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Staying within Atmospheric and Judicial Limits

Core Principles for Assessing Whether State Action on Climate Change Complies with Human Rights

SOPHIE MARJANAC AND SAM HUNTER JONES

7.1 INTRODUCTION

We have a right to practise our culture and to practise it here, in our traditional homeland, where we belong. Our culture has a value to us that no money could ever compensate for. Our culture starts here on the land. It is how we are connected with the land and the sea. You wash away the land and it is like a piece of us you are taking away from us. The impact of climate change on our culture – sea levels rising, coastal erosion, the effect of climate change and coral bleaching on our practices connected with the sea – it is beyond one's understanding.

Kabay Tamu (Warraber)

Climate change threatens human rights around the world by increasing the frequency and intensity of extreme weather events and through the degradation of the environmental resources on which human populations depend.[1] For some particularly vulnerable populations, however, climate

[1] The most comprehensive and internationally accepted assessments of the science of climate change are those of the Intergovernmental Panel on Climate Change (IPCC), an international organization established in 1988 that has 195 member States. The IPCC issues assessment reports synthesizing the state of knowledge in the field of climate change science. At the time of writing, the most recent was its Fifth Assessment Report (AR5) issued in 2014. The AR5 finds that climate change will have the following effects on human systems: it is very likely that heat waves will occur more often and last longer and that extreme precipitation events will become more intense and frequent in many regions. The ocean will continue to warm and acidify, and global mean sea level will rise. Low-lying areas are at risk from sea-

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change represents a critical and immediate threat to both their subsistence and their way of life. Indigenous Australians living on the tiny, remote islands of the Torres Strait are already living with the effects of climate change, with sea level rise literally eroding their cultural heritage and threatening their most basic fundamental human right – their right to enjoy and subsist from their territorial homeland.

This chapter begins by discussing the approach to interpreting and applying human rights law taken in a communication to the Human Rights Committee by a group of Torres Strait Islanders against their home state, Australia. The Islanders allege that by failing to implement sufficient climate change policies, Australia has failed to respect and ensure the protection of their civil and political rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR). Specifically, they allege infringements of the right to life, the right to protection from arbitrary or unlawful interference with privacy, family and home, the rights of the child, and the right of minorities to enjoy and practise their culture (Articles 6, 17, 24, and 27 of the ICCPR).

level rise, which will continue for centuries even if global mean temperature is stabilized (high confidence). It is virtually certain that global mean sea-level rise will continue for many centuries beyond 2100 (the amount will depend on future emissions). Over the course of the twenty-first century, climate change is expected to lead to increases in ill-health in many regions, especially in developing countries with low incomes (high confidence). The negative impacts of climate change on crop yields, across a wide range of regions and crops, have been more common than positive impacts (high confidence). Climate change is projected to increase risks in urban areas for people, assets, economies, and ecosystems, including from heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, water scarcity, sea level rise, and storm surges (very high confidence). These risks are amplified for those lacking essential infrastructure and services or living in exposed areas. See 'Climate Change 2014: Synthesis Report (AR5 Synthesis Report)' (2014) Intergovernmental Panel on Climate Change (IPCC) 4, 6, 8, 10, 13, 15–16. The more recent IPCC Special Report on Global Warming of 1.5°C, published in October 2018, describes the 'robust differences' in climate impacts between present-day warming and warming of 1.5°C and between 1.5°C and 2°C. See 'Special Report on Global Warming of 1.5°C (SR15) (Summary for Policymakers, B.1)' (2018) Intergovernmental Panel on Climate Change (IPCC). It finds that 'limiting global warming to 1.5°C, compared with 2°C, could reduce the number of people both exposed to climate-related risks and susceptible to poverty by up to several hundred million by 2050' (ibid. B.5.1) and that 'there are limits to adaptation and adaptive capacity for some human and natural systems at global warming of 1.5°C, with associated losses' (ibid. B.6).

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Although there is growing state,[2] judicial,[3] institutional,[4] and academic[5] acceptance of states' responsibilities to guarantee protection from climate change-related harms under human rights law, there has been more limited discussion of how in practice courts (and other bodies) might approach adjudicating the effectiveness of states' climate policies. We have therefore sought in this chapter to outline possible approaches that judges and other adjudicators can take in this context, with a focus on certain 'core' assessment criteria that should be capable of near-universal application, that is, even in jurisdictions with the strongest separation of the judicial and political branches of the state. Many jurisdictions or fora may well provide scope for more intense and detailed legal scrutiny, but this chapter seeks to explore principles of general application across legal systems.

