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ARTICLE

Victims in Climate Litigation

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Abstract

Alleged victims have often played a central role in litigation aimed at prompting climate change mitigation. Courts have identified such victims in order to grant plaintiffs standing to sue, justify their invocation of individual rights and consider claims for compensation. This article observes, however, that no individual can really be, at least in a strict legal sense, a victim of a State or an entity's failure to mitigate climate change. This is because, while climate wrongs certainly harm society, they do not harm specific individuals in a sufficiently direct and proximate way. This observation has major implications for climate litigation, but it is not a fatal flaw: the absence of victims does not necessarily preclude litigation as, for instance, standing can often be established on sounder legal grounds.

Keywords: climate litigation; victim; climate change mitigation; causation; attribution; standing

1. Introduction

States have long committed to limit their greenhouse gas (GHG) emissions with a view to mitigating climate change,[1] but the steps they have taken have remained short of what is needed to realise collective objectives.[2] This lack of ambition has prompted advocates to bring lawsuits against governments, and, increasingly, corporations before national and supranational courts. Courts (in a broad sense)[3] have relied on various legal norms (such as human rights law, tort law and public law) to order

[1] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 4(1)(b); Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79, art 4(2).

[2] Paris Agreement (n 1) art 2(1)(a). See M Meinshausen et al, 'Realization of Paris Agreement Pledges May Limit Warming Just Below 2°C' (2022) 604 Nature 304; COP serving as the Meeting to the Paris Agreement, Decision 1/CMA.5, 'Outcome of the First Global Stocktake' (13 December 2023) UN Doc FCCC/PA/CMA/2023/16/Add.1, para 24.

[3] Including quasi-judicial human rights treaty bodies.

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defendants to enhance their action on climate change mitigation in general,[4] or to take specific steps.[5]

In many such cases, courts have had to assess whether a plaintiff had suffered (or was at risk of suffering) 'a concrete and particularized injury … caused by the challenged conduct',[6] and thus whether he or she was 'individually concerned by the acts at issue'[7] or, to the contrary, whether the action was brought solely in pursuance of the public interest. In other words, courts must decide whether an individual can be considered a 'victim'—in a loose legal sense—of the defendant's failure to mitigate climate change (referred to in this article as 'climate wrong'). This question arises most obviously in climate litigation based on human rights law (national or supranational) and tort law, but also occasionally in relation to certain narrow conceptions of judicial review.[8]

The question of victim status is often asked as a matter of admissibility, either to justify an individual's standing,[9] or to determine their membership in a class action.[10] Yet it can also be raised at subsequent stages of legal proceedings, for instance, as a condition for applying certain legal norms that 'presuppose … the existence of a directed wrong done to an individual', as might be the case with human rights law,[11] or where a court seeks to identify victims as potential recipients or beneficiaries of compensatory damages.[12]

Irrespective of the reason why this question is raised, courts have generally assumed the existence of victims of climate wrongs, focusing instead on their identification. Some courts have readily characterised individual plaintiffs as actual or potential victims of climate wrongs.[13] Others have held that plaintiffs had not established that they 'were affected in different ways by climate change',[14] but often without formally excluding the

[4] e.g. *Urgenda v Netherlands* (2020) 59 ILM 811 (Supreme Court of the Netherlands); *Neubauer v Germany* (24 March 2021) 1 BvR 2656/18 (German Federal Constitutional Court); *Klimaatzaak v Belgium* (30 November 2023) 2021/AR/1589 (Court of Appeal of Brussels); *Verein KlimaSeniorinnen v Switzerland* (2024) 79 EHRR 1; *Milieudefensie v Royal Dutch Shell* (12 November 2024) ECLI:NL:GHDHA:2024:2100 (Court of Appeal of The Hague).

[5] e.g. *Gray v Minister for Planning* [2006] 152 LGERA 258 (Land and Environment Court of New South Wales); *R (Finch) v Surrey County Council* [2024] UKSC 20 (UK Supreme Court).

[6] *Juliana v United States* 947 F 3d 1159, 1168 (9th Circuit Court of Appeals, 2020).

[7] Case C-565/19 P *Carvalho v Parliament* (25 March 2021) ECLI:EU:C:2021:252, para 37.

[8] See *Lujan v Defenders of Wildlife* 504 US 555, 560 (SCOTUS, 1992).

[9] *Verein KlimaSeniorinnen* (n 4) para 535.

[10] *ENVironnement JEUnesse v Procureur General du Canada* [2021] QCCA 1871, paras 43–44 (Superior Court of Québec); *Milieudefensie v Royal Dutch Shell* (26 May 2021) ECLI:NL:RBDHA:2021:5337, paras 4.2.2–4.2.4 (District Court of the Hague); *Milieudefensie* Court of Appeal (n 4) para 6.4.

[11] G Letsas, 'The European Court's Legitimacy after *KlimaSeniorinnen*' (2024) 5 ECHRLR 444, 446.

[12] See *Kivalina v ExxonMobil* 663 F Supp 2d 863, 877–82 (Northern District of California, 2009); *Kivalina v ExxonMobil* 696 F 3d 849, 867–69 (Pro DJ, concurring) (9th Circuit Court of Appeals, 2012). See also J Setzer and C Higham, 'Global Trends in Climate Change Litigation' (London School of Economics and Political Science, June 2025) 33 <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2025/06/Global-Trends-in-Climate-Change-Litigation-2025-Snapshot.pdf>.

[13] *Klimaatzaak* (n 4) paras 131–133; *Held v Montana* 560 P 3d 1235, para 41 (Supreme Court of Montana, 2024). See also decisions adopted on a prima facie basis in *Juliana* (n 6) 1169; *Sacchi v Argentina* Communication No 104/2019 (22 September 2021) UN Doc CRC/C/88/D/104/2019, para 10.14.

[14] *Carvalho* (n 7) para 43. See also *Grande-Synthe v France* (19 November 2020) ECLI:FR:CECHR:2020:427301.20201119, para 4 (Conseil d'État); *Verein KlimaSeniorinnen v Federal Department of the Environment* (5 May 2020) 146 BGE I 145, 154 (para 5.4) (Federal Supreme Court of Switzerland);

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possibility that other individuals may establish that they are victims of the defendant's climate wrong in future cases. For instance, the European Court of Human Rights (ECtHR) has not identified any individual plaintiff as a victim in cases invoking climate wrongs, but it has not ruled out the possibility of doing so in a future case; in fact, it has held that an association had standing to represent the (unidentified) 'individuals whose rights are or will allegedly be affected'.[15]

Contrary to these decisions, this article shows that an individual cannot properly be characterised as a 'victim' of a defendant's climate wrong in law, notwithstanding the legal field invoked (e.g. human rights law, tort law or administrative law) or the jurisdiction where litigation unfolds. To be absolutely clear, there is no denial that climate wrongs harm the environment, society and future generations. However, not every wrong necessarily translates into distinct individual harm suffered by individual victims.

As will be shown, the concept of victim can only be defined as involving a relatively direct and proximate causation between the wrongful conduct and the individual harm. Without such a qualified causal requirement, the concept of victim would become ineffective at distinguishing some individuals from others: as a wrongful act produces ripple effects extending ad infinitum, virtually anyone could present themselves as the victim of wrongs committed in a distant past, or as the potential victim of anyone else's present wrongs. Far from fulfilling such a qualified causal requirement, this article shows that an individual's harm could only ever be an extremely tenuous and remote consequence of a State or a corporation's failure to mitigate climate change. A climate wrong only makes an incremental contribution to global cumulative GHG emissions, with diffuse, global and protracted effects on the likelihood of adverse physical events, whose impacts on individuals depend largely on extraneous factors such as exposure, vulnerability and resilience.

To make this argument, this article relies primarily on an analysis of scientific and social scientific studies on the impacts of climate change on society and individuals. While the article also engages with numerous court decisions, it does so mainly as a means to map the debate by identifying possible arguments and objections on the existence of victims of climate wrongs. The main goal of this article is neither to account for nor to compare individual court decisions, but only to question an assumption shared by many of these decisions: the notion that a climate wrong can produce individual victims, rather than causing more diffuse harm to society, ecosystems and future generations.

While the non-existence of victims is an impediment to climate litigation, the article emphasises that it is not a fatal flaw. In many contexts, the functions that the concept of victim is invoked to serve can be performed in other ways. As discussed in Section 4, some legal systems grant standing to individuals with merely an intellectual interest in

Washington Environmental Council v Bellon 732 F 3d 1131, 1141–146 (9th Circuit Court of Appeals, 2013); *Milieudefensie* (n 10) para 4.2.7 (upheld on appeal); *Teitiota v New Zealand* Communication No 2728/2016 (24 October 2019) UN Doc CCPR/C/127/D/2728/2016, para 9.11; *Foley v Sweden* (19 February 2025) Ö 7177-23, para 86 (Supreme Court of Sweden).

[15] *Verein KlimaSeniorinnen* (n 4) para 498. See also ibid para 533; *Carême v France* (2024) 79 EHHR SE1, paras 82–83.

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the case or to institutions seeking to protect the public interest; some legal norms apply to climate change mitigation without any requirement as to the existence of individual victims; and non-compensatory remedies, such as an obligation to make up for excess GHG emissions, can potentially be granted for the benefit of the community at large. It remains nonetheless true that the non-existence of climate victims should be an important consideration for advocates considering climate litigation strategies, to judges deciding climate lawsuits and to scholars interested in this phenomenon. The argument may generally imply a need for greater reliance on public law approaches to climate litigation which better capture the diffuse impacts of climate change on society.

Three caveats are in order. First, what this article refers to as a 'victim' includes a diverse set of legal concepts and standards, which differ significantly across legal fields and legal systems[16] depending, among other things, on their function (e.g. establishing standing or a right to a remedy).[17] This article does not focus on these particularities; it makes a more abstract argument. It is submitted that a minimal condition for an individual to be characterised as a victim of a climate wrong—in the broadest possible legal sense and notwithstanding the context—is that this individual should suffer, or be at a risk of suffering, harm as a relatively direct or proximate consequence of a wrong. A central claim of this article is that, even on an expansive interpretation of this test, in retrospect and with complete knowledge of all facts, no such direct or proximate causal relationship can be established between an entity's failure to mitigate climate change and an individual's harm.

The argument that an individual cannot properly be characterised as a victim of a climate wrong can be applied in a wide range of contexts where plaintiffs assert rights by claiming to have suffered individual harm caused by the defendant's climate wrong, whether this is to justify standing or a right to compensation. As such, the article builds on decisions from various jurisdictions, involving different legal fields, such as human rights law, tort law and administrative law. It also engages with discussions that take place at different stages of legal proceedings. With regard to human rights law, for instance, the article does not seek to distinguish between the victim status determination at the admissibility stage and the attribution of the harm to a wrong at the merits stage. Courts tend to conflate these two enquiries, in particular in climate litigation,[18] and indeed the distinction is less helpful when harm is mediated through environmental factors. Whether someone who dies during a heatwave is a 'victim' of something other than a natural death—a question of admissibility—inevitably depends on whether the heatwave itself can be attributed to wrongful conduct. People suffer (i.e. in an unspecific, non-legal sense, are 'victims') from all sorts of harms, but the argument of this article is that they are not victims, in a legal sense, *of a climate wrong*.

