The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation?

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Abstract:

The right to a healthy environment is recognised in the law of several states and in some regional treaties. Litigants all over the world have increasingly relied on this right to demand the protection of a host of environmental interests. This trend is expanding and as of late has started to affect also climate litigation. This article scrutinises the extent to which the right to a healthy environment has been invoked in the growing body of human rights-based climate litigation. It then provides an in-depth analysis of rights-based litigation that has occurred to date, with the aim to establish the extent to which the right to a healthy environment has furthered the prospects of applicants and, conversely, the extent to which climate litigation has bolstered the recognition of the right to a healthy environment.

Keywords: *Human rights, climate litigation, right to a healthy environment.*

1. Introduction

The right to a healthy environment is formulated with various phraseologies in the law of more than 150 states[1] and in regional human rights treaties,[2] which recognise the crucial role of environmental conditions to the very existence and well-being of humankind. At their core, these various definitions acknowledge the right to 'an ecologically balanced, sustainable, healthy, clean, or satisfactory environment that permits healthy living for human (and sometimes non-human) entities on Earth'.[3] And even though it has not been yet recognised in an international law treaty of general application, a growing body of national and international caselaw and practice has defined the content and scope of this right, as well as its relationship with other human rights. This practice has been amply documented in the literature,[4] and has been thoroughly mapped by the UN Special Rapporteur on Human Rights and the Environment (UNSR).

[1] See e.g., D R Boyd, 'Catalyst for Change. Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment', in J. H. Knox and R. Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press, Cambridge 2018), 18.

[2] See: African Commission on Human and Peoples Rights, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); Inter-American Court of Human Rights (IACtHR) Advisory Opinion OC-23/17, IACtHR Series Serie A No. 23, 15 November 2017; and IACtHR, *Comunidades indígenas miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, IACtHR Series C No. 400, 6 February 2020.

[3] L Kotzé, 'In Search of a Right to a Healthy Environment in International Law. Jus Cogens Norms', in J H. Knox and R Pejan (2018) (n 1), 136, 136.

[4] See for example: A Boyle and M R Anderson, *Human Rights Approaches to Environmental Protection* (Oxford University Press 1998); D Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law; A Boyle, 'Human Rights and the Environment. Where Next?' (2012) Vol. 23 No. 3 European Journal of International Law 613; D Shelton,

At the same time, the literature,[5] Parties to the climate treaties[6] and human rights bodies[7] have increasingly emphasised the links between climate change and human rights law. These links are particularly evident in so-called 'rights-based climate litigation'.

The literature typically describes climate litigation as lawsuits raising questions of law or fact regarding climate science, climate change mitigation or adaptation, which are filed before international or domestic judicial, quasi-judicial or other investigatory bodies.[8] In recent years, litigants around the world have increasingly invoked human rights to prompt state and corporate actors to reduce emissions, and/or to redress harm associated with the impacts of climate change.[9]

In this special issue, Savaresi and Setzer have aggregated and analysed the data concerning human rights-based climate litigation,[10] relying on the databases curated by the Sabin Centre for Climate Change Law at Colombia Law School and the Grantham Research Institute on Climate Change and the Environment at the London School of Economics.[11] While both databases are admittedly incomplete, the data they report is routinely used in the literature and legal practice to make sense of the burgeoning phenomenon of climate litigation.[12] Savaresi and Setzer estimate that, by the end of May

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Human Rights and the Environment (Edward Elgar 2011); D K Anton and D Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2012).

[5] D Bodansky, 'Introduction: Climate Change and Human Rights: Unpacking the Issues' (2009) 38 Georgia Journal of International and Comparative Law 511; Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press 2010); Lavanya Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 Journal of Environmental Law 391; S McInerney-Lankford, M Darrow and L Rajamani, 'Human Rights and Climate Change. A Review of the International Legal Dimensions' (World Bank 2011); Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Handbook on Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018); Sébastien Duyck and others, 'Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach' (2018) 12 Carbon & Climate Law Review 191.

[6] Cancun Agreements, Appendix I, 2; and Paris Agreement, Preamble.

[7] The Human Rights Council has adopted ten resolutions on human right and climate change between 2008 and 2020. See <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx> A summary of the activities of the Office of the UN High Commissioner for Human Rights is available at <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx>. All sources accessed 15 June 2021.

[8] See e.g. David Markell and JB Ruhl, 'An Empirical Assessment of Climate Change in the courts: A New Jurisprudence or Business as Usual?' (2012) 64 Florida Law Review 15.