As we will explain, the task of assessing state action on climate change is aided by the comprehensive system of greenhouse gas accounting and reporting under the United Nations Framework Convention on Climate

[2] In December 2019, at the 25th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) (COP25), Chile, Costa Rica, Fiji, Luxembourg, Mexico, Monaco, Nigeria, Peru, Sweden, Slovenia, Spain, and Uruguay signed a Declaration on Children, Youth and Climate Action, acknowledging the negative impacts of climate change on children's rights and that 'a safe climate is a vital element of the right to a safe, clean, healthy and sustainable environment and is essential to human life and well-being'. See details at 'Declaration on Children, Youth and Climate Action', Children's Environmental Rights Initiative, <https://www.childrenvironment.org/declaration-children-youth-climate-action>.

[3] See HR 20 december 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.) (hereinafter *Urgenda*); See *Föreningen Greenpeace Norden v. Norway*, 18-060499ASD-BORG/3 at 20 (23.01.2020) (Borgarting Lagmannsrett).

[4] See 'Understanding Human Rights and Climate Change' (2015) Office of the High Commissioner for Human Rights (OHCHR), <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>; see also Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities, 'Joint Statement on Human Rights and Climate Change', United Nations Human Rights, 16 September 2019, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>; see also Special Rapporteur on Human Rights and the Environment 'Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment' (2019) UN Human Rights, <https://www.unenvironment.org/resources/report/safe-climate-report-special-rapporteur-human-rights-and-environment>.

[5] See Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (Oxford: Hart, 2018); see also Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 *International and Comparative Law Quarterly* 759; see also John Knox 'Human Rights Principles and Climate Change,' in Kevin R. Grey et al. (eds.), *Oxford Handbook of International Climate Change Law* (Oxford: Oxford University Press, 2016); see also Kate Cook, 'A Mutually Informed Approach: The Right to Life in an Era of Pollution and Climate Change' (2019) 24 *European Human Rights Law Review* 274.

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Change (UNFCCC) and, in particular, by the terms of the 2015 Paris Agreement,[6] which sets an overarching global temperature goal and requires state signatories to ensure that their emission reduction policies reflect their 'highest possible ambition'.[7] We argue that these generally accepted legal, as well as technical and scientific, frameworks give judges and other adjudicators a reliable basis on which to assess a state or public body's climate policy and compliance with international, regional, or domestic human rights law. In particular, 'due diligence' principles and internationally accepted climate change science allow human rights courts and other adjudicators to develop and apply coherent and objective assessment criteria, something that they are well used to doing in relation to other rights violations.

Before turning to these general principles, we discuss a recent case – brought against Australia by a group of Torres Strait Islanders – to illustrate both (i) the wide range of human rights that can be, and are already being, affected by climate change and (ii) how well-established human rights law principles can be used to judge the adequacy of states' climate policy.

7.2 THE TORRES STRAIT CLIMATE CASE

On 13 May 2019, eight individuals (formally called 'authors') filed a communication under the Optional Protocol to the ICCPR with the United Nations Human Rights Committee (HRC), both on their own and on behalf of six of their minor children. The authors are from four small low-lying island communities (Boigu, Poruma, Masig, and Warraber) in the Torres Strait region, which is a narrow strip of sea between the State of Queensland and Papua New Guinea. Torres Strait Islanders are, together with mainland Aboriginal peoples, recognized as Australian first nations indigenous peoples, with their traditional rights to land ownership recognized by the Australian government and in Australian law.[8] The authors' ancestors have inhabited their islands for

[6] See the Paris Agreement under the United Nations Framework Convention on Climate Change, Art. 13, 12 December 2015, TIAS No. 16-1104.

[7] These are known as 'Nationally Determined Contributions' (NDCs) per Article 4 of the Paris Agreement. Each State party must submit an updated, and increasingly ambitious, NDC every five years as part of the global stocktake established by Articles 4(9) and 14. As Professor Alan Boyle argues: 'the Paris Agreement is important precisely because it provides a clearer yardstick by which to measure . . . detrimental [environmental and human rights] impact than previous climate change agreements have done'. Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 *International and Comparative Law Quarterly* 759.

[8] See *Mabo* v. *State of Queensland (No 2)*, [1992] 175 CLR 1; see also *Native Title Act 1993* (Cth) (Austl.).

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over 9,000 years, developing a deep spiritual connection to their lands and a rich and vibrant cultural tradition that is still proudly practised today.[9]

The effects of climate change on the authors, their children, and their communities are severe and predicted to worsen. Each of the authors' home islands are between approximately three and ten metres above sea level, and some are already subject to regular inundation at the highest tides. Expert scientific evidence predicts that the continued viability of each island community will be threatened in the next ten to thirty years, primarily due to sea level rise, which will cause unavoidable saltwater incursion into critical infrastructure, including that related to water supplies and sewerage. Residents currently experience anxiety as inundation and storm surges erode their lands, damaging important cultural heritage sites, such as cemeteries and burial grounds, as well as gardens and homes. Elders also speak with remarkable consistency about the impact of a changing climate on seasonal patterns and traditional ways of life, which are deeply intertwined with the predictable rhythms of weather and the associated cycles of local flora and fauna. Coral bleaching has also affected critical marine resources, such as the fisheries on which islanders depend for subsistence, and the region's main industry, the tropical rock lobster (*panulirus ornatus*) fishery. It is also further depleting endangered turtle and dugong populations, which are important animals to Torres Strait Islanders spiritually, culturally, and ceremonially.[10]