Second, the argument presented in this article applies only to litigation on obligations to mitigate climate change (i.e. to limit and reduce GHG emissions),

[16] See H Keller and C Heri, 'The Future Is Now: Climate Cases Before the ECtHR' (2022) 40 Nordic Journal of Human Rights 153, 156–57.

[17] *Held* (n 13) para 36.

[18] On *Verein KlimaSeniorinnen*, see V Stoyanova, 'In Search for the Content of States' Positive Obligations under the European Convention on Human Rights: *KlimaSeniorinnen* and Climate Change' in C Gomes et al (eds), *Climate Change Before International Courts: A Comparative Study* (Routledge, 2025).

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whether against governments or corporations, and whether seeking injunctions, damages or other remedies. Thus, the article does not question the possibility of identifying victims in other types of climate litigation. In particular, an individual might be directly and proximately affected by a State's failure to adapt to climate change, for instance, when a State fails to adopt and implement a disaster risk reduction strategy that would reduce that individual's vulnerability to adverse physical events.[19] Individuals could also fall victim to the unintended effects of action on climate change mitigation or adaptation, for instance, when individuals are forcibly resettled to give way to hydroelectric projects aimed at providing clean energy or improving drought management.[20]

Third, this article focuses on individual victims, and it does not take any position as to the possibility of characterising groups or entities—e.g. States, the international community as a whole,[21] young and future generations,[22] 'Mother Earth',[23] species or natural features—as 'victims' of the failure of another entity to take measures aimed at mitigating climate change. However, it should be noted that the aggregation of harm to such groups and entities could mitigate some of the issues faced when applying the concept of victim to individuals.

Section 2 recounts how victims have been invoked in climate litigation and in broader political discourse. Section 3 argues that individuals cannot properly be characterised as the victims of climate wrongs in a legal sense. Section 4 discusses the implications of the non-existence of victims for climate litigation.

2. Invoking victims in climate litigation

This section begins with the observation that courts have frequently upheld plaintiffs' self-characterisation as victims of climate wrongs. It then identifies some possible reasons for this judicial trend, including by situating it in the broader political discourse on the impacts of climate change on individuals.

2.1. Victims of climate wrongs in the courtroom

Courts have repeatedly heard plaintiffs argue that they are the victims of a defendant's failure to take appropriate measures aimed at mitigating climate change. Many national courts have upheld such claims, in particular to establish standing. In *Urgenda v the*

[19] *Leghari v Pakistan* (25 January 2018) W.P. No. 25501/2015 (High Court of Lahore); *Billy v Australia* Communication No 3624/2019 (21 July 2022) UN Doc CCPR/C/135/D/3624/2019, para 8.12.

[20] P Arrojo Agudo et al, 'Joint Statement on the Human Rights of People Affected by Dams and Other Water Infrastructure' (Office of the High Commissioner for Human Rights, 1 November 2021) <https://www.ohchr.org/en/statements-and-speeches/2021/11/joint-statement-human-rights-people-affected-dams-and-other-water>.

[21] See International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', UNYBILC, vol II (2001) UN Doc A/56/10 (ARSIWA) art 48 and commentary para 12.

[22] *Neubauer* (n 4); *Do-Hyun Kim v South Korea* (29 August 2024) 2020 Hun-Ma 389 (Constitutional Court of South Korea).

[23] Paris Agreement (n 1) preambular para 14; DR Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press 2017) 189, 189–201.

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Netherlands, the Supreme Court of the Netherlands found that the applicant had standing to act 'on behalf of residents who are in fact … victims' of the State's failure to reduce its GHG emissions.[24] The Supreme Court of Montana decided that the plaintiffs in *Held v Montana* had 'shown a sufficiently concrete injury to their constitutional right to a clean and healthful environment' as a consequence of the state's policy not to require a climate effect assessment of GHG-intensive projects (e.g. coal mines).[25] At times, individual harm has also been invoked to claim damages. The Higher Regional Court of Hamm allowed the case of *Lliuya v RWE* to move to trial, considering it plausible that a Peruvian farmer could have a right to compensation for the climate impact caused by a German public utility company, although the Court ultimately found the claims unsubstantiated on factual grounds.[26]

International human rights institutions have reached similar findings. In *Sacchi v Argentina*, the United Nations (UN) Committee on the Rights of the Child (UNCRC) concluded that the authors of a communication against five States had established their victim status on a prima facie basis.[27] Similarly, in *Billy v Australia*, the UN Human Rights Committee (UNHRC) held that the authors of the complaint had established standing as victims by demonstrating 'real predicaments that they ha[d] personally and actually experienced owing to disruptive climate events and slow-onset processes such as flooding and erosion'.[28]

Such findings have often relied on the observation that plaintiffs were exposed to weather events that were more severe or more frequent as a result of climate change. The plaintiffs in *Juliana v United States*, for instance, contended that they were forced to leave their homes due to flooding and water scarcity.[29] In *Billy*, the UNHRC observed that the authors of the complaint, as Torres Strait Islanders (members of an Indigenous people living in low-lying tropical islands), were 'highly exposed to adverse climate change impacts' and 'extremely vulnerable to intensely experiencing severely disruptive climate change impacts'.[30] In these and other decisions,[31] courts have focused on scientific evidence of a causal relationship between climate change and adverse physical events, while paying scant attention to the rest of the causal chain between the defendant's climate wrong and the individual's harm.

Some courts have declined to identify individuals as victims of a defendant's climate wrong. In *Grande-Synthe v France*, the French Conseil d'État dismissed an individual's claim that his residence was exposed to a risk of flooding exacerbated by climate change, seemingly agreeing with the advocate general's assessment that this harm was 'too

[24] *Urgenda* (n 4) para 5.9.3.

[25] *Held* (n 13) para 40.

[26] *Lliuya v RWE* (28 May 2025) 5 U 15/17 OLG Hamm, 14361 (Higher Regional Court of Hamm).

[27] e.g. *Sacchi v Argentina* (n 13) para 10.14.

[28] *Billy* (n 19) para 7.10. The complaints alleged both a failure to mitigate the effects of climate change and to adapt to its impacts.

[29] *Juliana* (n 6) 1168.

[30] *Billy* (n 19) para 7.10.

[31] See *Klimaatzaak* (n 4) para 131; *Verein KlimaSeniorinnen* (n 4) para 483; *Klimatická Žaloba v Czechia* (15 June 2022) para 199 (Prague Municipal Court) (quashed on appeal).

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uncertain'.[32] In *R (Plan B Earth) v Prime Minister*, the High Court of England and Wales found that 'a generalized future risk of harm to the global community' was insufficient to establish the victim status necessary to invoke a breach of the Human Rights Act.[33] The Court of Justice of the European Union (CJEU) held that the applicants in *Carvalho v Parliament* did not have standing to seek the annulment of legislative acts aimed at climate change mitigation on the ground of their alleged lack of ambition. The CJEU noted that 'every individual is likely to be affected one way or another by climate change',[34] but that the applicants had not demonstrated that the legislative acts at issue were 'of direct and individual concern' to them.[35] In *Pabai v Commonwealth of Australia*, the Federal Court of Australia held that the Australian Government had not 'materially contributed' to climate-related losses suffered by Torres Strait Islanders as its contribution was immeasurably small.[36] Yet these decisions can often be explained by either the particularly narrow causal test applied in the context or by the facts at issue rather than necessarily by the court's understanding that, as a matter of principle, an individual cannot be the victim of a defendant's climate wrong.

The question of victim status is particularly salient in climate cases before the ECtHR. Article 34 of the European Convention on Human Rights (ECHR) confers jurisdiction on the Court to decide on applications made by any 'victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention'.[37] Satisfying this condition was thought to be a major challenge for climate litigation before the ECtHR.[38] Indeed, the ECtHR has yet to characterise any individual applicant as a victim. In *Duarte Agostinho v Portugal*, which it dismissed for failure to exhaust domestic remedies, the Court noted that 'a significant lack of clarity as regards the applicants' individual situations' hindered an assessment of their victim status.[39] In *Carême v France*, the Court held that the applicant had not demonstrated his exposure to impacts of climate change as he was no longer a resident of the town that he alleged was being impacted by climate change.[40] In relation to the individual applicants in *Verein KlimaSeniorinnen v Switzerland*, the Court found that the harm suffered (health effects of exposure to heatwaves) could be addressed 'by means of reasonable measures

[32] *Grande-Synthe* (n 14) para 4. See also Opinion of Public Rapporteur Stéphane Hoynck in *Grande-Synthe v France* (19 November 2020) 5 (Conseil d'État). On the subsequent ECtHR case, see n 39.

[33] *R (Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin), para 78. See also *R (Friends of the Earth) v Secretary of State for Business* [2022] EWHC 1841 (Admin), paras 261–275.

[34] *Carvalho* (n 7) para 37. See also ibid paras 35–52; Case T-330/18 *Carvalho v Parliament* (8 May 2019) ECLI:EU:T:2019:324, para 49.

[35] *Carvalho* (n 7) para 71.

[36] *Pabai v Commonwealth* [2024] FCA 796, para 1085.

[37] Consolidated version of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11, 14 and 15 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 34.

[38] A Hefti, 'Intersectional Victims as Agents of Change in International Human Rights-Based Climate Litigation' (2024) 13 TEL 610, 611; R Luporini and A Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) 32 RECIEL 267, 274.

[39] *Duarte Agostinho v Portugal* (2024) 79 EHRR SE9, para 229.

[40] *Carême* (n 15) paras 82–83.

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of personal adaptation'.[41] Four subsequent cases were dismissed on the ground that the individual applicants could not establish their individual victim status.[42]

In *Verein KlimaSeniorinnen*, however, the ECtHR stretched its case law in relation to the standing of an association co-applicant: the Court found the association had standing under Article 34,[43] as a 'representative … of the individuals whose rights are or will allegedly be affected'.[44] The Court thus seemed to assume that some individuals would potentially have standing as victims in other cases, and that the only issue in the case was that, somehow, these individuals had not joined the proceedings as co-applicants.[45] This, however, begs the question whether the Court should depart from its case law and allow an association to represent individual victims in cases where the individuals would have the capacity to bring a case themselves.

