaches have been developed depending on the research projects' needs. For instance, a research project that aimed at surveying litigation would adopt a relatively restrictive definitional approach, in which case it would need to address a material issue link to climate change.<sup>29</sup> However, other research projects, mostly from

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<sup>23</sup> Christian Huglo, *Le Contentieux Climatique: Une Révolution Judiciaire Mondiale* (Bruylant 2018); David Markell and JB Ruhl, “An Empirical Survey of Climate Change Litigation in the United States” [2010] *Environmental Law Reporter* 10644; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13); Peel and Osofsky, “Climate Change Litigation” (n 21); Meredith Wilensky, “Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation” (2015) 26 *Duke Environmental Law & Policy Forum* 131; Setzer and Vanhala (n 12).

<sup>24</sup> For a discussion on the strength and weakness of these databases see: Shaikh Eskander, Sam Fankhauser and Joana Setzer, “Global Lessons from Climate Change Legislation and Litigation” (2021) 2 *Environmental and Energy Policy and the Economy* 44, 47–56; Joana Setzer and Mook Bangalore, “Regulating Climate Change in the Courts” [2017] *Trends in Climate Change Legislation* 181.

<sup>25</sup> Jacqueline Peel and Hari M Osofsky, “A Rights Turn in Climate Change Litigation?” (2018) 7 *Transnational Environmental Law* 37; Setzer and Vanhala (n 12); Gianluca de Fazio, “Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States” (2012) 53 *International Journal of Comparative Sociology* 3; Brian Doherty and Graeme Hayes, “Having Your Day in Court: Judicial Opportunity and Tactical Choice in Anti-GMO Campaigns in France and the United Kingdom” (2014) 47 *Comparative Political Studies* 3; Chris Hilson, “Framing Time in Climate Change Litigation” (2018) *Online Oñati Socio-legal Series* 1; Chris Hilson, “New Social Movements: The Role of Legal Opportunity” (2002) 9 *Journal of European Public Policy* 238.

<sup>26</sup> Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 31, 35–36.

<sup>27</sup> Setzer and Vanhala (n 12) 3.

<sup>28</sup> Chris Hilson, “Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)” [2010] *Climate change: la riposta del diritto* 421, 422; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 4–5.

<sup>29</sup> Markell and Ruhl, in their survey of USA's climate litigation, included “any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions *directly and expressly* (emphasis added)

the third wave of scholarship, did include the motivation of litigants, including cases that were not particularly framed through the climate change ground, but where climate change would be addressed in the verdict.<sup>30</sup> To palliate these definitional difficulties, and the growing volume of litigation, the study of trends and strategies in specific context has taken an important part of the scholarship (see part 2).

This article focuses on strategic climate litigation, which are cases brought to the courts voluntarily “to exert bottom-up pressure” on governments or corporations.<sup>31</sup> This trend comes from the fact that civil society is using litigation as one of many initiatives “in response to the lack of effective environmental regulations”,<sup>32</sup> especially since the impact of cases goes beyond the judges’ decisions. A case does not need to be won to “trigger political action.”<sup>33</sup> However, it is important to note that some litigants did not necessarily aim to pursue social change and climate action when initially filing the cases, but media attention and/or the support received from NGOs transformed cases into *strategic* climate litigation.

## 2. Strategic Climate Change Litigation

Domestic and international courts’ potential in encouraging States to accelerate climate action and to raise awareness on the climate crisis has been recognised by civil society. Indeed, the majority of cases recorded until 2022 (70% of recorded case in the Grantham Research Institute database) are filed against government by NGOs or individuals.<sup>34</sup> In Europe, several organisations

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raise issues or fact of law regarding the substance or policy of climate change causes and impacts.” Similar definitions were adopted with minor modifications by the Sabin Centre, UNEP reports and Wilensky’s survey of non-USA litigation. Markell and Ruhl (n 23) 10647–10648; David Markell and JB Ruhl, “An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual” [2012] *Florida Law Review* 15, 26–27; Wilensky (n 23) 134–135; Burger and Gundlach (n 17) 10; Michael Burger and J Daniel Metzger, “Global Climate Litigation Report: Status Review” (2020).

<sup>30</sup> As an example, see Peel and Osofsky’s 4 concentric circles’ diagram to define climate change litigation. Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 8.

<sup>31</sup> Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, “If at First You Don’t Succeed: Suing Corporations for Climate Change” (2018) 38 *Oxford Journal of Legal Studies* 841, 843; Joana Setzer and Rebecca Byrnes, “Global Trends in Climate Change Litigation: 2019 Snapshot” (Grantham Research Institute on Climate Change and the Environment 2019) 2.

<sup>32</sup> Osofsky, “Climate Change Litigation as Pluralist Legal Dialogue?” (n 6) 574.

<sup>33</sup> David B Hunter, “The Implications of Climate Change Litigation for International Environmental Law-Making” [2007] *SSRN Electronic Journal* 1 <<http://www.ssrn.com/abstract=1005345>> accessed 23 January 2019; Marilyn Averill, “Climate Litigation: Ethical Implications and Societal Impacts” (2007) 85 *Denver University Law Review* 899, 918.

