A human right to climate protection – Necessary protection or human rights proliferation?

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Abstract
In recent years, climate change has presented itself as a new challenge to human rights dogmatism. The present contribution examines the hurdles caused by interpreting existing regional and international human rights standards in the context of climate change, with particular reference to issues of causality, attribution, standing, and extraterritorial jurisdiction. As climate change does not neatly fit into present human rights categories, and progressive interpretation bears the risk of arbitrary and unjust results as well as overstretching the rules of interpretation, this article makes a case for an autonomous human right to climate protection without, however, losing sight of the risks of concomitant human rights overreach. It argues that a new human right to climate protection would respond to basic human needs and could allow for establishing clear legal standards that have the potential to strengthen human rights protection and secure pre-existing rights.

Keywords
Human rights, climate change, right to climate protection, human rights expansionism, human rights overreach

I. INTRODUCTION
After two years of a seemingly endless pandemic, global attention returned, at least briefly, to a crisis of even greater magnitude in early November 2021. For a few days, all eyes were on Glasgow, watching the wrangling over the latest climate change resolutions. At first glance, the
Glasgow Climate Change Conference (COP26) has brought some progress. For the first time since the signing of the Kyoto Protocol, direct reference is made to fossil fuels, including ‘accelerating efforts towards the phasedown of unabated coal power’. Furthermore, the agreement to bring forward the revision of Nationally Determined Contributions (NDCs) to 2022, originally scheduled for 2025, may give cause for cautious optimism, as it moves the 1.5-degree target back into the realm of possibility. Nevertheless, the Glasgow pledges still put us on a path to 2.4 degrees in 2100 missing by far the 1.5 target set in the Paris Agreement. At the same time, urgent questions of distributive justice, including loss and damage, remain largely unsolved. A few weeks after the 26th Conference of the Parties, the movement that had come into the negotiations seems to have ended up moving at a snail’s pace.

Elsewhere, growing awareness regarding the major threat climate change poses to human rights has created a momentum: One month before COP26, the UN Human Rights Council for the first time recognised a clean, healthy, and sustainable environment as a human right, and created a mandate for a Special Rapporteur on the promotion and protection of human rights in the context of climate change. This inherent link between climate change and human rights is not new but has been sparked and driven by a longer process of scientific discussions and civil society activities.

In the absence of sufficient progress in the international climate change negotiations, many individuals have taken national legal action, resulting in numerous cases of climate change litigation. This is hardly surprising, as the predominant inaction at the international level fails to recognise that

1. See Harro van Asselt, ‘Breaking a Taboo: Fossil Fuels at COP26’ (EJIL: Talk!, 26 November 2021) <https://www.ejiltalk.org/breaking-a-taboo-fossil-fuels-at-cop26/> accessed 11 January 2022.
2. Glasgow Climate Pact, Decision CP.26 of COP26, Advance unedited version, para 20, <https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf> accessed 11 January 2022.
3. Glasgow Climate Pact, Decision CMA.3 of COP26, Advanced unedited version, para 29, <https://unfccc.int/sites/default/files/resource/cma3_auv_2_cover%20decision.pdf> accessed 11 January 2022.
4. See, for example, Fiona Harvey, ‘What are the key points of the Glasgow Climate Pact’ (The Guardian, 14 November 2021) <https://www.theguardian.com/environment/2021/nov/14/what-are-the-key-points-of-the-glasgow-climate-pact-cop26> accessed 11 January 2022.
5. See Climate Action Tracker, ‘Warming Projections Global Update’, November 2021 [i, ii] <https://climateactiontracker.org/documents/997/CAT_2021-11-09_Briefing_Global-Update_Glasgow2030CredibilityGap.pdf> accessed 11 January 2022; Somini Sengupta, ‘Climate Promises Made in Glasgow Now Rest With a Handful of Powerful Leaders’ (The New York Times, 14 November 2021) <https://www.nytimes.com/2021/11/14/climate/glasgow-cop26-leadership.html> accessed 11 January 2022.
6. See Hannah Abdullah, ‘Climate justice at COP26 in Glasgow: Between disappointment and tentative hope’ (CIDOB Opinion 699, December 2021) <https://www.cidob.org/publicaciones/serie_de_publicacion/opinion_cidob/2021/climate_justice_at_cop26_in_glasgow_between_disappointment_and_tentative_hope> accessed 11 January 2022.
7. See Human Rights Council Res 48/13 ‘The human right to a clean, healthy and sustainable environment’ (8 October 2021) A/HRC/RES/48/13 para 1.
8. See Human Rights Council Res 48/14 ‘Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change’ (8 October 2021) A/HRC/RES/48/14 para 2.
9. See Brian J. Preston, ‘Climate Change Litigation – Part I’ (2011) 5 CCLR 3; Bridget Lewis, Environmental Human Rights and Climate Change: Current Status and Future Prospects (Springer 2018) 242.
10. For an overview on climate-related case law see the regularly updated Climate Change Litigation Databases provided by the Sabin Centre for Climate Change Law at the Colombia Law School <http://climatecasechart.com/climate-change-litigation/> accessed 11 January 2022. See also generally Julie Fraser and Laura Henderson, ‘The human rights turn in climate change litigation and responsibilities of legal professionals’ (2022) 40 Netherlands Quarterly of Human Rights 3.
basic human interests are already affected or threatened by global warming. National courts worldwide have found different, and at times creative, ways to accommodate the unprecedented crisis of climate change in their corresponding legal systems.

In contrast, regional human rights systems have yet to decide on fundamental questions relating to human rights and climate change. There are several reasons why the (future) decisions of regional and international human rights bodies are of particular interest. One aspect is the mostly binding character and the widespread impact of their decisions vis-à-vis a multitude of different Member States. In addition, their precedents are of particular importance for the domestic, but also the regional and international levels, as they provide guidance and seek to ensure consistency in dealing with specific human rights issues. It further seems reasonable to tackle a global phenomenon like climate change on a transnational scale. In view of the urgency that is indicated by the tipping points we are currently reaching and stagnant climate change negotiations, it is exactly the right time for human rights lawyers to address the challenges of climate change from an international human rights perspective.

The present analysis argues that the ecological, social, and economic consequences of climate change call for a debate on new human rights standards in the context of climate protection. After addressing the question of why the phenomenon of climate change must be qualified as a human rights issue (Section 2), the analysis turns to the highly disputed narrative of human rights expansion in the field of climate change. In regard to the methodological hurdles faced by progressive interpretation of existing human rights standards set out in the present analysis, an autonomous right to climate protection is brought into focus as one option to accommodate a complex phenomenon like climate change, which does not neatly fit into current human rights dogma (Section 3).

Although emblematic cases of national climate change litigation may inspire future decisions at the regional and international level, they still reflect specific domestic approaches informed by and based on national norms. While these cases may very well serve as sources of inspiration, it is rather unlikely that they will be able to solve existing challenges posed to regional and international human rights institutions that operate within their own specific normative framework. In this sense, the current analysis focuses exclusively on regional and partly international human rights regimes that constitute appropriate fora to identify and define human rights content related to climate change. Due to its extensive environmental case law, the European Court of Human Rights (ECtHR) serves as a prominent example for analysing the dogmatic hurdles that arise in the context of climate change. Furthermore, the analysis relies on the innovative approaches of

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11. See IPCC ‘Climate Change 2021: The Physical Science Basis’, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policy Makers (2021) 21, 27. See also IPCC ‘Global Warming of 1.5°C - An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty’ (2018) 257, 262 and following.

12. See in particular the speech delivered by ECtHR Judge Tim Eicke with regard to challenges climate change litigation faces before the Court which includes comparisons between national decisions and the ECtHR human rights regime. Judge Tim Eicke, ‘Human Rights and Climate Change: What Role for the European Court of Human Rights’ (2 March 2021) Inaugural Annual Human Rights Lecture, Department of Law, Goldsmiths University <https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4#_ftnref45> accessed 11 January 2022.
the Inter-American Court of Human Rights (IACtHR) and refers to relevant decisions of the Human Rights Committee and the Committee on the Rights of the Child.