The ECtHR hinted at another potential justification for allowing standing to an association applicant when it observed that 'recourse to collective bodies such as associations is … sometimes the only means' of protecting certain interests,[46] including the interests of future generations.[47] The Court further observed that climate change is 'not the concern of any one particular individual, or group of individuals, but are rather a common concern of humankind'.[48] Thus, the judgment has been interpreted (and often denounced) as, in effect, granting standing to an association acting in the public interest in a case where no individual would be 'able to turn to the Court and be granted victim status by it'.[49] As Judge Eicke noted in a partly dissenting opinion, such a finding would be inconsistent with the Court's jurisdiction under Article 34.[50]

When courts have accepted that individuals are or could be victims of climate wrongs, they have found it difficult to distinguish these victims from the rest of the population. The ECtHR has observed that 'indefinite numbers of persons' could qualify

[41] *Verein KlimaSeniorinnen* (n 4) para 533.

[42] *De Conto v Italy* App No 14620/21 (ECtHR, 7 May 2025) para 14; *Uricchio v Italy* App No 14615/21 (ECtHR, 7 May 2025) para 14; *Engels v Germany* App No 46906/22 (ECtHR, 1 July 2025) para 10; *Fliegenschnee v Austria* App No 40054/23 (ECtHR, 18 November 2025) para 31. See also *Greenpeace Nordic v Norway* App No 34068/21 (ECtHR, 28 October 2025) para 306.

[43] *Verein KlimaSeniorinnen* (n 4) operative para 4. See also paras 440, 499.

[44] ibid para 498. See also para 502; *Cannavacciuolo v Italy* App No 51567/14 (ECtHR, 30 January 2025) para 221; *Greenpeace Nordic* (n 42) para 311.

[45] See *Verein KlimaSeniorinnen* (n 4) (Partly Concurring Partly Dissenting Opinion of Justice Eicke) para 43. See also *De Conto* (n 42) para 13.

[46] *Verein KlimaSeniorinnen* (n 4) para 489.

[47] ibid para 499.

[48] ibid para 489.

[49] *Cannavacciuolo* (n 44) para 9 (Justice Krenc). See also J Laffranque, '*KlimaSeniorinnen*: Climate Justice and Beyond' (2024) 5 ECHRLR 433, 435; OW Pedersen, 'Disruption, Special Climate Considerations, and Striking the Balance' (2025) 119 AJIL 129, 137; V Sefkow-Werner, 'Consistent Inconsistencies in the ECtHR's Approach to Victim Status and Locus Standi' (2025) 16 European Journal of Risk Regulation 814, 820.

[50] *Verein KlimaSeniorinnen* (n 4) (Partly Concurring Partly Dissenting Opinion of Judge Eicke) para 44(a). See also AB Auner, 'Legal Standing and Victim Status of Individuals and Associations after the "KlimaSeniorinnen" Case' (2024) 22 Law and Politics 131, 140; United Kingdom, 'Written Comments on Obligations of State in Respect of Climate Change' (12 August 2024) paras 46.6 n 85, 52 n 115 <https://www.icj-cij.org/case/187>.

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as victims.[51] The UNHRC has appeared ready to qualify any inhabitant of 'small, low-lying islands' as a victim,[52] while the UNCRC has depicted 'children' as being 'particularly affected by climate change'.[53] The UNCRC and four other human rights treaty bodies have jointly stated their understanding that climate risks are:

> particularly high for those sectors of the population that are already marginalized or in vulnerable situations or that, owing to discrimination and pre-existing inequalities, have limited access to decision-making or resources, such as women, children, persons with disabilities, indigenous peoples and persons living in rural areas.[54]

Other courts have also considered a broad approach to victims in climate litigation. For example, the Supreme Court of Montana entertained the possibility that every Montanan may have standing as a victim to challenge the state's climate action,[55] and the Court of Appeal of Brussels has suggested that victim status could extend to 'each individual on the planet'.[56]

However, concerns have been expressed about an overly broad approach to victimhood in climate litigation. A recurring question is whether granting standing to virtually everyone would create an actio popularis,[57] and whether this would 'disrupt … national constitutional principles and the separation of powers by opening broad access to the judicial branch as a means of prompting changes in general policies'.[58] In a strict sense, a claim 'is an *actio popularis* only when it is brought *solely* in the public interest',[59] therefore allowing standing to everyone would not amount to an actio popularis if it were based on the understanding that everyone is a victim. However, this observation does not address concerns with the consequences of allowing everyone to bring similar claims before the courts. One such concern is of a practical nature: universal standing could open the 'floodgates' of litigation.[60] Another, more conceptual concern might be that painting everyone as a victim of climate wrongs begs the question who would be left to bear responsibility as perpetrator, accomplice or beneficiary of the wrongs.

2.2. Why courts have assumed the existence of victims of climate wrongs

Courts have often assumed the existence of victims in climate litigation as a corollary of the existence of climate harm. For instance, the Supreme Court of the Netherlands has inferred the existence of 'victims' of climate change in the Netherlands from evidence

[51] *Verein KlimaSeniorinnen* (n 4) para 480.
[52] *Billy* (n 19) para 7.10.
[53] *Sacchi v Argentina* (n 13) para 10.13.
[54] Committee on the Elimination of Discrimination against Women et al, 'Joint Statement on Human Rights and Climate Change' (14 May 2020) UN Doc HRI/2019/1, para 3.
[55] *Held* (n 13) para 41.
[56] *Klimaatzaak* (n 4) para 131.
[57] Hoynck (n 32) 2.
[58] *KlimaSeniorinnen* (n 4) para 484.
[59] Letsas (n 11) 450. See also *Juliana* (n 6) 1168 (emphasis in original).
[60] See *KlimaSeniorinnen* (n 4) para 484. But see discussion in *Smith v Fonterra* [2024] NZSC 5, para 151 (Supreme Court of New Zealand).

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that climate impacts would unfold within the State's territory.[61] Similarly, the Court of Appeal of Brussels has justified the standing of individuals mainly by reference to the gravity of the impacts of climate change.[62] The ECtHR considered documentation of the impact of climate change on mortality as evidence that 'a legally relevant relationship of causation may exist between State actions or omissions (causing or failing to address climate change) and the harm affecting individuals'.[63]

Yet this ignores the difference between the existence of harm and that of victims. Harm can affect society in general, including statistical indicators such as mortality rates, without affecting individuals in a sufficiently direct and proximate way. For instance, a government's decision to defund blue-sky medical research would presumably slow progress in treating illness, which, like climate impacts, could be expected to increase mortality. Yet it would not seem possible to identify individual victims of such policy without knowing which research projects would have been funded, which discoveries would have been made, which new medical treatments would have been commercialised and whether these new treatments would have been effective on any particular individual. Similarly, there is no reason to assume—and, as Section 3 will show, strong reasons to doubt—that individuals could be victims of a government's climate wrong, as the causal chain in this scenario is also long and tenuous.

A few judges and scholars have gone further in their attempts to justify their assumption of the existence of victims of climate wrongs. In the various phases of *Held*, the courts asserted that there was 'a fairly traceable' and 'reasonably close' connection between the defendant's conduct and the plaintiffs' injury.[64] However, separate opinions rightly observe the lack of evidence supporting this factual claim.[65] Another oft-heard argument evokes an emerging 'science of attribution of extreme weather events', which would make it possible 'to attribute individual losses to human-caused climate change'.[66] However, such studies seek to attribute physical events to climate change, which is only one link in the causal chain between an individual's harm and a defendant's climate wrong, as Section 3.2 will show.

The International Court of Justice sought to rely on the finding of the Intergovernmental Panel on Climate Change (IPCC), which, it suggested, 'has determined that approximately 3.3 to 3.6 billion people are highly vulnerable to climate change'.[67] However, this misrepresents the IPCC's finding: rather than a number of vulnerable individuals, the IPCC was assessing the number of 'people living in regions classified as highly vulnerable to climate change impacts'.[68] This range relies largely on an assessment of the population

[61] *Urgenda* (n 4) para 5.9.3.

[62] *Klimaatzaak* (n 4) para 133.

[63] *KlimaSeniorinnen* (n 4) para 478.

[64] *Held v Montana* (14 August 2023) CDV-2020-307, 'Conclusions of Law' paras 13–14 (District Court of Montana). See also *Held* (n 13) para 44.

[65] *Held* (n 13) para 76 (Justice Sandefur); paras 83, 95 (Justice Rice).

[66] F Otto et al, 'Causality and the Fate of Climate Litigation: The Role of the Social Superstructure Narrative' (2022) 13 Global Policy 736, 736–37.

[67] *Obligations of States in Respect of Climate Change* (Advisory Opinion) (General List No 187, 23 July 2025) para 78.

[68] J Birkmann, 'Poverty, Livelihoods and Sustainable Development' in HO Pörtner et al (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2022) 1171, 1251.

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living in 'low and lower middle-income countries'[69] rather than any assessment of individual vulnerability.

At times, the assumption of the existence of victims has been justified as a means to enable courts to exercise jurisdiction in climate litigation. Thus, the Supreme Administrative Court of Czechia explained that plaintiffs had to be identified as victims since doing otherwise 'would effectively exclude the filing of a climate lawsuit'.[70] The ECtHR was also concerned that 'Convention rights of individuals [could be] affected without them having any judicial recourse before the Court'.[71] The Inter-American Court of Human Rights (IACtHR) suggested that rules on admissibility 'should be interpreted flexibly to avoid them becoming unjustified procedural barriers for victims'.[72] These arguments are often circular: they take for granted that individuals are directly affected by climate wrongs to conclude that these individuals should be considered as victims of these wrongs. Clearly, arguing that the existence of victims of climate wrongs would have desirable consequences does not demonstrate that, as a matter of fact, a category of individuals can properly be characterised as victims of climate wrongs.

2.3. The broader political discourse on climate victims

The judicial assumption that there exist victims of climate wrongs is situated in a broader political discourse that presents climate change as a source of individual harm. Arguments on climate justice, for instance, often build on the idea that 'climate change impacts people differently, unevenly and disproportionately'.[73] Some have argued for the compensation of 'climate victims'.[74] From a public communication perspective, 'putting a human face on climate change' has been presented as a way to increase public support for climate action.[75] By appealing to emotion, the concept of climate victims can support populist forms of climate advocacy by implicitly opposing the 'us' of innocent victims, to some distant perpetrator (e.g. China, 'the elite' or 'the billionaires').[76]

[69] ibid 1199.

[70] *Klimatická Žaloba v Czechia* (20 February 2023) para 100 (Supreme Administrative Court of Czechia). See also *Klimatická Žaloba* (n 31) para 199.

[71] *Verein KlimaSeniorinnen* (n 4) para 484. See also I Jelić and E Fritz, 'The "Living Instrument" at the Service of Climate Action: The ECtHR Long-Standing Doctrine Confronted to the Climate Emergency' (2024) 36 JEL 141, 144; Laffranque (n 49) 433.

[72] *Climate Emergency and Human Rights* (Advisory Opinion) (IACtHR, Case No AO-32/25, 29 May 2025) para 554.

[73] F Sultana, 'Critical Climate Justice' (2022) 188 Geographical Journal 118, 118.