[9] As noted e.g. Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244.

[10] Annalisa Savaresi and Joana Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation' (2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787963> accessed 15 June 2021.

[11] Sabin Centre for Climate Change Law at Colombia Law School <http://climatecasechart.com/> and Grantham Research Institute on Climate Change and the Environment at the London School of Economics <http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/>, accessed 15 June 2021.

[12] See e.g. 'Climate Change - the Evolving Landscape of Litigation' (Clyde & co 2019) <https://resilience.clydeco.com/articles/climate-change-liability-risks> accessed 15 June 2021; Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot - Grantham Research Institute on Climate Change and the Environment' (Grantham Institute 2020) <http://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2020-snapshot/> accessed 15 June 2021.

2021, 112 out of 1,841 ongoing or concluded cases of climate change litigation from around the world listed in these databases mentioned human rights. The literature surveying these cases convenes that human rights complaints have given visibility to the plight of groups that may be regarded as particularly vulnerable to the impacts of climate change – such as islanders, children and indigenous peoples – as well as to broader concerns over inadequate climate change mitigation and/or adaptation.[13] As we have already observed elsewhere, this use of human rights law and remedies enables applicants to raise grievances that might otherwise be overlooked, and can help to engender a change in attitude by courts and lawmakers.[14] In this connection, human rights law and remedies are being used as a 'gap filler' to bridge the climate accountability gap left by climate law at the national and international levels.[15]

While human rights-based climate litigation has received increasing scholarly attention,[16] the literature is yet to consider the specific role played by the right to a healthy environment in this context. This article therefore relies on data collected by Savaresi, Setzer and de Vilchez to cover this blind spot in the literature and ascertain how the human right to a healthy environment has been used in climate change litigation. The article opens with a bird's eye perspective on the use of this right in the growing body of human rights-based climate litigation. It then moves on to take a closer look at how this right has been used in the climate cases that have been decided to date. The objective is to establish whether the right to a healthy environment has furthered the prospects of climate litigants and, conversely, the extent to which climate litigation has bolstered the recognition of the right to a healthy environment.

2. The use of the right to a healthy environment in climate litigation: A bird's eye perspective

Well before the advent of climate litigation, the right to a healthy environment was already widely invoked in environmental litigation all over the world.[17] The use of human rights law and institutions to protect environmental interests is not a new phenomenon. After having reviewed a vast body of evidence,[18] in 2018 the UNSR concluded that the explicit recognition of the right to a healthy environment has real advantages, including raising the profile and importance of environmental protection and providing a basis for

[13] See e.g. Peel and Osofsky (n 9) 48; Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 Wiley Interdisciplinary Reviews: Climate Change e580, 8; Annalisa Savaresi, 'Human Rights and the Impacts of Climate Change: Revisiting the Assumptions' (2021) 11 Oñati Socio-Legal Series 231, 245.
[14] Savaresi (n 13) 249.
[15] Ibid.
[16] See e.g. Peel and Osofsky (n 9); Savaresi and Auz (n 9); Keina Yoshida and Joana Setzer, 'The Trends and Challenges of Climate Change Litigation and Human Rights' (2020) 2020 European Human Rights Law Review 140; Savaresi (n 13).
[17] See e.g. David R Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 *Environment: Science and Policy for Sustainable Development* 3, 4 and 7.
[18] See the mapping studies prepared by the UN Special Rapporteur on Human Rights and the Environment, available at: <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx>; and UN Special Rapporteur on Human Rights and the Environment, 'Good Practices Report' (2015) <http://www.srenvironment.org/report/good-practices-report-2015>; and the best practice study UN Special Rapporteur on Human Rights and the Environment, 'Good Practices in Implementing the Right to a Healthy Environment' (2020) <http://www.srenvironment.org/report/good-practices-in-implementing-the-right-to-a-healthy-environment-2020>. All sources accessed 15 June 2021.

the enactment of stronger environmental laws.[19] The UNSR also noted that, when applied by the judiciary, the right to a healthy environment helps to provide a safety net to protect against gaps in statutory laws and creates opportunities for better access to justice.[20] The literature further suggests that the recognition of the right to a healthy environment provides a lever to overcome classical hurdles in human rights-based environmental litigation, such as *locus standi* and, more generally, a burden of proof that is often too heavy on applicants.[21] The same literature suggests that the explicit provision of the right to a healthy environment reduces costs, decreases delays, and minimizes risks associated with pursuing other judicial remedies.[22] In sum, the explicit recognition of the right to a healthy environment is predicated to enable individuals, groups, civil society organizations and the judiciary to contribute to improved implementation and enforcement of environmental laws.[23]