<sup>34</sup> Joana Setzer and Catherine Higham, “Global Trends in Climate Change Litigation: 2022 Snapshot” (Grantham Research Institute (LSE) 2022) 2.

such as Greenpeace<sup>35</sup>, Friend of the Earth and Client Earth, among others,<sup>36</sup> are supporting or bringing cases to the courts strategically.<sup>37</sup> As mentioned earlier, cases are being gathered in a joint database by the Sabin Center and the Grantham Research Institute, and the 2022 Annual Report based on the database highlighted a number of “successful” cases aiming at “domestic accountability for climate targets” which reached a final verdict, including : *Friends of the Irish Environment v. Ireland* (2018); *Commune de Grande-Synthe v. France* (2019); *Future Generations v. Ministry of the Environment and Others* (2018); *Neubauer, et al. v. Germany* (2020); *Shrestha v. Office of the Prime Minister et al.* (2017); *Urgenda Foundation v. State of the Netherlands* (2015).<sup>38</sup>

The Dutch *Urgenda Foundation v. Netherlands* case is considered as one of the first “successful” strategic cases.<sup>39</sup> This case has been widely discussed in the climate change litigation scholarship.<sup>40</sup> Filed in 2015 by the Urgenda Foundation and 886 co-plaintiffs, claims were made against the government “for not taking sufficient measures to reduce greenhouse gas emissions that cause dangerous climate change.”<sup>41</sup> They based their claim on UN treaties, EU regulations as well as IPCC reports and domestic laws. The plaintiffs gathered a significant amount of evidence and scientific information and listed all the obligations of the State of the Netherlands.<sup>42</sup> The court here did not apply international obligations “directly” because of their nature, but based the verdict on all available national regulations, thereby allowing international obligations to have a “reflex effect” in national law.<sup>43</sup> Accordingly, the court “order[ed] the state to limit the joint volume of

<sup>35</sup> Greenpeace Philippines - Climate Justice and Liability Campaign, “Holding Your Government Accountable for Climate Change: A People’s Guide” (Greenpeace 2018) <[https://www.greenpeace.org/static/planet4-international-stateless/2018/12/4fdd4d8a-peoples\\_guide\\_fnl\\_2.pdf](https://www.greenpeace.org/static/planet4-international-stateless/2018/12/4fdd4d8a-peoples_guide_fnl_2.pdf)> accessed 29 April 2022.

<sup>36</sup> In the US, the non-profit *Our Children’s Trust* brings youth-led climate cases to the courts. Our Children’s Trust, “Mission Statement” <<https://www.ourchildrenstrust.org/mission-statement>> accessed 28 April 2022.

<sup>37</sup> Christopher Rootes, “Is There a European Environmental Movement?” in John Barry, Brian Baxter and Richard Dunphy (eds), *Europe, globalization and sustainable development* (Routledge New York 2004) 49–50; Maryam Golnaraghi and others, “Climate Change Litigation – Insights into the Evolving Global Landscape” (The Geneva Association 2021) 30.

<sup>38</sup> Setzer and Higham (n 34) 30.

<sup>39</sup> To access documentations of each steps of the Urgenda case, see Sabin Center for Climate Change Law, “Urgenda Foundation v. State of the Netherlands” <<http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>> accessed 9 July 2022.

<sup>40</sup> Roger Cox, “A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*” (2016) 34 *Journal of Energy & Natural Resources Law* 143; Peel and Osofsky, “A Rights Turn in Climate Change Litigation?” (n 25); Setzer and Vanhala (n 12); Jacqueline Peel and Hari M Osofsky, “Climate Change Litigation” (2020) 16 *Annual Review of Law and Social Science* 21.

<sup>41</sup> Urgenda Foundation, “Climate Case: Landmark Decision by Dutch Supreme Court” <<https://www.urgenda.nl/en/themas/climate-case/>> accessed 15 May 2022.

<sup>42</sup> *Rechtbank Den Haag, Urgenda Foundation v State of the Netherlands C/09/456689 / HA ZA 13-1396 (English translation)* [2015] Rb Den Haag ECLI:NL:RBDHA:2015:7196 al. 2.8-2.69; Jolene Lin, “The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)” (2015) 5 *Climate Law* 65, 68–74.

<sup>43</sup> *Rechtbank Den Haag, Urgenda Foundation v. State of the Netherlands C/09/456689 / HA ZA 13-1396 (English translation)* (n 42) al. 4.37-4.44; Joana Setzer and Dennis van Berkel, “Urgenda v State of the Netherlands: Lessons for International Law and Climate Change Litigants” (*Grantham Research Institute on climate change and the environment*)

Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990, as claimed by Urgenda, in so far as acting on its own behalf.”<sup>44</sup> The decision was appealed by the Dutch Government but upheld by the Supreme Court in 2019.<sup>45</sup> It is, therefore, the first case in which civil society held a State accountable for climate-related obligations.<sup>46</sup> This case had direct effects because new climate laws were implemented after the verdict, and as mentioned earlier the cases also had an indirect effect, as it inspired a number of other cases, with some authors calling this the ‘Urgenda effect’.<sup>47</sup> It notably inspired the *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council* case and others (see Part 3).

