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Climate Litigation before International Tribunals

The *Six Portuguese Youth* v. 33 *Governments of Europe* Case before the European Court of Human Rights

GERRY LISTON AND PAUL KINGSLEY CLARK

18.1 INTRODUCTION

The 2017 wildfire season in Portugal will forever be etched in the memories of Sofia and André Oliveira; Cláudia, Martim, and Mariana Agostinho; and Catarina Mota. That year, over one hundred people perished as a result of the most devastating outbreak of forest fires in Portugal's history. Many were killed only miles from Cláudia, Martim, Mariana, and Catarina's homes in Portugal's Leiria district. For a number of years, these children and young adults have been experiencing ever-intensifying heat extremes that interfere with their ability to exercise, sleep, and spend time outdoors. But, as with so many among their generation, it is what their futures hold that scares them the most. And sadly, they have every reason to be extremely worried. If global warming remains on its current trajectory, Portugal could face deadly heatwaves, bringing temperatures of over forty degrees Celsius, which could endure for over a month, and the number of days on which there is an extreme risk of wildfire could quadruple.[1]

It is for this reason that on 3 September 2020, these six Portuguese children and young adults ('youth-applicants') filed an application with the European Court of Human Rights ('ECtHR' or 'Court') against thirty-three European states in which they argue that these states are breaching their obligations under the European Convention on Human Rights ('ECHR') by failing to adopt adequate climate change mitigation measures.[2] This chapter provides an overview of the basis on which the youth-applicants argue that the

[1] See Carl-Friedrick Schleussner et al., 'Climate Impacts in Portugal' (2020) Climate Analytics, <https://youth4climatejustice.org/wp-content/uploads/2021/01/Climate-Analytics-Climate-Impacts-in-Portugal-min.pdf>.

[2] See European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (1950). A copy of the application filed with the

https://doi.org/10.1017/9781009106214.023 Published online by Cambridge University Press

respondent states are responsible under the ECHR for the harm and risk of harm to which they are exposed as a result of climate change. For the purpose of this analysis, it will be assumed, as the youth-applicants contend, that this harm/risk falls within the scope of harm/risk covered by Article 2 (the right to life), Article 3 (the prohibition on inhuman or degrading treatment), and Article 8 (the right to respect for private and family life). This chapter begins with a brief overview of the key challenge – which stems from the absence of an agreed approach to how the burden of mitigating climate change ought to be shared between states – that arises in climate change litigation. Next, it outlines how principles of shared state responsibility address this difficulty and, further, how these principles are consistent with existing principles of ECHR law. A summary of the approach taken by the Dutch Supreme Court in the *Urgenda* case is then provided by way of comparison, followed by some brief concluding remarks.

18.2 THE CHALLENGE THAT ARISES IN CLIMATE CHANGE LITIGATION

It is well established that the ECHR imposes on states a duty 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[3] The ECtHR has further held that 'in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8' such that 'the principles developed in the Court's case-law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life'.[4] Among the principles that apply in this context is that when a state 'authorises [dangerous activities], it must ensure through a system of rules and sufficient control that the risk is reduced to a reasonable minimum'.[5] When it comes to defining this 'reasonable minimum' in cases raising issues of an environmental nature, the ECtHR has regard to applicable international standards governing, for example, noise pollution[6] or exposure to electromagnetic fields.[7]

Court is available at: <https://youth4climatejustice.org/the-case/>. A copy of the Court's 'Objet de l'Affaire' is available at: http://hudoc.echr.coe.int/eng?i=001-206535.

[3] E.g., *Öneryıldız* v. *Turkey*, 2004-XII Eur. Ct. H.R. at §89 (2004); *Budayeva* v. *Russia*, 15339/02 Eur. Ct. H.R. at §129 (2008); *Kolyadenko* v. *Russia*, App. Nos. 17423/05 *inter alia*, §157 (2012).

[4] *Budayeva*, above note 3 at §133.

[5] *Mučibabić* v. *Serbia*, 637 Eur. Ct. H.R. at §126 (2016).

[6] See *Fägerskiöld* v. *Sweden*, 37664/04 Eur. Ct. H.R. (2008).

[7] See *Calancea* v. *Moldova*, App. No. 23225/05, §29 (2018).

