Incorporating climate justice into legal reasoning: shifting towards a risk-based approach to causation in climate litigation*

Abstract

This article examines whether the widely accepted political theory contributions on fair burden sharing, harm avoidance, and a just distribution of the remaining carbon budget can (and ought to) be incorporated or reflected in judicial reasoning on causation in systemic rights-based climate litigation. It explores whether wider use of the European Court of Human Rights' lenient approach to causation the national level could help overcome some of the causal difficulties that might otherwise excuse wealthy developed country governments that are signatories to the European Convention on Human Rights from responsibility. It also considers how rights-based arguments might be a way of operationalising climate justice in judicial reasoning in systemic rights-based climate cases in Europe.

Keywords: climate litigation, causation, risk-based approach, climate justice, fair burden sharing, ECHR, *Urgenda v Netherlands, Family Farmers and Greenpeace v Germany, Neubauer and others v Germany, Friends of the Irish Environment v Ireland, and Klimaseniorinnen v Switzerland*

1 INTRODUCTION

It is unequivocally clear that climate warming is a result of human influence[1] and that 'continued emissions of greenhouse gases (GHG) will cause further warming […] increasing the likelihood of severe, pervasive and irreversible impacts'.[2] And it is equally clear that GHG emissions should be reduced in order to limit warming so as to reduce the risk of severe or catastrophic climate impacts. Yet proving causation in the context of climate change poses a series of problems. Activists who wish to hold governments legally accountable for not managing their GHG emissions still run into difficulty when trying to show a sufficiently close nexus between a government's failure to adequately protect against climate harms and the violation of specific human rights.

Difficulties establishing causation stem from the polycentric nature of anthropogenic climate change, which is caused by cumulative GHG emissions as a result of human activities across a range of sectors, at varying scales, in different parts of the world.[3] In other words, the geographically and temporally dispersed nature of cumulative greenhouse gas emissions make it difficult to identify, or

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[1] Intergovernmental Panel on Climate Change, *Assessment Report 5: Synthesis Report Summary for Policymakers* (2014) 2; M Burger, J Wentz, R Horton, "The Law and Science of Climate Change Attribution" (7 February 2020, Climate Law Blog) http://blogs.law.columbia.edu/climatechange/2020/02/07 date accessed: 30 April 2020

[2] Ibid, 8.

[3] E Fisher, E Scotford and E Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) Modern Law Review 173, 178.

attribute responsibility to, an obvious wrongdoer. There is not only a plurality of agents contributing to climate change but also intervening geographical, socio-economic and political factors aggravating the impacts of climate change.[4] Finally, many impacts are 'indirect, multi-scalar and differentiated,'[5] serving to reinforce and exacerbate the vulnerabilities of already marginalised and disadvantaged communities.

Rapid advances in climate change attribution science are improving understanding of how human activities are affecting the climate system and informing discussions on scientific and legal causation.[6] Burger et al observe that once a particular impact has been attributed to anthropogenic climate change, a state or company's contribution to that impact can, in theory, be expressed as a proportion of contribution to total global GHG emissions.[7] They warn, however, that source attribution is not a purely objective quantitative exercise.[8] Attributing responsibility for climate harm raises complex normative questions about who is responsible for which GHG emissions, and responsibility can be apportioned in different ways.[9] Calculating legal accountability, Liston notes, 'inescapably involves consideration of States' *equitable* share of the global carbon budget' for the 1.5°C target enshrined in the Paris Agreement.[10]

Climate (change) litigation has been an important arena for teasing out these kinds of questions, with a recent surge in cases. As of July 2020 the number stood at 1,550 cases filed in 38 countries.[11] There are various understandings, however, of what qualifies as climate litigation.[12] For example, some scholars include cases that both support and oppose regulatory measures aimed at curbing GHG emissions, while others only include supportive, pro-regulatory cases.[13] Setzer and Vanhala correctly suggest that there is no 'need for an overarching definition but rather urge scholars to be clear about how they are conceptualizing and operationalizing their ideas about what climate litigation is and is not'.[14]

This article focuses on a subset of climate litigation: 'systemic rights-based climate litigation', understood here as legal cases that take a whole-of-system approach by challenging the overall ambition of a government's framework climate mitigation policies often on fundamental rights (and sometimes on statutory)

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[4] O Quirico, "Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation" (2018) 65 Netherlands International Law Review 185, 186.
[5] Fisher (n3) 178.
[6] For in depth discussion see: Burger (n1); see generally: M Burger, J Wentz, R Horton, "The Law and Science of Climate Change Attribution" (2020) 45(1) Columbia Journal of Environmental Law 57; S Marjanac and L Patton, "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36(3) Journal of Energy and Natural Resources Law 265, 266.
[7] Burger (n1).
[8] Ibid.
[9] Ibid.
[10] G Liston, "Enhancing the efficacy of climate change litigation: how to resolve the 'fair share question' in the context of international human rights law" (2020) 9(2) Cambridge International Law Journal 241, 243. Emphasis added.
[11] UNEP and Sabin Center for Climate Change Law, *Global Climate Litigation Report 2020 Status Review* (26 January 2021) https://www.unenvironment.org/resources/report/global-climate-litigation-report-2020-status-review, 4.
[12] J Setzer and L Vanhala, "Climate change litigation: A review of research on courts and litigants in climate governance" (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change 3.
[13] Ibid.
[14] Ibid .

grounds before domestic and regional human rights courts.[15] Such litigation is often designed to compel governments to pursue more ambitious climate mitigation targets.[16]

Systemic rights-based climate litigation — in particular — raises a causation challenge because litigants must prove a causal link between insufficient regulatory action on climate mitigation by governments and climate harms. In jurisdictions amenable to systemic rights-based climate litigation, litigants must typically show that the state in question is interfering with the climate system, that this is causing or are likely to cause adverse impacts (e.g., more frequent extreme weather events), and that these climate harms reach a certain threshold of seriousness to amount to human rights violations.[17] Establishing liability will often involve demonstrating that a government's framework response to climate mitigation is so inadequate that it is causing harm to the litigants' fundamental rights in a tangible sense and that the harm is sufficiently proximate. Litigants will have to achieve this in circumstances where there is a plurality of agents (state and non-state actors) producing GHG emissions, where the individual state's emissions might be relatively minor on a global scale and where some of the impacts might not be felt in the short term.

Value-laden, normative questions around the attribution of responsibility and causation inevitably arise in systemic rights-based climate litigation. One of the main reasons these normative questions come up is that whilst fairness in sharing the differential burden of climate mitigation measures has always been pivotal in the international climate regime, the precise meaning of differentiation remains ill-defined and controversial.[18] The heavily contested nature of differentiation comes into sharp focus at the national level as states translate their international climate law obligations into domestic GHG emission reduction targets. Political theorists have long contributed to debates on climate justice and grappled with the normative question of how to fairly allocate responsibility for climate change.[19] The prevalent view points towards wealthy developed countries bearing the lion's share of responsibility because of their disproportionate contribution to the problem, their greater ability to pay, and their accrual of the greatest benefit from past emissions. Such countries continue, moreover, to have disproportionately high per capita (and luxury) emissions.

From the viewpoint of political theory and climate justice, fair burden sharing focuses on how the cost of reducing GHG emissions should be shared fairly amongst states, whilst harm avoidance starts from the imperative of averting catastrophic warming and works back from this position to determine which actors

[15] J Setzer and C Higham , *Global trends in climate change litigation: 2021 snapshot* (Grantham Research Institute on Climate Change and the Environment 2021) 23 https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf accessed: 10 October 2021.

[16] For an illustrative list of climate cases that might be considered "systemic" challenges, see: https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/ accessed: 23 May 2021.

[17] K Braig and S Panov, 'The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?' (2020) 35 Journal of Environmental Law & Litigation 261, 287-288.

[18] For discussion see: R Falkner, "The unavoidability of justice – and order – in international climate politics: From Kyoto to Paris and beyond" (2019) 21(2) The British Journal of Politics and International Relations 270.

[19] For an excellent overview of the seminal papers that have shaped key debates on climate justice see: S Gardiner, S Caney, D Jamieson and H Shue (eds) *Climate Ethics: Essential Readings* (Oxford University Press 2010).

should do what.[20] A just distribution of the remaining carbon budget might be seen as an application of these approaches to that remaining budget. This article examines whether the widely accepted political theory contributions on fair burden sharing, harm avoidance, and a just distribution of the remaining carbon budget can (and ought to) be incorporated or reflected in judicial reasoning on causation in systemic rights-based climate litigation. It explores whether European human rights law offers answers: for example, could wider use of the European Court of Human Rights' (ECtHR) lenient approach to causation or proximity, to use the lexicon of the ECtHR, at the national level help overcome some of the causal difficulties that might otherwise excuse wealthy developed country governments that are signatories to the European Convention on Human Rights (EHCR) from responsibility? How might rights-based arguments be a way of operationalising climate justice in judicial reasoning in systemic cases in Europe?

After this introduction (section 1), section 2 explores in greater detail how political theorists have addressed the question of how to fairly allocate the burdens/costs of climate mitigation. Section 3 examines how the gap between the body of knowledge from the field of political theory and legal analyses of responsibility for climate harms might be bridged, by offering an examination of the jurisprudence of the ECtHR on the positive obligations that arise in the context of environmental harm and the Court's proximity tests for engaging rights. Section 4 engages in a comparative analysis of approaches taken to the causal link/proximity dilemma in systemic rights-based climate litigation from four countries—Netherlands, Germany, Ireland, and Switzerland[21] —which are each party to the European Convention on Human Rights (ECHR) and addresses how, or if, the judicial reasoning therein reflects the dominant conception of climate justice. Section 5 offers some concluding remarks on the potential of a risk-based test for causation for operationalising climate justice in judicial reasoning and the prospects of the ECtHR adopting similar reasoning in three climate applications currently pending before it.