The importance and prevalence of strategic cases have not only been recognised by the actors bringing them to the courts but also by the institutions of the international community. Already in 2017, the UNEP review on climate change litigation stated that “litigation has arguably never been a more important tool to push policymakers and market participants to develop and implement effective means of climate change mitigation and adaptation than it is today.”<sup>48</sup> This was confirmed by the latest IPCC Report (April 2022), notably in the Summary for Policymakers which stated that “[c]limate-related litigation, for example by governments, private sector, civil society and individuals is growing – with a large number of cases in some developed countries, and with a much smaller number in some developing countries – and in some cases, has influenced the outcome and ambition of climate governance.”<sup>49</sup> The mention of climate change litigation does not stop in the Summary for Policymakers. Many further mentions throughout the reports can be spotted, and a section is dedicated to how climate change litigation is “shaping climate governance.”<sup>50</sup> The 2022 Annual Report of the Grantham Research Institute even suggests that the continuous increase in cases “has firmly established itself as an activist strategy across jurisdictions.”<sup>51</sup>

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<<https://www.lse.ac.uk/granthaminstitute/news/urgenda-v-state-of-the-netherlands-lessons-for-international-law-and-climate-change-litigants/>> accessed 15 May 2022.

<sup>44</sup> *Rechtbank Den Haag, Urgenda Foundation v. State of the Netherlands C/09/456689 / HA ZA 13-1396 (English translation)* (n 42) al. 4.18, 4.79.

<sup>45</sup> Voigt (n 2) 8.

<sup>46</sup> Arthur Neslen, “Dutch Government Ordered to Cut Carbon Emissions in Landmark Ruling” *The Guardian* (24 June 2015) <<https://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>> accessed 15 May 2022.

<sup>47</sup> Setzer and Vanhala (n 12) 3.

<sup>48</sup> Burger and Gundlach (n 17) 8.

<sup>49</sup> “Climate Change 2022: Mitigation of Climate Change” (n 7) 56.

<sup>50</sup> *Ibid* 29–32.

<sup>51</sup> Setzer and Higham (n 34) 2.



## 2.1 Strategies Put in Place to Further Climate Goals

The extent to which climate change litigation can develop legal arguments is as broad and complex as climate change issues. As the phenomenon of strategic litigation becomes more prevalent in the climate arena, this phenomenon has received attention in the literature.<sup>52</sup> The following paragraphs will analyse four climate change litigation's strategies and framing.<sup>53</sup>

First, legal arguments presented to the court are often backed by the latest scientific reports available, and a case can even become, in itself, what is called science-based litigation.<sup>54</sup> Setzer found that courts have, generally, followed the scientific consensus led by IPCC reports.<sup>55</sup> However, it is also important to note that litigation efforts are not always aligned with pro-regulatory measures. The 2022 Annual Report from the Grantham Research Institute survey found 12 strategies, but only four of them were “non-climate-aligned-strategies.”<sup>56</sup> Setzer and Bangalore came to a similar conclusion in 2017, writing that “climate change litigation enhances climate regulation more than it hinders it.”<sup>57</sup>

Second, two strategies that are often based on obligations entailed in international climate frameworks are mitigation and adaptation litigation. Mitigation litigation aims to address the cause of climate change, most notably the “intervention to reduce the sources or enhance the sinks of greenhouse gases”<sup>58</sup>, while adaptation litigation will involve cases on a wide range of actions which aim to adjust “to actual or expected climate and its effects.”<sup>59</sup> Most litigation in the Grantham

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<sup>52</sup> See for instance: Ben Batros and Tessa Khan, “Thinking Strategically about Climate Litigation” (*OpenGlobalRights*) <<https://www.openglobalrights.org/thinking-strategically-about-climate-litigation/>> accessed 14 April 2022; Aidan Ricketts, *Strategic Litigation* (2021); Jacqueline Peel and Rebekkah Markey-Towler, “Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases” (2021) 22 *German Law Journal* 1484; Ganguly, Setzer and Heyvaert (n 31).

<sup>53</sup> Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 7; Chris Hilson, “UK Climate Change Litigation: Between Hard and Soft Framing” in Stephen Farrall, Ahmed Tawhida and Duncan French (eds), *Criminological and legal consequences of climate change*. (Hart Publishing 2012).

<sup>54</sup> Setzer and Vanhala (n 12) 9–10.

<sup>55</sup> Setzer and Bangalore (n 24) 179.

<sup>56</sup> Setzer and Higham (n 34) 2.

<sup>57</sup> Setzer and Bangalore (n 24) 176.

<sup>58</sup> “Climate Change 2001: Synthesis Report” (Cambridge University Press 2001) Contribution of Working Groups I, II, and III to the Third Assessment Report of the Intergovernmental Panel on Climate Change 379.

<sup>59</sup> Peel and Osofsky, “A Rights Turn in Climate Change Litigation?” (n 25) 40; Ian R Noble and Saleemul Huq, “Adaptation Needs and Options in Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change” (Cambridge University Press 2014) 838; Elizabeth Donger, “Lessons on ‘Adaptation Litigation’ from the Global South” (*Verfassungsblog*, 2022) 1 <<https://verfassungsblog.de/lessons-on-adaptation-litigation-from-the-global-south/>> accessed 12 April 2022.