It seems fair to suggest, therefore, that if, hypothetically, only one European state was responsible for the greenhouse gas ('GHG') emissions that cause climate change, a case against that state would be relatively straightforward. The international standard would, of course, be provided by the Paris Agreement, which makes clear the need 'to limit the [global] temperature increase to 1.5°C' ('1.5°C target').[8] The only issue of any real complexity that would arise in such a hypothetical case is the extent to which the single emitting state could rely on the possibility that negative emissions technologies might emerge at some point in future, thereby enabling it, as it would argue, to delay reducing its emissions. The ECtHR has, however, already held that states must apply a precautionary approach in relation to 'new technology ... whose consequences for the environment [are] unknown'.[9] And in any event, authoritative UN reports make clear the total emissions reductions that are required, year-on-year, to keep global warming to the 1.5°C target.[10]

Similarly, if it were the case that any GHG emissions would cause climate change to exceed the 1.5°C target, a case against any state that emits GHG would be equally straightforward. As Mayer notes, 'the task of lawyers would be easier if the global mitigation objective was an immediate and absolute cessation of all GHG emissions, as the implication of this objective would be clear: each State would be bound to stop [these] emissions'.[11]

The principal challenge that arises with climate change litigation therefore stems from the fact that, first, multiple states contribute to the problem; second, it is not the case that any contribution to global emissions causes global warming to exceed a permissible level (in ECHR terms); third, by virtue of the 'bottom-up approach' of the Paris Agreement – and the associated ambiguity as to the meaning of 'equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances' ('CBDR') – the specific amount by which any given state must reduce its emissions in order to achieve the collective goal of that agreement is imprecisely defined;[12] and fourth, owing to the philosophical

[8] Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, TIAS No. 16-1104

[9] *Tatar* v. *Romania*, App No. 67021/01, §108 (2009) (unofficial translation of original in French).

[10] See, e.g., 'The Emissions Gap Report 2019' (2019) United Nations Environment Programme 26, <https://www.unenvironment.org/resources/emissions-gap-report-2019>.

[11] Benoit Mayer, 'Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review' (2019) 28 *Review of European, Comparative and International Environmental Law* 107, 112.

[12] On the contested understanding of the CBDR principle, see, e.g., Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 *International and Comparative Law Quarterly* 493.

and political nature of the considerations underlying any choice as to how to measure a given state's 'fair share' of the required global mitigation effort, a court is unlikely to select the 'correct' approach to global burden-sharing.[13] That is, a court would be unlikely to endorse, for example, historical responsibility over economic capability as the single proper approach to measuring a state's 'fair share'.

18.3 SHARED RESPONSIBILITY AND CLIMATE CHANGE

How, then, do the youth-applicants propose to address this challenge in the case before the ECtHR? In answering this question, it is appropriate to consider first the recently published Guiding Principles on Shared Responsibility ('Guiding Principles').[14] According to Principle 2 of the Guiding Principles, 'the commission by multiple international persons of one or more internationally wrongful acts that contribute to an indivisible injury entails shared responsibility'.[15] Thus, 'the defining feature of shared responsibility is that multiple international persons, by committing one or more internationally wrongful acts, contribute to an indivisible injury'.[16] It is Principle 4 of the Guiding Principles that is relevant in the context of the ECHR obligation to prevent harm from climate change. It provides:

> International persons share responsibility for multiple internationally wrongful acts when each of them engages in separate conduct consisting of an action or omission that:
>
> (a) is attributable to each of them separately; and
> (b) constitutes a breach of an international obligation for each of those international persons; and
> (c) contributes to the indivisible injury of another person.[17]

[13] See Mayer, 'Interpreting States' General Obligations on Climate Change Mitigation', above note 11 at 112. It is true, however, that positive human rights obligations can, in a general sense, be read in light of the CBDR principle; see Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Oxford: Hart, 2019), p. 110.

[14] See André Nollkaemper et al., 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 *European Journal of International Law* 15. The Guiding Principles, which were developed by a group of international lawyers with recognized expertise in the field of international responsibility, are of an interpretive nature and build on the existing rules of the law of international responsibility that address situations of shared responsibility. Ibid. at 20 – 21.

[15] Ibid. at 16 (stating Principle 2).

[16] Ibid. at 24.

[17] Ibid. at 17 (stating Principle 4).

