



Climate Law and Litigation Recent Developments at Global Level

EUFJE Annual Conference 2022

24-25 October 2022

Conseil d'Etat – Paris – France, 1 Pl. du Palais Royal

Prof. Dr. Christina Voigt

University of Oslo, Department of Public and International Law

Chair, IUCN World Commission on Environmental Law

Co-Chair of the Paris Agreement Implementation and Compliance Committee



Recent Developments: Climate Law and Litigation

1. International Climate Law

- Paris Agreement: Normative Impacts of the Glasgow Climate Pact (2021)
- Right to a Safe, Healthy and Sustainable Environment
- Ecocide

2. International Climate Litigation

- UNHRC
- ECtHR (pending)
- ICJ AO
- ITLOS AO

3. National Climate Litigation (trends)

- **Duty of care:** Miljeudefensie vs Royal Dutch Shell, 2021
- **Inter-temporality:** BVerfG, 2021
- **Non-regression and in dubio pro natura:** District Court, Mexico, 2021
- **Extraterritoriality:** UNCRC, 2021
- **Rights of Nature:** SC of Colombia, 2018

1. International Climate Law:

1.1 Impacts of Glasgow Climate Pact (2021)

- Decision by the Conference of Parties of the PA in Glasgow
- Normative elements relevant for interpretation of Paris Agreement
 - Interpretation of **temperature goal: raise in ambition/stronger focus on 1.5°C**

Paris Agreement Article 2

1. This Agreement ... aims to strengthen the global response to the threat of climate change..., including by:

(a) Holding the **increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C** above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

Decision 1/CMA.3 (Glasgow Climate Pact)

20. *Reaffirms* the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels;

21. *Recognizes* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and **resolves to pursue efforts to limit the temperature increase to 1.5 °C**;

1. International Climate Law: Impacts of Glasgow Climate Pact (2021)

- Decision by the Conference of Parties in Glasgow
- Normative elements relevant for interpretation of Paris Agreement
 - Interpretation of **mitigation goal: in line with IPCC, more concise and need to act earlier!**

Paris Agreement Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to **undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century**, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

Decision 1/CMA.3 (Glasgow Climate Pact)

22. *Recognizes* that limiting global warming to 1.5 °C requires **rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid- century** as well as deep reductions in other greenhouse gases;

1. International Climate Law:

1.2 Right to a clean, healthy and sustainable environment



- UN Human Rights Council adopted **Resolution 48/13** (8 October 2021)
- **Recognizing** the right to a clean, healthy and sustainable environment **as a human right that is important for the enjoyment of human rights**
- **Resolution 48/14:** Establishment of a UN Special Rapporteur on climate change and human rights (Ian Fry, AUS)

1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights;
2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;
4. *Encourages* States:
 - (a) To build capacities for the efforts to protect the environment in order to fulfil their human rights obligations and commitments, and to enhance cooperation with other States, the Office of the United Nations High Commissioner for Human Rights, the rest of the United Nations system and other relevant international and regional organizations, agencies, convention secretariats and programmes, and relevant non-State stakeholders, including civil society, national human rights institutions and business, on the implementation of the right to a clean, healthy and sustainable environment, in accordance with their respective mandates;
 - (b) To continue to share good practices in fulfilling human rights obligations relating to the enjoyment of a clean, healthy and sustainable environment, including by exchanging knowledge and ideas, building synergies between the protection of human rights and the protection of the environment, bearing in mind an integrated and multisectoral approach and considering that efforts to protect the environment must fully respect other human rights obligations, including those related to gender equality;
 - (c) To adopt policies for the enjoyment of the right to a clean, healthy and sustainable environment as appropriate, including with respect to biodiversity and ecosystems;

(d) To continue to take into account human rights obligations and commitments relating to the enjoyment of a safe, clean, healthy and sustainable environment in the implementation of and follow-up to the Sustainable Development Goals, bearing in mind the integrated and multisectoral nature of the latter;

4. *Invites* the General Assembly to consider the matter;

1. International Climate Law:

1.2 Right to a clean, healthy and sustainable environment



General Assembly Meets on Peacebuilding and Human Rights. Photo by UN

- UN General Assembly adopted **Resolution 76/300 (28 June 2022)**
- **Recognizing** the right to a clean, healthy and sustainable environment as **a human right**

Noting also that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies,

1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right;
2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;
3. *Affirms* that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law;
4. *Calls upon* States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.