2 FAIR ALLOCATION OF RESPONSIBILITY: FROM POLITICAL THEORY TO INTERNATIONAL CLIMATE CHANGE LAW

The issue of a fair allocation of responsibility for climate mitigation measures has long between a contentious issue in both law and politics. Political unwillingness to accept responsibility for climate mitigation measures has repeatedly led to paralysis within the international climate regime. Inaction is often rationalised by wealthy developed countries on the basis that they would be willing to bear their 'fair share' of the burden once that fair share has been calculated (through an international climate regime characterised by power imbalances skewed in their favour).[22] But in the meantime, such countries have argued in a political context, it would be damaging to their national interests if they were to do very much — lest they end up bearing more than their 'fair share'.[23] There are myriad examples of this kind of

[20] S Caney, 'Two Kinds of Climate Justice: avoiding Harm and Sharing Burdens' (2014) The Journal of Political Philosophy 125, 125-126.
[21] These jurisdictions were chosen, in part, because they represent the four European jurisdictions in which systemic rights-based climate litigation has reached the apex courts. For further detail see section 4.
[22] H Shue, 'Historical Responsibility, Harm Prohibition, and Preservation Requirement: Core Practical Convergence on Climate Change' (2015) 2(1) Moral Philosophy and Politics 7,9.
[23] Ibid.

progress-blocking behaviour from the United States[24] but self-serving positions have also historically been taken by for example, Australia, Canada, Japan, Russia, New Zealand[25] and even the self-proclaimed climate leader, the EU.[26] Meanwhile, the Netherlands, Germany and Ireland are just three examples of states that have defended their climate inaction in *court* by relying on these kinds of 'fair share' arguments and arguing that their national emissions are relatively small and that adopting more stringent mitigation policies would only be a 'drop in the ocean' relative to global emissions.[27]

Philosophers have long challenged these kinds of excuses and argued that whatever needs to be done about climate change the burden should, at least initially, be borne by wealthy developed countries.[28]Climate justice can be broadly understood as a concept that approaches climate change from the perspective of distributive, corrective, procedural and epistemic justice. An important facet of climate justice is the fair and equitable distribution of responsibility for climate change between states.[29] The three main principles for allocating moral responsibility for climate change include contributor/polluter pays, ability to pay, and beneficiary pays.[30]

On the contributor pays principle, which is based on a 'clean up your own mess' logic,[31] Henry Shue and others[32] argue that if the mess maker accrues a benefit and does not have to shoulder the cost, not only is there no incentive to stop but it is also unfair on whoever has to pay for the clean-up.[33] Shue claims that this inequality and offloading on others means that those who have been made worse

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[24] For a comprehensive exposition of the United States as a blocker of climate action. Demand Climate Justice, "A Brief History of the United States and the UN Climate Change Negotiations" (*The World at 1°C,* 2 June 2017) https://worldat1c.org/a-brief-history-of-the-united-states-and-the-un-climate-change-negotiations-bf7525d4ef13#sdfootnote38anc accessed: 17 May 2021.

[25] D Bodansky, J Brunnée and L Rajamani. *International Climate Change Law* (Oxford University Press 2017) 202-205.

[26] The EU revised down its 2020 emission reduction target from a 30 to 20% reduction in GHG emissions relative to 1990 levels (even though it acknowledge that such a commitment fell outside the widely endorsed 25-40% range for industrialised nations to keep warming to +2°C) See: EESC Opinion on the Proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community COM(2008) 16 final-2008/0013 COD.

[27] *Urgenda Foundation v Netherlands* (24 June 2015) ECLI:NL:RBDHA:2015:7196 [4.78]; *Netherlands v Urgenda Foundation* (9 October 2018) ECLI:NL:GHDHA:2018:2591 [30]; *Netherlands v Urgenda Foundation* (20 December 2019) ECLI:NL:HR:2019:2006, [3.4]. *Friends of the Irish Environment v Government of Ireland* [2019] IEHC 747; *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49. The author attended the Irish High Court and Supreme Court hearings and took notes of the oral submissions. Similar arguments were also at issue in the German Constitutional Court's judgment in *Neubauer v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20, [199]-[203].

[28] H Shue, 'Global Environment and International Inequality' in H Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014), 194. S Caney, 'Climate Change and duties of the advantaged' (2010) 13(1) Critical Review of International Social and Political Philosophy 203.

[29] M Robinson and T Shine, 'Achieving a climate justice pathway to 1.5°C' (Nature, July 2018) <https://www.nature.com/articles/s41558-018-0189-7> accessed: 19 February 2019.

[30] For a contemporary account of these principles, see: E Page, "Give it up for climate change: a defence of the beneficiary pays principle" (2012) 4(2) International Theory 300, 304-307.

[31] Shue (n28) 182.

[32] S Gardiner, 'Ethics and Climate Change: An Introduction' (2010) Wiley Interdisciplinary Reviews: Climate Change 54, 56-58; Caney (n28) 205-206; E Neumayer, 'In defence of historical accountability for greenhouse gas emissions' (2000) 33 Ecological Economics 185, 187-190.

[33] Shue (n28)183.

off are entitled to demand that the mess maker should shoulder 'extra burdens' to correct the inequality unilaterally imposed.[34] Shue extrapolates from this that developed countries whose carbon intensive industrialisation has accelerated climate change ought to 'bear unequal burdens henceforth to correct the inequality they have historically imposed' on developing countries.[35]

Shue's formulation aligns with Simon Caney's 'poverty sensitive polluter pays principle' which asserts that those who have contributed to climate change should make amends for it so long as doing so would not require people to pay for the emissions necessary for their basic survival.[36] These principles correspond to the 'common but differentiated responsibilities' element of the common but differentiated responsibilities and respective capacities principle (CBDRRC), a core legal principle for defining how countries ought to reduce their GHG emissions, especially as formulated under the United Nations Framework Convention on Climate Change (UNFCCC).[37] An objection, however, frequently made against the backward-looking contributor pays principle is that until relatively recently polluting countries were ignorant of the adverse effects of their emissions, and so should not be held accountable.[38] Shue has described this as the 'no offence' objection: the act of emitting greenhouse gases was not unlawful nor was it *prima facie* wrong at the time it was done.[39]

It is worth pointing out in response that over half of all cumulative global carbon emissions have taken place since 1990, the year of the first Intergovernmental Panel on Climate Change (IPCC) Assessment Report.[40] The early 1990s are widely recognised as the cut-off point after which policymakers could no longer reasonably claim to be unaware of the dangers of human-induced climate change.[41] Since the 1990s, the United States, China and the EU-27 alone have been responsible for 41.5% of global GHG emissions.[42] Accordingly, Shue argues that while those who have used up the no-harm 'budget' have committed no crime as such, their lack of bad intentions/foresight of harm does not make them unaccountable.[43] Stephen Gardiner makes a similar point: if the harm inflicted on the world's poor is serious and these populations do not control sufficient wealth readily to deal with the impacts, it seems strange to say that developed countries owe no duty to assist, especially where developed countries could do so comfortably and historically have contributed the most to dangerous climate change.[44] If a wealthy developed country deprives developing countries (albeit unwittingly) of their fair share of the carbon budget and benefits from doing so then

[34] Ibid.
[35] Ibid.
[36] Caney (n28) 205 and 218.
[37] Article 3(1) of the United Nations Framework Convention on Climate Change.
[38] Ibid, 208.
[39] Shue (n22) 14-15.
[40] Institute for European Environmental Policy, 'More than half of all CO2 emissions since 1751 emitted in the last 30 years' (*Institute for European Environmental Policy*, 29 April 2020) https://ieep.eu/news/more-than-half-of-all-co2-emissions-since-1751-emitted-in-the-last-30-years accessed: 4 December 2020.
[41] Ibid.
[42] World Resources Institute, "This Interactive Chart Shows Changes in the World's Top 10 Emitters" (10 December 2020) https://www.wri.org/insights/interactive-chart-shows-changes-worlds-top-10-emitters accessed: 17 May 2021.
[43] Shue (n22) 16.
[44]S Gardiner, 'An Introductory Overview' in Stephen Gardiner, Simon Caney, Dale Jamieson and Henry Shue (eds) *Climate Ethics: Essential Readings* (Oxford University Press 2010) 15.

historical ignorance should not be the only consideration in determining who bears the costs and burdens of historical emissions.[45] In other words, even if it is not completely fair that the developed country bears the burden, it is more unjust if that burden is borne by the developing country.[46]

The ability-to-pay principle requires states to bear the burden in proportion to their relative capacity: the more a state is able to do or to pay to prevent catastrophic warming, the more they should do.[47] The ability-to-pay principle also points towards wealthy countries footing the bill for climate change response measures particularly where this can be done without too much detriment to their own reasonable interests.[48] The principle does not take into account who caused the harm but focuses instead on who is in a position to rectify or prevent further harm.[49] Unlike the contributor/polluter pays principle, the ability-to-pay principle is forward-looking.[50] Shue explains that the appeal of the principle is that it is fairer than a flat rate contribution on the basis that it takes into consideration whether contributors are in fact in a position to bear the cost of their respective contributions.[51] The principle was used at the EU level as the basis for determining individual member states emission reduction for the 2020 targets under the Effort Sharing Decision and reflects the 'respective capacities' element of the CBDRRC principle.[52]

The third main principle — beneficiary pays — asserts that those who receive benefit from activities resulting in adverse impacts on third parties have an obligation to contribute and to help bear the burden of climate change.[53] The beneficiary pays principle helps overcome the objection that it would be unfair to hold present generations responsible for the actions of their ancestors who caused the harm.[54] As Shue notes, this objection is largely irrelevant because current generations in wealthy industrialised countries are not 'completely unrelated' to their polluting ancestors and as such can still bear responsibility.[55] Current generations continue to enjoy the benefits of earlier industrialisation in the form of higher standards of living, even if they have not consented to or asked for the carbon emissions of their ancestors.[56] There is continuity in the institutions underpinning the nation state; and past, present and future citizens benefit from these institutional structures.[57] An objection sometimes raised by developed countries is that developing countries have benefitted from these activities because technologies and medicines made possible through the exploitation of fossil fuels in developed