In conclusion, it is assumed that the establishment of a new human right to climate protection is a suitable option to shape the transformation process that the human rights regime must undergo in the face of a phenomenon which is unparalleled in the extent and intensity of its destructive potential (Section 4). While due to the complexity of the topic many questions have to be left unanswered, the present contribution will hopefully advance the discussion on the potential establishment of a human right to climate protection and corresponding formulations.

2. CLIMATE CHANGE AS A HUMAN RIGHTS ISSUE

In light of the existing climate change regime surrounding the UN Framework Convention on Climate Change13 (UNFCCC) the question may arise of why the phenomenon of climate change should be addressed from a human rights perspective. The most obvious answer can be drawn from climate change’s negative ecological, social, and economic effects as described above. It would be presumptuous to believe that the devastating consequences for the human environment and livelihood will leave human beings themselves untouched. Even though climate change as a meteorological phenomenon cannot violate human rights,14 it is difficult to imagine a human interest that is not affected by climate change, ranging from human life and health to access to food and water, adequate housing, and living in a healthy environment or striving for peace and self-determination.15 Since human existence itself is at stake, it is reasonable to look at climate change from a human rights perspective.

International climate change agreements hardly cover the human dimension of climate change and guarantee even less effective protection of human needs affected by climate change. Despite the fact that both the Paris Agreement and the UNFCCC categorise climate change as a “common concern of humankind”,16 these treaty texts barely refer to the negative impact of climate change on individuals and their corresponding rights.17 Several States and NGOs have made a case for clear and concise human rights references in the operational part of the Paris Agreement,18 a request that was still reflected in the first drafts of the text.19 Nevertheless, what

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13. UN Framework Convention on Climate Change (UNFCCC) (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.
14. See Daniel Bodansky, ‘Introduction: Climate Change and Human Rights: Unpacking the Issues’ (2010) 38 Ga J Int’l & Comp L 511, 519. See also John H. Knox, ‘Human Rights Principles and Climate Change’ in Kevin R. Gray, Richard G. Tarasofsky, Cinnamon P. Carlame (eds), Oxford Handbook of International Climate Change Law (OPU 2016) 213, 215.
15. See Lewis (n 9) 157 and following; OHCHR ‘Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights’ (15 January 2009) UN Doc A/HRC/10/61 paras 20 and following.
16. UNFCCC (n 13) preamble; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) Annex to Decision 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1, preamble.
17. Silja Vöneky and Felix Beck, ‘Umweltschutz und Menschenrechte’ in Alexander Proelß (ed), Internationales Umweltrecht (De Gruyter 2017) 133, 165.
18. Compare Lewis (n 9) 153 and following; Annalisa Savaresi, ‘The Paris Agreement: a new beginning?’ (2016) 34 Journal of Energy & Natural Resources Law 16, 25; Alan Boyle, ‘Climate Change, the Paris Agreement and Human Rights’ (2018) 67 ICLQ 759, 769.
19. Compare Lewis (n 9) 153; Savaresi (n 18).
was left at the end of the negotiations was a single provision in the preamble of the agreement, stating that:

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

Although the Paris Agreement is the first worldwide multilateral environmental agreement that makes explicit reference to human rights, the lack of its operationalisation was met with clear criticism and disappointment. The lip service paid to human rights in the preambular provision illustrates once again that many States are not willing to give human rights a legally binding place in the climate debate. In this sense, the human rights reference in the Paris Agreement has been classified as a minimal contribution to the promotion of a human rights approach in the context of climate protection.

In addition to the weak human rights references in the Paris Agreement, there is ‘a general frustration [regarding] the slow pace of progress in tackling climate change using the traditional politico-scientific approach’. This has made individuals and States particularly vulnerable to the detrimental effects of climate change demand the recognition of the interrelation between climate change and human rights in different fora. The adoption of the Male’ Declaration as well as the Inuit Petition to the IACHR, and the following trend of human rights arguments utilised in national climate change litigation demonstrate that the intergovernmental agreements concerning climate change are – though not superfluous – at least not effective enough to address the devastating impact of climate change on human beings in an adequate and timely manner.

20. Indicators of a downgrading of the human rights perspective in the Paris Agreement can be found in Boyle (n 18) 769.
21. Paris Agreement (n 16) preamble.
22. Compare Savaresi (n 18).
23. ibid. See also Boyle who emphasised that ‘[t]his preamble is not a triumph for the human rights lawyers’. Boyle (n 18) 770.
24. Compare Lewis (n 9) 153; Savaresi (n 18); Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’ (2016) 110 AJIL 288, 313. See also Boyle (n 18) 770.
25. Marc Limon, ‘Human Rights Obligations and Accountability in the Face of Climate Change’ (2010) 38 Ga J Int’l & Comp L 543, 546.
26. Male’ Declaration on the Human Dimension of Global Climate Change, adopted in Male’ on 14 November 2007 by the representatives of the Small Island Developing States (SIDS).
27. Sheila Watt-Cloutier et al. v United States (Petition to the Inter-American Commission on Human Rights, 7 December 2005). See also Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting by emissions of Black Carbon by Canada (23 April 2013) <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2013/20130423_5082_petition.pdf> accessed 11 January 2022.
28. See Lewis (n 9) 242; Jacqueline Peel and Hari M. Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 TEL 37, 41. Regarding the case law see, for example, The State of the Netherlands v Urgenda Foundation No. 19/00135 (Supreme Court of the Netherlands, 20 December 2019); Kelsey Cascada Rose Juliana et al. v United States of America Case No. 6:15-cv-01517-TC (United States District Court in the District of Oregon, 10 November 2016); Andrea Lozano Barragán et al. v la Presidencia de la República et al. STC4360-2018 (Supreme Court of Colombia, 5 April 2018); Decision of the First Senate 1 BvR 2656/18 (German Constitutional Court, 24 March 2021), paras 1–270 (German Constitutional Court).
Over the past two decades, different human rights-based approaches to climate change have been developed, as the consequences of climate change for human life have become increasingly tangible and international climate negotiations have failed to achieve any real success. Although all these approaches recognise the human dimension of climate change, the nature of the relationship between climate change and human rights and the question of whether and how human rights considerations should guide our responses to climate change are still part of a multifaceted debate.\(^\text{29}\)

One way to present the existing commonalities of a variety of approaches is to divide them into legalistic and rhetorical approaches.\(^\text{30}\) This simplified breakdown does by no means claim exclusivity but has proven useful to categorise and illustrate different approaches in the context of human rights and climate change.

On one hand, human rights-based language is used as a rhetorical argument in the climate change debate.\(^\text{31}\) Highlighting the ethical and moral dimensions of human rights protection serves to steer the debate away from the economic and political considerations towards a human-centric perspective.\(^\text{32}\) On the other hand, defenders of a legalistic approach are concerned with the identification of right-holders and their entitlements, duty-bearers with their corresponding obligations as well as potential legal remedies by which certain claims can be asserted.\(^\text{33}\) Legalistic approaches have therefore already addressed the identification of potential State obligations under existing human rights law.\(^\text{34}\) The use of positive obligations to address climate change in terms of human rights can be cited as an example of a legalistic approach reflecting a dynamic interpretation of existing human rights law.\(^\text{35}\) In its broadest form, legalistic approaches have also led to the recognition of an independent right to climate stability or similarly formulated guarantees.\(^\text{36}\) The Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, David R. Boyd, recognised that a safe climate is ‘a vital element of the right to a healthy environment’\(^\text{37}\), but also explicitly referred to the right to a safe climate.\(^\text{38}\) According to legalistic approaches that form the main focus of the following analysis, States may be held responsible for their failure to mitigate or adapt to the effects of climate change under human rights law. In this sense, climate change constitutes a phenomenon that necessarily needs to be examined through a human rights lens.

\(^{29}\) See Lewis (n 9) 153.

\(^{30}\) See, *inter alia*, ibid 171.

\(^{31}\) See ibid 152, 171.

\(^{32}\) See ibid 152; Bodansky (n 14) 517; Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Abingdon 2016) 98.

\(^{33}\) Compare OHCHR, ‘Applying a human rights-based approach to climate change negotiations, policies and measures’ Guidance note, 2010; Lewis (n 9) 171.