Item 74(b) - Draft resolution A/76/L.75

The human right to a clean, healthy and sustainable environment

AFGHANISTAN	+ CAMEROON	+ FINLAND	+ KUWAIT	+ NEPAL	+ SAUDI ARABIA	+ UKRAINE
+ ALBANIA	+ CANADA	+ FRANCE	✗ KYRGYZSTAN	+ NETHERLANDS	+ SENEGAL	+ UNITED ARAB EMIR
+ ALGERIA	CENTRAL AFR REP....	GABON	+ LAO PDR	+ NEW ZEALAND	+ SERBIA	+ UNITED KINGDOM
+ ANDORRA	+ CHAD	+ GAMBIA	+ LATVIA	+ NICARAGUA	SEYCHELLES	UNITED REP TANZA
+ ANGOLA	+ CHILE	+ GEORGIA	+ LEBANON	+ NIGER	SIERRA LEONE	+ UNITED STATES
+ ANTIGUA-BARBUDA	✗ CHINA	+ GERMANY	+ LESOTHO	+ NIGERIA	+ SINGAPORE	+ URUGUAY
+ ARGENTINA	+ COLOMBIA	+ GHANA	+ LIBERIA	+ NORTH MACEDONIA	+ SLOVAKIA	+ UZBEKISTAN
+ ARMENIA	COMOROS	+ GREECE	+ LIBYA	+ NORWAY	+ SLOVENIA	+ VANUATU
+ AUSTRALIA	CONGO	+ GRENADA	+ LIECHTENSTEIN	+ OMAN	+ SOLOMON ISLANDS	VENEZUELA
+ AUSTRIA	+ COSTA RICA	+ GUATEMALA	+ LITHUANIA	+ PAKISTAN	+ SOMALIA	+ VIET NAM
+ AZERBAIJAN	+ COTE D'IVOIRE	GUINEA	+ LUXEMBOURG	+ PALAU	+ SOUTH AFRICA	+ YEMEN
+ BAHAMAS	+ CROATIA	GUINEA-BISSAU	+ MADAGASCAR	+ PANAMA	+ SOUTH SUDAN	+ ZAMBIA
+ BAHRAIN	+ CUBA	+ GUYANA	MALAWI	+ PAPUA NEW GUINEA	+ SPAIN	+ ZIMBABWE
+ BANGLADESH	+ CYPRUS	+ HAITI	+ MALAYSIA	+ PARAGUAY	+ SRI LANKA	
+ BARBADOS	+ CZECHIA	+ HONDURAS	+ MALDIVES	+ PERU	+ SUDAN	
✗ BELARUS	DEM PR OF KOREA	+ HUNGARY	MALI	+ PHILIPPINES	+ SURINAME	
+ BELGIUM	DEM REP OF THE C...	+ ICELAND	+ MALTA	+ POLAND	+ SWEDEN	
+ BELIZE	+ DENMARK	+ INDIA	+ MARSHALL ISLANDS	+ PORTUGAL	+ SWITZERLAND	
+ BENIN	+ DJIBOUTI	+ INDONESIA	+ MAURITANIA	+ QATAR	✗ SYRIAN ARAB REP...	
+ BHUTAN	DOMINICA	✗ IRAN (ISLAMIC REP...	+ MAURITIUS	+ REP OF KOREA	+ TAJIKISTAN	
+ BOLIVIA	+ DOMINICAN REP...	+ IRAQ	+ MEXICO	+ REP OF MOLDOVA	+ THAILAND	
+ BOSNIA-HERZEGOVI...	+ ECUADOR	+ IRELAND	+ MICRONESIA (FS)	+ ROMANIA	+ TIMOR-LESTE	
+ BOTSWANA	+ EGYPT	+ ISRAEL	+ MONACO	✗ RUSSIAN FED...	+ TOGO	
+ BRAZIL	+ EL SALVADOR	+ ITALY	+ MONGOLIA	+ RWANDA	TONGA	
+ BRUNEI DARUSSAL...	+ EQUATORIAL GUINEA	+ JAMAICA	+ MONTENEGRO	SAINT KITTS-NEVIS	+ TRINIDAD-TOBAGO	
+ BULGARIA	+ ERITREA	+ JAPAN	+ MOROCCO	SAINT LUCIA	+ TUNISIA	
+ BURKINA FASO	+ ESTONIA	+ JORDAN	+ MOZAMBIQUE	+ SAINT VINCENT-GR...	TURKMENISTAN	
BURUNDI	+ ESWATINI	+ KAZAKHSTAN	+ MYANMAR	+ SAMOA	+ TUVALU	
+ CABO VERDE	✗ ETHIOPIA	+ KENYA	+ NAMIBIA	+ SAN MARINO	+ TÜRKIYE	
✗ CAMBODIA	+ FIJI	KIRIBATI	NAURU	SAO TOME-PRINCIPE	+ UGANDA	