[45] Ibid.
[46] Gardiner (n32) 56.
[47] Page (n30) 305
[48] A Zellentin, 'How to Do Climate Justice' in Thom Brooks (eds), *Current Controversies in Political Philosophy* (Routledge 2015) 133.
[49] Caney (n28)
213.
[50] Ibid.
[51]Shue (n28) 187.
[52] Page (n30) 305
[53]Zellentin (n48) 134.
[54] Shue (n28) 185-186. See also: Shue (n22) 22-23.
[55] Shue (n28) 185.
[56] Ibid.
[57] Ibid.

countries have also reached developing countries.[58] Overall, however, developing countries have been made to pay for these technologies and medicines; as such, much greater additional benefits have accrued to developed, high emitting countries while the environmental costs are borne by all countries.[59] Notwithstanding the strong corrective justice appeal of the beneficiary pays principle, it is not mentioned in the UNFCCC and nor has it been explicitly adopted or operationalised by a developed country or bloc in the setting of its climate mitigation policies.[60]

Shue cautions against treating any of the three principles as alternative options[61] and argues that 'the complexity of… climate change, strongly suggests that no one answer will be adequate'.[62] Instead, Shue proposes a convergence thesis. The 'no harm' principle — the moral prohibition on inflicting harm on innocent people — is central to Shue's convergence thesis. Anthropogenic climate change violates the moral obligation to do no harm by causing harm to people and ecosystems forced to adapt to the present climate and by depriving certain people of their share of the diminishing carbon budget.[63] Shue argues that the 'no harm' principle requires the primary sources of such harm to do whatever it takes to put an end to the harm as quickly as possible.[64]

The imperative to do no harm and to preserve the physical pre-conditions of human life provide the underlying rationale for the combined use of all three principles (contributor pays, ability-to-pay, beneficiary pays): 'those who contributed heavily to creating the problem of excessive emissions thereby both benefitted more than others and became better able to pay than most others'.[65] These three principles, in practical terms, tend to converge upon the same countries — namely, wealthy developed countries, which, at least initially, bear the lion's share of responsibility.[66]

On the related question of a just distribution of the remaining carbon budget, Shue claims that individuals, particularly in developing countries, should be entitled to 'subsistence emissions' — that is that they should have an inalienable right to the emissions necessary for their survival or for some minimum level of quality of life.[67] Subsistence emissions ought to be sharply distinguished from luxury emissions.[68] In other words, GHG emissions might be understood differently 'depending on the necessity and urgency of the activities that give rise to them'.[69] Shue has since acknowledged that due to decades of stalled climate action no one — rich or poor — can for much longer depend on carbon-based energy. Accordingly, he has advocated for subsistence and for an exit from poverty through energy rights for the

[58] H Shue, 'Global Environment and International Inequality' in S Gardiner, S Caney, D Jamieson and H Shue (eds) Climate Ethics: Essential Readings (Oxford University Press 2010), 104; see also: Shue (n22) 20.
[59] Ibid.
[60] Page (n30) 306
[61] Shue (n22) 8.
[62] Ibid, 12.
[63] H Shue, 'Climate' in D Jamieson (eds) *A Companion to Environmental Philosophy* (Blackwell Publishers, 2001) 449, 449-451.
[64] Shue (n22) 11.
[65] Ibid, 16.
[66] Ibid, 24; see also Shue (n58) 111.
[67] H Shue, "Subsistence emissions and luxury emission" in H Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014), 66.
[68] Ibid, 64, 66.
[69] H Shue, "Subsistence protection and mitigation ambition: Necessities, economic and climatic" (2019) 21(2) The British Journal of Politics and International Relations 251, 252.

poor rather than emission rights.[70] More recently, he has discussed subsistence in the context of negative emissions technologies (NET) and the imperative of maximising aggressive mitigation measures in the short term to minimise the pressure for NET in future.[71]

While these arguments point towards wealthy developed countries (and to a lesser extent newly industrialised countries like China) bearing the majority of the burden,[72] there are other accounts more indulgent to the lifestyle choices of those living in wealthy developed countries and accounts that have tried to play down the importance of distributive and corrective justice when it comes to climate change. The purpose of engaging with these alternative accounts is, in part, to acknowledge the contested nature of the claim that wealthy developed countries should have to lead and bear the greatest burden of reducing emission. It also serves to bolster the claim by illustrating the shortcomings in accounts that have played down the significance of wealthy developed country responsibility

An example of these more permissive viewpoints can be found in the work of Posner, Weisbech and Sunstein who argue against shaping the international climate regime according to distributive or corrective justice and instead support a forward-looking, welfarist approach that is sensitive to feasibility constraints[73] of the existing world order. Their accounts start from the premise that the rich should help the poor but contend that wealthy developed countries bearing the cost of mitigation is not likely to be the most economically efficient or even effective method of doing so because most of the benefit will accrue to future generations (who are likely to be richer than current generations of poor people). [74] In their view, a cash transfer to present generations of poor people would be a better approach than subsidising the cost of emission reductions.[75] However, as De Bres notes, the key reason for wealthy developed countries shouldering the burden is not to get 'more bang for our poverty relief buck' but because emission reductions are morally necessary and should therefore be funded in a way that does not impose an additional burden on the poor.[76]

The assumption that future generations will be better off is also questionable.[77] The analysis that this assumption is based on (which predicts a small drop in GDP from a given rise in temperature) relies on what is now considered to be outdated and flawed economic reasoning.[78] At the time of writing (2008-2010) Posner, Weisbech and Sunstein perceived the risk of catastrophic

[70] H Shue, "Climate Hope: Implementing the Exit Strategy" in H Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014), 329
[71] Shue (n69) 258-259.
[72] M Rocha et al, *Historical Responsibility for Climate Change – from countries emissions to temperature increase* (Climate Analytics and Potsdam Institute for Climate Impact Research, November 2015), 3 https://climateanalytics.org/media/historical_responsibility_report_nov_2015.pdf accessed: 1 April 2021.
[73] E Posner & D Weisbach, *Climate Change Justice*, (2010 Princeton University Press) E Posner and C Sunstein, "Climate Change Justice," Georgetown Law Journal 96 (2008) 1565.
[74] Ibid.
[75] Ibid.
[76] H De Bres, "Book Review: Climate Change Justice" (2011) 28(3) Journal of Applied Psychology 323, 324-325.
[77] M Frisch, "Climate Change Justice" (2012) 40(3) Philosophy and Public Affairs 225, 231.
[78] S Keen, "The appallingly bad neoclassical economics of climate change" (2020) Globalizations DOI: 10.1080/14747731.2020.1807856

climate impacts to be relatively low but conceded if there were a serious risk then emission reductions by wealthy developed countries might be the best method of redistribution or welfare.[79] The stark findings of the IPCC's SR15 report published in 2018 put paid to the notion that the risk of catastrophic impacts is low, making clear that even 1.5°C of warming will have very severe impacts on people's lives.[80]

Farber notes that Posner et al.'s arguments against corrective justice are all based on *practical* concerns. [81] These practical concerns include difficulties identifying wrongdoers and the purported unacceptability of imposing such responsibility on *inter alia* environmentally conscious residents of wealthy developed countries, but these concerns have little bearing on the *ethical* validity of compensation claims.[82] Posner et al's arguments conflate punishment and remediation; [83] overlook the fact that countries are often required to compensate for past wrongdoings; [84] and fail to address the fact that the *per capita* emissions of wealthy developed countries have remained persistently high even after the harmful nature of those emissions became well-known.[85]

The accounts of Posner et al., which seem intent on justifying the *status quo,* have not served to unsettle the widely held view in political theory, that wealthy developed countries should bear most responsibility — a point underscored by the IPCC's second assessment report's statement that '[a]ll ethical systems, and all the applied literature, appear to point in the same direction'.[86]

The international climate regime also reflects the developed country leadership facet of climate justice albeit to a lesser degree than these dominant political theory accounts. Central organising principles of the UNFCCC include polluter pays, equity, CBDRRC and the precautionary principle.[87] The Kyoto Protocol to the UNFCCC took this a step further by imposing binding emissions reduction targets on developed (Annex I) countries but not for developing (non-Annex I) countries.[88]

The 2015 Paris Agreement did not write distributive and corrective climate justice considerations out of the international climate regime, but *is* based on a voluntarist, 'self-differentiation'[89] model of nationally determined contributions (NDCs) which spreads mitigation responsibility widely.[90] A central feature of this 'bottom-up approach' is the absence of any consensus as to the extent to which a state's mitigation burden should reflect historic responsibility, ability-to-pay,

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[79] Posner & Weisbach, (n73); Posner & Sunstein (n73).
[80] Intergovernmental Panel on Climate Change, *Special Report on Global Warming of 1.5 ºC* (2018).
[81] D Farber, "Review of Climate Change Justice" (2012) 110(6) Michigan Law Review 985, 995
[82] Ibid.
[83] Ibid, 991
[84] Ibid, 992.
[85] Frisch (n77) 243.
[86] T Banuri, K-G Mäler, M Grubb, et al. "Equity and social considerations" in JP Bruce, H Lee, and EF Haites
(eds*) Climate Change 1995: Economic and Social Dimensions of Climate* Change. *Contribution of Working Group III to the Second Assessment Report of the Intergovernmental Panel on Climate Change*.
(Cambridge University Press 1996)
[87] Recital 3 of the Preamble and Article 3(1) of the United Nations Framework Convention on Climate Change
[88]Bodansky (n25) 27.
[89] Ibid, 29.
[90] Faulker (n18) 274.

beneficiary pays, or *per capita* emissions.[91] The upshot of leaving states this choice is that states (particularly wealthy developed countries) have adopted climate policies that favour their own interests, which is resulting in insufficient global mitigation efforts to limit heating to +1.5°C.[92]

According to Carbon Action Tracker, with the exception of the United Kingdom, no wealthy developed country has submitted an updated NDCs — which if replicated globally — would limit warming to +1.5°C.[93] The Paris Agreement does still require NDCs and the agreement itself to be implemented to reflect equity and the modified principle of CBDRRC;[94] it refers to the importance (albeit just 'for some') of climate justice;[95] and also restates the expectation that 'developed countries should continue taking the lead on economy wide' and 'absolute' emissions reduction targets.[96]

The incorporation of these distributive or corrective justice principles into the international climate regime is significant because it helps answer the normative question of why a climate justice approach (which emphasises wealthy developed countries not shirking their responsibility to bear the greatest burden) *should* be relevant in systemic right-based climate litigation.