[74] See D Farber, 'Basic Compensation for Victims of Climate Change' (2007) 155 UPennLR 1605; P Toussaint, 'Loss and Damage, Climate Victims, and International Climate Law: Looking Back, Looking Forward' (2024) 13 TEL 134; International Lawyers, 'Written Statement' (7 June 2016) UN Doc A/HRC/32/NGO/98, 2; O De Schutter, 'Report on a Visit to Bangladesh' (30 April 2024) UN Doc A/HRC/56/61/Add.1, para 76.

[75] International Climate Justice Network, 'Bali Principles of Climate Justice' (28 August 2002). See also SM Gardiner, 'Climate Justice' in JS Dryzek, RB Norgaard and D Schlosberg (eds), *Oxford Handbook of Climate Change and Society* (OUP 2011) 310; DB Hunter, 'The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making' in W Burns and H Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (CUP 2009) 360.

[76] See generally C Hilson, 'Climate Populism, Courts, and Science' (2019) 31 JEL 395.

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Unlike the concept of victim in climate litigation, this broader discourse does not necessarily seek to attribute individual harm to the wrongful conduct of a legal person but, rather, to anthropogenic climate change as a global phenomenon or to economic or political systems contributing to causing it. However, this discourse relies on the same questionable assumption that climate change translates into distinct individual harm, so that some victims can be singled out of the global population. Thus, this political discourse has faced similar difficulties when seeking to delineate a category of victims. Large groups have been depicted as being particularly affected by climate impacts, including women,[77] children,[78] peasants,[79] populations that depend directly on forests[80] and people living in the Arctic.[81] A group of non-governmental organisations (NGOs) calling for the protection of 'victims of climate change' highlighted that 'the impacts of climate change are disproportionately felt by small island States, women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly'.[82] The concept of intersectionality has sometimes been used in an attempt to narrow down the category of climate victims to individuals experiencing 'several inequalities simultaneously, such as those based on gender, age, and disability'.[83]

Despite this, the scientific literature provides little support for the assumption that distinct individuals could meaningfully be described as victims of climate change, even in this broader political sense. Most results of a search for 'climate change victims' on Google Scholar, for instance, are law and policy publications that assume the existence of such victims[84] rather than scientific research demonstrating it. No article ever published in *Nature Climate Change*—arguably the leading journal in the field—refers to 'victims' of climate change. The latest IPCC reports have not identified victims of climate change or otherwise suggested that climate change affects individuals in any direct and proximate ways. Rather, the IPCC has emphasised the 'complexities of climate risk'[85] and highlighted multiple 'underlying social determinants of human vulnerability' to climate impacts.[86]

[77] Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the Ninth Periodic Report of Norway' (22 November 2017) UN Doc CEDAW/C/NOR/CO/9, paras 14–15.

[78] Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia' (1 November 2019) UN Doc CRC/C/AUS/CO/5-6, paras 40–41.

[79] UNGA, 'Seventy-Third Session: Summary Record of the 53rd Meeting of the Third Committee' (31 January 2019) UN Doc A/C.3/73/SR.53, para 8.

[80] 'Joint Statement of the Leaders of Tropical Rainforest Countries' (24 September 2007) in annex to the 'Letter from the Permanent Representative of Indonesia to the United Nations Addressed to the Secretary-General' (27 September 2007) UN Doc A/C.2/62/3.

[81] Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Sixth Periodic Report of the Russian Federation' (16 October 2017) UN Doc E/C.12/RUS/CO/6, para 42.

[82] Bali Principles (n 75) para 9, recital 10.

[83] Hefti (n 38). See also Sefkow-Werner (n 49) 819.

[84] e.g. Farber (n 74); E Halstead, 'Citizens of Sinking Islands: Early Victims of Climate Change' (2016) 23 IndianaJGlobalLegalStudies 819.

[85] RA Begum et al, 'Point of Departure and Key Concepts' in HO Pörtner et al (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (CUP 2022) 145.

[86] HO Pörtner et al, 'Technical Summary' in Pörtner et al ibid 53.

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A more specific debate on the individual impacts of climate change has unfolded in relation to human migration. Journalists and legal scholars have advocated for a protection regime to be established for the benefit of climate-induced migrants (sometimes also referred to as climate refugees or other descriptions).[87] By and large, however, migration scholars have denounced the simplistic causal assumptions of this discourse: '[t]he term [climate refugee] implies a monocausality about the reasons for migration that just does not exist in reality'.[88] These scholars have shown that environmental factors such as climate change are only one of a cluster of causes of migration, so that it is 'not empirically possible' to attribute an individual's migration to climate change.[89] While the IPCC suggested the existence of climate-induced migrants in its initial report in 1990,[90] it has since acknowledged the difficulty of attributing an individual's migration to climate change.[91] There is no denying that climate change has and will have some effects on migration, but one cannot infer from this alone the existence of a distinct population of climate-induced migrants, passively affected by physical effects of climate change in abstraction from any other factors, who could be the subjects of a specific protection regime.

Attempts to address the adverse consequences of climate change have thus not relied on the identification of individual victims. UN climate negotiations have considered the provision of financial assistance to facilitate efforts to promote adaptation and address loss and damage in developing States,[92] but not generally in terms of providing compensation,[93] especially not to individuals.[94] Even though two states in the United States (US) have adopted 'superfunds' aimed at recovering the costs of adaptation to climate change impacts, their focus has been on funding relevant collective projects, such as infrastructure investments, not on compensating individual victims.[95] The political discourse on climate victims has consistently failed to translate into concrete policies targeting individuals, not just for political reasons, but also because of the impossibility of identifying climate victims.

[87] A Kent and S Behrman, *Facilitating the Resettlement and Rights of Climate Refugees: An Argument for Developing Existing Principles and Practices* (Routledge 2018); JR Wennersten and D Robbins, *Rising Tides: Climate Refugees in the Twenty-First Century* (Indiana University Press 2017).

[88] M Hulme, 'Climate Refugees: Cause for a New Agreement?' (2008) 50 Environment 50, 50.

[89] I Boas et al, 'Climate Migration Myths' (2019) 9 Nature Climate Change 901, 902. See also Foresight, 'Migration and Global Environmental Change' (UK Government Office for Science, 2011) 9; G Jónsson, '"Climate Migration"? Empirical Insights and Conceptual Cautions from Political Ecology and Migration Studies' in C Nicholson and B Mayer (eds), *Climate Migration: Critical Perspectives for Law, Policy and Research* (Hart 2023) 63.

[90] WJ McG Tegart et al, 'Climate Change: The IPCC Impacts Assessment: Report Prepared for Working Group II' (Australian Government Publishing Service 1990) ch 5, 10.

[91] See Pörtner et al (n 86) 52; G Cissé et al, 'Health, Wellbeing and the Changing Structure of Communities' in Pörtner et al (n 85) 1079–1084.

[92] See UNFCCC (n 1) art 4(3)–(5); Paris Agreement (n 1) arts 7–9.

[93] See Decision 1/CP.21, 'Adoption of the Paris Agreement' (12 December 2015) UN Doc FCCC/CP/2015/10/Add.1, para 51.

[94] See B Mayer, 'Whose "Loss and Damage"? Promoting the Agency of Beneficiary States' (2014) 4 Climate Law 267.

[95] See New York Environmental Conservation Law (McKinney 2025) para 76-0101; Vermont Statutes Annotated (West 2025) Title 10, para 596.

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3. The non-existence of victims of climate wrongs

This section argues that individuals cannot properly be characterised as victims of a State or entity's failure to mitigate climate change. It starts by defining victims, in law, as persons suffering an individual harm as a sufficiently direct and proximate consequence of someone else's wrongful conduct. It then argues that, in climate change mitigation cases, the causal link between wrongful conduct and individual harm is too tenuous to fit this definition. Lastly, it argues that extending the legal concept of victim to individuals harmed only as a remote consequence of wrongful conduct would have unmanageable consequences.

3.1. Defining victims

The concept of a victim may serve different functions, as required in different contexts, from establishing the plaintiff's standing, to determining whether a legal rule is applicable and which remedies may be available. Victim definitions differ depending on the function that the concept fulfils, but also on the jurisdiction and area of law. The ECtHR, for instance, interprets victim status under the ECHR autonomously from national domestic concepts.[96] At times, courts have relied on other terms or terminologies to refer to comparable concepts involving the attribution of individual harm suffered by the plaintiff to wrongful conduct of the defendant. For instance, European Union (EU) law limits admissibility in annulment proceedings to individuals who are 'individually concerned' by the decision,[97] and the IACtHR once sought to distinguish a narrow concept of 'victims' from a slightly broader category of 'injured parties'.[98]

However, despite these peculiarities the concept of victim has a minimal core meaning. In a non-legal sense, the word may refer to any person who has been harmed 'as the result of a natural disaster, disease, accident, etc'[99]—or as a result of climate change. In a more specific legal sense, a victim is someone who has been harmed by someone else's wrongful conduct (e.g. a crime or a tort)—that is, conduct from which a moral or legal obligation to make reparation may arise,[100] such as a climate wrong. The victim of a harmful event (i.e. in a non-legal sense) is not necessarily a victim of wrongful conduct (in a legal sense) because not every harm results from wrongful conduct. Distributive justice arguments may justify assistance to victims in the non-legal sense, based on their needs, but only victims in the narrower, legal sense can make corrective justice arguments to claim reparation.[101]

[96] See *Norris v Ireland* (1988) 13 EHRR 186, para 31; *Verein KlimaSeniorinnen* (n 4) para 462.

[97] Case C-25/62 *Plaumann v Commission* [1963] ECR 95, 107.

[98] *Velásquez Rodríguez v Honduras* (Merits) IACtHR Ser C No 7 (21 July 1989) paras 2–3. See D Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 245.

[99] Definition 3(b): 'victim' in *Oxford English Dictionary* (OUP 2025).

[100] ibid definition 3(a). See also G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2019) 997.

[101] K Gray and E Kubin, 'Victimhood: The Most Powerful Force in Morality and Politics' (2024) 70 Advances in Experimental Social Psychology 137, para 2.3.

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The law in general and litigation in particular mainly use the concept of victim in the specific sense:[102] to refer to an individual suffering as a consequence of 'a crime, tort, or other wrong'.[103] Victims, in this specific sense, are individuals who deserve a legal remedy for the harm they suffer due to someone else's wrongful conduct.[104] For instance, the ECHR allows standing to the 'victim of a violation by one of the High Contracting Parties of the rights' defined by the ECHR.[105] While the ECtHR often addresses an applicant's victim status as a threshold admissibility issue, this determination can only be on a prima facie basis: it is plain from the language of Article 34 that identifying a victim 'of a violation' requires a substantive finding of such a violation.