\(^{34}\) See, for example, Katharina Braig and 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?’ (2020) 35 J Envtl L & Litig 261 and following; Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Oxford 2019) 10f, 14, 97 and following.

\(^{35}\) See Braig and Panov (n 34).

\(^{36}\) See, *inter alia*, Simon Caney, ‘Human rights, climate change, and discounting’ (2008) 17 Env Polit 536, 538f; Steve Vanderheiden, *Atmospheric Justice: A Political Theory of Climate Change* (Oxford 2008) 252.

\(^{37}\) Compare UNGA ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (15 July 2019) UN Doc A/74/161 para 96.

\(^{38}\) ibid para 65.
3. HUMAN RIGHTS EXPANSIONISM IN THE FIELD OF CLIMATE CHANGE

The analysis of climate change from a legalistic perspective usually involves the expansion of the present *corpus iuris* of human rights. Such an expansion may take two forms: First, the human rights canon may grow internally through either the progressive interpretation of pre-existing human rights norms or the development of new human rights standards. Second, human rights themselves may reach out to other special regimes of international law, feeding their own standards into fields as diverse as the different branches of international law, such as environmental or trade law. ³⁹

As already indicated, legalistic human rights-based approaches to climate change mostly refer to the first form, which can be called internal expansion of human rights, either in the shape of a dynamic interpretation of present human rights law or the recognition of a new human right to climate protection. These can be considered as two sub-forms of what has been described as internal expansion. The present analysis discusses how the phenomenon of climate change could be best addressed under human rights law (Section 3.1), arguing that an autonomous right to climate protection may be better suited to address the complicated relationship between human rights and climate change (Section 3.2). Aware of the potential risk of such a human rights expansion, the contribution thereafter critically reflects on the risks and potential of human rights expansionism in the context of climate change (Section 3.3).

3.1. A HUMAN RIGHT TO CLIMATE PROTECTION

One possibility to see the consequences of climate change addressed by human rights is the progressive interpretation of existing human rights norms. To give a hypothetical example, a regional or international human rights body may examine the failure of a certain State to mitigate or adapt to the negative effects of climate change through the interpretation of a single norm, such as the right to life, or a conglomerate of various human rights norms to assess a potential violation of the selected standards. However, this approach is confronted with several challenges, which require further attention. ⁴⁰ These include, *inter alia*, questions of causality and standing, systematic allocation, and extraterritorial application of human rights norms, which will be addressed in the following subsections.

3.1.1. Causality and attribution

First, climate change is a meteorological phenomenon that does not *per se* violate human rights. Still, it is an anthropogenic phenomenon ⁴¹ and States do contribute through emissions – either their own or emissions emanating from their territory or under their control – to global warming and its negative impact on human beings. However, climate change is neither caused by a single

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³⁹. See, *inter alia*, Puneet Pathak, ‘Human Rights Approach to Environmental Protection’ (2014) 7 OIDA IJSL 17; John Mubangizi, ‘Towards a human rights-based approach to trade and investment in Africa in the context of globalisation’ (2012) 16 Law, Democracy & Development 101.

⁴⁰. See speech of ECtHR Judge Tim Eicke (n 12).

⁴¹. See IPCC ‘Climate Change 2013: The Physical Science Basis’, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) 15.
polluter nor limited to current contributions to global warming, as historic emissions continue to fuel climate change even today. In addition, climate change is characterised by complex feedback effects and mechanisms of action. The causal complexity of the phenomenon leads to an essential time gap between the emission of greenhouse gases and the materialisation of the harm that Pedersen describes as a ‘significant and forensically problematic delay’. As a result, it will be difficult to attribute a certain negative consequence of a climate-change-related event to a specific State. Tully has therefore argued that ‘the human rights paradigm cannot address the disjuncture between “victims” and their diffuse or distant “perpetrators” where “violations” are only predicted, rather than known and identifiable’. The question arises if the current human rights system with its canon of pre-existing rights is prepared to address such complex questions of causality and attribution.

Similar to the ECtHR’s treatment of natural disasters or dangerous activities of third parties, an interpretation of relevant human rights norms could consider the phenomenon of climate change under the concept of so-called positive obligations. The boundaries between positive and negative obligations may not always be clear-cut. In more detail, negative obligations can generally be understood as protecting the individual’s rights and freedoms from illegitimate State interference, while positive obligations require that States take the necessary measures to actively safeguard the rights at stake. It follows that the responsibility of the State may be triggered not only by its actions but also, in specific cases, by its omissions. Positive obligations have particularly been used in the rulings of human rights courts regarding environmental cases. The ECtHR has based its ‘greening’ of the European Convention of Human Rights (ECHR) and related documents specifically on positive obligations. Similarly, the IACtHR relied on positive obligations when it derived State obligations from the right to life and personal integrity of the American Convention on Human Rights in the context of environmental protection. It, therefore, stands to reason that positive obligations may also be applied to the negative effects of changes in the climatic system, which is part of the environment. An example of such a potential positive obligation could be the duty of a State to regulate Greenhouse Gas (GHG) Emissions in its jurisdiction to

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42. See Atapattu (n 32) 18; Alan Boyle, ‘Human Rights and the Environment: Where Next?’ (2012) 23 EJIL 613, 640 and following.
43. See IPCC ‘Climate Change 2013’ (n 41) 57 and following, 93 and following.
44. Ole W. Pedersen, ‘Climate Change and Human Rights: Amicable or Arrested Development?’ (2010) 1 J Hum Rights Environ 236, 246.
45. See OHCHR, 2009 Report (n 15) para 70; Boyle (n 42) 618; Knox (n 14) 225. See also Bodansky (n 14) 523.
46. Stephen Tully, ‘Like Oil and Water: A Sceptical Appraisal of Climate Change and Human Rights’ (2008) 10 Aust ILJ 213, 221.
47. See Council of Europe ‘Manual on Human Rights and the Environment’ (2nd edn, 2012) 18.
48. See Sandra Fredman, ‘Human Rights Transformed: Positive Duties and Positive Rights’ (2006) 38 Oxford Legal Studies Research Paper 498f; Kegon v Ireland App no 16969/90 (ECtHR, 26 May 1994) para 49.
49. See, inter alia, Stephen P. Marks, ‘Emerging Human Rights: A New Generation for the 1980s?’ (1981) 33 Rutgers L Rev 435, 438; L.C.B. v United Kingdom App no 4/1997/798/1001 (ECtHR, 9 June 1998) para 36.
50. See Olivier De Schutter, International Human Rights Law: Cases, Materials, Commentary (Cambridge University Press 2014) 188. See also The Environment and Human Rights Serie A No. 23 (IACtHR, 15 November 2017) para 119.
51. The term greening of human rights refers to the integration of environmental concerns into the interpretation of existing human rights standards. See for example Boyle (n 42) 614.
52. Compare Braig and Panov (n 34) 272.
53. See, for example, The Environment and Human Rights (n 50) paras 108, 119, 215, 221.
54. See the definitions provided in Philippe Sands and Jacqueline Peel, Principles of International Environmental Law (Cambridge University Press 2018) 15.
reduce the negative effects of climate change on human beings in form of floods, heatwaves, sea-level rise, or other phenomena.

However, such an approach faces several hurdles. The primary obstacle leads back to questions of causality. Braig and Panov envisaged a three-step process in determining the causality link in climate change cases: (i) State interference with the climate system, that (ii) causes or results in extreme weather phenomena or slow onset events, which (iii) affect specific human rights in a serious, significant, and specific manner. As already indicated, due to a multitude of polluters, historic emissions, and complex feedback effects, it will be difficult to prove that a certain State has interfered with the climate change system in a way that a specific weather event can be attributed to climate change in general and the specific State in particular. Although the attribution of a specific event to climate change is rather difficult, in some cases scientific data may be able to provide evidence that a specific environmental effect is caused by global warming.