Our core research objective with this article is to gauge whether climate litigation corroborates or disproves the findings by the literature and the UNSR. We therefore analysed the data collected in the climate litigation databases described above, with a view to ascertain how the right to a healthy environment is used in climate litigation and whether it has made a palpable difference to the outcome of said cases. As noted above, so far only 112 climate 'cases' – broadly understood as encompassing complaints before national and international judicial and non-judicial bodies– have relied in whole or in part on human rights.[24]

These cases preponderantly target states, and occasionally non-state actors,[25] and typically use human rights to prop up arguments based on private or public law, demanding greater state and corporate efforts to reduce greenhouse gas emissions.[26] More rarely, human rights arguments are used to complain about harm associated with the impacts of climate change, which can be framed in terms of human rights violations.[27]

Geographically, human rights-based climate cases have overwhelmingly been brought in Europe, followed by the Asia-Pacific, Latin America, North America, and Africa (**Figure 1**).

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[19] UN Special Rapporteur on Human Rights and the Environment, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (OHCHR 2018) A/HRC/37/59 para 13.
[20] Ibid.
[21] David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011) 181.
[22] Ibid.
[23] UN Special Rapporteur on Human Rights and the Environment, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', A/73/188, 19 July 2018, 41.
[24] Savaresi and Setzer (n 10).
[25] See e.g., *Friends of the Earth Netherlands v Shell* (The Hague 2019) and *Petition Requesting Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, Case No: CHR-NI-2016-0001* (Quezon City 2016).
[26] See e.g. *Urgenda Foundation* v *The State of the Netherlands* C/09/456689 / HA ZA 13-1396 (2015); *Armando Ferrão Carvalho and Others v. The European Parliament and the Council* T-330/18 (2018).
[27] See e.g. *UN Human Rights Committee Views Adopted on Teitiota Communication,* UN Doc CCPR/C/127/D/2728/2016 (2020); and *Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change,* unreported (2019).

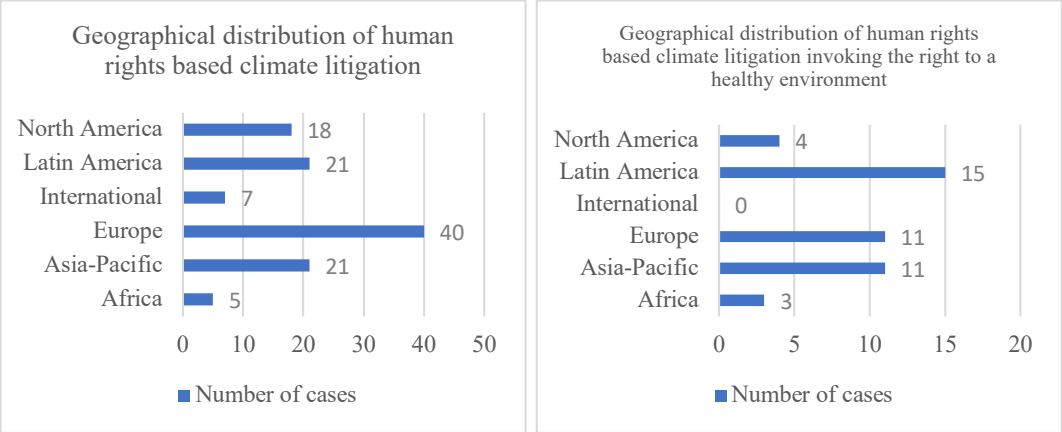

Figure 1: Geographical distribution of climate cases

Of these 112 human rights-based climate cases, 44 mention the right to a healthy environment (**Annex 1**), alongside other human rights allegedly breached as a result of climate change. These cases largely target state authorities and take the guise of judicial review applications, as well as of complaints relying on constitutional and/or human rights law, filed before national judicial or quasi-judicial bodies.

This is admittedly a rather limited case sample. Yet even this limited sample seems to corroborate general trends in litigation concerning the right to a healthy environment.

First, cases invoking the right to a healthy environment tend to be concentrated in the Global South, with the majority in Latin America, followed by the Asia-Pacific (**Figure 1**). This data aligns with earlier findings, suggesting that courts in the Global South more readily rely on the constitutionally recognised right to a healthy environment in order to protect environmental interests.[28] Case numbers are however increasing also in the Global North, with numbers growing both in Europe and North America.