As the commentary to that Principle notes, 'in order to establish shared responsibility for the indivisible injury of climate change, violations of applicable international obligations incumbent on each of the responsible international persons need to be established, for instance under international environmental law or international human rights law'.[18]

Taking the prevention of this 'indivisible injury' as being the chief objective of the ECHR obligation to mitigate climate change, it follows logically that this obligation, as it applies to each state individually, must be interpreted so as to ensure to the extent possible that its collective implementation is consistent with the prevention of such injury. And it is here that the widely accepted principle of law applicable to causal uncertainty arising from the involvement of multiple potential contributors to a particular harm becomes relevant.[19] This principle may be illustrated by reference to the leading English authority in this area, *Fairchild* v. *Glenhaven Funeral Services*.[20] In that case, the plaintiffs were unable to establish which of several periods of exposure to asbestos by their multiple negligent employers had caused their resulting injuries. This was because the inhalation of as little as one single asbestos fibre could have given rise to those injuries, and it was not scientifically possible to establish when exactly this had occurred. The House of Lords, after reviewing the principles that apply to similar situations in various jurisdictions,[21] concluded that it was appropriate to apply a relaxed approach to causation in such a situation, such that the defendant employers were presumed to have caused the injuries in question. This approach was necessary to give effect to 'the policy of common law and statute to protect employers against the risk of contracting asbestos-related diseases'.[22]

At the root, the ambiguity at issue in a situation such as that which arose in *Fairchild* is materially equivalent to the ambiguity as to what constitutes the 'reasonable minimum' amount by which any one state ought to reduce its emissions. First, the latter involves ambiguity as to the extent, if any, of the unlawful contribution to 'indivisible injury' by multiple potential contributors

[18] Ibid. at 34.

[19] See Cees van Dam, *European Tort Law* (Oxford: Oxford University Press, 2013), pp. 329–34; see also Christian Von Bar, *The Common European Law of Torts: The Core Areas of Tort Law, Its Approximation in Europe, and Its Accommodation in the Legal System*, vol. I (Oxford: Clarendon Press, 1998), pp. 340–42; see also Walter van Gerven et al., *Cases, Materials and Text on National, Supranational and International Tort Law* (Oxford: Hart, 2000) pp. 441 and 465.

[20] See *Fairchild* v. *Glenhaven Funeral Services Ltd and Others* [2003] 1 AC 32.

[21] See ibid at 56–66 (Lord Bingham).

[22] Ibid. at 75 (Lord Hoffmann).

to that injury. If any, because if a state's contribution to global GHG emissions falls below its 'reasonable minimum', then its contribution to that injury is not unlawful. Second, in both situations the ambiguity in question results solely from the fact that there are multiple potential contributors to the relevant injury.

A further justification for applying the *Fairchild* principle to the obligation to mitigate climate change concerns the fact that the ambiguity as to the 'reasonable minimum' amount by which any one state must reduce its emissions stems from the failure by states to agree on a globally applicable approach to sharing the burden of mitigating climate change. In *Fairchild*, Lord Bingham held that there was 'a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so'.[23] Thus, the potential injustice entailed by relaxing the approach on causation in such a case, that is, imposing liability on a negligent defendant who had not caused the harm in question, was 'heavily outweighed by the injustice of denying redress to a victim'.[24] By the same token, it is on balance surely more appropriate that states, and not the victims of the harm which they collectively cause, should bear the consequences of their failure to agree on an approach to distributing amongst themselves the global burden of mitigating climate change.

Applied in the context of climate change, this principle requires – insofar as global warming is on course to vastly exceed the 1.5°C target – that states' respective contributions (past and projected) to global GHG emissions be presumed, as a starting point, to exceed a 'reasonable minimum' amount. This places the onus on states to provide, in the language of the ECtHR, a 'satisfactory and convincing explanation'[25] that they are not contributing to injury (or risk thereof) caused by climate change. It is important to note in this context that it is axiomatic that the adequacy of one state's mitigation efforts depends on the mitigation efforts that they require of the rest of the world, if the 1.5°C target is to be achieved. Thus, to discharge its onus, a state is required to demonstrate that its approach to determining the extent of its mitigation efforts, if generalized globally, is capable of achieving that target, having regard to the mitigation effort it implies for the rest of the world (a point that the below analysis of the *Urgenda* decision will serve to clarify).