Further, the causal attribution of the harm to the wrong requires a certain degree of causal proximity. In US tort and criminal law, for instance, a victim is typically defined as someone who is 'directly and proximately' harmed by the wrongful act, which means that wrongful conduct must be an 'active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source'.[106] There may be 'multiple links in the [causal] chain',[107] provided that there is 'a sufficient connection' between the wrong and the harm[108] and that the causal link is not 'hypothetical or tenuous'.[109] In this context, contributing to causing a cumulative issue is not generally viewed as proximate causation.[110] While other legal systems define the causal element of victimhood differently, they do not generally accommodate remote and tenuous causation.[111] As any wrongful act can have ripple effects extending ad infinitum, a requirement of a (somewhat) direct and proximate causation is essential to delineating the concept of victim—to ensure that not everyone could be viewed as a victim of everyone else's wrongs.

3.2. The tenuous causal link between climate wrongs and individual harm

This subsection argues that no individual is a victim of a climate wrong, in a legal sense, because no individual suffers harm as the direct or proximate consequence of a State or entity's failure to mitigate climate change. To attribute a plaintiff's individual harm to a defendant's climate wrong, a court would need to find a causal chain made up of three

[102] Some legal instruments protect subclasses of 'victims' in this unspecific sense, but they rarely use the term. See UNGA Res 79/128 (4 December 2024) UN Doc A/RES/79/128, para 4.

[103] BA Garner (ed), *Black's Law Dictionary* (9th edn, West 2009) 1703.

[104] UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34, para 1; Victims and Prisoners Act 2024 (UK) section 1.

[105] ECHR (n 37) art 34.

[106] *Lynn Gas and Electricity v Meriden Fire Insurance* 158 Mass 570, 575, 33 NE 690, 691 (1893) (Supreme Court of Massachusetts). See also *Paroline v United States* 572 US 434, 446 (2014) (SCOTUS); Crime Victims' Rights Act 2004 18 USC, section 3771(e)(2)(A).

[107] *Mendia v Garcia* 768 F 3d 1009, 1012 (9th Circuit Court of Appeals, 2014).

[108] *Paroline* (n 106) 444.

[109] *Maya v Centex* 658 F 3d 1060, 1070 (9th Circuit Court of Appeals, 2011).

[110] ibid; *Kivalina* (n 12) 881–82 (affirmed on appeal). See also *Allen v Wright* 468 US 737, 759 (1984) (SCOTUS); *O'Handley v Padilla* 579 F Supp 3d 1163, 1191 (Northern District of California, 2022).

[111] See, e.g. *Shortall v Ireland* (2021) 74 EHRR SE3, para 50; C Troman (ed), *Halsbury's Laws of England: Tort* (2021) vol 97A, para 17; Cour de Cassation (Fr), Civ. 2e, 19–17.384 (11 March 2021).

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successive links: first, between individual harm and a physical event; second, between the physical event and climate change; and, third, between climate change and the climate wrong (i.e. the failure of the defendant to mitigate climate change). The following shows that each of these links is tenuous and difficult to establish. Thus, as a consequence, the entire causal chain between individual harm and a climate wrong appears particularly weak.

3.2.1. Attributing an individual harm to a physical event

When seeking to attribute a plaintiff's individual harm to a defendant's climate wrong, a necessary step is to establish that the harm is caused by a physical event that could subsequently be linked to climate change and to the climate wrong. This first step is difficult to establish because physical events do not cause individual harm in isolation from other factors.

A mantra in disaster risk studies is that there is no such thing as a natural disaster.[112] Similarly, a disaster cannot be attributed to climate change in abstraction from the context in which it unfolds.[113] Whether a physical event becomes a disaster depends, among other things, on a population's vulnerability, exposure and resilience.[114] Thus, States understand that their efforts to reduce exposure and vulnerability can reduce disaster risk.[115] These efforts may not be sufficient to prevent any harm, but they largely determine the types of harm (e.g. human or economic loss) that an adverse physical event may trigger, and their distribution within a population (e.g. disproportionately affecting minorities).[116] In other words, while some physical events may inevitably harm society, they do not inevitably harm a given individual in a particular way.

The absence of a deterministic causal link between a physical event and individual harm has occasionally hindered claims of victimhood in climate litigation. The Higher Regional Court of Hamm rejected claims in *Lliuya* on the ground that the local authorities were able to control the risk of glacial lake outburst flood exacerbated by climate change by controlling the quantity of water stored in the glacial lake.[117] Similarly, the ECtHR held in *Verein KlimaSeniorinnen* that the medical conditions from which individual applicants suffered during heatwaves could 'be alleviated by the adaptation measures available in Switzerland or by means of reasonable measures of personal adaptation', thus finding that the applicants could not be viewed as victims of a State's failure to mitigate climate change.[118]

[112] A Oliver-Smith, 'Peru's Five-Hundred Year Earthquake: Vulnerability in Historical Context' in A Oliver-Smith and S Hoffman (eds), *The Angry Earth: Disaster in Anthropological Perspective* (2nd edn, Routledge 2020) 83; C Hartman and G Squires (eds), *The Is No Such thing as a Natural Disaster: Race, Class, and Hurricane Katrina* (Routledge 2006).

[113] E Raju, E Boyd and F Otto, 'Stop Blaming the Climate for Disasters' (2022) 3 Communications Earth & Environment 1.

[114] K Hagon, 'Protecting People in the Context of Climate Change and Disasters: Setting the Scene' (2021) 115 ASIL: Proceedings of the Annual Meeting 156, 157.

[115] Sendai Framework for Disaster Risk Reduction 2015–2030 (2015), preambular para 6.

[116] See G Garfield, 'Hurricane Katrina: The Making of Unworthy Disaster Victims' (2007) 10 Journal of African American Studies 55.

[117] *Lliuya* (n 26) para 486.

[118] *Verein KlimaSeniorinnen* (n 4) para 533. See also *De Conto* (n 42) para 14; *Uricchio* (n 42) para 14.

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In other cases, courts have recognised that States had an obligation to take measures to reduce the exposure and vulnerability of their populations to adverse physical events,[119] including when these events were causally related to climate change.[120] Such action on climate change adaptation may protect individuals in a much more direct and effective way than action on climate change mitigation, by acting on the various factors that determine individual exposure, vulnerability and resilience in the face of physical events.

3.2.2. Attributing a physical event to climate change

Assuming that one could attribute individual harm to a physical event, another essential step would be to attribute this physical event to climate change. Climate change manifests itself through both slow-onset events (e.g. sea-level rise and ocean acidification) and changes to the likelihood and severity of some types of extreme weather events (e.g. cyclones and heavy rainfall).[121] Attributing slow-onset events to climate change is relatively straightforward, though attributing individual harm to such events is more difficult, since their slow pace allows more time for adaptation (e.g. managing the effects of sea-level rise through land planning). In contrast, attributing extreme weather events to climate change is more problematic, even if relying on methods of probabilistic attribution.

Studies that seek to attribute extreme weather events to climate change[122] have occasionally been presented as a way 'to attribute individual losses to … climate change' in the context of climate litigation.[123] As noted in Section 2.2,[124] these studies could only possibly address one of the three links in the causal chain between an individual harm and a climate wrong. Overall, these studies are of limited use in attributing a physical event to climate change, not just due to 'evidentiary challenges', which could potentially be addressed through future research,[125] but also for structural reasons.[126]

The conclusions that event attribution studies reach largely depend on the framing of the question. One of these decisions relates to the definition of the event. For instance, climate change may have a certain effect on the likelihood of extreme rainfall events at a global scale, but a different effect at national, regional or local scales.[127] Another such

[119] *Budayeva v Russia* (2008) 59 EHRR 2.

[120] *Billy* (n 19) para 8.12; *Leghari* (n 19).

[121] Pörtner et al (n 85) 45, 47.

[122] See P Hope et al, 'Attribution' in Pörtner et al (n 85) 150.

[123] Otto et al (n 66) 736. See also MB Burger, J Wentz and R Horton, 'The Law and Science of Climate Change Attribution' (2020) 45 ColumJEnvtlL 57, 147–218, 225–39.

[124] See text accompanying n 66.

[125] R Stuart-Smith et al, 'Attribution Science and Litigation: Facilitating Effective Legal Arguments and Strategies to Manage Climate Change Damages' (Sustainable Law Programme, Environmental Change Institute, University of Oxford, 2021) 2 <https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/attribution-science-and-litigation.pdf>.

[126] See generally M Hulme, 'Attributing Weather Extremes to "Climate Change": A Review' (2014) 38 PPG: Earth and Environment 499; G Lusk, 'The Social Utility of Event Attribution: Liability, Adaptation, and Justice-Based Loss and Damage' (2017) 143 Climatic Change 201; AR Solow, 'Extreme Weather, Made by Us?' (2015) 349 Science 1444.

[127] See National Academies of Sciences, Engineering and Medicine (NASEM), *Attribution of Extreme Weather Events in the Context of Climate Change* (National Academies Press 2016) 32–33; S Seneviratne et al,

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decision is whether the attribution study assesses the impact of climate change on either the likelihood or the intensity of an event.[128] For instance, stating that cyclones are becoming more intense amounts to saying that the more intense type of cyclones are becoming more frequent; yet attribution studies focusing on intensity or frequency often lead to very different conclusions. There is no objective justification to prefer one option or the other, yet these choices have major implications for any attempt at assessing the causal link between climate change and the event.

This issue can be illustrated by considering attribution studies focusing on Hurricane Milton, which unfolded in the Gulf of Mexico in October 2024. The World Weather Attribution, a research consortium, reported that climate change had made hurricanes 10 to 50 per cent more intense, but also that it had made a hurricane of such intensity twice as likely; that the hurricane was fuelled by a sea-level temperature that was 1°C warmer than it would have been without climate change, and that higher sea-level temperature had become 400 to 800 times more likely because of climate change; and that the most intense rainfall over one hour had become 20 to 30 per cent more intense, and twice as likely, than it would have been without climate change.[129] Each of these claims frames the question of attribution differently. First, they use different definitions of the attributable 'event' (e.g. a category 4 hurricane, higher sea-water temperature or intense rainfall). Then, they approach the effect of climate change as either a change in the severity or in the frequency of the event (e.g. as more intense rainfall or a higher risk of very intense rainfall). It is far from clear which of these claims (or an infinite list of alternative claims), or combination thereof, should be relied upon when seeking to attribute individual harm to a climate wrong; or, more generally, how such studies, when read with the necessary caution, could lead to anything beyond the rather unhelpful conclusion that climate change had 'something to do' with the event.

A related but more fundamental issue with attribution studies has to do with their premise that, 'once the climate has changed, some weather events would have occurred exactly as they did in its absence'.[130] In other words, these studies assume that it is possible to distinguish weather events that would have occurred without climate change from weather events that would not. This premise ignores the chaotic nature of the weather system—a system characterised by a 'high sensitivity to initial conditions',[131] where 'a small alteration … will cause subsequent states [of the system] to differ greatly from the states that would have followed without the alteration'.[132] In this system, as Edward Lorenz put it, 'the flap of a butterfly's wings in Brazil [could] set off a tornado in

'Weather and Climate Extreme Events in a Changing Climate' in V Masson-Delmotte et al (eds), *Climate Change 2021: The Physical Science Basis* (CUP 2021) 1513, 1519.