In this sense, it must be borne in mind that climate change is caused by all States since all GHG emissions contribute to climate change. Where everyone contributes to climate change but attribution to a specific actor is impossible, human rights institutions could decide to turn away from issues of primary causality and resort to positive obligations. In the environmental context, positive obligations have been utilised by the ECHR in situations of natural disasters where primary causality is irrelevant, or cases related to dangerous activities in which the specific harm can be attributed to third parties. In such a scenario the focus would shift from the perpetrator or phenomenon that caused the harm to the question whether the State failed to protect individuals from the specific harm, for example the harmful effects of a mudslide or the toxic emissions from a factory.

However, even if it is left aside whether the State has contributed through its GHG emissions to the phenomenon of climate change in general and to the specific event in particular, another hurdle related to causality awaits. The applicant would still have to prove a causal link between the environmental degradation or – in the case of climate change – the specific weather phenomenon or slow onset event and the impairment of his or her rights.

Even if the harm has already occurred, it will be difficult to prove the causal link to the specific situation or event, except if the assessment of evidence is based on standards of probability, as suggested by Braig and Panov. However, probability considerations comparable to those applied in extradition-related cases rather refer to negative obligations regarding potential

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55. Compare Braig and Panov (n 34) 287 and following.
56. See John H. Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33 Harv Envtl L Rev 477, 488 and following.
57. Compare ibid 489.
58. See the Manual on Human Rights and the Environment that describes natural disasters as ‘beyond human control’.
59. Compare ibid 489.
60. See Budayeva and Others v Russia App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 115343/02 (ECtHR 20 March 2008).
61. See Öneryıldız v Turkey [GC] App No 48939/99 (ECtHR, 30 November 2004).
62. See, inter alia, The Environment and Human Rights (n 50), para 120; Tătar v Romania App no 67021/01 (ECtHR, 27 January 2009) para 106.
63. Braig and Panov (n 34) 288 and following.
64. Braig and Panov suggest the application of a legal analogy from extradition proceedings with regard to probabilities as part of legal standard assessment, Compare ibid 288 and following.
65. See Soering v United Kingdom App No 14038/88 (ECtHR, 7 July 1989) paras 90-91.
victims. An example is the obligation not to extradite in case a person faces a real risk of being subjected to torture. In case of the transfer of this obligation to climate change cases, it would still be necessary to prove the existence of a ‘real risk’ to the applicant’s rights posed by the specific weather phenomenon or slow onset event. Proving such a real risk in the framework of the ECHR might be difficult in the case that potential climate change-related harm is not concretely foreseeable and its potential materialisation is not located in the near future.

It might in any case be more convincing to borrow from probability standards already used in environmental cases. However, the degree of probability applied in these cases seems to depend on the right at stake. In the context of Article 2 ECHR, reference has been made to a ‘real and imminent risk’, while in the realm of Article 8 ECHR a ‘sufficiently close link’ between the event and the right at stake is required. It has yet to be seen whether such a lower standard of probability would be considered appropriate for climate change cases and if a certain percentage or level of probability as applied in climate change science would be sufficient to prove a corresponding causal link between the meteorological phenomenon and human rights infringement.

Apart from the question of causality, when a violation of the right to life is alleged, it has to be established that the authorities knew or should have known about the real and imminent risk to human life. Although this standard of attribution is applied in cases regarding risks to life, it is clear from ECtHR case law that a breach of positive obligations can only exist if the State was aware or should have been aware of the risk of a human rights violation. As for today, due to well-known scientific evidence a general awareness of States regarding the adverse effects of climate change on human rights can be assumed. Still, a successful application will depend on whether it is required that the State was aware or should have been aware of the dangers of climate change in general or the specific risk to the rights of the applicant(s) emanating from a weather phenomenon or slow onset event caused by climate change, which would be far more difficult to prove.

Although both the IACtHR and the ECtHR have made general reference to the precautionary principle in their environmental jurisprudence, one could only speculate if human rights institutions would require States to take preventive action in climate change-related cases. This is due to the fact that despite clear scientific knowledge on climate change in general, uncertainty still exists with regard to the attribution of specific weather events to global warming or even specific activities – an uncertainty that is further aggravated when these events lie in the (distant) future. Besides, a strict application of the precautionary principle – for example in the case of absent scientific knowledge

66. Compare Braig and Panov (n 34) 289.
67. See The Environment and Human Rights (n 50) para 120; Önerürldüz v Turkey (n 61) para 101.
68. See, for example, McGinley and Egan v United Kingdom App Nos 21825/93 and 23414/94 (ECtHR, 9 June 1998) para 97.
69. See The Environment and Human Rights (n 50) para 120; Osman v United Kingdom App no 23452/94 (EctHR, 28 October 1998) para 116.
70. With regard to Article 8 ECHR see Fadeyeva v Russia App No 55723/00 (EctHR, 9 June 2005) para 90; López Ostra v Spain App No 16798/90 (EctHR, 9 December 1994) para 53.
71. The evaluation of scientific knowledge regarding the dangers of climate change would be similar to the consensus assessment utilised by the ECtHR in the evaluation of dangers emanating from asbestos, Brincat and Others v Malta App Nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 July 2014), para 105.
72. See The Environment and Human Rights (n 50) paras 175–180; Tătar v Romania (n 62) paras 107, 120.
regarding the risks posed by a certain weather event to human rights—would require a threat of serious or irreversible damage to the environment.73

3.1.2. Standing

A large number of cases related to climate change will concern future impacts of global warming.74 This is due to the fact that a lack of action on part of the State today may result in future damages when the effects of climate change materialize.75 However, human rights violations are regularly established after the harm has occurred.76 Before a human rights body decides on a corresponding petition or application, individuals seeking redress for a potential violation of human rights in the context of climate change need to make the case that they are victims of a violation of the corresponding human rights instrument.77 In Aalbersberg v The Netherlands, the Human Rights Committee stated that ‘[f]or a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent’.78

As illustrated in the framework of the ECHR, standing—except in exceptional scenarios79—neither includes potential victims, referring to individuals that have not yet but will or may suffer a violation of their rights in the future, nor actio popularis.80 Therefore, an individual could successfully claim standing only if future negative effects of climate change were added as another exception regarding the acceptance of potential victims. In this case, it would be on the victim to provide ‘reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur’.81 In this sense, the granting of potential victim status is also a question of causality. Similarly to cases in which the harm has already occurred, the individual would therefore need to prove that a certain weather phenomenon or slow onset event will result in a violation of his or her rights. With regard to potential victims in environmental cases, the ECtHR has in the realm of Article 6 and Article 8 ECHR required a sufficiently close link between the event or situation and the human right invoked,82 while mere tenuous connections or remote consequences have been considered to be not sufficient.83 In the context of the right

73. See Rio Declaration on Environment and Development, United Nations Conference on Environment and Development (June 3 to 14 1992) UN Doc A/CONF.151/26/Rev.1 (Vol. 1), Principle 15.
74. See OHCHR, 2009 Report (n 15) para 70.
75. See Knox (n 14) 225; Lewis (n 9) 188.
76. Compare OHCHR, 2009 Report (n 15), para 70; Lewis (n 9)188.
77. See, for example, ECHR ‘Practical Guide on Admissibility Criteria’ (last updated on 30 April 2020) 9. See also Article 47(b) of the American Convention on Human Rights.
78. Aalbersberg v The Netherlands, Communication No 1440/2005 (Human Rights Committee, 12 July 2006), para 6.3.
79. See, for example, ECHR ‘Practical Guide on Admissibility Criteria’ (n 77) 14. See also OHCHR, 2009 Report (n 15) para 70.
80. See ECHR ‘Practical Guide on Admissibility Criteria’ (n 77) 14 and following. With regard to actio popularis the ECHR stated that ‘the Convention does not allow complaints in abstracto alleging a violation of the Convention. The Convention does not provide for the institution of a meaning that applicants may not complain against a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the Convention.’ Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania [GC], App No 47848/08 (ECtHR, 17 July 2014) para 101.
81. ibid 14.
82. See, inter alia, Taşkın and Others v Turkey App No 46117/99 (ECtHR, 10 November 2004), para 113; Balmer-Schafroth and Others v Switzerland [GC] App No 22110/93 (ECtHR, 26 August 1997) para 39.
83. See Balmer-Schafroth and Others v Switzerland (n 82) para 40.
to a fair trial, earlier jurisprudence has established that the applicability of Article 6 ECHR requires a serious, specific, and above all imminent risk.\textsuperscript{84} However, more recent case law indicates a certain softening of this strict standard, particularly when the risk has been established by prior national risk assessments.\textsuperscript{85} Therefore, the outcome of a decision regarding standing would – if climate change were accepted as an exception regarding potential victim status – largely depend on the applicability of the right invoked and the meaning given to the requirement of a ‘sufficiently close link’.