All of the authors have provided evidence to the HRC that the degradation of natural sea and land resources is causing an irreparable loss of culture, damaging their sense of dignity and identity as a people, and affecting their ability to pass their culture on to their children. The evidence provided to the HRC describes in detail how damage to biodiversity and the disruption of predictable seasonal patterns affects traditional ecological knowledge, which is the fundamental basis of the authors' unique culture. Author Keith Pabai of Boigu summarizes the deep connection of the authors to their lands and the interdependency between the people and the natural environment of the islands:

> we as a people are so connected to everything around us. The Island is what makes us, it gives us our identity. We know everything about the

[9] See, e.g., 'Culture Art and Heritage', Torres Strait Regional Authority (TSRA), <http://www.tsra.gov.au/the-tsra/programmes/culture-arts-and-heritage/>; see also Gab Titui Cultural Center, <http://www.gabtitui.gov.au/>.

[10] 'Torres Strait Climate Change Strategy 2014–18: Building Community Adaptive Capacity and Resilience' (2014) Torres Strait Regional Authority, <http://www.tsra.gov.au/__data/assets/pdf_file/0003/7419/TSRA-Climate-Change-Strategy-2014-2018-Upload4.pdf>.

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> environment on this island, the land, the sea, the plants, the winds, the stars, the seasons …. Our whole life comes from the island and the nature here, the environment. It is a spiritual connection. We know how to hunt and fish from this island – to survive here. We get that from generations of knowledge that been passed down to us. I know every species of plant, animal, wind on this island, the way the vegetation changes, what to harvest at different times of the year. That is the cultural inheritance we teach our children. It is so important to us, this strong spiritual connection to this island, our homeland.

The authors' claim is also supported by evidence that erosion due to rising seas and storm surges is impacting cultural heritage, including recent damage to ancient graves and cemeteries, coconut plantations, and other important community sites and resources. The damage to cemeteries and graves is particularly acute and distressing for Torres Strait Islanders, who have cultural obligations to tend to and protect their ancestors' graves.

Finally, the authors' evidence also explains how forced displacement and dispossession due to rising seas would cause an irreparable loss of culture and damage to their sense of identity as Indigenous people, expressed by Yessie Mosby of Masig as follows:

> our land is the string connecting us to our culture. It ties us to who we are. If we were to have to move we would be like helium balloons disconnected from our culture. Our culture would become extinct. We would be a dying race of people.

Given the severity of the situation, the Torres Strait Regional Authority (TSRA), an Australian government organ based in the region, warns that climate change threatens 'a looming human rights crisis' for the Torres Strait.[11]

The authors allege that Australia is obliged under the ICCPR to ensure that their rights are protected by (i) adopting policies and measures that facilitate their safe continued habitation of the islands by protecting their islands from rising seas and other climate impacts (the Adaptation Claim) and (ii) adopting and implementing sufficient national emission reduction policies to address the cause of the issue (the Mitigation Claim).

In relation to the Adaptation Claim, the authors argue that the State party must, at a minimum:

[11] Ibid. iii.

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- immediately provide AUD $20 million of emergency sea wall funding requested by the Torres Strait Island Regional Council (which was promised by the Australian government on 18 December 2019);[12]
- commission a comprehensive and fully costed study of all coastal defence and resilience measures available in respect of each island, with the primary objective being to avoid the communities' forced displacement from their islands and to minimize erosion and inundation as far as possible; and
- implement fully and expeditiously coastal defense and resilience measures based on that study in consultation with the island communities, while monitoring and reviewing the effectiveness of those outcomes and resolving any deficiencies as soon as practicable.[13]

In relation to the Mitigation Claim, they argue that Australia must, at a minimum:

- remain a party to the UNFCCC and the Paris Agreement and participate in good faith in the processes and mechanisms established therein, cooperating with other countries in order to achieve the temperature and emissions reduction goals in Articles 2 and 4 of the Paris Agreement;
- comply with the terms of the Paris Agreement and accordingly increase its nationally determined contribution (NDC) in 2020 in line with an assessment of all appropriate means available, applying its maximum available resources. In line with the advice of the Australian Climate Change Authority, this should result in an increase from the current target of between 26 and 28 per cent below 2005 levels by 2030 to at least 65 per cent by 2030 and net zero by 2050;[14]

[12] Shahni Wellington, 'Funding to Build Seawalls in the Torres Strait, amidst Calls for Climate Change Action', National Indigenous Television, 22 December 2019, <https://www.sbs.com.au/nitv/article/2019/12/22/funding-build-seawalls-torres-strait-amidst-calls-climate-change-action>.