IN FAVOUR:161



AGAINST:0



ABSTENTION:8

1.2 Some reflections

Legal status versus legal consequences

Strengthening of national laws/ constitutions

Interpretation of other human rights

Justiciability: Standard of care/threshold

1. International Climate Law:

1.3 Ecocide



Mineral extraction
Copper, iron ore and gold mining
....



....as well as oil drilling all
contribute to deforestation as
well as creating additional harm
via contamination of land and
river systems.



- Objective: criminalizing the most severe environmental harm (including significant contributions to climate change)
- Same level as most serious crimes of concern to the international community
- Amendment of the Rome Statute ICC
- Stop Ecocide Foundation (Polly Higgins, Arne Næss Chair, UiO, 2014)

1.3 International Expert Panel



1.3 Defintion

Article 8 ter

Ecocide

1. *For the purpose of this Statute, “ecocide” means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.*
2. *For the purpose of paragraph 1:*
 - a. *“Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;*
 - b. *“Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;*
 - c. *“Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;*
 - d. *“Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;*
 - e. *“Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.*

1.3 Ecocide: Some reflections

Long process, increasing political support

Criminalization: important signal/ change of consciousness

Ecocentric or anthropocentric?

Legal actions and illegal actions?

Changes to national Penal Codes

Effective prosecution must be ensured by taking measures at the national level

2. International Climate Litigation

2.1 UNHRC



**Daniel Billy at al. versus
Australia (“Torres Strait
Islanders case”) UN Human
Rights Committee,
23 September 2022**

- States are obliged to take “timely and adequate” adaptation measures to protect the right of life, private life and culture (ICCPR)
- Australia has violated this obligation

2. International Climate Litigation

2.2 ECtHR

Ground-breaking crowdfunded case demands that states make more ambitious emissions cuts



▲ A wildfire in Monchique in Portugal in 2018. The case was initiated in 2017 after devastating forest fires in Portugal killed over 120 people. Photograph: Filipe Farinha/EPA

- Duarte Agostinho and Others v. Portugal and 32 Other States
- Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others
- Mex M. v. Austria
- Greenpeace Nordic Ass'n v. Norway (Norwegian Ministry of Petroleum and Energy)
- Grand-Synth v. France

2. International Climate Litigation

2.3 ICJ



Climate activists call on Pacific Islands leaders to endorse Vanuatu's push for the International Court of Justice to issue an advisory opinion on climate change in Suva, Fiji on July 9, 2022. Courtesy of Greenpeace Australia Pacific

- Vanuatu, supported by CARICOM
- Advisory Opinion ICJ
- UNGA (tabled October 2022)
- Question: States obligations to protect current and future generations against the consequences of climate change?

2. International Climate Litigation

2.4 ITLOS



Media Release

Commission of Small Island States on Climate Change and International Law (COSIS) approves Plan of Action

Three Heads of Government met virtually on 26 August 2022 to pursue ways by which international law could be utilized to secure compensation for damage caused to small island states by Climate Change.

The Heads of Government of Antigua and Barbuda, Tuvalu and Palau gathered under the umbrella organisation, 'The Commission of Small Islands States on Climate Change and international law', which was established last November prior to the opening of the COP-26 meeting in Glasgow.

Reaffirming their determination to pursue climate justice for their countries and other small island states, which are amongst the greatest victims of Climate Change, the Co-Chairs of the Commission conferred with a group of 14 international lawyers who are highly experienced in matters related to loss and damage, sea-level rise, marine environment, and human rights.

The distinguished group of lawyers reported to the leaders on their research activities and a plan of action that is being developed.

The leaders, Prime Minister Gaston Browne (Antigua and Barbuda), Prime Minister Kauea Natano (Tuvalu) and President Surangel Whipps Jr. (Palau), welcomed the report of the expert group of lawyers and approved their recommendations.