[23] Ibid. at 67.
[24] Ibid.
[25] See, e.g., *El Masri* v. *The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, §97 (2002).

Furthermore, just as the ambiguity surrounding the causation question at issue in *Fairchild* was resolved in favour of the plaintiffs, the ambiguity as to the precise extent to which any particular state ought to reduce its GHG emissions, in order to hold global warming to the 1.5°C target, must also be resolved in favour of the victims of climate change-related injury. This simply reflects, as in *Fairchild*, the paramountcy of the need to prevent the injury that would result from global warming exceeding the 1.5°C target; any other approach would give rise to the possibility that states could 'extricate' themselves from their presumptive responsibility through mitigation efforts that, combined, would not be sufficient to hold global warming to that target. Thus, it requires the adoption of more demanding interpretations of states' individual mitigation obligations, such as the exacting 'due diligence' standard of conduct advocated by Hunter Jones and Marjanac.[26]

Equally, it requires that a state's mitigation efforts be judged according to more onerous approaches to measuring that state's 'fair share' of the global mitigation effort (in particular for 'developed' countries, in light of their obligation to 'take the lead' under the Paris Agreement).[27] It therefore provides a normative basis for relying on the approach of the Climate Action Tracker ('CAT') to measuring the compatibility of a state's mitigation efforts with the 1.5°C target.[28] The CAT's approach is to construct a 'fair share range' from the wide range of approaches to measuring the fairness of a particular state's mitigation efforts.[29] That range is then divided into three sections: 'insufficient', '2°C compatible', and '1.5°C compatible'. Each section corresponds to the temperature outcome that would result if all other countries were to adopt mitigation efforts of equivalent ambition relative to their respective fair share ranges. This approach reflects the point made above that the adequacy of a state's mitigation efforts is necessarily relative to what it implies for other countries. And, in effect, it means that only where a state's mitigation efforts are compatible with the relatively more demanding measures of fairness within its fair share range will those efforts be rated as compatible with the 1.5°C target.

[26] See Sam Hunter Jones and Sophie Marjanac's chapter in this volume (Chapter 7).

[27] Paris Agreement, above note 8 at Art. 4(4).

[28] CAT is an independent scientific analysis that tracks government climate action and measures it against the globally agreed Paris Agreement. See <www.climateactiontracker.org>. On the relationship between the *Fairchild* principle and CAT's approach, see Gerry 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 *Cambridge International Law Journal* 241, 258–59.

[29] See 'Comparability of Effort', Climate Action Tracker, <https://climateactiontracker.org/methodology/comparability-of-effort/>.

https://doi.org/10.1017/9781009106214.023 Published online by Cambridge University Press

18.4 SHARED RESPONSIBILITY, CLIMATE CHANGE, AND KEY PRINCIPLES OF ECTHR JURISPRUDENCE

An analysis of shared responsibility under the ECHR for harm caused by climate change would not be complete without reference to a number of key principles of ECtHR jurisprudence that are essential to determining responsibility under the Convention. Chief among these is, of course, the margin of appreciation principle by which the latitude enjoyed by states in their implementation of the Convention is determined.[30] As the ECtHR observed in *Taşkin* v. *Turkey*, 'the Court has repeatedly stated that in cases raising environmental issues the State must be allowed a wide margin of appreciation'.[31] In *Hatton* v. *United Kingdom*, which concerned the regulation of noise levels associated with night flights into London's Heathrow Airport, the Court explained that the margin of appreciation in this area stems from the fact that 'national authorities have direct democratic legitimation and are ... in principle better placed than an international court to evaluate local needs and conditions'.[32] Furthermore, it was not for the Court 'to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this social and technical sphere',[33] a point that has been made by the Court in numerous environmental cases since.[34]

In the climate change context, states undoubtedly enjoy a very wide margin of appreciation when determining how to achieve their GHG emissions reductions, that is, when deciding from what sectors of the economy to seek to achieve their GHG emissions reductions or the mechanism used to do so. In ECtHR terminology, states enjoy a wide margin as to 'choice of means'[35] in this area. The same cannot be true, however, when it comes to the overall rate at which a state reduces its emissions. This follows not only from the nature of the rights at stake but also from the fact that the margin of appreciation is a

[30] See, from amongst a wide range of literature, Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 *Cambridge Yearbook of European Legal Studies* 381; see also Oddný Mjöll Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 *European Competition Law Review* 27.