[13] Of the 127 adaptation tasks identified in the Torres Strait Regional Adaptation and Resilience Plan 2016–2021, 5 had been completed, 58 were partially complete, and 59 had not commenced.

[14] On 31 December 2020, the Australian Government submitted its updated NDC to the UNFCCC, without an increase in its 2030 target or any strategy or long-term target for 2050. See: <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Australia%20First/Australia%20NDC%20recommunication%20FINAL.PDF>. The Climate Action Tracker found that despite Australia's submission claiming that it will 'overachieve' its current target, this 'has little or no basis in fact'. See 'Australia repeats old target with no increase in ambition', Climate Action Tracker, <https://climateactiontracker.org/climate-target-update-tracker/australia/>.

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- put in place and pursue measures (including laws, policies, and practices) that are sufficient to achieve its NDC (without carrying over credits from the Kyoto Protocol regime);[15] and
- cease all policies actively promoting the use of thermal coal in electricity generation (both domestically and internationally) and phase out all coal mining as soon as possible (taking into account the need for a just transition for coal mining communities).

The communication also includes detailed submission and authoritative expert evidence demonstrating that Australia is a global 'climate laggard' when compared to other countries of similar size and wealth. As reflected in the authors' Mitigation Claim, the claim also relies in part on recommendations made by the Climate Change Authority, an independent statutory authority established to advise the Australian government on climate change policy. In July 2015, ahead of the Conference of the Parties at which the Paris Agreement was reached (and at which the 'highest possible ambition' standard was set), the Authority recommended that Australia pursue an emissions reduction target for 2030 of between 45 and 65 per cent below 2005 levels. The Authority concluded that such a target would be both fair and feasible, and 'no more challenging that the targets many other developed countries have been pursuing'.[16]

The communication argues that in order to meet their human rights obligations under the ICCPR in the context of climate change, states must – at a minimum[17] – comply with applicable international climate change law, being the UNFCCC and Paris Agreement. The communication argues that these international law regimes should inform the Committee's interpretation and application of the ICCPR, applying Article 31(3)(c) of the Vienna

[15] See Ben Doherty, 'Australia Won't Use Kyoto Carryover Credits to Meet Paris Climate Targets, Scott Morrison Confirms', *The Guardian*, 11 December 2020, <https://www.theguardian.com/world/2020/dec/11/australia-wont-use-kyoto-carryover-credits-to-meet-paris-climate-targets-scott-morrison-confirms>.

[16] See Australia Climate Change Authority, 'Final Report on Australia's Future Emissions Reductions Targets,' (2015) Australian Government 6 and figure 2, <https://www.climatechangeauthority.gov.au/news/final-report-australias-future-emissions-reduction-targets>.

[17] This is further reinforced in this case by the science on 1.5°C of warming and its impact on the population of the Torres Strait Islands. In addition to local impact reports and projections, this is also reflected in the most recent international science: see, e.g., IPCC, 'Special Report on Global Warming of 1.5°C', above note 1, Summary for Policymakers, B.6.2: 'Some vulnerable regions, including small islands and Least Developed Countries, are projected to experience high multiple interrelated climate risks even at global warming of 1.5°C (high confidence).'

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Convention on the Law of Treaties.[18] The communication also argues that the Committee's approach to assessing compliance with the ICCPR should be informed by general norms of international law, including the precautionary principle and due diligence standard. This is in line with the clear guidance provided by the HRC's General Comment 36 on the Right to Life, finalized in October 2018, which states that:

> Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[19]

[18] Article 31 provides in relevant part:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; (1969) 8 ILM 679; UKTS (1980) 58.

[19] Human Rights Committee, 'General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life', UN Doc. CCPR/C/GC/36 (15 October 2018), pp. 14–15, <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf>.

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7.3 AN EMERGING JURISPRUDENCE

While many aspects of the Torres Strait Climate Case are novel, it presents the same fundamental question to the adjudicating body as any other climate case against a state: is there a standard that is amenable to legal analysis and judicial enforcement by which the state's conduct can be judged? Alongside a dramatic increase in the number of climate-related cases and decisions in recent years,[20] a common approach to this question has started to emerge through a series of prominent decisions, each finding that such a standard does exist. However, it is also the case that some courts continue to take a starkly contrasting view, as exemplified by a recent North American judgment.