Research Institute database are of the mitigation type, but adaptation cases seem to have become more popular, especially in Global South jurisdictions.<sup>60</sup>

Third, another strong trend in litigation is to use human right arguments in climate-related claims. This trend received a lot of attention because of the prevalence of such legal framing, which coincides both with the increasing importance of human rights in international law and the recognition of the link between human rights and climate change, including “the endorsement of this linkage in the Preamble to the Paris Climate Agreement concluded in December 2015.”<sup>61</sup> Furthermore, grounding a claim in human rights, such as the general right to health and life, can be an advantage because human right treaties are relatively more “robust” than environmental law and climate change treaties.<sup>62</sup> However, one drawback has been mentioned in the scholarship on the human rights framing. It can lead to the fragmentation of climate law. However, as courts and human rights body are receiving an increasing number of climate claims, they will have to find a way to tackle the crisis, while maintaining legal security and legitimacy of the adjudicative bodies.<sup>63</sup>

Fourth, the criminal trials of climate activists involved in protest or direct action are another kind of litigation strategy that is growing as a tool of legal activism.<sup>64</sup> These kinds of litigation are *reactive* because they are initiated by the State – as opposed to *proactive* lawsuits where law is being mobilised by civil society. A number of these trials are used strategically and become a platform to raise awareness on climate issues and the inadequacy of policy implementation by States. The strategy and framing developed in proactive cases are also used in such cases,<sup>65</sup> and they may also reach human right courts,<sup>66</sup> potentially having similar effects to their proactive counterparts. The prosecution of activists can also be used as a means of repression, to hinder the resources and

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<sup>60</sup> Victor B Flatt, “Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation” (2012) 64 Florida Law Review 269; Donger (n 59).

<sup>61</sup> Peel and Osofsky, “A Rights Turn in Climate Change Litigation?” (n 25) 39–40; Stirling University and Annalisa Savaresi, “Human Rights and the Impacts of Climate Change: Revisiting the Assumptions” (2021) 11 Oñati Socio-Legal Series 231.

<sup>62</sup> Eric A Posner, “Climate Change and International Human Rights Litigation: A Critical Appraisal” (2007) 155 University of Pennsylvania Law Review 1925, 1927, 1931.

<sup>63</sup> Meguro (n 5); Helen Keller and Corina Heri, “The Future Is Now: Climate Cases Before the ECtHR” [2022] Nordic Journal of Human Rights 1; Stirling University and Savaresi (n 61).

<sup>64</sup> Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge 1992) 8; Hilson, “Framing Time in Climate Change Litigation” (n 25) 5–15; Lisa Vanhala, “The Comparative Politics of Courts and Climate Change” (2013) 22 Environmental Politics 447, 457; Joana Setzer and Rebecca Byrnes, “Global Trends in Climate Change Litigation: 2020 Snapshot” (Grantham Research Institute on Climate Change and the Environment (LSE) 2020) 13; Richard L. Abel, “Speaking Law to Power: Occasions for Cause Lawyering” in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998).

<sup>65</sup> To see a non-exhaustive list of reactive litigation, see: <<http://climatecasechart.com/non-us-case-category/protesters/>>.

<sup>66</sup> This is the case of Credit Suisse Protestor Trial. For more details on the case see: <<http://climatecasechart.com/non-us-case/credit-suisse-protesters-trial/>>.

power of a social movement.<sup>67</sup> A parallel can be made here with strategic litigation against public participation (SLAPP), which includes “cases filed against civil servants, climate activists and litigants in climate-aligned cases”,<sup>68</sup> the aim being to prevent or make it more difficult to reach the court in “climate-aligned” case.<sup>69</sup>

The strategic or framing choices made in the context of (green) legal activism are often dictated by the opportunities that arise in the jurisdiction in which they are brought. The analysis of opportunities produces different trends in the legal argumentation and evidence to support the claim as we saw above. Indeed, strategic dilemmas encountered by activists, grassroots organisations, and NGOs span questions of legal opportunity<sup>70</sup>, standing or justiciability, as well as cost and time sensitivity.<sup>71</sup> The aim of these strategic choices is therefore to maximise impact, aim towards “high salience in the media and public debate and generate the most potential for impact beyond the specific circumstances of an individual case.”<sup>72</sup> Peel and Markey-Towler highlights six elements that need to be looked at strategically to build a “successful” climate litigation: an experienced legal team, choice of plaintiffs and defendants, “innovative” legal argument, links “to the latest climate science” as well as “seeking remedies that extend beyond the situation of individual litigants and contribute to intended policy and regulatory impacts.”<sup>73</sup> These six dimensions will be further discussed in the case study in the last part of this contribution.

## 2.2 Legal Issues

The strategic use of climate change litigation brings about several issues and criticisms, which mostly surrounds the question of the rule of law, separation between law and politics, “complex and unsettled” scientific evidence and access to courts.<sup>74</sup> This section will briefly address some of them. Starting with the question of justiciability and the competence of the courts to adjudicate on the matter presented to them, it has been argued that using the courts with a regulatory aim

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<sup>67</sup> Zoe Russell, “Resistance and Movement in Neoliberal Society: A Literature Review on the Criminalisation of Dissent” (2020) 6 *Stirling International Journal of Postgraduate Research* 1; Steven E Barkan, “Criminal Prosecution and the Legal Control of Protest” (2006) 11 *Mobilization* 181.

<sup>68</sup> Setzer and Higham (n 34) 23; Chris Hilson, “Environmental SLAPPs in the UK: Threat or Opportunity?” (2016) 25 *Environmental Politics* 248.

<sup>69</sup> Criminal proceedings are not generally taken into account in the definition of SLAPPs. Hilson, “Environmental SLAPPs in the UK: Threat or Opportunity?” (n 68) 249–250.

<sup>70</sup> de Fazio (n 25).

<sup>71</sup> Voigt (n 2).

<sup>72</sup> Peel and Markey-Towler (n 52) 1845.

<sup>73</sup> *Ibid* 1487.