While the IACtHR and the ECtHR have – so far – not issued judgments regarding cases related to the adverse effects of climate change, the UN Human Rights Committee has had the opportunity to decide on an application regarding a Kiribati citizen denied refugee status in New Zealand, claiming that the effects of climate change forced him to migrate from his home country.\textsuperscript{86} Ioane Teitiota \textit{v} New Zealand passed the admissibility hurdle as the Committee granted the author of the communication victim status based on the following considerations:

‘[T]he Committee considers that the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise on the habitability of Kiribati and on the security situation on the islands, he faced a real risk of impairment to his right to life under article 6 of the Covenant as a result of the State party’s decision to remove him to Kiribati.’\textsuperscript{87}

In the end, the Committee denied a violation of Article 6 (right to life) of the International Covenant on Civil and Political Rights stating that the 10 to 15 years until the island would become uninhabitable due to sea-level rise ‘could allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population’.\textsuperscript{88} After all, however, standing was granted on the basis of the real risk faced by Ioane Teitiota to his right to life. Still, it has to be taken into account that the case was related to the specific situation of deportation, which might have lowered the admissibility threshold.\textsuperscript{89} Furthermore, although the case did not concern hypothetical future harm according to the Committee, the author of the communication was not able to jump the merit-hurdle due to the timeframe that still allowed for adaptation measures.\textsuperscript{90}

Therefore, the threshold for standing and causality criteria concerning future harm will most probably continue to pose significant obstacles for future climate change litigation before human rights bodies. Nonetheless, Ioane Teitiota \textit{v} New Zealand may indicate a new pathway in dealing with standing in climate change cases, particularly where the effects of climate change have already materialised. This does, however, not solve the lack of \textit{actio popularis}, so that NGOs would not be able to claim the violation of relevant human rights standards in the context of climate change. There are good reasons to reject the concept of \textit{actio popularis} as it would open the door to a flood of applications and is therefore also referred to as ‘dissolution

\textsuperscript{84} See \textit{Athanassoglou and Others v Switzerland} App No 27644/95 (ECtHR, 6 April 2000) paras 46, 51.
\textsuperscript{85} See \textit{Taşkıın and Others v Turkey} (n 82), para 133; \textit{Okyay and Others v Turkey} App No 36220/97 (ECtHR, 12 July 2005) para 66.
\textsuperscript{86} \textit{Ioane Teitiota v New Zealand} Communication No. 2728/2016 (UN Human Right Committee, 24 October 2019), para 1.1.
\textsuperscript{87} ibid para 8.6.
\textsuperscript{88} ibid para 9.12.
\textsuperscript{89} See the explanation of the Committee, ibid para 8.5.
\textsuperscript{90} See ibid para 9.12.
of *locus standi*. Likewise, a limited acceptance of *actio popularis* – for example in the form of class action or subject to certain restrictive criteria in the context of a loosened *locus standi* – could do justice to the fact that climate change will sooner or later, in one way or another, affect every human being. Domestic cases of climate change litigation, such as *The State of the Netherlands v Urgenda Foundation*, could serve as a blueprint for such a change in regional human rights jurisprudence regarding *actio popularis* and standing of potential victims. However, it must be seen if the ECtHR is willing to adapt its rather strict standards with regard to standing on the basis of innovative, but at times distinct, national approaches.

### 3.1.3. Extraterritorial jurisdiction

Besides standing, the territorial application of human rights instruments poses further challenges in the context of climate change. Citizens of Small Island Developing States affected by the adverse effects of climate change might prefer to file an application against a high-emitting State rather than against their own home country, of which the emissions contribute to global warming only to a very small extent. However, individuals affected or potentially affected by the effects of climate change can file an application against a State only if they are subject to the State’s jurisdiction. In this sense, the exercise of jurisdiction is a necessary prerequisite to hold a State accountable for alleged violations of an individual’s rights and freedoms. Generally, the term ‘jurisdiction’ is predominantly understood territorially. In this sense, ‘jurisdiction’ refers to imputable conducts exercised in the State’s territory, in which the person alleging a violation of human rights norms is physically present. The extraterritorial application of human rights instruments – referring to acts performed or producing effects outside the territory of the State – is admitted only in exceptional cases.

In the jurisprudence of the ECtHR extraterritorial conduct within a State’s jurisdiction includes the exercise of effective control over an area or the authority and control over persons located in another State through the State of origin’s agents operating either lawfully or unlawfully in that respective territory. Most of these cases are related to military interventions or military occupation and do not fit the scenario of transboundary environmental harm or the adverse effects of climate change.

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91. Anthony Arnall, ‘Private Applicants and the Action for Annulment under Article 173 of the EC Treaty’ (1995) 32 CML Rev 7. See also William J. Aceves, ‘Actio Popularis – Class Action in International Law’ (2003) U Chicago Legal F 353, 398 and following.

92. See Aceves who clearly distinguishes between *actio popularis* and class action (n 91).

93. See The State of the Netherlands v Urgenda Foundation (n 28).

94. See Knox (n 14) 228.

95. Compare Ilasçu and Others v The Republic of Moldova and Russia App No 48787/99 (ECtHR, 8 July 2004) para 311. See also The Environment and Human Rights (n 50) para 72.

96. See Knox (n 14) 228.

97. Compare Ilașcu and Others v The Republic of Moldova and Russia App No 48787/99 (ECtHR, 8 July 2004) para 311. See also The Environment and Human Rights (n 50) para 72. See, *inter alia*, ECtHR ‘Practical Guide on Admissibility Criteria’ (n 77) 53.

98. See, for example, N.D. and N.T. v Spain App Nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) paras 103, 105. See also The Environment and Human Rights (n 50) para 73. This conclusion can also be drawn from reference to the exceptions to this rule in ECtHR ‘Practical Guide on Admissibility Criteria’ (n 77) para 216.

99. Compare Bankovic and Others v Belgium and Others [GC] App No 52207/99 (ECtHR, 12 December 2001) para 67.

100. See ibid and The Environment and Human Rights (n 50) para 81. See also Braig and Panov (n 34) 290.

101. See ECtHR ‘Practical Guide on Admissibility Criteria’ (n 77) paras 213, 214. Concerning effective control over a territory see Ilașcu and Others v Moldova and Russia (n 95) paras 314–319; Chiragov and Others v Armenia [GC] App No 13216/05 (ECtHR, 16 June 2015) paras 169–186. For authority and control over persons abroad see Öcalan v Turkey [GC] App No 46221/99 (ECtHR, 12 May 2005) para 91; Al-Skeini and Others v United Kingdom [GC] App No 55721/07 (ECtHR, 7 July 2011) paras 134, 136, 149.
crossing international borders. In these cases, the State of origin rarely exercises effective control over the territory of the State concerned or over the persons present in that territory.

In its Advisory Opinion No. 23 concerning the environment and human rights, the IACtHR has therefore further developed these standards and adapted them to scenarios of transboundary environmental harm. According to the IACtHR, in the case of transboundary environmental damage, a person is subject to the jurisdiction of the State of origin, if i) there is a causal link between the domestic activity or incident and the violation of that person’s human rights, and ii) the State of origin exercises effective control over the activities that have caused the damage and the resulting human rights violation. While in the context of the European Human Rights System a new exception of extraterritorial application of the ECHR to adverse effects of climate change would be needed, the IACtHR’s progressive development of extraterritorial application standards with regard to transboundary harm may leave room for extending tendencies. Although the Court did not include adverse effects of climate change in its analysis and determination of extraterritorial jurisdiction, it did make general reference to the fact that climate change affects the enjoyment of human rights. Furthermore, transboundary environmental harm is a likely consequence of global warming caused by GHG emissions. Therefore, if a State has control over GHG emitting activities and these activities cause transboundary environmental harm and corresponding human rights violations, the persons whose rights have been violated could be under the jurisdiction of the State of origin. However, an applicant filing a corresponding case would face the problem of having to prove the causal link between the GHG emitting activity and the violation of human rights. This would be – at least – a two-step process: i) demonstrating a causal link between the activity and the environmental harm, and ii) proving a causal link between the environmental harm and the human rights violation. Due to the multitude of polluters, historic emissions, and complex feedback effects, it would be nearly impossible to prove that a particular GHG emitting activity has caused a specific environmental harm. At the same time, establishing a causal link between environmental harm and human rights violation remains as challenging as in the context of causality under positive obligations or standing. It becomes obvious that in cases of extraterritorial jurisdiction there also seems to be no way around issues of causality.