Whilst these arguments could, in principle, be instrumentalised in a wider context, this article is not primarily concerned with the responsibilities of *all* wealthy developed countries to lead on emission reductions but limits its focus to signatories to the ECHR. The article will now shift gear from the normative to the descriptive to examine the question of whether this widely supported framing of the climate justice debate in political theory, which, I have argued, is also found in the central organising principles of international climate law, *can* be incorporated, or reflected in judicial reasoning in systemic rights-based climate litigation. In order to examine this, I reflect on the jurisprudence of the European Court of Human Rights (ECtHR).

[91] Liston (n10), 244.
[92] Ibid. J Gabbatiss, "Analysis: Which countries met the UN's 2020 deadline to raise 'climate ambition'?" (Carbon Brief, 8 January 2021) https://www.carbonbrief.org/analysis-which-countries-met-the-uns-2020-deadline-to-raise-climate-ambition accessed: 11 February 2021.
[93] Climate Action Tracker, "Climate Target Update Tracker" https://climateactiontracker.org/climate-target-update-tracker/ accessed: 18 May 2021.
[94] Article 2(2) and Article 4(3) of the Paris Agreement.
[95] Recital 13 to the Paris Agreement.
[96] Article 4(4) of the Paris Agreement.

3 THE ENVIRONMENTAL CASE LAW OF THE ECtHR, THE CAUSATION CONUNDRUM FOR CLIMATE HARM AND THE WIDER IMPLICATIONS FOR CLIMATE JUSTICE

While there is no explicit right to a healthy environment under the ECHR,[97] the ECtHR has carved out an extensive body of case law on environmental degradation by giving a 'green' interpretation to Convention rights.[98] The ECtHR's environmental case law establishes that where environmental degradation attains a 'level of severity' necessary for there to be 'actual interference with the applicant's private sphere', the application of the Convention is triggered.[99] The ECtHR's case law enumerates several positive obligations in the environmental field, including procedural duties (around access to environmental information,[100] public participation[101] and access to justice[102]) and substantive duties.[103]

One of the most important substantive obligations is to put in place legislative and administrative frameworks to minimise environmental risk by regulating the licensing, setting up, operation, and control of hazardous activities — measures which must include appropriate public studies and research to enable the public to assess the risks or effects associated with the relevant activity.[104] Another important substantive duty is that where a state authorises dangerous activities, it must ensure through a system of rules and sufficient controls that the risk is reduced to a reasonable minimum.[105]

In order to establish state liability in a positive obligations case, there must be a risk of harm which the state knew or ought to have known of, and a failure on the part of the state to adopt 'necessary'[106] and 'appropriate'[107] measures to prevent or minimise the risk of harm.[108] Pollution or environmental degradation cases are usually heard under articles 2 (the right to life) and 8 (the right to respect for one's home, private and family life) of the Convention, and the ECtHR has repeatedly stated that the state's positive obligations under these articles largely overlap in the context of environmental harm.[109] A consequence of this overlap is that Convention responsibility —under either article 2 or 8 — may be triggered where there is a mere 'risk of harm' and not just where there is concrete, materialised harm.[110] Article 2 operates preventatively and does not require death to occur.[111] Similarly, 'article 8 applies to severe environmental pollution which may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely' and does not necessarily require serious endangerment to health.[112]

However, as Stoyanova notes, the ECtHR has 'not developed anything close to a consistent terminology' on causation by omission to fulfil a positive obligation.[113] This lack of linguistic consistency has also been the case for the threshold test for the risk element of causation in the Court's environmental jurisprudence. For example, in *Öneryildiz,* the ECtHR referred to a 'real and immediate risk'.[114] In *Tătar*, the ECtHR referred to a 'serious and substantial risk for the applicants' health and well-being' in the context of article 8.[115] In *Cordella,* the ECtHR used the expression 'serious health and environmental risks'.[116] In *Jugheli,* the Court talked about a 'real risk' to 'life and health'.[117] In *Brincat,* the Court used the 'serious risk of an ensuing death' standard.[118]

It is not clear, however, that there is any great difference in practical terms between various iterations of the threshold test. The immediacy requirement in *Öneryildiz*, for example, has tended to be understood as requiring a genuine, foreseeable and direct risk to those concerned rather than requiring harm to materialise in the short term.[119] In any event, the ECtHR has tended to use the expression 'real and serious risk' in its more recent case law.[120] Whatever the expression of the threshold test, the key point is that the ECtHR does not adopt a strict notion of causation or proximity, to use the language of the ECtHR .[121] Indeed, the Court has explicitly rejected the *'*but for*'* test (at least, in the context of positive obligations protected under Article 3).[122] Minnerop and Otto argue that the traditional legal tests for causation in common law and civil law jurisdictions, such as the 'but for' and '*conditio sine qua non*' tests, are inadequate to develop a meaningful account of causation in the context of climate change.[123] These *ex-post*, counterfactual tests were originally developed in the context of tort law — and according to Savaresi, under human rights law applicants must satisfy a less

[97] *Kyrtatos v. Greece* App no 41666/98 (ECtHR, 22 August 2003), [52]; *Hatton and Others v. the United Kingdom* App no. 36022/97 (ECtHR, 8 July 2003), [96].
[98] See generally: Braig (n17) 266-269.
[99] *Fadeyeva v. Russia* App no. 55723/00 (ECtHR, 9 June 2005)
[100] *Guerra and Others v. Italy* App no 116/1996/735/932 (ECtHR, 19 February 1998)
[101] *Hardy and Maile v. the United Kingdom* App. no. 31965/07 (ECtHR, 14 February 2012).
[102] *Taşkin et al. v Turkey,* App no. 46117/99 (ECtHR, 10 November 2004).
[103] Braig (n17) 273.
[104] *Öneryıldız v. Turkey* App no. 48939/99 (ECtHR, 30 November 2004), [89]; *Budayeva and Others v. Russia* App nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008), [129]; *Tătar v Romania* App no. 67021/01 (ECtHR, 27 January 2009), [88].
[105] Mučibabić v. Serbia, App no. 34661/07 (ECtHR, 12 October 2012) [126]
[106] *Öneryıldız* (n104) [101];
[107] *Budayeva* (n104) [128]; *Kolyadenko and Others v. Russia*, App no. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 9 July 2012), [212]
[108] H Duffy and L Maxwell, "People v Arctic Oil before Supreme Court of Norway – What's at stake for human rights protection in the climate crisis?" (*EJIL Talk!* 13 November 2020) https://www.ejiltalk.org/people-v-arctic-oil-before-supreme-court-of-norway-whats-at-stake-for-human-rights-protection-in-the-climate-crisis/ accessed: 4 February 2021.
[109] *Öneryıldız* (n104) [90]; *Budayeva* (n104) [133].
[110] O Pedersen, "The European Court of human Rights and International Environmental Law" in J Knox and R Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018), 87.
[111] *Öneryıldız* (n104) [89]-[90].
[112] *Taşkin* (n102) [113].
[113] V Stoyanova, "Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights" (2018) 18 Human Rights Law Review 309, 318.
[114] *Öneryıldız* (n104) [101].
[115] *Tătar* (n104) [107].
[116] *Cordella v. Italy* App no. 54414/13 and 54264/15 (ECtHR, 24 January 2019), [169].
[117] *Jugheli v Georgia* App no. 38342/05 (ECtHR, 13 July 2017), [67]
[118] *Brincat v Malta* App no. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11 (ECtHR, 24 October 2014), [82].
[119] *Öneryıldız* (n104) [98]-101]; *Budayeva* (n104) [147]-[158] *Kolyadenko* (n107) [174]-[180].
[120] Duffy and Maxwell (n108).
[121] L Lavrysen, "Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova" (2018) 18 Human Rights Law Review 705
[122] *E v United Kingdom* App. no. 33218/96 (ECtHR, 15 January 2003) [99].
[123] P Minnerop and F Otto, 'Climate Change and Causation: Joining Law and Climate Science on the Basis of Formal Logic' (2020) 27 Buffalo Journal of Environmental Law 49, 50.

stringent burden of proof: the test is based on known contribution to *risk* of harm rather than on a 'but for' standard. [124]

The ECtHR has not yet ruled on the applicability of the Convention to harm arising from climate change. This, however, is likely to change in the near future as three climate change applications have recently been lodged in Strasbourg. [125] The ECtHR's case law to date provides no reason to assume, moreover, that climate change would be excluded from the scope of states' positive obligations under the Convention.[126] The Convention is a 'living instrument' which must be read consistently with international law.[127] Understood as such, there is a strong argument to be made that states have a positive obligation to put in place and to enforce administrative and legislative frameworks that comply with the 'well below 2°C' or even the 1.5°C temperature goal of the Paris Agreement.[128] This is necessary to provide effective protection for Convention rights While states are not required to take measures that are 'impossible' or that impose a 'disproportionate burden' in order to discharge this duty, they must nevertheless show that they are doing everything in their power to protect the rights in question.[129] This is the line of argument raised in the *Mex M and Klimaseniorinnen* applications, two of the three climate cases currently pending before the ECtHR.[130] In *Mex M* the applicant who suffers from temperature-dependent form of multiple sclerosis argues that the Austrian government is perpetuating a violation of his Convention rights by failing to comply with its positive obligation to take "reasonable and appropriate" climate measures to effectively protect the applicant's health and wellbeing.[131] In *Klimaseniorinnen*, the applicants, an association of older women and four individual women, claim that Switzerland's inadequate climate policies violate the women's Convention rights.[132]

The ECtHR has recognised the possibility in certain circumstances of shifting the burden of proof from the applicant to the state to provide evidence that it has not failed to fulfil its obligations.[133] An argument of this nature is being pursued in the *Duarte Agostinho* application, another systemic climate case currently pending before the ECtHR.[134] Here, the applicant children argue that because warming is projected to exceed +1.5°C on the current trajectory, the 33 respondent states share presumptive responsibility under the ECHR for the 'indivisible injury' that inadequate

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[124] A Savaresi, "Human rights and the impacts of climate change: Revisiting the assumptions" (2021) 11(1) Oñati Socio-Legal Series 231, 240.