<sup>74</sup> For a discussion around legal issues of climate litigations see: Voigt (n 2) 14–17.

jeopardises the separation of powers between law and politics.<sup>75</sup> The difference between interpretation and “illegitimate” law making is not easy to discern. A problem can arise when courts need to clarify the content of obligations or principles that are not specifically aimed at regulating climate change issues. This could lead to an extension of regulation which is overstepping the role of the judiciary. However, procedural frameworks act as a safeguard for the separation of power by limiting access to the courts. Indeed, for the courts to be competent to reach a verdict on the matter, the plaintiffs must have “standing,”<sup>76</sup> and the forum in which the case is brought needs to have a direct link with the matter at stake to respect the “forum of convenience.”<sup>77</sup> This sufficiently restricts access to courts and protects the separation of powers. Payandeh confirmed this view by writing that:

Legally binding climate change mitigation obligations of States exist, either under international or national law, [and] courts are, within the procedural framework in which they operate, called upon to adjudicate on the compliance with these obligations. In declaring that the executive or the legislature violated these obligations, courts do not illegitimately engage in politics.<sup>78</sup>

It has also been argued that national judges ‘lack the necessary expertise’ with regard to climate science and international law. For instance, questions of responsibility and attributions of climate change consequences are very technical issues that require specific knowledge.<sup>79</sup> However, this has been resolved in most cases by inviting climate experts into the courts.

Finally, before moving to the impacts and potential of climate change litigation, it is useful to recall Osofsky’s theory, suggesting that climate change litigation “modified Westphalian geography in which States must navigate overlapping sets of relationships in order to regulate effectively.”<sup>80</sup> Three axes of governance are highlighted by Osofsky: multi-scale (supranational, national, subnational), multi-branch (executive, legislative and judicial), and multi-actors (governmental and non-governmental, corporations, individuals and NGOs). These three axes are

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<sup>75</sup> Michael Burger and Daniel J Metzger, “Global Climate Litigation Report: 2020 Status Review” (UNEP 2020) 30; Mehrdad Payandeh, “The Role of Courts in Climate Protection and the Separation of Powers” in Wolfgang Kahl and Marc-Phillipe Weller (eds), *Climate Change Litigation: A Handbook* (Beck/Hart/Nomos 2021).

<sup>76</sup> The standing requirements will differ in each jurisdiction, some will require the plaintiff to be “injured or likely to suffer an injury” and other will have less restrictive standing rules which will allow an NGO to bring the case to court. Burger and Metzger (n 75) 27–28; de Fazio (n 25).

<sup>77</sup> O’Connell (n 11) 61; Burger and Metzger (n 75) 27–28; Hari M Osofsky, “The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance” (2005) 83 *Washington University Law Review* 1789, 1809–1810.

<sup>78</sup> Emphasis added; Payandeh (n 75) 66–67.

<sup>79</sup> Hari M Osofsky, “Climate Change Litigation as Pluralist Legal Dialogue?” (n 6) 181, 182; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 34; Averill (n 33) 90–911; Newell (n 3) 123.

<sup>80</sup> Osofsky, “The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance” (n 77) 1794, 1803.

brought together in one arena through climate change litigation.<sup>81</sup> This is notably illustrated by the relationship between actors<sup>82</sup> and place-based implications. For petitioners the type of legal arguments that can be made will change depending on the place in which they raised it, especially with regards to standing requirements.<sup>83</sup> For the defendants (especially if they are corporations<sup>84</sup>), the forum in which they are filed and decided can bring about very different results – as adjudicators’ backgrounds and experiences will impact the verdict.<sup>85</sup> Actors, and overlapping regulation (e.g. national and international), which are usually not interacting in the same forum, will be brought together. Courts thus become a discussion platform, which highlights the complexity of the climate crisis by raising legal, ethical, economic, and social justice issues as well as questioning or asserting scientific knowledge.<sup>86</sup>

### 2.3 Impacts and Potential of Strategic Climate Change Litigation

When mapping impacts and potential of strategic climate change litigation, we can identify both direct effects when the litigation objective is mostly interpretative (*constitutional, statutory, or common law*) and indirect effects when litigation is “increasing cost and risks,” or “changing social norms and values.”<sup>87</sup> These indirect effects will create a “motivation for action” for corporations, individual and NGOs, as well as for governments.<sup>88</sup> In other words, direct impacts create legal change, and therefore legal adaptation, by either clarifying or extending the application of existing regulations, whereas indirect impacts entails an increase in “public awareness of an issue or climate injustice” and create pressure to drive behavioural policy change at the State or private level.<sup>89</sup> To further elaborate on indirect effect, domestic litigation focusing on local issues increases the available knowledge on the specific situation, and highlights how climate change impacts local communities.<sup>90</sup> This allows for a better distribution of and access to information; it educates the

<sup>81</sup> *Ibid* 1813–1818.

<sup>82</sup> Actors being separated in three categories by Osofsky: (1) petitioners, who are bringing the case to court, (2) respondents creating the externalities affecting climate change, and (3) adjudicators who are responsible for delivering a verdict.

<sup>83</sup> Osofsky makes a comparison between the Inuit populations and low-lying island states potentially having the same types of claims related to climate change, but being situated in very different places. Osofsky, “The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance” (n 77) 1805, 1809.

<sup>84</sup> Corporate activities (i.e. export, import, extraction, transformation and use) are happening in different places, which make it difficult both to regulate and to adjudicate. *Ibid* 1795.