In addition, it must be taken into account that both the ECtHR and the IACtHR generally consider extraterritorial jurisdiction an exceptional scenario. It seems, however, that the new standards developed by the IACtHR in its Advisory Opinion No. 23 turn the actual exception into the new rule. As the Court has developed requirements of extraterritorial jurisdiction in environmental scenarios detached from an individual case, it has to be seen how the Court will address issues of extraterritorial jurisdiction in future contentious cases and whether the Court will open the

102. See The Environment and Human Rights (n 50) para 80.
103. Compare Verena Kahl, ‘Ökologische Revolution am Interamerikanischen Gerichtshof für Menschenrechte – Besprechung des Rechtsgutachtens Nr. 23 ‘Umwelt und Menschenrechte’ (OC-23/17)’ (2019) 17(2) J Eur Environ Plan Law 110, 118 and following.
104. See The Environment and Human Rights (n 50) paras 95 and following.
105. Compare ibid paras 101, 103, 104 h.
106. See ibid paras 47, 49, 54.
107. See ibid paras 101, 103, 104 h.
108. Compare Kahl (n 103) 121. Similarly, Monica Feria-Tinta and Simon Milnes, ‘The Rise of Environmental Law in International Dispute Resolutions: The Inter-American Court Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights’ (2016) 27 YB Int’l Env L 64, 78.
application of these standards also to climate change cases. It stands to reason that there is a significant difference whether transboundary environmental harm is caused by adverse effects crossing one single border or extraterritorial jurisdiction is applied to a global phenomenon like climate change. Therefore, it remains to be seen if the Court will apply a broad approach corresponding to the standards developed in the advisory opinion or whether it will impose certain restrictions depending on the specific case.\(^{109}\) If probability considerations, for example, inspired by the precautionary principle, are sufficient to jump the ‘causal link’ hurdle will particularly depend on the requirements of burden of proof.

Nevertheless, Advisory Opinion No. 23 has inspired a recent decision of another international human rights body. In *Sacchi et al. v Argentina*,\(^{110}\) the Committee on the Rights of the Child made ground-breaking findings regarding jurisdiction. While in the view of the Committee ‘extraterritorial jurisdiction should be interpreted restrictively’, the communication ‘raises novel jurisdictional issues of transboundary harm related to climate change’.\(^{111}\) Applying the parameters set by the IACtHR in its Advisory Opinion No. 23, the Committee established that in the case of transboundary harm

‘children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.’\(^{112}\)

The Committee concluded that Argentina had ‘effective control over the sources of emissions that contribute to causing reasonably foreseeable harm to children outside its territory’\(^{113}\) and affirmed the complainants’ victim status.\(^{114}\) The Committee also seemed to assume the existence of a sufficient causal link, without however making explicit statements of its own.\(^{115}\) The complaints were ultimately declared inadmissible, as the complainants had failed to exhaust domestic remedies.\(^{116}\) In this sense, further details on complex questions regarding the significant causal link conundrum could at least be expected in future decisions. Nevertheless, an open letter to the complainants shows that despite its ground-breaking findings about extraterritoriality, the Committee ‘had to work within the limits of the legal powers given to [it] under the Optional Protocol on a Communications Procedure (OPIC)’.\(^{117}\)

While some voices also propose the application of the duty to cooperate in the context of human rights and climate change,\(^{118}\) there are several reasons why this duty may fail to deliver what it seems to promise. First, the duty to cooperate is not a human rights obligation *sensu stricto* as it

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109. See Kahl (n 103) 121.
110. *Sacchi et al v Argentina* No. 104/2019 (Committee of the Rights of the Child, 22 September 2021).
111. ibid paras 10.4 and following.
112. ibid para 10.7.
113. ibid para 10.12.
114. See ibid para 10.14.
115. See ibid para 10.12.
116. See ibid para 10.21.
117. Open letter to the authors of *Sacchi et al v Argentina* and four similar cases of the Committee on the Rights of the Child <https://www.ohchr.org/Documents/HRBodies/CRC/Open_letter_on_climate_change.pdf> accessed 11 January 2022.
118. See, for example, OHCHR, 2009 Report (n 15) paras 84 and following; UNEP ‘Climate Change and Human Rights’, in cooperation with Sabin Centre for Climate Change Law of the Colombia Law School (December 2015) 23 and following.
applies between States while traditional human rights duties operate between individuals as right-holders and States as duty-bearers. A duty to cooperate will therefore not help an individual located outside the territory of a high emitting State to jump the hurdle of extraterritorial application, if that individual seeks redress for (potential) violations related to GHG emitting activities. Second, the duty to cooperate remains largely vague in the context of human rights. Nonetheless, the IACtHR has defined the obligation to cooperate by means of a further breakdown into several sub-obligations, including the duties to notify, consult, and negotiate. These duties make sense especially in cases of transboundary environmental harm concerning one or at least a few national borders, for example in the case of an industrial megaproject that could affect human rights of individuals located in one or several neighbouring States. In the case of a global phenomenon like climate change, to which all States contribute in manifold ways, the duty to cooperate would lead to an endless and senseless circle of notifications, consultations, and negotiations, as every Member State would have to cooperate with every other Member State regarding any GHG-emitting activity that could have detrimental effects on possibly any individual’s rights. In this sense, the duty to cooperate carries the high risk of being reduced to the Member States’ obligation to strive for the agreement of adequately strict GHG reduction targets at the international level. Caught in a circular argument, climate change litigation would as a result of an application of the human rights duty to cooperate be thrown back on the hitherto unsuccessful climate negotiations in the UNFCCC framework from which it originally emerged.

The preceding analysis has shown that where climate change cases already face difficulties in terms of causation, attribution, and standing, extraterritorial jurisdiction poses a further challenge that seems even more difficult to overcome under current human rights law. As noted, the IACtHR’s Advisory Opinion No. 23 could be a useful precedent, although the time and manner in which the established standards will be applied to future contentious cases are questionable. Nevertheless, the Committee on the Rights of the Child has opened the door to new future precedents by using the parameters established by the IACtHR regarding extraterritorial jurisdiction. It remains to be seen whether other regional and international human rights bodies will follow its example.

3.2. ADVANTAGES OF AN AUTONOMOUS RIGHT TO CLIMATE PROTECTION

Climate change cases pose several complicated questions of causality, attribution, and standing to human rights methodology. The case-law of the ECtHR and the jurisprudence of the IACtHR indicate that positive obligations could solve some of the issues inherent to human rights cases based on the adverse effects of climate change. Nonetheless, the examination of potential answers to questions of causality, attribution, and standing has also shown that there are certain limits to the approach of positive obligations under the current human rights regime and that the hurdles faced by human rights institutions cannot – or at least not easily – be overcome without essential adjustments. The success of climate change litigation before human rights institutions would depend on new exceptions to victim status and on the specific rights invoked. In this sense, the environmental case law of the ECtHR reveals a fragmented picture, where legal standards may vary according to the norm under which the matter is treated and on the specific case under examination.

119. See The Environment and Human Rights (n 50) paras 186 and following.
Furthermore, the human rights body will also be confronted with the question to which specific right the negative effects of climate change could be allocated. As indicated above, climate change affects the full range of human rights norms. It is therefore questionable if the impact of climate change can be attributed to a single right, such as the right to life, or a chosen group of rights. Should the human rights institution decide not to allocate those effects to a specific right, but rather choose the corresponding right(s) on a case-by-case basis, the question arises of whether the standards of the specific right apply or whether common prerequisites for these scenarios are developed, as issues of causality, attribution, and standing are independent of the right at stake, thereby potentially leading to arbitrary and unjust results.