[31] *Taşkin* v. *Turkey*, App. No. 46117/99, §116 (2004).

[32] *Hatton* v. *United Kingdom*, 2003-VIII Eur. Ct. H.R. at §97 (2003).

[33] Ibid. at §100.

[34] See *Öneryıldız*, above note 3 at §107; see also *Budayeva*, above note 3 at §135; see also *Tatar*, above note 9 at §108.

[35] See, e.g., *Fadeyeva* v. *Russia*, 2005-IV Eur. Ct. H.R. at § 96 (2005); see also *Budayeva*, above note 3 at §134; see also *Kolyadenko*, above note 5 at §160.

creature of the principle of subsidiarity.[36] The latter principle finds expression in the Court's emphasis on state authorities' greater ability to evaluate local needs and conditions and their democratic legitimacy (as in the above quote from the *Hatton* case). A state's greater ability to assess its own local needs and conditions clearly does not, however, have the same relevance in the context of a global problem like climate change. Indeed, from its vantage point as an international court, the ECtHR is particularly well-placed to appreciate that if, for example, each state chooses a self-serving interpretation of its own 'fair share' of the global mitigation effort required to meet the 1.5°C target, that target will not be achieved. Similarly, a state could hardly rely on the democratically expressed preferences of its citizens to justify a less ambitious contribution to the required global mitigation effort.[37]

Another important point to note in this context is that the majority of environmental cases before the ECtHR have been addressed under Article 8, which protects the right to respect for private and family life and which permits interference with that right in certain circumstances. In these cases, the margin of appreciation principle has been invoked when determining whether the extent of the interference with this right was 'necessary in a democratic society' and justified on the grounds enumerated in the second paragraph of that Article. Thus, in *Hatton*, for example, the margin of appreciation was central in determining whether the relevant UK authorities had, in permitting a degree of interference with the Applicants' Article 8 rights, struck a 'fair balance' between those interests and the competing economic interests served by permitting night flights into Heathrow Airport.[38] When it comes to climate change, however, it is clear that the interference that would result from global warming exceeding the 1.5°C target could never be justified as being 'necessary in a democratic society'. This is true not only as a matter of fact[39] but also because the 1.5°C target in the Paris Agreement reflects the international consensus as to the level beyond which global warming poses a threat to human well-being. And it is well-established

[36] See Arnardóttir, 'Rethinking the Two Margins of Appreciation', above note 30 at 38; see also Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000), p. 34.

[37] This is a point that is largely hypothetical insofar as European citizens favor greater action to reduce GHG emissions. See 'Special Eurobarometer 501: Attitudes of European citizens towards the Environment', European Commission, 2020, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getSurveydetail/instruments/special/surveyky/2257>.

[38] See *Hatton*, above note 31 at §§116–27.

[39] See, especially, the report of the Intergovernmental Panel on Climate Change (IPCC), 'Global warming of 1.5°C' (2018) IPCC.

that the expression of consensus via international instruments plays a central role in the interpretation of Convention rights.[40] Thus, the question that the margin of appreciation has been used to answer in environmental cases decided to date is, in the context of climate change, already answered by the Paris Agreement.

Two other principles that relate to the interaction between the Convention and other aspects of international law are also relevant in this context. First, in the landmark case of *Golder* v. *United Kingdom*, the ECtHR held that general principles of law of the kind referred to in Article 38 of the Statute of the International Court of Justice must be taken into account when interpreting the Convention.[41] The principle of law applied in *Fairchild* has been recognized as a general principle of law of that kind.[42] It is also, incidentally, among the 'norms and principles applied … in the domestic law of the majority of member States of the Council of Europe', which are equally relevant to the interpretation of the Convention.[43]

Second, the Court has held that where there is ambiguity in the terms of a provision of international law of relevance to the interpretation or application of the Convention, it must 'choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations'.[44] Resolving the ambiguity of the CBDR principle in favour of victims of harm from climate change is an approach that is entirely consistent with the object and purpose of the Paris Agreement of holding global warming to the 1.5°C target. Indeed, the contrary approach, that is, one where states can adopt self-serving interpretations of the CBDR principle, is contrary to that object and purpose.[45]