[128] F Otto, 'Attribution of Weather and Climate Events' (2017) 42 Annual Review of Environmental Resources 627, 629; NASEM (n 127) 30–32.

[129] 'Yet Another Hurricane Wetter, Windier and More Destructive because of Climate Change' (*World Weather Attribution*, 11 October 2024) <https://www.worldweatherattribution.org/yet-another-hurricane-wetter-windier-and-more-destructive-because-of-climate-change/>.

[130] G Hansen, M Auffhammer and AR Solow, 'On the Attribution of a Single Event to Climate Change' (2014) 27 Journal of Climate 8297, 8300.

[131] E Ghys, 'The Lorenz Attractor, a Paradigm for Chaos' in B Duplantier, S Nonnenmacher and VRivasseau (eds), *Chaos: Poincaré Seminar 2010* (Springer 2013) 2–3.

[132] E Lorenz, *The Essence of Chaos* (University of Washington Press 1993) 206.

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Texas'.[133] When taking into account ripple effects in chaotic systems, it could be argued that every single weather event happening today is the consequence of climate change—and also, for instance, of the fumes of a single coal plant, or of the rotation of the blades of a windmill, as each of these 'events' would have caused ripple effects permanently altering the weather system. In other words, 'it may not make sense to speak about whether an event has or has not been caused or affected by anthropogenic influence'[134] when in reality, a world without climate change would have experienced an entirely different sequence of events. It is thus clear that while climate change affects the probability of certain weather events, the attribution of singular events to climate change faces significant obstacles.

3.2.3. Attributing climate change to a climate wrong

Successfully attributing a plaintiff's individual harm to a physical event, and that physical event to climate change, would only show that the plaintiff is a victim of climate change, that is, a victim in the non-legal sense. A third step—the attribution of climate change to a climate wrong—is necessary to demonstrate that the plaintiff is a victim, in the legal sense, of the defendant's wrongful conduct. The problem at this point is twofold. First, a defendant's GHG emissions make only an extremely small contribution to causing climate change.[135] Thus, in *Kivalina v ExxonMobil Corp*, US courts rejected compensation claims from a local community against energy companies for climate impacts, in part, on the ground that the local community was unable to justify the attribution of liability to these companies 'out of all the greenhouse gas emitters who ever have emitted greenhouse gases over hundreds of years'.[136] Second, many GHG emissions do not result from a climate wrong. As Judge Nolte observed, it is likely that 'only a limited amount of all anthropogenic GHG emissions since industrialisation has been caused by *wrongful* acts'.[137]

A thought experiment can illustrate this point. In 2023, the United Kingdom (UK) emitted 302 million tonnes of carbon dioxide (CO_2).[138] Consider for the sake of argument that the UK failed to take appropriate measures to mitigate climate change, and that this omission caused a 10 per cent increase in national CO_2 emissions in 2023. This wrongful act would have caused an increase in global CO_2 emissions by 0.07 per cent that year,[139] adding about 0.001 per cent to cumulative anthropogenic CO_2

[133] ibid 181.

[134] NASEM (n 127) 30.

[135] *Anvill Hill Project Watch Association v Minister for the Environment* (2007) 243 ALR 784, para 42 (Federal Court of Australia); *350 Montana v Haaland* 50 F 4th 1254, 1270, 1281 (9th Circuit Court of Appeals, 2022); *Backsen v Germany* (31 October 2019) 10 K 412.18, para 74 (Administrative Court of Berlin). See generally J Peel, 'Issues in Climate Change Litigation' (2011) 5 CCLR 15, 16; B Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (OUP 2024) 115–19.

[136] *Kivalina* (n 12) 868–69 (Prof DJ). See also 881.

[137] *Obligations of States in Respect of Climate Change* (n 67) (Declaration of Judge Nolte) para 27 (emphasis in original).

[138] Emissions Database for Global Atmospheric Research (EDGAR), 'GHG Emissions of All World Countries' (European Commission, 2024) <https://edgar.jrc.ec.europa.eu/report_2024>. Considering other GHGs with a shorter atmospheric lifetime would complicate the thought experiment without significantly changing its conclusions given that CO_2 emissions are the main cause of climate change.

[139] Based on EDGAR ibid.

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emissions since the Industrial Revolution,[140] thus increasing the long-term global average temperature by about one hundred-thousandth of a degree Celsius.[141] This consequence should not be dismissed as negligible: an extremely small contribution to an extremely large issue might be significant. But, for the purpose of attribution of harm to a climate wrong, it is relevant that the effect of the wrong would be extraordinarily diffuse in space and protracted in time and would have virtually no tangible effect on any given individual. Even if the UK persisted in causing wrongful emissions over many years, or if a similar thought experiment was applied to a larger country, it would remain the case that a single actor's wrongful conduct would not affect any particular individual in any even remotely direct or proximate way.

Courts have largely overlooked this causal link when seeking to establish the causal chain between climate wrongs and individual harm. In *Billy*, the UNHRC considered that the authors of the communication had standing as victims. It did so, however, without distinguishing between claims concerning climate change adaptation and those concerning climate change mitigation—that is, without considering any link between the harm suffered by the individuals and the alleged failure of the State to mitigate climate change.[142] In *Sacchi*, the UNHRC justified the victim status of several individuals against five different States in exactly the same way, without seeking to demonstrate that the harm invoked by these individuals could somehow be attributed to the conduct (wrongful or otherwise) of any individual State.[143] In *Smith v Fonterra*, the Supreme Court of New Zealand held that the applicant had standing, having suffered special damage related to coastal erosion, although the Court did not show a causal link with an act of the defendant.[144] Admittedly, the last two decisions were only concerned with the threshold question of admissibility, and further consideration of causality could follow in *Smith* as it proceeds to trial, or could have followed in *Sacchi*, had the case not been found inadmissible due to the failure of the applicants to exhaust domestic remedies. Yet it remains unclear how victimhood could have been established, even on a prima facie basis, when clearly the alleged omission would have almost no effect on the applicants.

Verein KlimaSeniorinnen is another case in point. At first, the ECtHR rightly adopted the specific definition of a victim when suggesting that, in order to justify victim status under Article 34, the applicant would need 'to show that he or she was personally and directly affected by the impugned failure'—namely, the 'alleged failure by the State to combat climate change'.[145] Yet the Court went on to assess how individuals were affected by climate change in general, rather than specifically by

[140] Based on IPCC, 'Climate Change 2023: Synthesis Report' (WMO and UNEP, 2023) 44.

[141] Based on ibid 19.

[142] *Billy* (n 19) para 7.10.

[143] *Sacchi v Argentina* (n 13) para 10.14; *Sacchi v Brazil* Communication No CRC/C/88/D/105/2019 (9 November 2021) UN Doc CRC/C/88/D/105/2019, para 10.14; *Sacchi v France* Communication No CRC/C/88/D/106/2019 (10 November 2021) UN Doc CRC/C/88/D/106/2019, para 10.14; *Sacchi v Germany* Communication No CRC/C/88/D/107/2019 (11 November 2021) UN Doc CRC/C/88/D/107/2019, para 9.14; *Sacchi v Turkey* Communication No CRC/C/88/D/108/2019 (8 October 2021) UN Doc CRC/C/88/D/108/2019, para 9.14.

[144] *Smith* (n 60) para 152.

[145] *Verein KlimaSeniorinnen* (n 4) para 487.

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Switzerland's failure to take measures to mitigate climate change.[146] The Court ultimately allowed standing to an association as a representative of 'individuals who may arguably claim to be subject to specific threats or adverse effects *of climate change* on their life, health, well-being and quality of life as protected under the Convention'[147]—that is, as victims in a non-legal sense. While the Court suggested that a respondent State could only be required to take measures 'that could have … a real prospect of altering the outcome or mitigating the harm',[148] it did not explain how any action by Switzerland could possibly satisfy this condition.[149]

It is unclear how courts can justify their frequent failure to address this third causal link. Holding one actor to account for the consequences of all anthropogenic GHG emissions would require the simultaneous application of two doctrines: strict liability and joint-and-several liability. Strict liability would suggest that a GHG emitter would be responsible for the consequences of all its GHG emissions, not just for those resulting from the breach of an obligation to mitigate climate change. Yet strict liability regimes are typically limited to narrowly defined subject-matters.[150] One of the strongest arguments for strict liability, in domestic law, could rely on the tort of nuisance, which is not generally framed as requiring the breach of a legal obligation.[151] Yet nuisance does presuppose unreasonable conduct,[152] that is, conduct that could be qualified as 'wrongful', at least in the sense that it inflicts an extraordinary and unreasonable risk of harm onto others.[153] Whether these conditions are met depends, among other things, on the social utility of the act[154] and on the practical possibility of avoiding the harm.[155] Certainly some GHG-intensive activities would likely not be considered an actionable nuisance because they are ordinary, permitted and even often encouraged by society and government as beneficial to human welfare.[156]

Likewise, there is no obvious legal basis for applying a regime of joint-and-several liability, which would justify holding any GHG emitter liable for the consequences of the emissions of all others. Under international law, a State is normally responsible only for the consequences of its own wrongful acts.[157] While States have adopted a principle

[146] ibid paras 487(a), 499, 502.

[147] ibid para 524 (emphasis added). Similar confusion can be found in some of the ECtHR's other positive obligation cases on environmental harm. See *Cordella v Italy* App No 54414/13 (ECtHR, 14 January 2019) paras 101–107; *Di Sarno v Italy* App No 30765/08 (ECtHR, 10 January 2012) para 81.

[148] *Verein KlimaSeniorinnen* (n 4) para 444.

[149] See Stoyanova (n 18).

[150] e.g. *Restatement of Torts* (2nd edn, American Law Institute 1965–1979) para 520.

[151] Otto et al (n 66) 745.

[152] *Bamford v Turnley* (1860) 122 ER 25 (Queen's Bench Division); *Sedleigh-Denfield v O'Callagan* [1940] AC 880 (House of Lords); *Restatement of Torts* (n 150) paras 821B(1), 822.

[153] *The Wagon Mound No 2* [1967] 1 AC 617, 639 (Privy Council); C Witting, *Street on Torts* (15th edn, OUP 2018) 434–35.

[154] *Harrison v Southwark* [1891] 2 Ch 409, 414–15; *Restatement of Torts* (n 150) paras 826, 828.

[155] *Moy v Stoop* (1909) 25 TLR 262 (King's Bench Division); *Restatement of Torts* (n 150) para 830.

[156] H Shue, 'Subsistence Protection and Mitigation Ambition: Necessities, Economic and Climatic' (2019) 21 British Journal of Politics and International Relations 251.

[157] ARSIWA (n 21) art 47, commentary para 8; B Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115 AJIL 409, 428–30; *Sacchi v Argentina* (n 13) para 10.8.