Although an autonomous right to climate protection may not solve all the challenges mentioned above, there are certain advantages to treating climate change cases under a new specific and separate right. Instead of facing troubles to allocate the negative consequences of climate change to a certain pre-existing right or choosing the applicable standards on a case-by-case basis, an autonomous right to climate protection could delineate common standards with regard to questions of causality, attribution, and standing for climate change cases. It would thereby avoid arbitrary and possibly unjust results. The creation of a new right – whether by amendment or dynamic interpretation – would allow for the application of new standards, which consider the specificities of climate change. Exceptions to potential victim status could help tackle the time gap between the emission of GHG and the materialisation of the damage. States could be required to take preventive action in cases where climate change poses a risk to human rights, but the risk is not yet imminent, as the harm will not materialise in the nearest future.

Moreover, the application of clear probability standards could help to lower the applicants’ burden to prove complex causality links. At the same time, the utilisation of the precautionary principle might lower standards of attribution where scientific knowledge is absent or uncertain. While positive obligations applied in environmental cases so far are predominantly of a procedural nature and substantive obligations would at best require the adoption of adaptation measures, an autonomous right to climate change could also include obligations to mitigate the effects of climate change. These obligations could be shaped by the interpretation of international agreements related to climate change, which require States to regulate the GHG emissions on their territory or under their control. Addressing climate change in the context of a new human right to climate protection could thereby prove beneficial for other human rights, as GHG emissions affect various rights equally. At the same time, the determination of a violation of other rights, such as the right to life, would not be excluded if the respective standards were fulfilled. The inclusion of obligations to mitigate would furthermore consider the preventive measures necessary to limit the devastating consequences of climate change at least to a certain degree and do justice to situations where adaptation is no longer possible.

A new right to climate protection could establish further exceptions regarding extraterritorial jurisdiction. In this sense, new standards might be required to adapt to a phenomenon that does not stop at national borders. This would apply particularly to obligations of mitigation, as a national from a low-lying island State faced with the risk of submergence would most probably demand one or more high-emitting countries to reduce their GHG emissions rather than to grant assistance

120. Compare Braig and Panov (n 34) 274; Vöneky and Beck (n 17) 155, 181. With regard to the development of procedural environmental rights see Boyle (n 42) 621 and following.
121. See, for example, the argumentation utilised in Duarte Agostinho and Others v Portugal and Others (communicated case) - 39371/20, Information Note on the Court’s case-law 246 (ECHR, December 2020).
for adaptation measures. However, it must be borne in mind that such an application of extraterritorial jurisdiction to climate change would most probably turn the exception into a rule. As all human beings and States contribute to a certain extent to the global phenomenon of climate change, reference has been made to the concept of ‘shared responsibility’ in order to deal with the multitude of polluters. Future analysis will demonstrate whether and to what extent this concept could be applied to human rights doctrine.

Still, an autonomous right to climate protection would provide the opportunity to determine uniform standards which apply to all claims that invoke human rights violations based on the adverse effects of climate change. It would therefore guarantee a coherent application of the law suited to the specific features of climate change.

3.3. POTENTIAL AND DANGERS OF HUMAN RIGHTS EXPANSIONISM IN THE CONTEXT OF CLIMATE CHANGE

Both the emergence of a new right to climate protection and the dynamic interpretation of pre-existing human rights norms would in the end result in an expansion of the current human rights regime. The phenomenon of human rights expansion is the object of a multifaceted debate. For decades, the emergence of new human rights is the bone of contention:

‘Why speak of “new” rights when the “old” ones are not properly respected? Is there not a danger that these “new” rights will supplant the “old”? Might it not be true that the more rights introduced the less weight they carry? Does not the term “third generation” imply that the “first generation” rights have become dated?\(^{123}\)

Concerns have been raised that expanding tendencies would cause a so-called human rights overreach or overselling\(^{124}\) that could ultimately weaken their legitimacy and acceptance.\(^{125}\) In this sense, Hannum warns that ‘human rights are on the verge of becoming a victim of their own success’\(^{126}\) and that ‘the unintended consequence of this [human rights] expansion […] may be to set back an entire movement that is based on the proposition that all human beings enjoy certain universal rights that their governments must protect’.\(^{127}\) Pessimistic voices proclaim the ‘endtimes’\(^{128}\) of human rights, as others seek to ‘rescue’\(^{129}\) or ‘save’\(^{130}\) human rights from limitless expansionism.

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122. Compare Braig and Panov (n 34) 264. See also generally Franziska Martinsen and Johanna Seibt, ‘Climate Change and the Concept of Shared Responsibility’ (2013) 35(2) Environ Ethics 163.
123. NGO-UNESCO Standing Committee – Working Group on the Teaching of Human Rights, ‘The Rights of Solidarity: An Attempt at Conceptual Analysis’ (9 July 1980) UNESCO Doc. SS.80/CONF.806/6 para 5.
124. Compare Hurst Hannum, *Rescuing Human Rights – A Radically Moderate Approach* (Cambridge University Press 2019) xvii, 4. See also Joseph Raz, ‘Human Rights Without Foundations’ (2007) Oxford Legal Studies Research Paper 14/2007, 4; George Weigel, ‘Are Human Rights Still Universal’ (1995) 99 Commentary 43.
125. Compare Hannum (n 124) xvii; John Tasioulas, ‘Saving Human Rights from Human Rights Law’ (2019) 52 Vand J Transnat’l L 1167, 1185 and following.
126. Hannum (n 124) 3.
127. ibid 5; A critical assessment of the hostility regarding human rights proliferation can be found in Marks (n 49), 451 and following.
128. See Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press 2013).
129. See Hannum (n 124).
130. See Tasioulas (n 125) 1167 and following.
While some of the doomsday scenarios predicted in academia may appear to be somewhat far-fetched, the core criticism should nevertheless be taken seriously. Overburdening human rights with exaggerated expectations carries the risk that the support and acceptance of human rights institutions by Member States will crumble.\(^{131}\) An overambitious interpretation and proliferation of human rights law may on the one side cause blurred lines between human rights and human interests.\(^{132}\) On the other side, it can lead to strong criticism or – even worse – complete rejection of current human rights systems.\(^{133}\) A multitude of rights formulated in vague language could prove counterproductive when it comes to guiding States’ conduct and implementation.\(^{134}\) At the same time, the utilisation of human rights for every political agenda could lead to their ongoing dilution.\(^{135}\) As a consequence, this may lead to confusion as to the distinction between duties and pure aspirations. Thus, it would become difficult to identify one of the greatest strengths of human rights: their legally binding nature.\(^{136}\) Therefore, human rights-based approaches – whether rhetoric or legalistic – should accept that human rights are neither a panacea for all issues that arise in international law or politics\(^{137}\) nor a tool to pursue ‘all of the moral and political ideals we properly recognise’.\(^{138}\)

Still, the history of human rights illustrates their capacity to adapt to human developments and newly arising challenges.\(^{139}\) Human rights have always been part of a temporal and dynamic process.\(^{140}\) The necessity of human rights transformation and development is described by Alston, who emphasises that

‘the vitality and enduring significance of the human rights tradition depend in large measure on the extent to which it can respond to new needs and can accommodate the concern with which the majority of the peoples of the world are pre-occupied.’\(^{141}\)

As indicated by the existence of three human rights generations, new human rights norms have been the logical response to new pressing needs that arose due to human development. It stands to reason that also in the future human rights cannot be separated from continuing human

\(^{131}\) See Hannum (n 124) 166.

\(^{132}\) Tasioulas (n 125) 1179 and following, particularly 1181, 1183 and following.

\(^{133}\) See, for example, the Declaration on the Inter-American System of Human Rights, adopted on 11 April 2019 by the governments of Argentina, Brazil, Chile, Colombia and Paraguay, addressed to the Executive Secretary of the Inter-American Commission of Human Rights, available in Spanish only <www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifestan-sobre-el-sistema-interamericano-de-derechos-humanos?bclid=IwAR24ZiaqFhGrVniznEnL35X2MMu71tqy48-p2CB098cnMNleC_6OdHg&ccm_paging_p=164> accessed 11 January 2022.