The above-outlined approach to interpreting states' mitigation efforts under the ECHR is also consistent with more generally applicable principles relating to the interpretation of the Convention. As far back as 1968, the Court held that it is 'necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the

[40] See *Demir and Baykara* v. *Turkey*, 1345 Eur. Ct. H.R. at §§85-86 (2008).
[41] See *Golder* v. *United Kingdom*, 1 Eur. Ct. H.R. (ser. A) at §35 (1975).
[42] See *Oil Platforms* (*Islamic Republic of Iran* v. *United States*), 2003 ICJ Rep 161, 354-358 (November 6) (Separate Opinion of Bruno Simma).
[43] See *Demir and Baykara*, above note 40 at § 86.
[44] *Al Jedda* v. *United Kingdom*, App. No. 27021/08, §102 (2011).
[45] See Tim Crosland et al. 'The Paris Agreement Implementation Blueprint: A Practical Guide to Bridging the Gap between Actions and Goal and Closing the Accountability Deficit (Part 1)' (2016) 24 *Environmental Liability: Law, Policy and Practice* 114, 117.

Parties'.[46] This is in contrast to the discounted view of Sir Gerald Fitzmaurice, set out in the above-mentioned *Golder* case, that 'any serious doubt [as to the meaning of a Convention provision] must . . . be resolved in favour of, rather than against, the government concerned'.[47] The above-outlined approach is also consistent with the related effectiveness principle, which requires that states' obligations be interpreted in such a way that the right to live in an environment where climate change has not exceeded the 1.5°C target is 'practical and effective' rather than 'theoretical and illusory'.[48]

18.5 A COMMENT ON THE *URGENDA* DECISION

Against the background of the above analysis, it is appropriate to consider the landmark decision of the Dutch Supreme Court in *Urgenda* v. *Netherlands*.[49] This case is of profound significance not only as the first in which a domestic court ordered a government to increase its GHG emissions reduction efforts but also because the Dutch Supreme Court arrived at this decision predominantly by reference to the Netherlands' obligations under the ECHR. Central to this outcome was the range of GHG emissions reductions of 25 per cent to 40 per cent relative to 1990 by 2020, which was presented to the court by the applicants in that case.[50] This range, which originated in the IPCC's Fourth Assessment Report, referred to the amount by which the parties listed in Annex I to the UN Framework Convention on Climate Change ('UNFCCC') (broadly corresponding with 'developed' countries), including the Netherlands, would be required to reduce their GHG emissions to hold global warming to two degrees Celsius ('2°C target'). The court ultimately held that the Netherlands was required to reduce its emissions by the lowest-end (25 per cent) figure in that range. In doing so, it followed an approach that, if replicated globally, would not be capable of keeping global warming even to the 2°C target on which that case was based; as has been noted by two leading experts on climate change mitigation policy, 'systematic court decisions that governments must follow the least-ambitious end of an equity range would be insufficient to achieve the [goal of the] Paris Agreement'.[51]

[46] *Wemhoff* v. *Germany*, 2 Eur. Ct. H.R. (ser. A, no. 7) at §8 (1968).
[47] *Golder*, above note 40 at §39 (Separate Opinion of Judge Sir Gerald Fitzmaurice).
[48] *Airey* v. *Ireland*, 32 Eur. Ct. H.R. (ser. A, no. 33) at §24 (1979).
[49] See HR 20 December 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.).
[50] See ibid. at ¶¶7.1–7.6.2.
[51] Yann Robiou du Pont and Malte Meinshausen, 'Warming Assessment of the Bottom-up Paris Agreement Emissions Pledges' (2018) 9 *Nature Communications* 1, 2.

https://doi.org/10.1017/9781009106214.023 Published online by Cambridge University Press

What is relevant for present purposes is how the Dutch Supreme Court came to hold, in the context of the Netherlands' obligations to mitigate climate change under the ECHR, that the 'equity range' in question was applicable and, further, that it was appropriate to opt for the lowest-end figure in that range. With regard to the equity range itself, the court referred to the fact that the parties to the Kyoto Protocol to the UNFCCC, which included the Netherlands, had agreed that the countries listed in Annex I to that Convention ought to reduce their emissions according to this range in order to prevent climate change from exceeding two degrees Celsius.[52] This demonstrated 'a high degree of international consensus on the urgent need for the Annex I countries to reduce greenhouse emissions by at least 25–40 per cent by 2020 compared to 1990 levels', which could be 'regarded as common ground' among such states for the purpose of the ECHR principle of consensus referred to above.[53]