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of common but differentiated responsibilities,[158] they have not generally construed it as implying any sort of liability for the consequences of GHG emissions, let alone joint-and-several.[159] In domestic law, joint-and-several liability has only occasionally been applied, for instance, when it is not possible to determine the contribution of each tortfeasor to the harm,[160] or where each contributor to the harm had 'materially increased the risk'.[161] It would be difficult to justify holding a defendant liable for all consequences of climate change (even if, initially, only towards an individual plaintiff) when this defendant has only caused an extremely small contribution to global cumulative GHG emissions.

3.3. Redefining victims?

The difficulties identified in Section 3.2 in relation to each causal link compound one another, revealing an extraordinarily tenuous causal chain, far from the direct and proximate causation required to identify someone as the victim of someone else's wrongful conduct. Yet it is possible to object to that starting point: perhaps the standard of direct and proximate causation defines victimhood too narrowly. For instance, it might be argued that the law is to be interpreted in light of what is socially desirable, and that identifying victims of climate wrongs is socially desirable because it is conducive to the judicial enforcement of obligations on climate change mitigation.[162] The legal concept of a victim can be defined in various ways but, as this article argues, it cannot be extended so as to be applied in relation to climate wrongs—not, that is, without this concept becoming entirely meaningless and ineffective.[163]

For example, when some remote consequences of a climate wrong are considered, other equally remote consequences of the defendant's conduct would also presumably need to be considered, and the person claiming to be a victim of the defendant's conduct may soon appear to be, at the same time, a beneficiary of that conduct. For instance, a State's failure to take measures to mitigate climate change does not only cause additional GHG emissions; it also reduces economic and regulatory burdens, which could have positive effects on individuals.

In fact, the benefits that plaintiffs may draw from a climate wrong will often be more direct than the harm they invoke, particularly in cases that plaintiffs bring against their own governments, given that the burden of climate change mitigation tends to be immediate and localised, whereas the benefits of reducing GHG emissions are global and protracted. Nor are the individuals more likely to be affected by climate-related events necessarily different from those who might be affected by measures to mitigate

[158] UNFCCC (n 2) arts 3(1), 4(1)(b); Paris Agreement (n 2) arts 2, 4(2).

[159] Decision 1/CP.21 (n 2) para 51. See also *Urgenda* (n 4) s 5.7.7.

[160] *Barker v Corus* [2006] UKHL 20; *Restatement of Torts* (n 150) para 433A(1)(b); *Midland Empire Packing v Yale Oil* 169 P 2d 732 (1946); KB Maag, 'Climate Change Litigation: Drawing Lines to Avoid Strict, Joint, and Several Liability' (2009) 98 GeoLJ 186.

[161] *Fairchild v Glenhaven* [2002] UKHL 22, para 65. See AH Lindberg, 'Rights and Climate Change Mitigation: Why the Individual Rights Approach to Climate Change Mitigation Is Not the Right Approach' (Doctoral Thesis, University of Cambridge, 2023) 137.

[162] *Verein KlimaSeniorinnen* (n 4) para 484.

[163] See *Pabai* (n 36) para 1086, insisting that '[t]he question of causation must be approached with a modicum of common sense'.

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climate change. Factors that make some segments of the population particularly vulnerable to climate change, such as marginalisation, discrimination and inequalities, also make them more vulnerable to the social and economic impacts of action on climate change mitigation.[164]

Ultimately, determining whether an individual should genuinely be characterised as a victim of the climate wrong of the defendant, or rather as a beneficiary, accomplice or perpetrator of such wrongs, would inevitably involve an implausible comparison of the costs and benefits of the climate wrong for that individual. If the plaintiff claimed to have already been the victim of a climate wrong, a factual scenario would need to be compared with a counterfactual scenario without the climate wrong. And if the plaintiff claimed that they might become a victim of a climate wrong, the comparison would be between two projections with different assumptions. In practical terms, such counterfactuals and projections could not account for the immense complexity of the various human and natural systems involved and determine how the entire course of one's person life could be, or could have been, irreversibly changed by slight alterations in social and economic conditions on the one hand, and in climate conditions on the other. Such counterfactuals or projections would inevitably rely on highly simplistic and speculative reasoning. Even if a complete understanding of the consequences of the climate wrong could be achieved, the two scenarios or projections would likely be so different—leading the individual to entirely different lives—so as to render a comparison of the costs and benefits entirely meaningless.

4. Rethinking climate litigation without victims

This last section assesses the implications of the argument made in Section 3 for the prospects of litigation relating to climate change mitigation. While the non-existence of victims is a major impediment to such litigation, it does not always prevent plaintiffs from establishing standing, the relevant rules from being applied and courts from ordering effective remedies. Climate litigation may find more favourable ground in public law, based on procedural and substantive rules that aim to promote the common good rather than protect individual rights. The aim of this section is not to provide a comprehensive treatment of these questions but, rather, to outline potential solutions.

4.1. Standing

When plaintiffs claim to be victims of a climate wrong, it is often as a means to justify their standing to sue that entity. For instance, individuals' access to human rights courts is generally conditioned on their ability to demonstrate that they are the victims of the alleged wrongful conduct of the government.[165] Comparable conditions exist to access

[164] See Katowice Committee of Experts on Impact of Implementation of Response Measures, 'Impacts of the Implementation of Response Measures on Intergenerational Equity, Gender, Local Communities, Indigenous Peoples, Youth and People in Other Vulnerable Situations' (UNFCCC, 24 June 2024) 31–33 <https://unfccc.int/documents/638245>.

[165] ECHR (n 37) art 34; Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.

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US federal courts, where plaintiffs must be able to demonstrate an 'injury in fact'[166] and the CJEU, where individual standing in annulment proceedings is conditioned on a 'direct and individual concern' of the plaintiff.[167] The victim status test has been applied with considerable flexibility in circumstances where it could safely be assumed that victims existed or would come to exist at some point in the future.[168] By contrast to these cases, litigation on climate change mitigation raises an issue of an ontological rather than epistemological nature: even a future omniscient observer would not be able to identify any victim of a defendant's failure to mitigate climate change. The issue is not that victims of climate wrongs cannot be identified, but that they do not exist.

An important issue is that limiting standing to victims may allow victimless wrongs to remain unsanctioned. However, this issue is not specific to climate litigation. Many other breaches of public law obligations may affect a community in general without necessarily affecting any individual in particular.[169] Failure to protect biological diversity, for instance, will often not affect any individual in particular, although it harms a collective interest. Exclusively collective harm may also arise from breaches of legal norms relating to tax, education, media regulation or development policies, among other things.[170]

A frequent assumption is that limiting standing to victims is necessary to avoid an actio popularis[171]—that is, the right of 'any member of a community to take legal action in vindication of a public interest'.[172] This is a false dichotomy: standing can be extended to non-victims without necessarily being opened to every member of a community. Rules on public interest litigation may allow climate litigation to proceed while neither invoking elusive victims, nor allowing an actio popularis.

For example, public institutions are often allowed to sue in the public interest without having to demonstrate an actual or potential injury. This applies, for instance, to an Attorney-General or a subnational government,[173] whose standing has sometimes been justified as a representative of a community (rather than an individual) potentially affected by climate impacts.[174] Similarly, the victim status requirement under Article 34 ECHR does not apply to inter-State and advisory

[166] *Lujan* (n 8) 560.

[167] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ L115/47 (TFEU) art 263(4).

[168] See *Zakharov v Russia* (2015) 63 EHRR 17, paras 173–179; TR Hickman, 'Tort Law, Public Authorities, and the Human Rights Act 1998' in D Fairgrieve, M Andenas, and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (BIICL 2002) 41.

[169] D Krinsky, 'How to Sue without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals' (2006) 57 CaseWResJInt'lL 301, 302; *Attorney-General Ex Rel McWhirter v Independent Broadcasting Authority* [1973] QB 629, 649; CF Forsyth and IJ Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2023) 557.

[170] Krinsky (n 169) 304; C Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?' (2008) 20 JEL 417.

[171] *Klimatická Žaloba* (n 31) para 197; *Verein KlimaSeniorinnen* (n 4) para 460.

[172] *South West Africa (Ethiopia v South Africa) (Second Phase)* (Judgment) [1996] ICJ Rep 6, para 88.

[173] Forsyth and Ghosh (n 169) 558.

[174] *Grande-Synthe* (n 14) paras 3–4; *Massachusetts v EPA* 549 US 497, 520 (2007); *American Electric Power v Connecticut* 564 US 410, 420 (2011).

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proceedings before the ECtHR,[175] and the strict rule on individual standing before the CJEU is mitigated by the public interest standing of EU institutions and Member States.[176]

Public interest litigation may also be opened to some NGOs and individuals. For instance, English law allows standing in judicial review to any persons with a 'sufficient interest',[177] including NGOs[178] or 'public-spirited taxpayer[s]'[179] who pursue environmental protection goals of particular concern to them, including climate change mitigation.[180] Similarly, French law grants standing to anyone with a 'legitimate interest' in the case,[181] including environmental NGOs in climate lawsuits.[182] Even US federal courts, while formally limiting standing to victims, have allowed plaintiffs to invoke so-called 'procedural injuries' arising, for instance, from irregular environmental impact assessments.[183] And, as noted in Section 2.1, the ECtHR's decision in *Verein KlimaSeniorinnen* might best be understood as allowing such public interest litigation,[184] which might be a desirable development, were it not so clearly inconsistent with the ECHR.

Some legal systems have gone further in formalising public interest litigation in environmental matters. Unlike class actions, public interest litigation may be initiated without defining a class or identifying any of its members as actual or potential victims.[185] In particular, the parties to the Aarhus Convention are required to grant standing to some NGOs without condition of injury,[186] a rule that has facilitated climate litigation in Europe.[187] A 2019 reform of the French Civil Code extends NGOs' standing in environmental reparation cases,[188] and NGOs have already relied on this provision in climate litigation.[189] NGOs have also been granted public interest standing, including in

[175] ECHR (n 37) arts 33, 47. See VP Tzevelekos, 'Standing: European Court of Human Rights' in *Max Planck Encyclopedia of International Procedural Law* (December 2019) para 10.

[176] TFEU (n 167) art 263(2).

[177] Senior Court Act 1981, section 31(3).

[178] *R v Inspectorate of Pollution, ex parte Greenpeace (No 2)* [1994] 4 All ER 329 (Queen's Bench Division).

[179] *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617, 644 (House of Lords). See generally J Bell, 'The Resurgence of Standing in Judicial Review' (2024) 44 OJLS 313, 333–38.

[180] *Friends of the Earth* (n 33) paras 17–19.

[181] Code de Procedure Civil, art 31; *Casanova* (29 March 1901) (Conseil d'État).

[182] *Oxfam v France* (3 February 2021) Case No 1904967 (Administrative Tribunal of Paris); *Amnesty International v TotalEnergies SE* (18 June 2024) Case No 28/14348 (Court of Appeal, Versailles).