<sup>85</sup> Notably because adjudicators will be influenced by their “socioeconomic, political, and educational experiences.” O’Connell (n 11) 62.

<sup>86</sup> Averill (n 33) 900; Miles and Swan (n 17) 117.

<sup>87</sup> Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 36.

<sup>88</sup> *Ibid*.

<sup>89</sup> Peel and Markey-Towler (n 52) 1486–1487; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 47–49; Hunter (n 33) 1–2.

<sup>90</sup> Hunter (n 33) 3–4; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 50, 222–223.

population about climate change issues and reasserts the legitimacy of scientific body like the IPCC. It promotes public participation and may help the democratic process by stimulating an informed public debate and, potentially, shifting public opinion. Media reporting may impact people more than scientific reports, and litigation can help in the transmission of information from the scientific world to the political one.<sup>91</sup> Finally, as mentioned at the beginning of the previous section, litigation could help in creating small-scale solutions to tackle climate change.<sup>92</sup> In addition, the rising number of cases creates “momentum at both the national and international level for stronger climate policymaking” and increases commitments from the civil society to support climate action.<sup>93</sup> Additionally, this recurrence creates a constant reminder of the importance of the climate crisis.<sup>94</sup> Finally, judges engage in transnational dialogues between different domestic jurisprudences, drawing from decisions on similar issues in other jurisdictions.<sup>95</sup> These dynamics can be seen in the next part.

### 3. *Union of Swiss Senior Women for Climate Protection v. Switzerland*

The *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* (*KlimaSeniorinnen and Others v. Switzerland*) case is now pending at the European Court of Human Rights (ECtHR)<sup>96</sup>. Before filing the case, Greenpeace Switzerland (notably climate specialist, Georg Klingler<sup>97</sup>) asked four experts and allies to assess the potential of a case similar to *Urgenda v. Netherlands* in Switzerland and how to best build a case strategically.<sup>98</sup> A first major issue of justiciability for strategic climate litigation in Switzerland was highlighted. The Swiss Supreme Court is not allowed to abstractly review regulations enacted by the Federal Assembly (Swiss Parliament) or the Federal Council (Executive) according to art. 189 of the Swiss Constitution. Instead of challenging a specific piece of legislation, it was decided to challenge the “administrative

<sup>91</sup> Averill (n 33) 900–908; Hunter (n 33) 4–5; Marilyn Averill, “Linking Climate Litigation and Human Rights” (2009) 18 *Review of European Community & International Environmental Law* 139, 144; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 47.

<sup>92</sup> Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 10.

<sup>93</sup> Hunter (n 33) 4.

<sup>94</sup> *Ibid*; Peel and Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (n 13) 222; Wegener (n 18) 34.

<sup>95</sup> For more details see: Tawhida Ahmed and Duncan French, “Situating Climate Change in (International) Law: A Triptych of Competing Narratives” in Stephen Farrall, Ahmed Tawhida and Duncan French (eds), *Criminological and Legal Consequences of Climate Change* (Hart Publishing 2012) <10.5040/9781472565945>.

<sup>96</sup> To access documentations of each step of the ECtHR procedure, see: <<http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/>> accessed 9 July 2022.

<sup>97</sup> Brigitte Hürlimann, “Das Klima Vor Gericht” *Die Reubublik* (2022) 1.

<sup>98</sup> Cordelia Christiane Bähr and others, “KlimaSeniorinnen: Lessons from the Swiss Senior Women’s Case for Future Climate Litigation” (2018) 9 *Journal of Human Rights and the Environment* 194, 202; Johannes Reich, Flora Hausamman and Nina Victoria Boss, “Climate Change Litigation Before the ECtHR: How Senior Women from Switzerland Might Advance Human Rights Law” (*Verfassungsblog*, 2022) 1 <<https://verfassungsblog.de/climate-change-litigation-before-the-ecthr/>> accessed 21 May 2022.

actions” of the authorities.<sup>99</sup> In November 2016, the plaintiffs in *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others (Verein KlimaSeniorinnen Schweiz v. Bundesrat)* submitted a request, under article 25a of the *Administrative Procedure Act (APA)*. The request was submitted to the Federal Council (executive branch) and other concerned authorities, to respect the separation of powers.<sup>100</sup> The plaintiffs argued that the failure of the government to create a sufficient climate framework to meet the 2030 target agreed in the Paris Agreement, notably the failure to review the Federal Act on the Reduction of CO<sub>2</sub> Emissions<sup>101</sup> and the lack of efforts to enforce existing regulations, amounted to a violation of the positive obligation of art. 2 of the European Convention on Human Rights (ECHR) (right to life) and art. 8 of the ECHR (right to respect for private and family life).<sup>102</sup> This approach is directly inspired by the *Urgenda* case, as the Dutch Supreme Court recognised the violation of the positive obligation present in these two articles.<sup>103</sup> Therefore, they argued that the Swiss Constitution and the European Convention of Human Rights were not being complied with.<sup>104</sup>

The first request and a subsequent appeal were turned down by Swiss courts for justiciability. The first and second instance decisions argued that the matter was of public interest because old women are not the only member of the population to suffer from climate change issues.<sup>105</sup> These decisions were appealed at the Swiss Federal Supreme Court in 2020, which also rejected the appeal, arguing that climate change effects did not have enough intensity to violate the human rights of the plaintiffs. Furthermore, the decision highlighted that the claim should be resolved in a political forum, not in the courts.<sup>106</sup> As the Swiss Federal Supreme Court is the last possible forum to appeal in Switzerland, the petitioners decided to file an application at the ECtHR.