[125] *Duarte Agostinho and Others v. Portugal and Others,* filed 2 September 2020 https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf; *Klimaseniorinnen v Switzerland,* filed 26 November 2020 https://klimaseniorinnen.ch/wp-content/uploads/2020/11/201126_Application_ECtHR_KlimaSeniorinnen_extract_anonymised-2.pdf; *Mex M v Austria*, filed 12 April 2020 https://www.michaelakroemer.com/wp-content/uploads/2021/04/rechtsanwaeltin-michaela-kroemer-klimaklage-petition.pdf accessed: 16 April 2021.

[126] L Burgers and T Staal, "*Climate action as positive human rights obligation: The Appeals Judgment in Urgenda v The Netherlands"* in J E. Nijdam, & W G. Werner (*eds*.), *Netherlands Yearbook of International* Law *2018: Populism and International Law* Springer, Vol. 49, 2019), 223 230.

[127] *Demir and Baykara v Turkey* App no. 34503/97 (ECtHR 12 November 2008) [85]-[86].

[128] Braig (n17) 278. For detailed exposition of the ECtHR's case law on positive administrative and legislation duties in the environmental field see: Braig (n17) 273-282.

[129] *Budayeva* (n104) [128]; *Kolyadenko* (n107) [216].

[130] *Klimaseniorinnen* (n125)*; Max M* (n125).

[131] *Mex M* (n125) [61].

[132] See section 4.

[133] Braig (n17) 286; see also: *Fadeyeva* (n99) [128].

[134] *Duarte* (n125).

mitigation measures are causing to the applicants.[135] Extrapolating from the Court's existing case law, it appears that a state could violate Convention rights where it fails to adopt adequate climate laws or policies to protect against the grave consequences of climate change. The test likely to be applied, at the least at the ECtHR level, is whether there is a known, real, and serious *risk* of harm (which may only materialise in the long term) and whether the state satisfied the due diligence requirement to take preventative measures.

As a feature of the principle of subsidiarity,[136] the margin of appreciation should be narrowly construed in the context of climate change as being confined to 'choice of means'.[137] In other words, given the broad European consensus on the danger posed by runaway climate change, a state's margin of appreciation is limited to choosing the specific GHG emission reduction measures that will be taken to meet a target.

Adopting this line of judicial reasoning either at the domestic level or before an international court could potentially prevent developed country governments that are signatories to the ECHR from taking advantage of the causal complexity of climate change. In that sense, taking such an approach to the analysis of rights could in practice allow theories of responsibility from political theory, including on fair burden sharing and harm avoidance, to inform or permeate judicial reasoning. Such a juridical understanding of causation would mean that these governments could not easily evade their duty to lead on mitigation measures through rapid and substantial GHG emission reductions: a duty which runs to the benefit not just of their own citizens but to those outside their jurisdiction already experiencing climate harm. It is in *this* way that a willingness on the part of court to accept a risk-based causation test could bring us that much closer to realising the fair allocation of responsibility dimension of climate justice.

This article will now consider the approach taken to the question of causation or proximity between climate harm and rights violations in domestic systemic rights-based litigation to date. Has the case law reflected anything of this fair burden sharing and harm avoidance conception of climate justice? Have courts shut down climate *un*just arguments — which cynically rely on causal complexity — using this line of human rights argument? Have judges operationalised this dominant conception of climate justice into their judgments?

4 CAUSATION IN DOMESTIC SYSTEMIC RIGHTS-BASED CLIMATE LITIGATION: AN OPPORTUNITY FOR CLIMATE JUSTICE?

Before comparing various approaches at the domestic level, some points about case selection should be made. *Urgenda v Netherlands*, *Friends of the Irish Environment v Ireland, Family Farmers and Greenpeace v Germany, Neubauer and others v Germany, ,* and *Klimaseniorinnen v Switzerland* have been chosen here because although they are embedded in quite different legal contexts and legal systems, they represent a similar model of case. All four jurisdictions are Annex I wealthy developed countries in Europe that should be taking a lead on aggressively

[135] Ibid.
[136] *Handyside v United Kingdom* App No 5493/72 (ECtHR, 7 December 1976) [48].
[137] P Clark, G Liston and I Kalpouzos, "Climate change and the European Court of Human Rights: The Portuguese Youth Case" (EJIL Talk, 6 October 2020) https://www.ejiltalk.org/climate-change-and-the-european-court-of-human-rights-the-portuguese-youth-case/ accessed: 11 February 2021.

reducing emissions.[138] All five cases involve legal challenge against states aimed at eliciting new climate mitigation targets or climate action instruments and all rely, at least in part, on ECHR/constitutional rights arguments. Further, four of the five cases are, for now, the only systemic European cases for which there are published judgments from a jurisdiction's court of final appeal. *Family Farmers* was not decided by a court of final appeal but is not pending appeal.[139] There are other cases of a similar nature that have been initiated around Europe but, in the absence a final judgment, are not considered in this article.

In *Urgenda***,** a non-profit, limited liability foundation obtained a mandatory order from The Hague District Court against the Dutch government requiring it to reduce GHG emissions by at least 25% at the end of 2020 compared to 1990 levels, in line with the IPCC's advice for developed countries in its Fourth Assessment Report.[140] The District Court held that it was hazardously negligent to set emission reduction targets that 'only' pursued emissions reduction in line with what was required of the Netherlands under EU law pursuant to the EU's overall reduction target of a 20% reduction by 2020 (compared to 1990),[141] a target which was inconsistent with the IPCC's advice. On the causation issue, the first instance District Court found that the government's duty of care was not negated by the fact that the Dutch contribution to present global GHG emissions is minor (approximately 0.5% of global emissions).[142] Nor was its duty diminished by the fact that a more stringent reduction target would be a 'drop in the ocean' on a global scale and ineffective at securing the then 2°C target without action from other high emitting countries.[143] Nor did the fact that the Netherlands is not uniquely responsible for climate change break the chain of causation.[144] The District Court's findings were informed by the fact that Dutch GHG emissions, no matter how small, still contribute to climate change; that Annex I countries like the Netherlands, based on CBDRRC, are meant to be taking a lead on mitigation measures; and the fact that Dutch *per capita* emissions are amongst the highest in the world.[145] The District Court was also influenced by an earlier decision of the Dutch Supreme Court in *Polash Mines*[146] which developed a principle of *pro rata* liability: where environmental harm is the result of cumulative pollution from multiple sources, each source assumes liability for its share.[147] Applied to the climate change context, the principle required the Netherlands to take precautionary measures to avert dangerous climate change for its *pro-rata* contribution to climate change.[148] According to Ferreira, the judgment 'shows that, despite the vague nature of the concept "to take the lead" in the climate regime, this core aspect of differentiation may have sufficient persuasive force to be used as a

[138] Article 4(4) of the Paris Agreement.
[139] The plaintiffs in *Family Farmers* joined the recently decided constitutional claim in *Neubauer* (n27).
[140] *Urgenda*, District Court judgment (n27) [5.1]
[141] Ibid, [4.93].
[142] Ibid, [4.78]-[4.79], [4.90].
[143] Ibid.
[144] Ibid. See also: J Van Zeben, "Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?" (2015) 4(2) Transnational Environmental Law 339, 348.
[145] Ibid, [4.79].
[146] *Potash Mines* ("Kalimijnen" case), Hoge Raad 23 September 1988, NJ 1989 ECLI:NL:PHR:1988:AD5713.
[147] Ibid. See also: S Roy and E Woerdman, "Situating *Urgenda v the Netherlands* within comparative climate change litigation" (2016) Journal of Energy and Natural Resource Law 165, 171.
[148] *Urgenda,* District Court judgment (n27) [4.79]. See also: S Roy, "Urgenda II and its Discontent" (2019) 13(2) Carbon and Climate Law Review, 130, 132.

complementary tool in the interpretation of national obligations'.[149]

The Hague Court of Appeal upheld the decision of the District Court and based its decision directly on articles 2 and 8 of the ECHR.[150] Yet the Court of Appeal's approach to the issue of causation was remarkably similar to that of the District Court. The Court of Appeal said that it was partially because of the Netherlands' disproportionate per capita emissions, its historic contribution to climate change and the benefits it accrued from fossil fuels that the state should assume responsibility.[151] The Court found that the government's defence — that there was an insufficient causal link between Dutch emissions and climate harm to give rise to state liability for breach of a positive obligation — was unconvincing.[152] The Court reasoned that causation plays less of a role in circumstances where the remedy sought was not an award of damages, but instead an order to take mitigation measures — in those circumstances, all that has to be proven is a 'real *risk* of danger'.[153] The Court of Appeal said that a real risk had been established in the case[154] and that it was 'appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk … [of] loss of life and/or a disruption of family life'.[155] The Court held that were it to follow the government's line of reasoning, there would be no effective legal remedy for litigants concerned about the inadequacy of their state's climate policies as every state could argue that it had no legal obligations until others started to take climate action.[156] The Court concluded that this would be unacceptable, particularly as every country that was disproportionately contributing to climate harm could not be summoned to appear before the Dutch courts.[157]