In *Juliana* v. *United States*, a group of young people brought a challenge against the US federal government under the US Constitution, including in respect of their rights to life, liberty, and property. The plaintiffs sought (*inter alia*) an injunction requiring the US federal government to:

> prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.[21]

The majority of the United States Federal Ninth Circuit Court decided that the plaintiffs did not have standing on the basis that their claims were not amenable to resolution by the courts. They found that although 'there is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change', it was beyond the power of the federal court to order the production of such a remedial plan. The judges found that the plan would 'necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches'.[22] The minority judge, District Judge Staton, disagreed with this conclusion. She found that the '*Constitution* does not condone the Nation's wilful destruction' and that 'a federal court need not

[20] See Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (2020) Grantham Research Institute on Climate Change, <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/>.

[21] First Amended Complaint, *Juliana* v. *United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/57a35ac5ebbd1ac03847eece/1470323398409/YouthAmendedComplaintAgainstUS.pdf>.

[22] *Juliana* v. *United States*, 947 F.3d 1159 (9th Cir. 2020).

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manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief'.[23]

In *Urgenda Foundation* v. *Netherlands*,[24] the Supreme Court of the Netherlands considered Urgenda's request for a slightly different remedy – a minimum level of emission reductions across the Dutch economy by a given date[25] – and rejected the state's argument that this would wrongly infringe on the state's margin of discretion and power to legislate.[26] In determining the Dutch state's compliance with Articles 2 and 8 of the European Convention on Human Rights (ECHR), the Dutch Supreme Court found that judges can define the concept of a 'minimum fair share' of emission reductions, 'in accordance with the widely supported view of states and international organizations, which view is also based on the insights of climate science'. Applying the jurisprudence of the European Court of Human Rights and the requirement to observe due diligence and pursue good governance, the Dutch Supreme Court considered that the question was 'whether there are sufficient objective grounds from which a concrete standard can be derived in the case in question'. And whilst the Court noted that courts must observe restraint in such cases, the state 'must properly substantiate that the policy it pursues meets the requirements to be imposed'.[27]

A similar view was also recently taken by the Norwegian courts in a case brought under Article 112 of the Norwegian Constitution[28] by the NGOs Nature and Youth and Greenpeace Nordic. The claimants argued that the issuing of various oil and gas production licences in the Barents Sea infringed human rights protected by the Norwegian Constitution and the ECHR due

[23] Ibid.

[24] See HR 20 December 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.).

[25] The remedy sought was an order directing the state to reduce the emission of greenhouse gases so that, by the end of 2020, those emissions will have been reduced by 40 per cent, or in any case at by at least 25 per cent, compared to 1990. The Dutch Supreme Court granted an order directing the state to reduce greenhouse gases by the end of 2020 by at least 25 per cent compared to 1990.

[26] *Urgenda*, above note 3, at ¶¶3.4, 3.5.

[27] Ibid. at ¶¶6.3–6.5.

[28] Article 112 of the Norwegian Constitution: 'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles.'

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to the climate change impacts of the related oil and gas extraction.[29] The Norwegian Court of Appeal found that it was able to set limits on political action when the matter involves protecting constitutionally established values, with the question being the measure of discretion allowed to the authorities or 'where the threshold for review lies'.[30] Importantly, although the court declined to grant the claimants relief, it found that the Paris Agreement could 'contribute to clarifying what is an acceptable tolerance limit and appropriate measures'[31] for state action to protect the environment. The court also found that the impacts of 'downstream' emissions generated extra-territorially (outside of Norway) from the combustion of Norwegian oil and gas would need to be considered at a later stage by the government under the environmental assessment regulations and Article 112 of the Norwegian Constitution, including with respect to the rights of future generations. The Court of Appeal's decision was subsequently upheld by the Supreme Court, albeit with a dissenting minority of the court finding that the government's failure to assess the climate impacts of downstream emissions did amount to a breach of environmental assessment regulations, read in conjunction with Article 112.[32]

In *Friends of the Irish Environment* v. *Ireland*, the Irish Supreme Court quashed the Irish government's National Mitigation Plan on the basis that it failed to comply with the requirements of the governing legislation, the Climate Action and Low Carbon Development Act 2015. And while the court found that the claimant did not have standing to pursue claims under the ECHR or the Irish Constitution, it expressly affirmed the court's role in reviewing even complex areas of government policy where such policies may infringe rights:

> It is again important to reiterate that questions of general policy do not fall within the remit of the courts under the separation of powers. However, if an individual with standing to assert personal rights can establish that those rights have been breached in a particular way (or, indeed, that the Constitution is not being complied with in some matter that affects every citizen equally as occurred in Crotty v An Taoiseach [1987] I.R. 713), then the

[29] See *Föreningen Greenpeace Norden* v. *Norway*, 18-060499ASD-BORG/3 at 20 (23 January 2020) (Borgarting Lagmannsrett), <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200123_HR-2020-846-J_judgment.pdf>.

[30] Ibid. p. 19.

[31] Ibid. p. 22, §2.4.