[183] *WildEarth Guardians v Zinke* 368 F Supp 3d 41, 60 (US District Court of the District of Columbia, 2019); *Friends of the Earth v Haaland* 583 F Supp 3d 113, 130 n 3 (US District Court of the District of Columbia, 2022). See generally *Lujan* (n 8) 572 n 7; DR Mandelker et al, *NEPA Law and Litigation* (2nd edn, Thomson Reuters 2024) para 4.19.

[184] See n 49.

[185] See *Foley* (n 14) para 84.

[186] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, art 9(2).

[187] See *Klimaatzaak* (n 4) para 124; *Klimatická Žaloba* (n 70) paras 94–95; *Urgenda* (n 4) para 5.9.2.

[188] Civil Code (France) art 1248.

[189] *Oxfam* (n 182) para 10; *Amnesty International* (n 182).

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environmental matters, in some US states[190] and South Asian countries[191] as well as in Brazil[192] and China.[193]

Strong arguments have been made in favour of liberal rules of standing for non-victims in cases where wrongful conduct only affects the public interest, as a way to ensure that someone—preferably at arm's length from the government—may challenge such conduct in courts.[194] Allowing some plaintiffs to act in the public interest does not necessarily open the floodgates of litigation, nor does it necessarily impose on a court an unmanageable workload. Whether or not one agrees with the argument for public interest standing, there does not appear to be any particular policy reason to treat climate litigation differently from other cases of exclusively collective harm.[195]

4.2. Applicable law

The non-existence of victims may also carry important implications for the substantive law applicable in litigation on climate change mitigation. Some legal norms prohibit the direct infliction of harm to an individual, without prohibiting harm to society at large.[196] Thus, the existence of a victim may be not only a procedural condition for standing, but also a substantive condition for the applicability of certain norms (e.g. even in cases where standing is justified in the absence of victims). Such norms can arguably arise under human rights law and tort law.

While courts have increasingly applied human rights law as the source of an obligation to mitigate climate change,[197] this development is highly problematic. Human rights law protects rights that, for the most part, belong to individuals.[198] Thus, as George Letsas has noted, the ECHR 'is based on the principle of individual justice': its application in any given case, notwithstanding procedural conditions of standing, 'presupposes the existence of a directed wrong done to an individual'.[199] When no victim can be identified, human rights law no longer acts as a 'trump card' to protect individuals against the pursuit of objectives of general interest;[200] rather, what is then framed as human rights protection is, in fact, more readily characterised as an

[190] *Citizens for Amending Proposition L v Pomona* (2018) 28 Cal App 5th 1159 (California Court of Appeal).

[191] HB Tripathi, 'Public Interest Litigation in Comparative Perspective' (2007) 1 National Judicial Academy of Nepal Law Journal 49; Z Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19 IndJGlobalLegalStudies 555.

[192] Public Civil Action Act No 7.347/1985 (Brazil); AH Benjamin and N Bryner, 'Brazil' in E Lees and J Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (OUP 2019) 90.

[193] Civil Procedural Law (China) art 55. See generally R Zhang and B Mayer, 'Public Interest Environmental Litigation in China' (2017) 1 ChineseJEL 202.

[194] *Smith* (n 60) paras 149–151; *Klimatická Žaloba* (n 70) para 100.

[195] Compare *Verein KlimaSeniorinnen* (n 4) para 486 (invoking the 'special features of climate change' to justify different rules on standing). See also *Cannavacciuolo* (n 44) para 221, and (Opinion of Justice Krenc) para 13.

[196] See Lindberg (n 161).

[197] See, e.g. *Verein KlimaSeniorinnen* (n 4); *Climate Emergency and Human Rights* (n 72); *Obligations of States in Respect of Climate Change* (n 67) para 393.

[198] See M Freeman, 'Are There Collective Human Rights?' (1995) 43 Political Studies 25.

[199] Letsas (n 11) 446.

[200] R Dworkin, *Taking Rights Seriously* (Bloomsbury 1997) 6.

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objective of general interest.[201] Human rights law thus loses its typical deontological focus to promote broad utilitarian considerations, which involve value-based judgements, competing conceptions of the common interest and complex arbitrages between conflicting policy priorities.[202]

Not unlike human rights law, tort law often seeks to protect the right of a person against the conduct of another (i.e. a 'neighbour').[203] When there is no victim, a difficulty is to determine whose right is being protected. Thus, the Federal Court of Australia found that the 'indeterminacy' of the class of potential victims foreclosed the establishment of a duty of care owed by the Australian Government in relation to its climate policy.[204] However, there is no obvious reason why tort law could not also be developed in ways that aim to prevent exclusively collective harm. For instance, the common law tort of public nuisance protects 'a right common to the general public'.[205] While courts have traditionally limited actions in public nuisance to persons suffering a 'special damage',[206] the Supreme Court of New Zealand has noted the need for reconsidering this requirement to address 'ubiquitous harms such as pollution (including from GHGs)'.[207] By analogy, Dutch and Belgian courts have applied tort law to climate change in what could have been framed as public interest litigation.[208]

In contrast, the non-existence of victims does not preclude the applicability of legal norms that aim to protect the public interest, most obviously in public law. These include specific legislation on climate change mitigation[209] and general norms on environmental protection, sustainable development or the safeguarding of the interests of future generations,[210] as well as principles such as the public trust doctrine, among other norms.

4.3. Remedies

Lastly, the non-existence of victims has implications for the availability of remedies in climate litigation. If no victim can be identified, it is unclear who, if anyone, could be entitled to damages. So far, the question has seldom been decided by courts. In a notable exception, in *Oxfam v France*, the Administrative Tribunal of Paris ordered the French Government to pay nominal damages to four NGO applicants that had demonstrated

[201] R Alexy, 'Individual Rights and Collective Goods' in CS Nino (ed), *Rights* (Dartmouth 1992) 163.

[202] See B Mayer, 'Is Climate Change Mitigation Really within the Scope of Positive Human Rights Obligations?' in V Stoyanova and D McGrogan (eds), *From Protection to Coercion: The Limits of Positive Obligations in Human Rights Law* (Hart, forthcoming).

[203] *Donoghue v Stevenson* [1932] AC 562, 580; Witting (n 153) 25; *Restatement of Torts* (n 150) para 821(c).

[204] *Minister for the Environment v Sharma* [2022] FCAFC 35, para 747 (Full Court of the Federal Court of Australia). See generally *Caparo Industries v Dickman* [1990] 2 AC 605, 621 (House of Lords).

[205] *Restatement of Torts* (n 150) para 821B(1).

[206] *Ricket v Metropolitan Railway Company* [1861–73] All ER Rep Ext 2164, 2171; W Presser, 'Private Action for Public Nuisance' (1966) 52 VaLRev 997, 1007.

[207] *Smith* (n 60) para 151. See also DE Antolini, 'Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule' (2001) 28 EcologyLQ 755, 762; DA Kysar, 'What Climate Change Can Do about Tort Law' (2011) 41 EnvLaw 1, 54.

[208] See *Urgenda v Netherlands* (24 June 2015) C/09/456689, para 4.64 (District Court of The Hague) (affirmed on appeal on alternative legal bases); *Milieudefensie* (n 4) para 7.57; *Klimaatzaak* (n 4) paras 217–270.

[209] e.g. Climate Change Act 2008 (amended) section 1(1).

[210] e.g. Charte de l'environnement 2004 (France) art 3.

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that the Government had failed to comply with a statutory carbon budget, but the Tribunal rejected claims for compensatory damages.[211] Similarly, the Higher Regional Court of Hamm rejected claims for damages in *Lliuya* on factual grounds.[212]

If compensation for climate impacts can be ordered by courts at all, it appears that plaintiffs representing aggregated interests (e.g. local communities, insurance companies or even States, through international litigation) would have a better chance than individuals at demonstrating causation of individual harm. However, the non-existence of victims does not prevent courts from prescribing other remedies in climate litigation. At the very least, court decisions can establish that the law has been breached and order the wrongdoer to comply with their obligations.[213] In some legal systems, courts might be empowered to impose in-kind reparation for the adverse consequences of climate wrongs without having to identify victims; a court could thus require a wrongdoer to make up for its excess emissions either by further reducing its emissions or by paying someone else to do so.[214] Yet another conceivable remedy would be for wrongdoers to provide financial support to measures and policies to promote adaptation to climate change.

5. Conclusion

The concept of a victim is prominent in climate litigation, in particular, as a justification for standing. Yet this concept requires a direct and proximate causal relation between a wrong and a harm, and no such direct and proximate causal relation can exist between individual harm and a failure to mitigate climate change. The non-existence of climate victims has important implications, although it is not always or necessarily a fatal flaw to public law litigation on climate change mitigation. Despite this difficulty, courts certainly have a role to play in prompting action on climate change mitigation.

Given the extraordinarily tenuous causal link between climate wrongs and individual harms, it is perplexing that climate victims have come to play such a central role in litigation. There may be several reasons for this. Fuzzy thinking might lead to the acceptance of the simplistic assumption that harm to society necessarily translates into distinct individual harm. It may be that some courts are particularly keen to recognise standing in climate litigation, even if that comes at the cost of logical consistency. There might also be a concern that denying the existence of victims would somehow question the severity of the harm. There may also be an individualistic bias in legal reasoning, in particular in Western jurisdictions[215] (where most relevant cases are taking place),[216]

[211] See *Oxfam* (n 182) arts 3, 5.

[212] *Lliuya* (n 26).

[213] *Obligations of States in Respect of Climate Change* (n 67) paras 446–448.

[214] *Oxfam* (n 182) art 2. See also Consolidated version of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143, annex II; Civil Code (France) art 1249; M Hinteregger, 'Environmental Liability' in Lees and Viñuales (n 192) 1036–1041.

[215] M Bussani and M Infantino, 'Tort Law and Legal Cultures' (2015) 63 AJCL 77, 101; M Gluckman, *Politics, Law and Ritual in Tribal Society* (Blackwell 1971) 183–96.

[216] Climate litigation cases that unfold in developing countries tend to be 'peripheral' cases, often of a procedural nature, or focused on adaptation. See J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 AJIL 679, 703–04; Setzer and Higham (n 12) 2; J Lin and J Peel, *Litigating Climate Change in the Global South* (OUP 2024) 61–62, 77–78.

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making it more natural for new issues to be approached in terms of individual harm rather than, for instance, as harm to society, nature and future generations.

Yet the 'victimisation' of climate harm seems to be legally and politically ineffective. As shown in this article, it leads to arguments and decisions that are plainly confused and untenable. But more fundamentally, on a political plane, presenting all (or most) people as innocent victims contributes to a denial of responsibility. It is unlikely that all moral responsibilities for climate change fall on governments, to the exclusion of the populations who elect and enable them, or on fossil-fuel producers, to the exclusion of anyone who knowingly consumes fossil fuels or uses goods or services made using them. An effective judicial or political response to climate change starts with a proper conceptualisation of the problem, and this requires abandoning the notion that a failure to mitigate climate change can directly or proximately harm any individual in any meaningful sense.

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