Second, even though most climate cases remain pending at the time of writing, the success rate seems to improve, whenever the right to a healthy environment is invoked (Figure 2). Defining the meaning of success in climate litigation is admittedly a complex endeavour. For the present purposes, we relied and adapted the definition used in climate litigation databases used by Savaresi and Setzer, which considers the 'direct outcome' of the case.[29] We therefore considered as successful those cases where the applicants' requests have been in whole or in part granted, regardless of whether this decision was taken on the basis of human rights. Adopting this definition of success, we compared the outcome of cases invoking the right to a healthy environment and those that do not, finding that the success rate seems to increase, whenever the right is invoked.

[28] David R Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 Environment: Science and Policy for Sustainable Development: 3, 4.
[29] Joana Setzer and Catherine Higham. Global Trends in Climate Litigation: 2021 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, July 2021.

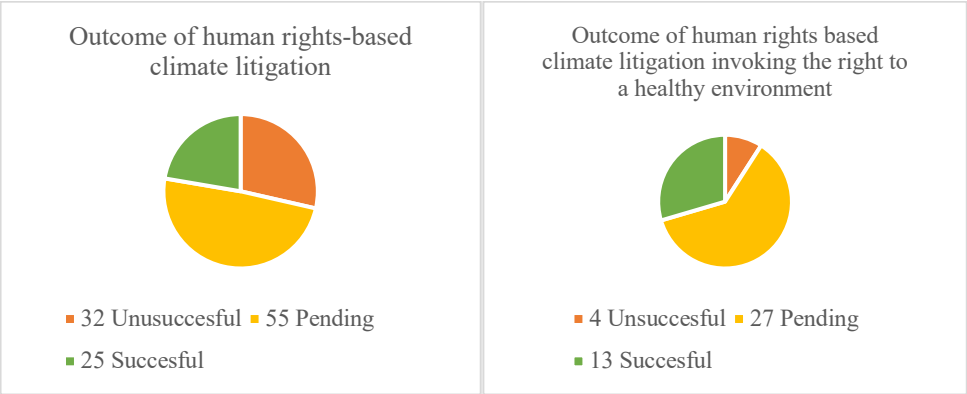

Figure 2: Outcome of climate cases invoking human rights

Of 57 rights-based climate cases that have been decided to date without further appeal, 25 were successful, 32 were unsuccessful and one case was withdrawn by the plaintiffs without prejudice (**Figure 2**). Of 17 rights-based climate cases mentioning the right to a healthy environment that have been decided to date without further appeal, 13 were successful and 4 were unsuccessful. The better success rate achieved whenever the right to a healthy environment is invoked seems to support some authors' prediction that the widespread recognition of environmental rights in the Global South might lead to more favourable climate litigation outcomes in that region.[30] Given the small numbers of cases, and that the majority remains pending, however, it would seem premature to draw any definitive conclusions on the role of the right to a healthy environment in securing the success of climate litigation.

3. The human right to a healthy environment in climate litigation: A closer look

Having preliminarily established that, on the face of it, the right to a healthy environment seems to have a positive impact on the outcome of climate litigation, we took a closer look at the caselaw, in order to ascertain how courts have dealt with the right to a healthy environment in the cases that have already been decided. As noted above, the data is presently rather scant. Out of 44 rights-based climate cases invoking the right to a healthy environment, 21 have been decided at least at the first instance level, whereas 17 are not subject to further appeal.

We analysed these 21 judgements in detail and categorised them, on the basis of the way in which the courts treated the right to a healthy environment. We identified five main scenarios (**Figure 4**).

[30] Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679.