[32] See *Föreningen Greenpeace Norden* v. *Norway*, HR-2020-2472-P (20-051052SIV-HRET) (22.12.2020), <https://www.domstol.no/en/Enkelt-domstol/supremecourt/rulings/2020/supreme-court-civil-cases/hr-2020-2472-p/>.

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> Court can and must act to vindicate such rights and uphold the Constitution. *That will be so even if an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy. Constitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes. There are undoubtedly matters which can clearly be assigned to one or other. However, there are also matters which may involve policy, but where that policy has been incorporated into law or may arguably impinge rights guaranteed under the Constitution, where the courts do have a role.*[33]

More recently, the German Constitutional Court issued its judgment in *Neubauer, et al.* v. *Germany*, in which the claimants challenged the lawfulness of the German government's emission reduction commitments. The Court held that the Federal Climate Change Act violated the German Constitution (or 'Basic Law') by failing to ensure that the fundamental freedoms of future generations were not disproportionately affected. This interference on the rights of future generations was held to stem from a failure to initiate and plan for emissions reductions in good time, and specifically by failing to provide for emissions reduction targets covering the period from 2031:

> Art. 20a of the Basic Law obliges the state to take climate action. This includes the aim of achieving climate neutrality. . . .
>
> Art. 20a of the Basic Law is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations.
>
> Compatibility with Art. 20a of the Basic Law is required in order to justify under constitutional law any state interference with fundamental rights.
>
> Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future. Furthermore, in its objective dimension, the protection mandate laid down in Art. 20a of the Basic Law encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence. Respecting future freedom also

[33] See 'Friends of the Irish Environment v. Ireland' (emphasis added), Sabin Center for Climate Change Law, <http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/> for the Supreme Court judgment and ¶8.16 therein.

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> requires initiating the transition to climate neutrality in good time. In practical terms, this means that transparent specifications for the further course of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty.[34]

Despite this series of high-profile decisions that have recognized courts' ability to assess the lawfulness of climate policy, there remains a possibility that other courts and adjudicators will follow the approach taken by the Federal Ninth Circuit in *Juliana* for fear of overstepping their remit. Accordingly, as constitutional and human rights courts and adjudicators around the world are asked to adjudicate more and more frequently states' emissions reduction policies,[35] we have sought to show in the remainder of this chapter how even the most conservative of courts can proceed to decide such cases, irrespective of the potential novelty of the claims' subject matter. Indeed, as we set out in Section 7.4, there are a range of well-established judicial tools that can be used to adjudicate these potentially novel and complex issues. These are based on, or consistent with, existing international and human rights law, including the concept of due diligence.

7.4 CORE ASSESSMENT PRINCIPLES

As discussed above, the obligations contained in the Paris Agreement can act as a helpful guide to the minimum standard expected of states in respect of their climate mitigation policy.[36] This does not mean that 'compliance' with the Paris Agreement simply substitutes for compliance with a state's human rights obligations – rather that existing principles and legal commitments made by states can assist in assessing whether a state's conduct has infringed the human rights of individuals.

[34] BVerfG, Beschluss des Ersten Senats vom 24. März 2021 – 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 - Rn. (1-270), <http://www.bverfg.de/e/rs20210324_1bvr265618en.html>, Official translation, pp 1–2.

[35] See Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Litigation?' (2018) 7 *Transnational Environmental Law* 37. This article describes cases based on human rights standards being brought or proposed in the following countries: Colombia, Norway, Austria, Belgium, France, Germany, Italy, Switzerland, Mexico, South Korea, Australia, the United States, Czech Republic, Canada, and Peru.

[36] Given the near-universal adoption of the Paris Agreement, the Agreement's standard-setting function may also be capable of applying in jurisdictions that have not themselves adopted it.

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The Agreement has been called a 'hybrid' agreement of both top-down and bottom-up governance,[37] with states determining their own NDCs within the constraint that their contributions must:

(i) 'represent a progression' over time (the principle of upward only progression or non-regression)[38]; and
(ii) reflect a party's 'highest possible ambition'.[39]

'Highest possible ambition' means that states must assess their capacity to reduce emissions to the maximum extent possible, which can be equated to the 'due diligence' and 'best efforts' standards in international law. As Christina Voigt explains:

> It implies that every State ought to act according to its best capabilities, or 'to do as well as they can'. In other words, every State is required to exert its best possible efforts and to take all appropriate measures to holding the increase in temperatures well below 2°C.[40]

The requirement to take 'all appropriate measures' also exists in international human rights law. In the recent case of *Portillo Cáceres and others* v. *Paraguay*, for example, the Human Rights Committee held that:

[37] See Harro van Asselt and Thomas Hale, 'Maximizing the Potential of the Paris Agreement: Effective Review in a Hybrid Regime' (2016) Stockholm Environment Institute.

[38] Article 4(9) requires state parties to present new and updated NDCs every five years in accordance with the global stocktake established by Article 14, which is intended to create an 'international normative pull' per Christina Voigt and Felipe Ferreira, '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285.