<sup>99</sup> Bähr and others (n 98) 204, 216; Reich, Hausamman and Boss (n 98) 2.

<sup>100</sup> Bähr and others (n 98) 203.

<sup>101</sup> Federal Act on the Reduction of CO<sub>2</sub> Emissions, 23 December 2011 (Status as of 1 January 2022), RO 2012 6989’ <<https://www.fedlex.admin.ch/eli/cc/2012/855/en>>.

<sup>102</sup> Registrar of the Court, “Grand Chamber to Examine Case Concerning Complaint by Association That Climate Change is Having an Impact on Their Living Conditions and Health - Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (Press Release)”; Bähr and others (n 98) 202–203; Reich, Hausamman and Boss (n 98) 2.

<sup>103</sup> See (n 9).

<sup>104</sup> Bähr and others (n 98) 201.

<sup>105</sup> *Ibid* 195.

<sup>106</sup> Sabin Center, “The Swiss Federal Supreme Court, *Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others.*” <<http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>> accessed 14 May 2022.

Before, carrying on with the evolution of *KlimaSeniorinnen and Others v. Switzerland* at the ECtHR, standing requirements need to be considered in both Swiss and ECtHR instances.<sup>107</sup> Questions of justiciability and especially standing were highlighted by the experts consulted by Greenpeace Switzerland as a main hurdle to access the courts. Starting with the standing requirement in the Swiss case (art. 48 al.1 let b APA), the jurisprudence held that standing is only granted to persons “affected more strongly than the general public” and with “a special, noteworthy, close connection to the matter in dispute.”<sup>108</sup> Furthermore, there is a need for an individual interest “worthy of protection,” and is “current and practical.”<sup>109</sup> The jurisprudence specified that these terms should be used practically, and not strictly, as a way to differentiate an admissible claim to an *l’actio popularis*.<sup>110</sup> At the ECtHR level, the victim status is provided under art. 34 of the ECHR and the requirements are similar to the Swiss standing rules. Applicants need to be at least “potential victims” of a violation of a right under the ECHR.<sup>111</sup> In the present case, the plaintiffs claimed that the population aged 75 and over, especially women, are more likely to be impacted negatively by heatwaves and therefore qualify as a “most vulnerable group” as “older women are currently suffering the highest rate of mortality during periods of extreme heat.”<sup>112</sup> This approach could reduce the risk of rejection both at the Swiss and European level as an *actio popularis*.<sup>113</sup> In a further attempt to forestall rejection, both by the Swiss authorities and the ECtHR, the plaintiffs are composed of the union/association representing women aged 75 and older, but also four individual claimants.<sup>114</sup>

In 2021, the same legal arguments were presented at the ECtHR. Furthermore, the plaintiffs claimed that by rejecting the claim, the Swiss Federal Supreme Court violated the right to a fair trial per art. 6, and Swiss authorities and courts violated the right to an effective remedy set out in art. 13.<sup>115</sup> The case was preliminarily accepted, and the court attributed a priority status to the case.<sup>116</sup> After the preliminary acceptance, the Swiss Government and the plaintiffs were asked to submit further evidence and arguments. During this time, nine different organisations, including

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<sup>107</sup> To see a detailed account of the potential and hurdle present with the 4 climate case brought to the ECtHR see: Keller and Heri (n 63).

<sup>108</sup> Bähr and others (n 98) 203.

<sup>109</sup> *Ibid.*

<sup>110</sup> Swiss Supreme Court, “ATF 139 II 279” consd. 2.3 <[shorturl.at/bEOP6](http://shorturl.at/bEOP6)> accessed 29 July 2022.

<sup>111</sup> Keller and Heri (n 63) 3.

<sup>112</sup> Bähr and others (n 98) 203; Keller and Heri (n 63) 3.

<sup>113</sup> 2022-10-14 8:41:00 PM

<sup>114</sup> Bähr and others (n 98) 204.

<sup>115</sup> Sabin Center, “European Court of Human Rights (ECtHR), Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others” <<http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/>> accessed 14 May 2022.

<sup>116</sup> *Ibid.*



the International Commission of Jurist, and the Climate Accelerator (NYU) through its legal clinics and academics, submitted third party interventions to the court, raising question of standing (victim status), admissibility, as well as the effect of climate change on the right to life in support of the Swiss Senior Women case.<sup>117</sup> The latest development in *KlimaSeniorinnen and Others v. Switzerland* took place on the 29<sup>th</sup> of April 2022. After reviewing submissions from the Swiss Government, the *Swiss Senior Women* and the third party interventions, the Chamber of the European Court of Human Rights relinquished jurisdiction and transferred the cases to the Grand Chamber according to art. 30 of the ECHR because the case “raises a serious question affecting the interpretation [...] or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court.”<sup>118</sup> This article is not used very often by the ECtHR, but as we will see at the end of this part it has been used twice in the last year for climate-related cases.<sup>119</sup>