The Supreme Court of the Netherlands echoed the position adopted by the lower courts on the question of causation. Referring to the case law of the ECtHR, the Supreme Court stressed the positive obligation to take 'reasonable and suitable' preventive measures to mitigate the danger where there is a known, 'real and immediate *risk*' to people's lives or welfare.[158] This obligation pertains even where the materialisation of the danger is uncertain,[159] the environmental hazard threatens a large cohort of people[160] and where the hazard might not come about in the short term.[161] The Supreme Court cited the severity of the climate crisis as well as equity, the CBDRRC principle, the 'no harm' principle and the precautionary principle to support its finding that 'partial fault… justifies partial responsibility' on the part of the Netherlands.[162] The Supreme Court said that the fact that other states are failing to do their part or that Dutch emissions are relatively minor are not good excuses for the Netherlands failing to meet its own individual obligations, otherwise there would

[149] P G Ferreira, '"Common But Differentiated Responsibilities" in the National Courts: Lessons from Urgenda v. The Netherlands' (2016) 5(2) Transnational Environmental Law 329, 349.
[150] *Urgenda,* Court of Appeal judgment (n27) [35]-[36].
[151] Ibid, [66].
[152] Ibid, [64].
[153] Ibid.
[154] Ibid, [64].
[155] Ibid, [45].
[156] Ibid, [64].
[157] Ibid.
[158] *Urgenda,* Supreme Court judgment (n27) [5.2.2]-[5.3.2] emphasis added.
[159] Ibid, [5.3.2.]
[160] Ibid, [5.3.1]
[161] Ibid, [5.2.2] and [5.2.3].
[162] Ibid, [5.7.2]- [5.7.6].

be a race to the bottom.[163]

The Court of Appeal's and the Supreme Court's emphases on contribution to *risk* — based on the case law of the ECtHR — as a basis for finding a violation of rights could readily be transposable to other signatories to the ECHR. The approach limits the potential for wealthy developed ECHR states to extricate themselves from responsibility by citing the causal complexity of climate change. It shuts down arguments that the causal link between a government's inadequate climate policies and an alleged rights violation are too tenuous. It also prevents wealthy developed country governments using 'drop in the ocean' arguments to sidestep responsibility. All an applicant needs to show is that there is a known real and serious *risk* to fundamental rights, and that the state in question is not taking necessary steps to mitigate that risk: not that the state is uniquely responsible. In that sense, the approach, which expressly invokes the legal iteration of the 'no harm' principle, aligns with and could be seen as a way of giving expression to the dominant harm avoidance conceptions of climate justice advocated by Shue and Caney, which push for wealthy developed countries to bear a significant and fair share of the burden. The judgments' emphasis on the interpretative value of the equity, CBDRRC and the Netherlands' special position as a wealthy country also reflects the fair burden sharing and developed country leadership espoused by the dominant conception of climate justice.

In *Friends of the Irish Environment,* an environmental NGO, FIE, challenged by way of judicial review the government's 2017 National Mitigation Plan (NMP), adopted under the Climate Action and Low Carbon Development Act 2015 (2015 Climate Act). The aim of the 2015 Climate Act was to enable the state to 'pursue, and achieve' a 'national transition objective' loosely defined as 'a low carbon, climate resilient, and environmentally sustainable economy by 2050'.[164] The NMP had been criticised by many, including Ireland's Climate Change Advisory Council, on the basis that it would do little or nothing to reduce Ireland's emissions.[165] In fact, emissions were projected to rise over the five-year lifespan of the NMP and to continue to rise thereafter until approximately 2030.[166] FIE argued that the adoption of the NMP was *ultra vires* the 2015 Act because it failed to 'specify' how the government proposed to achieve the national transition objective.[167] FIE also argued that the NMP violated the constitutional rights to life, bodily integrity and an unenumerated or derived right to an environment consistent with human dignity, as well as articles 2 and 8 of the ECHR (via the statutory duty on organs of the State to perform functions compatibly with ECHR obligations pursuant to the 2003 ECHR Act).[168]

Even though the deferential judgment of Ireland's High Court dismissing the judicial review was overturned by the Supreme Court, it is still worth making a few points about the High Court judgment from the perspective of how rights-based arguments could be a way of operationalising climate justice in judicial reasoning.

On the alleged rights violation, the High Court found without much elaboration

[163] Ibid, [5.7.7].
[164] Section 3(1) of the Climate Action and Low Carbon Development Act 2015.
[165] Climate Change Advisory Council, *Annual Review 2018* (July 2018), iii. *FIE,* High Court judgment (n27) [24].
[166] Ibid.
[167] *FIE,* High Court judgment (n27), [12]; see also section 4(2)(a) of the Climate Action and Low Carbon Development Act 2015.
[168] *FIE,* High Court judgment (n27), [26], [71].

that the approval of the NMP did not breach constitutional rights or put them at risk.[169] In other words, there was no causal link between an NMP and the alleged breach of constitutional rights.[170] Implicit in this finding was that the NMP itself could not be understood as threatening life, health or the environment because the NMP was attempting to do *something* about Ireland's GHG emissions. Although the High Court mentioned 'risk', it failed to tease out whether a NMP that allowed emissions to rise and therefore knowingly increases the *risk* of dangerous climate change could be tantamount to a constitutional rights breach. Clearly the ECtHR case law on environmental harm, the risk threshold, and the *Urgenda* rulings[171] which neatly distilled this jurisprudence for the climate context would have been instructive for an analysis of whether the failure of the NMP to aggressively reduce emissions could amount to a violation of constitutional rights or was incompatible with the state's obligations under the ECHR Act 2003.[172] Yet, the High Court refused to attach weight to the *Urgenda* rulings on the basis that the ECtHR had not yet addressed the application of the Convention to climate change.[173] The High Court also stated that, in any event, it was not convinced that the margin of appreciation had been exceeded by the government's adoption of the NMP.[174]

The High Court could alternatively have drawn on the Irish and UK courts' progressive jurisprudence on relaxing causation in toxic tort cases to support a more flexible approach to causation. For example, the Irish Supreme Court has previously recognised that proving a causal link between a polluter's activities and the alleged harm can involve considerable scientific and financial difficulty and has admitted the possibility of reversing the burden of proving causation in such cases.[175] An application of this rule in the context of rights-based climate litigation could have put the government on proof of how its mitigation policies could be said to vindicate constitutional rights. The Irish and UK courts have also recognised on public policy grounds that a 'material contribution to risk' test can satisfy the causal requirements for liability in toxic tort cases involving an indivisible injury (such as mesothelioma), where a victim could not identify which tortfeasor had caused their illness.[176] There are clear similarities between toxic torts and inadequate climate policy in terms of indivisible injury and the plurality of agents contributing to harm. There are also strong policy grounds stemming from both the required urgency of climate action and the complexity of global heating's causes to extend or to mimic this more relaxed approach to causation based on risk in rights-based climate litigation. The exceptional application of normative correctives in certain cases to alleviate the restrictiveness of the standard 'but for' or '*conditio sine qua non*' is not unique to

[169] Ibid, [133].
[170] Orla Kelleher, "A critical appraisal of *Friends of the Irish Environment v Government of Ireland* (2021) 30(1) RECIEL 138, 142.
[171] The Supreme Court's judgment in *Urgenda* had not been handed down at the time of the High Court's judgment.
[172] Section 2 of the ECHR Act 2003 requires "judicial notice" to be taken of any decisions of the ECtHR.
[173] *FIE,* High Court judgment (n27) [139].
[174] Ibid, [143].
[175] *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629; for discussion see: O McIntyre, "The test for causation in relation to "indivisible" environmental diseases: Fairchild v Glenhaven Funeral Services Ltd." (2003) 10(2) Irish Planning and Environmental Law Journal 32.
[176] See: *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [67]; *Fairchild* has been endorsed by the Irish courts, but they have emphasised that it should be confined to "exceptional cases" where "special circumstances arise" see: *Anne Marie Quinn (A Minor) suing by her mother and next friend, Kathleen Quinn v Mid Western Health Board and Donal O'Sullivan* [2005] 4 IR 1, [60].

common law jurisdictions.[177]

Accepting a test based on contributing to *risk* — either based on European human rights law or on the toxic tort jurisprudence — would have been one way for the Irish High Court to give expression to the dominant conception of the fair allocation of responsibility dimension of climate justice in its reasoning. This would have prevented the Irish government from taking advantage of the causal complexity of climate change to evade responsibility for increasing its emissions.

On appeal, Ireland's Supreme Court was addressed on broader questions such as whether a NMP that increases the *risk* of adverse climate impacts amounts to a breach of fundamental rights.[178] The Courtdecided the case on a narrow statutory point, namely the obligation under the 2015 Climate Act to 'specify' how the government proposes to achieve the national transition objective by 2050.[179] The Court said that a 'fundamental obligation of a compliant Plan'[180] is that it *specifies* in 'real' and 'sufficient detail' how the government intends to meet the national transition objective by 2050.[181] The Court noted that the objectives of the 2015 Climate Act are to provide for transparency and public participation so that any 'reasonable and interested member of the public' can decide whether the NMP is 'effective and appropriate' for meeting that objective.[182] The Court concluded that the NMP was *ultra vires* because it fell 'a long way short of the sort of specificity required' to comply with the 2015 Climate Act.[183]

The Supreme Court —by reference to *jus tertii* rules[184] — dismissed the rights aspects of the claim stating that FIE, as a corporation, did not itself enjoy any personal rights contended for[185] and did not come within any of the established exceptions to the bar on corporate litigants.[186] The Court emphasised that constitutional values, rights and obligations might be engaged in an appropriate case[187] and that had an individual brought the case, it would have had to tease out whether inadequate climate action might be said to impinge on constitutional rights.[188] The Court's *ultra vires* finding has been criticised for 'stepping outside the usual process of statutory interpretation… without clearly explaining why'[189] and for failing to adopt an approach to standing sensitive to the particular phenomenon of climate change, which is creating generalised impacts for which there may be no standout *individual* plaintiff.[190] Equally, where the affected class of individuals includes future generations (who naturally cannot represent their own interests in court), there would seem to be a strong case for the courts to apply an exception to the bar on corporate litigants vindicating rights.[191] In this respect, it is disappointing

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[177] Minnerop and Otto (n123) 55-62.
[178] Orla Kelleher, Notes of Hearing, 22 and 23 June 2020
[179] *FIE*, Supreme Court judgment (n27).
[180] Ibid, [6.20].
[181] Ibid, [6.36].
[182] Ibid, [6.37]-[6.38].
[183] Ibid, [6.46] - [6.48].
[184] For another recent example, see: *PP v. The Judges of Dublin Circuit Court* [2019] IESC 26.
[185] Ibid, [7.20].
[186] Ibid, [7.5].
[187] Ibid, [8.14] and [8.17].
[188] *FIE,* Supreme Court judgment (n27) [8.14].
[189] R Kennedy, M O'Rourke and C Roddy-Mullineaux, "When is a Plan Not a Plan? The Supreme Court Decision in Climate Case Ireland" (2020) 2 Irish Planning and Environmental Law Journal 60.
[190] Ibid.
[191] *SPUC v Coogan* [1989] IR 734, 742; *Irish Penal Reform Trust Ltd and Others v Governor of Mountjoy Prison and Others* [2005] IEHC, [30].

that the Court acknowledged but did not comment upon[192] another hurdle that stood in FIE's way when it came to vindicating rights: that is, the High Court's finding that the Irish courts were not entitled to rule on the applicability of the ECHR to climate change harms in advance of the Strasbourg Court.