[39] The concept of common but differentiated responsibilities (CBDR) of the UNFCCC is retained in Article 4(3), with developed countries expected to take the lead in making the deep emissions reductions of Article 4(4). However, the Annex 1 and 2 distinction of the Kyoto Protocol, whereby developed countries were required to make specific reductions, has been abandoned on favor of this more flexible approach. See ibid. 294.

[40] Christina Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?' (2016) 26 *Questions of International Law, Zoom-in* 17, 26–27. See also ibid. 21-22: 'The provision expresses the requirement that Parties will deploy their best efforts in setting their national mitigation targets and in pursuing domestic measures to achieve them . . .. As a result, each Party commits to taking all appropriate measures at its disposal. This would require defining the highest possible mitigation target that is not economically disproportionately burdensome or impossible to achieve. Such a target should be comprehensive and based on a thorough assessment of mitigation options in all relevant sectors. Parties would need to deploy all political, legal, socio-economic, financial and institutional capacities and possibilities in defining such target. Moreover, Parties would need to plan their climate strategies holistically and within a long-term time frame.'

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> States parties should take all appropriate measures to address the general conditions in society that may give rise to threats to the right to life or prevent individuals from enjoying their right to life with dignity, and these conditions include environmental pollution.[41]

These requirements are also similar to states' obligations in international human rights law to devote their 'maximum available resources' to avoiding the violation of rights.[42] In particular, under Article 2(1) of the Covenant on Economic, Social and Cultural Rights, states must take 'deliberate, concrete and targeted measures, making the most efficient use of available resources, to move as expeditiously and effectively as possible towards the full realization of rights'.[43] The way that this provision has been interpreted by human rights courts and treaty body committees is also instructive. In assessing compliance with this obligation, courts and treaty body committees have established the concept of a 'minimum core obligation',[44] against which it is possible to identify instances of non-compliance objectively while respecting a state's

[41] Human Rights Committee, Views Adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2751/2016, ¶7.3 Communication No. 2751/2016, 25 July 2019 ('*Portillo Cáceres and others* v. *Paraguay*').

[42] See, e.g., Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', ¶48, 11 February 2016, UN Doc. A/HRC/31/52 ('This distinction is relevant to all of the human rights obligations of States in relation to climate change, including the duty of international cooperation. As in human rights law generally, some of these obligations are of immediate effect and require essentially the same conduct of every State. For example, every State must respect the rights of free expression and association in the development and implementation of climate-related actions. At the same time, the implementation of other responsibilities – e.g., efforts to reduce emissions of greenhouse gases – can be expected to vary based on differing capabilities and conditions. Even in such cases, however, each State should do what it can. More precisely, consistent with article 2[1] of the International Covenant on Economic, Social and Cultural Rights, each State should take actions "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means".'); see also Committee on Economic, Social and Cultural Rights, 'Climate Change and the International Covenant on Economic, Social and Cultural Rights', ¶6, 31 October 2018, UN Doc. E/C.12/2018/1.

[43] See Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The nature of States' parties obligations', ¶3, 14 December 1990, UN Doc. E/1991/23; see also Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)', ¶31, 11 August 2000, UN Doc E/C.12/2000/4.

[44] See Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The nature of States' parties obligations', ¶10, 14 December 1990, UN Doc. E/1991/23 ('On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for

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margin of appreciation and discretion. Indeed, the minimum core obligation can be seen as analogous to the concept of 'minimum fair share' developed by the Supreme Court of the Netherlands and the concept of the 'threshold for review' developed by the Norwegian Court of Appeal.[45] We suggest that similar approaches can be developed and adopted by decision-makers in other climate change cases.

There are several principles that human rights courts and other adjudicators could apply in order to identify a state's 'minimum' or 'core' obligations, by reference both to the scientific literature identified above and the factual circumstances of each case. Relevant principles include:

(a) Consistency (i.e., with approaches and measures taken by comparably resourced states as well as internally between policies);
(b) Proportionality (i.e., of the state's measures in view of the gravity of the risk and harm);
(c) Due process (i.e., public participation, adequate reason-giving and justification, taking into account all material issues); and
(d) Good faith and effective participation in, and implementation of, relevant international processes.

In applying this approach in the context of a state's climate policy, courts and other human rights decision-makers may find that the following are relevant considerations by which states' compliance can be judged:

(a) Whether a state has participated in and complied with agreed international environmental law on climate change (i.e., the UNFCCC and

example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'). See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html>.

[45] See Hof Hague, 9 October 2018, HA ZA 13-1396, 2018 (Urgenda Foundation/Netherlands).