This case is the first strategic litigation of such scale in Switzerland and also the first climate-related case to reach the ECtHR after exhausting all national remedies.<sup>120</sup> As we will see in this part, it has the potential to become a landmark case in the climate change litigation landscape.<sup>121</sup> Even though the cases were initiated five years prior to the article by Peel and Markey-Towler (2021), the six dimensions to take into account to build a “successful” case and maximise its impacts are present here.<sup>122</sup> First, it is especially interesting to highlight the novelty in having senior plaintiffs. Indeed, strategic climate change litigation trends to be youth-led, or at least legal arguments are built with young litigants in mind (to use intergenerational equity in the argument).<sup>123</sup> However, the case presented here is led by a group of senior women. It is a specificity that fits the first dimension of “carefully selecting plaintiffs to communicate a strategic message.” Second, an experienced legal team led by Greenpeace Switzerland carried out in-depth research on how to bring the case to courts, drawing from other cases, allowing for cross-fertilisation between jurisdictions.<sup>124</sup> Furthermore, Greenpeace allies were also involved in the development of the case,

<sup>117</sup> For details and documents of the third party interventions: ‘Third-Party Interventions List’ (*KlimaSeniorinnen Schweiz*) <<https://www.klimasenioren.ch/drittparteien-interventionen/>> accessed 14 May 2022.

<sup>118</sup> Registrar of the Court (n 102).

<sup>119</sup> Reich, Hausamman and Boss (n 98) 3.

<sup>120</sup> *ibid* 1; Bähr and others (n 98) 205.

<sup>121</sup> For a details account of the potential of the case see: Keller and Heri (n 63); Reich, Hausamman and Boss (n 98).

<sup>122</sup> Peel and Markey-Towler (n 52) 1845.

<sup>123</sup> Our Children’s Trust (n 36); Camille Cameron and Riley Weyman, ‘Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices’ (2022) 34 *Journal of Environmental Law* 195; Julia Olson, ‘Youth and Climate Change: An Advocates Argument for Holding the US Governments Feet to the Fire’ (2016) 72 *Bulletin of the Atomic Scientists* 79; *Duarte Agostinho and Others v Portugal and 32 Other States* (European Court of Human Rights).

<sup>124</sup> Bähr and others (n 98) 214.

reinforcing the legal team and views on the best strategic choice to make. Third, “targeting defendants which are widely seen to be lagging in their climate action” is also a criterion present in this case as the Swiss government can be construed as not enacting sufficient regulations targeting climate change specifically.<sup>125</sup> Fourth, a strong and novel legal argument, using human-right articles to highlight the positive climate duties of protection of the Swiss government was used. Fifth, technical information from the IPCC, and technical information produced by the Swiss authorities were used to support the plaintiff’s argument and to highlight the inadequacy of the Swiss climate regime to reach its international commitment.<sup>126</sup> Finally, the case is “seeking remedies that extend beyond the situation of individual litigants and contribute to intended policy and regulatory impacts” as it is framed as a human rights claim and the aim was to reach the ECtHR, potentially impacting the 46 Member States of the ECHR, well beyond the situation of Switzerland and the litigant themselves.

In the last two years, three other climate cases<sup>127</sup> were brought to the ECtHR, including *Duarte Agostinho and Others v Portugal and Others*, which also reached the Great Chamber in June 2022.<sup>128</sup> The Grand Chamber will, if competent, look at a number of climate-related cases and make decisions on how to interpret the convention. According to Keller and Heri, the ECtHR will probably join the issue of victim status to the merits of the case.<sup>129</sup> The ECtHR will hopefully play its self-proclaimed role as the ‘conscience of Europe’ and make findings that will highlight the importance of protecting the climate, and so reinforce the stability and importance of the ECHR itself.<sup>130</sup>

## Conclusion

To conclude, we should step back from the case study to a more general perspective. Courts have been used, at least, as a common forum for actors and regulations to meet and at best, as a lever to pressure governments to be more accountable with regard to climate protection. They therefore have an impact beyond verdicts, both in terms of enforcement and the creation of novel or stronger framework regulation. Courts are and will continue to play an important role in climate

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<sup>125</sup> For details on the latest developments on the Swiss climate change regime see : “Giorgio Grasso, Démocratie Directe et Changement Climatique : Un Regard d’Italie Sur Une Votation Populaire Fédérale Récente et Sur Certains Problèmes Constitutionnels de La Protection Du Climat” (*Weblan*), 9 May 2022.

<sup>126</sup> Bähr and others (n 98) 198.

<sup>127</sup> The two other case being : *X v Austria*, and *Greenpeace Nordic and Others v Norway*. Keller and Heri (n 63).

<sup>128</sup> Registrar of the Court (n 102); Registrar of the Court, “Grand Chamber to Examine Case Concerning Global Warming - Duarte Agostinho and Others v. Portugal and Others, (Press Release)”.

<sup>129</sup> Keller and Heri (n 63) 6.

<sup>130</sup> *Ibid* 17–22; Council of Europe, *The Conscience of Europe: 50 Years of the European Court of Human Rights* (Third Millennium 2010).

governance as we saw throughout this contribution. Further research is needed on both direct and indirect impacts of strategic climate litigation, as well as the potential for the addition of the global litigation efforts to this literature.<sup>131</sup> The number of cases will continue to grow and highlight the complexity of the climate crisis in all aspects of society. New trends and legal argument will emerge, further pressuring government, influencing public opinion, raising awareness on climate-related issues, and most importantly, playing a limited, but important role in civil society efforts to create a more effective climate governance and enhance legal adaptation to the climate crisis.

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<sup>131</sup> Setzer and Higham (n 34) 27–28.