The Supreme Court's judgment might still be said indirectly to reflect the dominant conception of climate justice to the extent that it did not allow the state to succeed on arguments based on the causal complexity of climate change.[193] The Court did not express approval for the oral submissions made by the state that seemed to suggest Ireland's domestic emissions were too small to be of consequence.[194] Nor did it seem to countenance the state's contention that in order to succeed with a fundamental-rights claim an applicant would need to show more than just a *risk* to rights.[195] Indeed, the Court ultimately censured a wealthy developed country government for failing to set out in sufficient detail how it was going to achieve its 2050 national transition objective. It also quashed the NMP 'on grounds which are substantive rather than purely procedural', a very significant finding in an Irish context as it seems to signal a shift towards a more substantive form of environmental judicial review. [196] Had the Court based its judgment on fundamental rights though, this would arguably have led to a more lasting expression of climate justice in its jurisprudence.

In *Family Farmers*, the plaintiffs, a group of organic farmers and the environmental NGO Greenpeace, challenged the German government's failure to adhere to a cabinet decision to reduce GHG emissions by 40% compared to 1990 levels by 2020.[197] The German government's projections were that carbon emissions would be reduced by 32% within that period.[198] The plaintiffs argued that the government was bound by the 40% target and that its failure to meet this target violated the constitutional rights to life, physical integrity, freedom of profession and property rights.[199] The Administrative Court of Berlin dismissed the claim,[200] holding that while it is possible for a mere threat to rights to constitute a violation, the Court could leave unanswered the question of whether the plaintiffs had sufficiently demonstrated a causal link between the failure to achieve a 40% reduction and the alleged violation of rights.[201] The Court found that the government ultimately enjoys wide discretion in how it fulfils its constitutional obligations, and a climate measure would need to be shown to be wholly unsuitable or inadequate to be found unconstitutional.[202] Having cited the principles of intergenerational equity, CBDRRC and developed country leadership in the international climate regime, the Court noted that a 32% reduction by 2020 did not appear to be completely inadequate.[203] Germany's 32% reduction was more ambitious than the EU's collective target of a 20% reduction and the 'at least 25%' reduction target in *Urgenda*.[204] The Court gave

[192] *FIE,* Supreme Court judgment (n27) [5.5]-[5.18].
[193] Orla Kelleher, Notes of Hearing, 23 June 2020.
[194] Ibid.
[195] Ibid.
[196] *FIE,* Supreme Court judgment (n27) [6.49]. For discussion see: Kelleher (n199/170) 144.
[197] *Family Farmers and Greenpeace Germany v Germany* [2018] VG 10 K 412.18.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Ibid.

a nod to the fact that a 40% reduction largely ignores Germany's historic responsibility and acknowledged the attraction of an equal per capita distribution of the remaining carbon budget but concluded, that in circumstances where other developed countries did not adhere to this approach, these questions of justice and equity were political rather than justiciable matters.[205] The Court also found that the 32% reduction was compatible with the State's positive obligation under Article 2 of the ECHR because it had taken practical protective measures and, in such circumstances, enjoyed a wide margin of appreciation.[206]

The Berlin Administrative Court's decision seems to pose a challenge for the question of whether climate justice could be effectively incorporated into legal reasoning. On the one hand the Court makes reference to the possibility of *risk* or *threat* to rights as being sufficient causation, which on the face of it reflects a climate justice approach that prevents governments from extricating themselves from responsibility based on causal complexity. The Court also mentions key principles of the dominant conception of climate justice: equity, CBDRRC, developed country leadership, historic responsibility, and a just distribution of the remainder of the carbon budget, but ultimately determines that such 'normative and ethical discourse' is political in nature and cannot factor in the court's analysis given the government's broad discretion. However, the case arguably turned on its facts. The Court clearly accepts a risk-based standard for violation but — in circumstances where Germany's mitigation efforts *on the facts* reflected a level of leadership amongst other laggard EU states — imposing rights based legal accountability was discounted.

Liston argues that the Berlin Administrative Court may have been misguided in its assessment of the level of discretion governments enjoy under the ECHR;[207] a contention that seems to have been vindicated by the recent decision of the German Federal Constitutional Court in *Neubauer.*

Neubauer is a case involving a constitutional challenge to the 2019 German Climate Protection Act (the 2019 Climate Act). The Act set a GHG emission reduction target of at least 55% by 2030 relative to 1990 levels.[208] The plaintiffs had alleged that the 2019 Climate Act did not enshrine targets capable of reducing GHG emissions swiftly and sharply enough to stay within the carbon budget for limiting warming to +1.5°C, or at least well below +2°C.[209] The challenge was based on an alleged infringement of the constitutional rights to human dignity, life and physical integrity, freedom of profession, property rights and the constitutional obligation to protect the environment and climate system in Germany's Basic Law.[210] Like the Dutch Supreme Court in *Urgenda*, the Constitutional Court acknowledged that an individual's fundamental rights may be affected, even if, as with climate harms, a very large number of other people are also affected.[211] Unlike the Berlin Administrative Court, the Constitutional Court identified a violation of fundamental rights in the setting of the target and carbon budget for 2030 in the 2019 Climate Act, insofar as the Act lacked sufficient specifications for further emission reductions from 2031 onwards.[212] According to the Constitutional Court, the 55% emission reduction

[205] Ibid.
[206] Ibid citing *Kolyadenko* (n107)
[207] Liston (n10) 261.
[208] Article 3(1) and 4(1) of 2019 Climate Act, in conjunction with Annex 2.
[209] *Neubauer* (n27) [39]-[46], [59]-[66], [71]-[74], [78]-[84].
[210] Ibid.
[211] Ibid, [110].
[212] Ibid , [182]-[183].

target and associated carbon budget 'substantially narrow the remaining options for reducing emissions after 2030' and therefore do not do enough to limit the 'danger of serious impairments of fundamental rights in the future'.[213] The Court acknowledged considerable scientific uncertainty in the calculation of the remaining carbon budget and that consequently the constitutional obligation to take climate action does leave the legislature room for manoeuvre.[214] However, the Constitutional Court took its analysis further than the Berlin Administrative Court, finding that the legislature's discretion is not unfettered: scientific uncertainty coupled with the constitutional obligation to take climate action impose 'a special duty of care' on the legislature to take into account 'reliable indications of the possibility of serious and irreversible impairments'.[215] In the Constitutional Court's view, the legislature had infringed the principle of proportionality by offloading a significant amount of the emission reduction burden to the period after 2030.[216] The 'significant […] *risk* of serious burden' requires 'precautionary steps' and transitioning to carbon neutrality in 'good time'.[217] The Court's recognition of a future *risk* to fundamental rights as being sufficient to ground a finding of unconstitutionality and its use of the precautionary principle to overcome normative and political uncertainty about allocating the remainder of the carbon budget are redolent of fair burden sharing principle. The Court's foregrounding of intergenerational equity and the constitutional obligation to ensure that future generations do not have to 'engage in radical abstinence'[218] also reflect the fair allocation of the remaining carbon budget dimension of climate justice. The Court concluded that the statutory obligation to update the target by 2025 was insufficient and ordered the legislature to specify by no later than 31 December 2022 the emission reduction targets for the period after 2030.[219] The Court relied heavily on the Irish Supreme Court's ruling in *FIE* to reach this central finding that "it is imperative under constitutional law that further reduction targets beyond 2030 are specified in good time, extending sufficiently far into the future."[220]The Court also made clear that the State's constitutional obligation to take climate action is not vitiated by the fact that climate change is a global phenomenon or by the fact that Germany alone cannot solve the climate crisis.[221] In the words of the Court, the constitutional obligation to take climate action possesses a 'special international dimension' that requires the state to seek solutions at the international level and to implement agreed solutions.[222] Citing both the decisions of the Berlin Administrative Court in *Family Farmers* and the Dutch Supreme Court in *Urgenda,* the Court stressed that the state could not seek to evade responsibility by referring to the GHG emissions of other states.[223] Quite the opposite: because Germany is dependent on other states also doing their part, it must not create incentives for other states to

[213] See the Court's Press Release in English: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.htm,accessed: 21 May 2021. *Neubauer* (n27) [195].
[214] *Neubauer* (n27), [229].
[215] Ibid.
[216] Ibid, [241].
[217] Ibid, [241]-[242]. See also the Court's Press Release in English: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html accessed: 21 May 2021.
[218] Ibid, [193].
[219] Ibid, [268]
[220] Ibid, [253]
[221] Ibid, [199]
[222] Ibid.
[223] Ibid, [203].

undermine such cooperation.[224] In reaching this conclusion, the Court essentially turned the 'drop in the ocean' argument on its head[225] and strongly reflected the developed country leadership dimension of the dominant conception of climate justice. A climate justice reading of a wealthy developed ECHR state's climate mitigation obligations does not necessarily prevent a state from serving their own interests. But such a state cannot escape its obligation to aggressively reduce its greenhouse gas emissions and vindicate the energy rights of those in developing countries through technology transfer and climate finance that does not exacerbate existing inequalities.