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Paris Agreement), effectively and in good faith, including by implementing commitments made in its NDC.[46]

(b) Whether a state has submitted an NDC that is consistent with the due diligence standard of 'highest possible ambition'[47] and complies with all other terms of the Paris Agreement, including Article 4(4), which requires developed country parties to have economy-wide emissions reduction targets. And in so doing, whether a state has taken proper account of its technical and economic capability, including:
    (i) whether the state's analysis aimed to match or better the measures and targets of the most ambitious comparable states;
    (ii) whether modelling and other analysis conducted by the state included the costs of climate change impacts, as well as the economic, public health, and other benefits of transitioning to a low-carbon economy;
    (iii) whether target setting has been conducted transparently, with public participation, to allow all possible options and measures to be considered; and
    (iv) whether the state has justified any failure to align its policies with higher ambition states on capacity-based grounds that are rational and supported by sound evidence.

The Annex below includes a set of more specific criteria that could be relevant to assessing whether a state has met its due diligence obligation and complied with the principles set out above. We suggest that in order to meet their human rights obligations in the context of climate change, states must – at a minimum – comply with applicable international law (i.e., the UNFCCC and the Paris Agreement), as well as the 'no harm' and precautionary principles and due diligence standard in international environmental law, assessed by reference to these kinds of objective criteria. This task may involve the consideration of complex economic and scientific issues, but the application of the legal principles is firmly within the competence of courts and other human rights adjudicators.

In this chapter, we have tried to illustrate how national climate policy can be adjudicated in a way that may have great practical and environmental impact, while also staying well clear of judgements that might be said to fall within a state's discretion. The types of objective criteria that can be applied are frequently used by human rights adjudicators and stay well with the terrain

[46] See 'Understanding Human Rights and Climate Change', above note 4.
[47] Paris Agreement, above note 6, Art. 4(3).

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of legal analysis and away from questions of political judgement. They provide a framework with which judges and other adjudicators can safely and confidently assess the lawfulness of climate and energy policies, while seeking to ensure the protection of fundamental rights in the context of one of this century's defining challenges.

ANNEX: LIST OF CRITERIA POTENTIALLY RELEVANT TO ASSESSING WHETHER A STATE'S CLIMATE CHANGE POLICIES MEET A 'DUE DILIGENCE' LEGAL STANDARD

(1) Compliance / implementation of the state's obligations under the Paris Agreement
- Is the state complying with its formal/procedural obligations under the Paris Agreement, including timely submission of its NDC?
- Are planned policies consistent with its NDC (and being implemented)?
- Is there a clear commitment to the Paris Agreement and its objectives in national climate policy and legislation?
- Has there been a failure to update targets following adoption of the Paris Agreement?

(2) Targets and monitoring
- Are there national long-term targets, for example, for 2030/2050?
- Are there regular reviews of progress against targets and opportunities to increase their ambition?

(3) External consistency of climate policy (i.e., with the ambition of other states' climate policy)
- Benchmarking with comparator states (i.e., states with a similarly structured economy/development status GDP per capita)
  (i) Are the state's 2030/2050 targets consistent with comparator states? Are justifications for lower ambition given on the basis of capability?
  (ii) Are the sector-specific targets/policies consistent with comparator states?
- Is the discount rate used in modelling consistent with that used in other states?

(4) Internal consistency of climate policy (i.e., with targets and other government policy)
- Are the planned policies consistent with meeting national targets?

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- Is there consistency between the targets and objectives in climate policy and other relevant national or regional/local strategies? For example:
  (i) Are there fossil fuel support policies that run counter to national climate policy?
  (ii) Are local government policy and decision making consistent with national policy?

(5) Timeline for policy implementation
- Do policies have a timeline for coming into force/achieving objectives?
- Is the timeline based on an assessment of the earliest date at which the state can end such support?
- Will compliance with the timeline be monitored/kept under review?

(6) Policy gaps
- Is there a failure to address emissions from particular sectors/industries? Are justifications for lower ambition given on basis of capability?
- Is there a failure to consider opportunities to increase carbon sinks? Are justifications for lower ambition given on basis of capability?

(7) Policy implementation/effectiveness
- Are policies being implemented?
- Is there a failure to address the ineffectiveness of any existing policies?

(8) Lack of progression
- Is there a failure to increase the ambition of climate policy over time? Are justifications given on the basis of capability?
- Is climate policy being rolled back? Are justifications given on the basis of capability?

(9) Sound methodology
- Is robust modelling/analysis being used to develop climate policy on the basis of capability?
- Does the modelling/analysis reflect up-to-date technology costs?
- Does it take account of the benefits as well as the costs of climate action?
- Does it cover all sectors/industries?
- Does it reflect the Paris Agreement temperature goals?
- Is any discount rate used appropriate?

(10) Transparency
- Has there been effective public consultation at different stages of policy-making process – that is, before a draft exists and when all options are still on the table, as well as on interim and final drafts?
- Are the assumptions and data used in the modelling transparent/accessible?

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