As regards the decision to opt for the lowest-end of this range, it held that while the determination of 'the share to be contributed by the Netherlands in the reduction of greenhouse gas emissions is . . . in principle, a matter for the government and parliament, the courts can assess whether the State, with regard to the threat of a dangerous climate change, is complying with its duty . . . under Articles 2 and 8 ECHR'.[54] This duty requires the state to pursue 'a policy through which it remains above the lower limit of its fair share'.[55] It emphasized, however, that 'in determining the State's minimum obligations, the courts must observe restraint'.[56] The lowest-end figure 25 per cent could 'therefore be regarded as an absolute minimum' that the court was entitled to require the government to achieve.[57]

It is notable that in its analysis of the obligations under Articles 2 and 8 of the ECHR to protect people against environmental hazards, the Dutch Supreme Court held that 'states are obliged to take appropriates steps without having a margin of appreciation' and that 'states do have discretion in choosing the steps to be taken, although these must actually be reasonable and suitable'.[58] It therefore seemed to be indicating that a state's margin of appreciation in this area is confined to 'choice of means'. It is clear, however,

[52] See *Urgenda*, above note 49 at ¶¶7.2.1–7.2.3. Notably, the first instance decision in *Urgenda* was reached prior to the adoption of the Paris Agreement.
[53] Ibid. at ¶7.2.11.
[54] Ibid. at ¶6.5.
[55] Ibid.
[56] Ibid. at ¶6.6.
[57] Ibid. at ¶7.5.1.
[58] Ibid. at ¶5.3.2.

that in opting for the lowest end of the range in question based on separation of powers-type considerations, the court did, in effect, determine that the state enjoys a significant margin of appreciation regarding the total amount by which it must reduce its emissions. After all, separation of powers principles, based as they are in domestic constitutional law, play no role in determining the nature of states' obligations under the Convention.[59]

The decision by the lawyers for *Urgenda* not to pursue on appeal the similar decision of the Hague District Court to opt for the 25 per cent figure has been criticized as a 'a major flaw in the treatment of this case'.[60] This view is misguided. On the contrary, the wisdom of that tactical decision is borne out by the fact that the Dutch Supreme Court would clearly have been unwilling to entertain such an argument. What the decisions of both *Urgenda*'s lawyers and the Dutch courts do point to, however, is that recognition of shared responsibility, and the consequences that it entails, is needed to enhance the efficacy of climate change litigation at the domestic level.

18.6 CONCLUSION

Securing some of the most fundamental of Sofia, André, Cláudia, Martim, Mariana, and Catarina's rights – and those of their generation – now depends on governments adopting not just greater GHG emissions reductions but the 'deep and urgent'[61] reductions that the science says are necessary to hold global warming to the 1.5°C target. International courts such as the ECtHR have a critical role to play in ensuring that human rights law does in fact require states to adopt such measures. Rules of shared state responsibility and a related centuries-old principle of law that applies to causal uncertainty and multiple contributors to harm equip them well to do so.[62] The power of the latter principle in particular lies in how it renders ambiguities in the international climate change legal framework – the benefit of which has in practice mostly accrued to states to date – a problem for states and not victims of harm from climate change. In the ECHR context, these principles further combine with long-established principles of ECtHR jurisprudence to ensure that the Convention can, and indeed must, provide a response to the climate

[59] See *A and others* v. *United Kingdom*, App. No. 3455/05, §184 (2009).

[60] Benoit Mayer, 'The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of the Hague (9 October 2018)' (2019) 8 *Transnational Environmental Law* 167, 187.

[61] See United Nations Environment Programme , 'The Emissions Gap Report 2019', XIII.

[62] On the recognition of this principle in Roman law, see *Fairchild*, above note 20 at 113–15 (Lord Rodger).

crisis that is proportionate to the threat that it poses. A decision of the kind sought by the youth-applicants in this case the subject of this chapter would therefore significantly augment the potential of human rights–based climate change litigation first unlocked by the *Urgenda* case. It would, in other words, go a long way towards realizing the promise held by the 'rights turn' in climate change litigation.

https://doi.org/10.1017/9781009106214.023 Published online by Cambridge University Press