The final case considered here — the *Klimaseniorinnen* judgments of the Swiss courts — reached a markedly different conclusion to that of courts elsewhere in Europe. The litigants are an association of older women and four individual women.[226] The women — whose demographic is at an increased risk of mortality and morbidity during heatwaves that are becoming more intense and frequent as a consequence of climate change — filed a request with four government authorities in Switzerland.[227] The request, filed under Article 25a(1) of the Administrative Procedure Act, sought a 'discontinuation of failures in climate protection'[228] and demanded that the government take all necessary steps to ensure its emission reduction targets aligned with a fair contribution to the 'well below 2°C' temperature goal of the Paris Agreement.[229] Switzerland, as a party to the UNFCCC, has recognised and given effect to the 'well below 2°C' temperature goal via Article 1(1) of the CO2 Act 2013.[230] Under that Act, Switzerland is required to reduce its GHG emissions by 20% by 2020 and by 30% domestically by 2030 — both below 1990 levels (with a facility for further emission reductions via offsetting abroad).[231] These emission reduction trajectories do not align with the IPCC's advice for developed countries for staying below the 2°C limit of warming. In their request, the women alleged violation of constitutional rights and principles as well as articles 2 and 8 of the ECHR.[232] The Swiss authorities refused to address the substance of the women's request on the basis that the women did not meet the applicable standing requirements.[233] The Federal Administrative Court dismissed the women's appeal noting that the women are not 'particularly' affected in comparison to the general

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[224] Ibid.
[225] Anna-Julia Saiger, 'The Constitution Speaks in the Future Tense' (Verfassungsblog, 29 April 2021) https://verfassungsblog.de/the-constitution-speaks-in-the-future-tense/ accessed: 29 August 2021.
[226] *Swiss Senior Women for Climate Protection v Swiss Federal Council et al*., filed 25 October 2016, English translation, http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf accessed: 9 February 2021.
[227] Ibid.
[228] Ibid.
[229] Ibid, 3.
[230] C Bähr, U Brunner, K Casper, "KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation" (2018) 9(2) Journal of Human Rights and the Environment 194, 206.
[231] Ibid. Switzerland's updated NDC will commit it to a reduction of at least 50% by 2030 and net zero by 2050. These updated targets are subject to a facultative referendum expected to take place in 2021. See: CAT Climate Target Update Tracker, https://climateactiontracker.org/climate-target-update-tracker/switzerland/ accessed: 25 May 2021.
[232] *Swiss Senior Women for Climate Protection v Swiss Federal Council et al*., filed 25 October 2016, English translation, 6-8 http://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf accessed: 9 February 2021.
[233] *Swiss Senior Women for Climate Protection v Swiss Federal Council et al*., order of 25 April 2017 Federal Department of the Environment, Transport, Energy and Communications, English translation https://klimaseniorinnen.ch/wp-content/uploads/2017/11/Verfuegung_UVEK_Abschnitt_C_English.pdf accessed: 9 February 2021.

public.[234] The Federal Supreme Court also dismissed the women's appeal, on the basis that there is still time to prevent global warming exceeding the limit of 'well below 2˚C' and that this temperature threshold is unlikely to be exceeded in the near future.[235] Accordingly, the Federal Supreme Court found that the women's rights 'like the rest of the population' are 'not …threatened at the present time' by the alleged omissions of government 'with sufficient intensity'.[236] The Court thus reached a diametrically opposed conclusion on the applicability of the fundamental rights to climate change to the Dutch Supreme Court and German Constitutional Court (whilst the Irish Supreme Court left the matter unresolved). The implication of the Swiss Federal Supreme Court's ruling is that the only appropriate moment to challenge a state's regulatory inaction is after the 'well below 2˚C' temperature threshold has been surpassed or after the harm has occurred.[237]

`If the Swiss Federal Supreme Court's interpretation is correct — and the appropriate legal standard is an *ex post* analysis of harm rather than the existence of a known real and serious *risk* and a failure to meet the due diligence requirement — it would render fundamental rights a completely ineffective tool for securing climate accountability. For this reason, the judgment jars with the dominant conception of climate justice as it pays little heed to the precautionary principle, the 'no harm' principle, or the need for just burden sharing. In that sense, it resonates more strongly with Posner, Weisbech and Sunstein's increasingly unsound position in that both — based on today's best available science — seem to underestimate the risk of catastrophic climate impacts.

The divergent positions of the Courts might be attributable to the fact that the ECtHR has yet to rule on the matter, leading to greater interpretative flexibility on the part of the national courts. There are nevertheless signs of cross-fertilisation, with the German Constitutional Court in *Neubauer* repeatedly citing the Supreme Courts' judgments in *Urgenda* and *Friends of the Irish Environment*. If the *Klimaseniorinnen* application can overcome the admissibility hurdles, the ECtHR in Strasbourg will have an opportunity to provide some much-needed clarity on the appropriate legal tests or standards for engaging Convention rights in the context of climate change. The women allege that the Swiss government is aware of the risk climate change poses to human health and life but that it is failing to comply with its positive obligations under articles 2 and 8 to put in place all necessary measures to reduce emissions in line with the 'well below 2˚C' temperature goal.[238] If the applicants can demonstrate victim status, the ECtHR might shed light on the nature of a state's positive obligations in the context of climate change; the proximity or causal requirements in these cases; and the interpretative value of the precautionary principle,[239] CBDRRC and equity and the international climate regime more broadly in shaping these positive obligations. [240] If the ECtHR were to follow the Dutch

[234] *Swiss Senior Women for Climate Protection v Swiss Federal Council and Others,* Federal Administrative Court of Switzerland, Section 1 Judgment A-2992/2017 of 27 November 2018 [7.4.3].
[235] *Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*, Federal Supreme Court of Switzerland, Public Law Division I Judgment 1C_37/2019 of 5 May 2020 [5]-[5.5].
[236] Ibid. In arriving at its conclusion it cited *inter alia Kolyadenko* (n107) and *Hardy* (n101).
[237] *Klimaseniorinnen* (n125).
[238] Ibid.
[239] The interpretative value of the precautionary principle is uncertain in the ECtHR's jurisprudence, see: *Tătar* (n104); *Hardy* (n101).
[240] A Holzhausen, "Senior Women for Climate Protection v Switzerland: A Chance for the European Court of Human Rights To Make History in Climate Litigation" (Cambridge International Law Journal, 24 December 2020) http://cilj.co.uk/2020/12/24/senior-women-for-climate-protection-v-switzerland-a-

Supreme Court and German Constitutional Court's approach of a risk-based threshold test for engaging rights, this could be a watershed moment in terms of the dominant conception of climate justice permeating judicial reasoning, and could prevent governments in wealthy developed countries (in particular those that are parties to the ECHR) henceforth from exploiting the causal complexity of climate change to evade doing their fair share. Future litigants would only need to show a known real and serious risk of harm and a failure by a national government to take suitable steps, in line with best available science, to mitigate the risk in order to succeed in rights-based climate litigation. The *Duarte Agostinho* and *Max M* applications, which are both framed around knowingly contributing to the *risk* of harm from climate change, might also afford the Court similar opportunities.[241]

5 CONCLUSION

This article has explored whether widely accepted political theory contributions to the debate on climate justice on fair burden sharing and harm avoidance, that have been cautiously threaded through international climate law, can (and should) be operationalised in judicial reasoning in systemic rights-based climate litigation. Where courts are willing to accept a risk-based test for causation or proximity in such cases, this thwarts developed states' efforts to extricate themselves from responsibility by citing the causal complexity of climate change. Such a test also weakens arguments often made by states to the effect that there is an insufficient nexus between their emissions and the alleged rights violation for them to be held accountable or that their emissions on a global scale are too negligible to reach the level of severity needed to engage rights.[242] In that sense, this line of argumentation aligns with and could be seen as a way of giving expression to the dominant conception of climate justice, since it pushes for wealthy developed countries to bear a significant and fair share of the burden. A comparative survey of case law from the Netherlands, Germany, Ireland, and Switzerland demonstrates that courts have taken very different approaches to the question of causation and to the appropriate threshold for engaging rights and have not consistently reflected the dominant conception of climate justice in their reasoning.

All eyes are now on the ECtHR in Strasbourg to resolve the question of causation in systemic rights-based climate litigation. Comments of two judges of the ECtHR — speaking extrajudicially — show promising signs. These judges state that the ECtHR 'will play its role within the boundaries of its competences' in climate matters 'forever mindful that Convention guarantees must be effective and real, not illusory'.[243] If any of the pending applications are successful (and there seems a strong chance that at least one will be) this could be a watershed moment for the

chance-for-the-european-court-of-human-rights-to-make-history-in-climate-litigation/#comments accessed: 9 February 2020.

[241] *Duarte* (n125) [21]-[27]; *Max M* (n125) [61].

[242] N Grünhagen and R Diekjobst, "Of crabbed age and bold youth" (Voelkerrechtsblog, 24 December 2020) https://voelkerrechtsblog.org/of-crabbed-age-and-bold-youth/ accessed: 10 February 2021.

[243] Robert Spano, "Should the European Court of Human Rights become Europe's environmental and climate change court?" (5 October 2020) https://vidivaka.mk/istrazuvanja/wp-content/uploads/2021/01/%D0%93%D0%BE%D0%B2%D0%BE%D1%80-%D0%95%D0%A1%D0%A7%D0%9F-Roberto-Spano.pdf accessed: 15 March 2021; Tim Eicke, "Human Rights and Climate Change: What role for the European Court of Human Rights" (2 March 2021) https://rm.coe.int/human-rights-and-climate-change-judge-eicke-speech/1680a195d4#_ftnref66 accessed 15 March 2021.

incorporation of the hallmarks of climate justice thinking — from harm avoidance to fair burden sharing — into judicial reasoning.