\(^{134}\) See Eric A. Posner, ‘Human Welfare, Not Human Rights’ (2008) 108 Colum. L. Rev. 1758, 1779.

\(^{135}\) Fittingly, Hannum states that human rights have ‘become to mean almost anything that anyone thinks that it should mean’, Hannum (n 124) 3, 5. See also John Raz, ‘Human Rights Without Foundations’ (n 124) 15.

\(^{136}\) See Tasioulas (n 125) 1179.

\(^{137}\) See Hannum (n 124) xvii, 157. See also Tasioulas (n 125) 1191.

\(^{138}\) Tasioulas (n 125) 1191.

\(^{139}\) Marks (n 49) 439.

\(^{140}\) Compare Carl Wellmann, ‘Solidarity, the Individual and Human Rights’ (2000) 22(3) Hum Rts Q 639, 640. See also Farooq Hassan, ‘Solidarity Rights: Progressive Evolution of International Human Rights Law?’ (1983) 1 NYL Sch J Hum Rts 51, 69, 72, 73.

\(^{141}\) Philip Alston, ‘A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?’ (1982) 29 Nethl Int’l L Rev 307, 316.
development. It also follows from the fundamental nature of human rights that not every human
interest is deemed to end up as a human right.\footnote{See Marks (n 49) 451.} The UN General Assembly has therefore
adopted certain guidelines for the development of new human rights norms that require new
norms, \textit{inter alia}, to i) be consistent with the current human rights framework, ii) be of fundamental
character, iii) be sufficiently precise, iv) provide for effective implementation and v) attract broad
international support.\footnote{Compare UNGA ‘Setting international standards in the field of human rights’ (4 December 1986) UN Doc A/RES/41/
120 para 4.} While a detailed application of these guidelines to an autonomous right to
climate protection exceeds the present analysis, some conclusions can be drawn concerning the
legitimacy of such a human rights expansion.

Climate change is as an anthropogenic phenomenon part of and caused by human development.
Its devastating short and long-term effects on the whole range of human rights has resulted in new
needs and the articulation of corresponding demands for climate protection on a global scale. Since
basic human interests as life, health, food, water, or housing are affected by global warming, the
protection of the climatic system has reached fundamental importance for human beings world-
wide. In the end, climate change is caused by and affects every State and human being including
future generations, which further underlines the phenomenon’s global dimension and significance.
It would be surprising if the transformative process of human rights history skipped over climate
change of all things. While previous analysis has demonstrated that an autonomous right to
climate protection might be better suited to allow for the necessary adaptation to the specifics of
climate change, there are further advantages to a stand-alone right. If such a right were created
by amendment, it would receive the necessary support of Member States. Moreover, the enshrine-
ment of a right to climate protection – whether through amendment or progressive interpretation –
would respond to basic human needs and could provide for establishing clear legal standards so that
the corresponding States’ obligations could easily be identified.

In contrast, an adaptation of single human rights norms through expansive interpretation may
lead to varying standards depending on the right concerned and thus to a certain level of inconsist-
ency or, at worst, arbitrariness. In the end, such an interpretation also risks falling back on existing
standards applicable to natural disasters that do not do justice to climate change as a global phenom-
emon with devastating and in part irreversible consequences in the future, requiring more than con-
tingency plans or the restitution of harms that have already materialised. Even in the case that
building dikes and other adaptation measures would form part of such a dynamic interpretation,
we may still pose the question of whether the human rights dimension of climate change can be
reduced to adaptation obligations. In addition, if progressive interpretation trespasses existing stan-
dards in environmental human rights jurisprudence, it may lead to overstretching relevant interpret-
ation criteria, which would be water on the mills of already renegade States, that could feel
prompted to withdraw from existing human rights systems.

It is rather rhetorical approaches that risk mixing political aspirations with unspecific legal obli-
gations and may dilute existing human rights norms,\footnote{See also Tasioulas (n 125) 1191.} which could in the end lead to a general
weakening of the entire system. On the contrary, clear legal guidelines that use sufficiently
precise terminology with regard to human rights obligations would have the potential to strengthen
human rights protection and secure pre-existing rights. It can therefore be assumed that a future
right to climate protection would be of fundamental character and could, through sufficiently precise language generally in line with existing human rights terminology and methodology, attract broad international support.

The innovative approach applied by the German Federal Constitutional Court in its recent climate change decision could in part serve as a role model for a new right to climate protection. Particularly the carbon budget approach may help to overcome hurdles of standing and causality in light of potential future harms. While the carbon budget concept could have as well (and maybe even better) been applied to positive obligations, the reference to a variety of unspecified freedoms could speak in favour of a human right to climate protection. Where an allocation to specific rights becomes difficult, an autonomous right would be able to bundle the diverse effects on fundamental human interests through a consolidated approach.

4. CONCLUSION

Even if a right to climate protection may not remove all the dogmatic hurdles that stand in the way of a successful climate protection claim before regional and international human rights institutions, the previous analysis has shown the benefits that such a right would entail. In light of complex questions of causality, standing, or attribution, there is much to be said for a new right to climate protection. In particular, such a right could open the door for methodological adaptations necessary to capture governmental activities and omissions that are responsible for human rights violations connected to climate change.

Although every expansion of human rights law has to be cautiously weighed against the risks of dilution of existing human rights norms, the benefits of a stand-alone right in terms of methodology are also accompanied by further advantages compared to rhetorical approaches. A human right to climate protection would be based on the fundamental need of human beings seeking protection from climate change that human rights should respond to. Furthermore, the establishment of clear legal guidelines and specific State obligations would strengthen the existing corpus of human rights, while rhetorical approaches could end up confusing non-binding aspirations and political agenda with human rights law.

Still, it has to be seen which path States and human rights institutions will choose to tackle the phenomenon of climate change. It therefore remains to be seen whether regional and international human rights regimes will opt for a progressive interpretation of existing human rights norms, inspired by domestic case law, or for the establishment of an autonomous right to climate protection. The UN Human Rights Committee has made a first small step towards the solution of methodological issues in the context of climate change. Similarly, the Committee on the Rights of the Child has paved the way for innovative approaches regarding extraterritorial jurisdiction, although its decision on Sacchi et al v Argentina ended in a declaration of inadmissibility. Whereas the IACtHR has not yet had the opportunity to rule on an application based on the adverse effects of climate change, on the 13th of November 2020 the ECtHR issued a landmark communication

145. Decision of the First Senate (n 28).
146. See ibid paras 119, 185, 216.
147. See Ammar Bustami and Verena Kahl, ‘Auf den zweiten Blick – BVerfG zwischen innovativem Klimarechtsschutz und Pflicht ohne Schutz?’ (JuWiss, 7 May 2021) <www.juwiss.de/46-2021/> accessed 15 May 2021.
in which it accepted its first climate change case.\textsuperscript{148} Duarte Agostinho and Others v Portugal and 32 other States was granted priority status according to Article 41 of the Rules of Court,\textsuperscript{149} and was shortly followed by another climate change-related case.\textsuperscript{150} Therefore, there might be a chance that by next year the ECtHR will have taken a decision, revealing the standards applied to standing and, if applicable, to further issues of causality and attribution. Whatever the result, in the long run human rights law cannot escape the transformation process needed in light of a rapidly changing climate. As the world is constantly heating up, artificially freezing the existing human rights corpus could literally lead to a dead end.

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\textsuperscript{148} See Duarte Agostinho and Others v Portugal and 32 other States App no 39371/20 (ECtHR, 13 November 2020). On several hurdles, see also Ole W. Pedersen, ‘The European Convention of Human Rights and Climate Change – Finally!’ \textit{(EJIL: Talk!,} 22 September 2020) <www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 15 May 2021.

\textsuperscript{149} Duarte Agostinho and Others v Portugal and 32 other States (n 148).

\textsuperscript{150} Verein Klima Seniorinnen Schweiz and others v Switzerland App No 53600/20 (ECtHR, 26 November 2020).