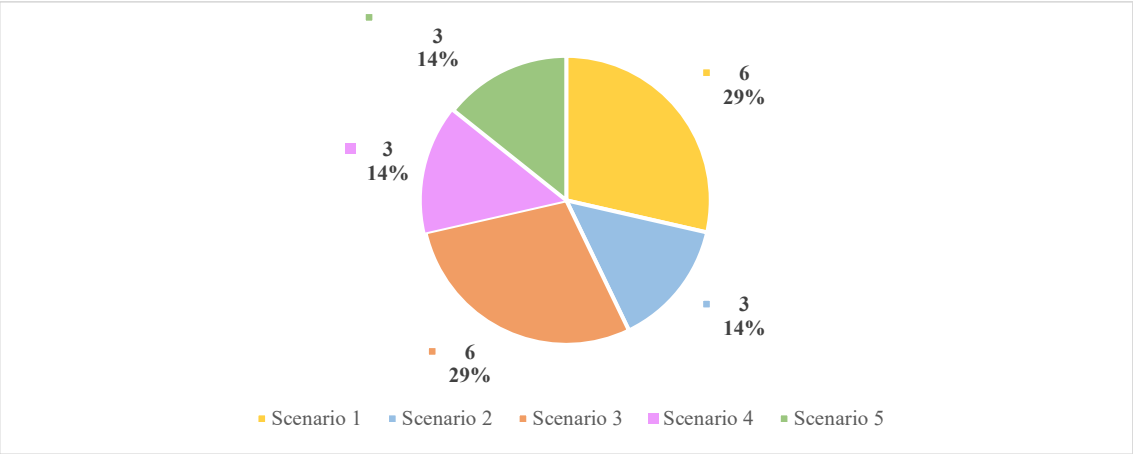

Figure 4: Number of cases per scenario and percentage over total.

In Scenario 1, the right to a healthy environment is recognised in domestic law, has been invoked by the applicants and the courts have relied on it in their judgements. In Scenario 2, the right to a healthy environment is recognised in domestic law, has been invoked by the applicants but the courts have not relied on it in their judgements. In Scenario 3, even though the right is not recognised in domestic law, the courts have relied on it in their judgements. In Scenario 4, the courts have acknowledged the implicit existence of the right to a healthy environment, but have not relied on it in their judgements. Finally, in Scenario 5, the courts have simply denied the existence of the right to a healthy environment. This section reviews these scenarios in turn.

3.1. Scenario 1: the courts' judgements rely on the right to a healthy environment, which is explicitly recognised in domestic law and has been expressly invoked by the applicants

We found six cases where the applicants have successfully relied on a right to healthy environment, as recognized in national law. Two prominent examples are discussed here, in order to illustrate the courts' reasoning in this group of cases.

In *Earthlife Africa v. the Minister of Environmental Affairs*, a South African NGO (Earthlife Africa), filed a request for judicial review regarding the government's license to build a coal power station, alleging that the plant would significantly contribute to climate change and affect the enjoyment of human rights. The applicants relied, amongst others, on the state obligation to pre-emptively assess the environmental impacts of projects, such as the one under dispute.[31] The High Court of South Africa upheld the applicants' request, ordering the Minister of Environmental Affairs to reconsider the license, after a proper climate impact assessment had been conducted.[32] The Court justified its decision, amongst others, by making reference to the right to a healthy environment,[33] as enshrined in Article 24 of the South African Constitution:

> Everyone has the right
>
> a. to an environment that is not harmful to their health or well-being; and
> b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

[31] National Environmental Management Act (NEMA), Article 240(1).
[32] *Earthlife Africa v. the Minister of Environmental Affairs et al.*, High Court of South Africa Gauteng Division, Pretoria, Judgment, 6 March 2017.
[33] Ibid., para. 80.

> i. prevent pollution and ecological degradation;
> ii. promote conservation; and
> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[34]

The Court specifically noted its duty 'to promote the purport, spirit and objects' of rights enshrined in the Constitution,[35] and highlighted the 'substantial risk' posed by climate change to sustainable development in South Africa and to future generations.

In *Salamanca Mancera v. Presidencia de la República de Colombia*, a group of 25 young applicants used a special procedure for the protection of fundamental rights in Colombia – known as 'acción de tutela'– to complain that deforestation of the Amazon affects the enjoyment of their right to a healthy environment, as protected by the Colombian Constitution, pursuant to which:

> Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends.[36]

The applicants also maintained that deforestation – which is the main source of greenhouse gas emissions in Colombia – contributes to climate change, thus affecting the enjoyment of the rights to life, health, food and water.[37] The Supreme Court upheld the applicants' claims,[38] ordering the Government to stop deforestation of the Colombian Amazon by 2020 and to launch public process to design a plan on how to halt deforestation.[39] The Court said that the judiciary should intervene to ensure the effectiveness of the rights recognised in the Constitution, including that to a healthy environment,[40] which was linked to the rights of future generations,[41] and to the rights of nature.[42] In the latter connection, the Court specifically recognised the Colombian Amazon as a 'rights bearer' that the state must protect, conserve, maintain and restore.[43]

These two judgements well illustrate how the right to a healthy environment might be relied upon by courts to order public authorities to halt climate harmful practices, and to simultaneously provide protection to the interests of younger generations and/or nature.