The Commission also expressed full support for the separate, parallel initiative of Vanuatu to request an Advisory Opinion on climate change from the International Court of Justice.

Noting that other small island states have indicated interest in joining the Commission, the leaders encouraged all affected states to join their effort to address the urgent and fundamental injustice in which they bear a disproportionate and overwhelming burden resulting from climate change.

The leaders also decided to establish three working groups, comprising members of the groups of expert international lawyers and representatives of member governments, to advance the objectives of the Commission.

- COSIS (Barbuda, Palau, Tuvalu)
- Commission established at margins of COP26 in Glasgow (2021)
- Objective:
 - Advisory Opinion (International Tribunal on the Law of the Sea/UNCLOS, arts. 192 and 194)

2.4 ITLOS AO

31 October 2021

AGREEMENT FOR THE ESTABLISHMENT OF THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW

Article 2

Activities and authority of the Commission

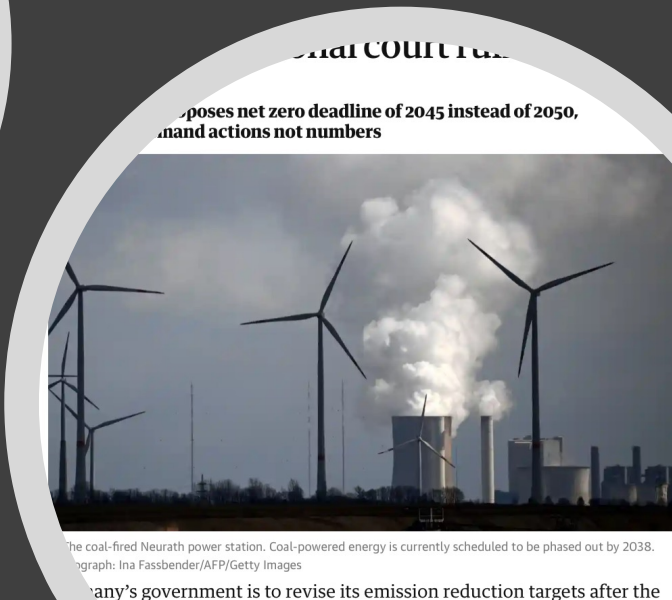
- (1) The activities of the Commission shall include *inter alia* assisting Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals.
- (2) Having regard to the fundamental importance of oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States, the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (“ITLOS”) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea, consistent with Article 21 of the ITLOS Statute and Article 138 of its Rules.



3. National Climate Litigation (Some Trends)

- **Duty of care of private actors**
- **Inter-temporality of rights**
- **Non-regression**
- **In dubio pro natura**
- **Extraterritoriality**
- **Rights of Nature**

- **Duty of care** for private companies along the entire production and supply chain: *Miljeudefensie vs Royal Dutch Shell* (Hague District Court, 2021) under appeal
- **Inter-temporality of freedom rights**, allocation of climate mitigation burdens equally over time: (*Neubauer vs Germany*, BVerfG, Germany, 2021)
- **Extraterritoriality**: States' have the obligation to take effective climate measures to protect children's UNCRC rights, also outside their state territory (*Sacchi et al. v. Argentina et al.* (UNCRC, 2021)



Non-regression (as well as in dubio pro natura, civic participation, and inclusion of future generations): withdrawal of licences for renewable energy projects, promotion of oil production instead: violating Art. 4.3 of Paris Agreement, and any unjustified and significant decrease in the level of environmental protection achieved will affect the heritage to be passed on to the next generation: *Greenpeace v. Instituto Nacional de Ecología y Cambio Climático and Others*, Eleventh Collegiate Court of the First Circuit in Administrative Matters, Mexico (2021) under appeal

Rights of Nature: “recognize the Colombian Amazon as an entity, *subject of rights*, and beneficiary of the protection, conservation, maintenance and restoration” that national and local governments are obligated to provide under Colombia’s Constitution”: *Demanda Generaciones Futuras v. Minambiente*, SC of Colombia (2018)



A close-up photograph of a hand holding a thin plant stem. The background is a soft-focus bokeh of green leaves and branches, suggesting an outdoor setting. The lighting is warm and natural, creating a gentle, appreciative atmosphere.

Thank you for your
attention!