3.2 Scenario 2: The courts' judgements do not rely on the right to a healthy environment, despite it being recognised in domestic law and being invoked by the applicants

[34] Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights, para. 24.
[35] *Earthlife Africa v. the Minister of Environmental Affairs et al*., para. 81.
[36] Colombian Constitution, Article 79.
[37] *Salamanca Mancera et al. v. Presidencia de la República de Colombia et al*., Tribunal Superior de Bogotá, Acción de Tutela, 29 January 2018, para. 5.2-5.6.
[38] *Salamanca Mancera et al. v. Presidencia de la República de Colombia et al*., Corte Suprema de Justicia de Colombia, No 110012203 000 2018 00319 01, 5 April 2018, 26-27.
[39] Ibid., para. 48-49.
[40] Ibid., para. 17.
[41] Ibid., para. 19-20.
[42] Ibid., para. 34-45.
[43] Ibid., para. 45.

We have found three climate cases where applicants have unsuccessfully tried to rely on the right to healthy environment, as enshrined in national law. A prominent example is discussed here, in order to provide an insight in the courts' reasoning in this group of cases.

In *Nature and Youth and Greenpeace Nordic v. the Government of Norway*, a group of NGOs filed a request for judicial review, challenging the validity of the decision to authorise new production licenses for oil and gas in the Arctic. The applicants contested the decision both because of climate change concerns and because of the threats to the fragile Artic ecosystem.[44] They furthermore alleged that the licensing decision breached the right to a healthy environment, as enshrined in Article 112 of the Norwegian Constitution, which says:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles.[45]

The Oslo District Court held that it was not possible for the state to control how the fossil fuels extracted would be used overseas. Moreover, pursuant to a rather narrow interpretation of the doctrine of the separation of powers, the Court deemed that the Parliament's involvement in the decision-making process was in itself enough to establish that the state's duties under Article 112 of the Norwegian Constitution had been discharged.[46]As a result, the Court concluded that the licensing decision could not be considered contrary to the Constitution.[47]

The Bogarting Court of Appeal revisited to some extent the interpretation provided by the Oslo District Court. It affirmed that Article 112 of the Norwegian Constitution provides rights, which impose a duty on the state to protect human rights, and that this duty is enforceable by courts.[48] The court noted that the judiciary 'must be able to set a limit' to the exercise of state powers when protecting constitutionally established rights.[49] Moreover, the Court of Appeal reasoned that the right to a healthy environment has an intergenerational dimension,[50] and that overseas greenhouse gas emissions derived from activities or decisions taken in Norway need to be taken into account when assessing the lawfulness of governmental decisions.[51] Even so, the Court of Appeal rejected the applicants' claims, on the grounds that the state had laid down several policy instruments that compensate for the increase in emissions deriving from the new licences.[52]

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[44] *Nature and Youth and Greenpeace Nordic v. the Government of Norway*, Oslo District Court, Writ of Summons, 18 October 2016. All documents of the case can be found at <https://www.klimasøksmål.no/en/2019/10/31/legal-documents-in-english/> accessed 15 June 2021.
[45] Constitution of the Kingdom of Norway, Article 112.
[46] Ibid., 27.
[47] *Nature and Youth and Greenpeace Nordic v. the Government of Norway*, Oslo District Court, Judgment, 4 January 2018, 18-19.
[48] *Nature and Youth and Greenpeace Nordic v. the Government of Norway*, Bogarting Court of Appeal, 17-20.
[49] Ibid., 17.
[50] Ibid., 17-18.
[51] Ibid., para. 21.
[52] Ibid., para. 20-21 and 28-31.

The decision was appealed before Norway's Supreme Court. The Special Rapporteur on Human Rights and the Environment and the Special Rapporteur on Toxics and Human Rights submitted a joint *amicus curiae* briefing in support of the applicants.[53] They argued that the margin of discretion of the state only applies to measures to reduce greenhouse gas emissions that comply with human rights and environmental obligations laid down in the Constitution, and not to measures that increase emissions and therefore contravene the aforementioned obligations. Similarly, the Norwegian National Human Rights Institution submitted an *amicus curiae* briefing, arguing that judicial scrutiny over measures that might affect the enjoyment of the right to a healthy climate should be particularly 'intensive'.[54]

The Supreme Court dismissed the points raised in both briefings[55] and rejected the applicants' appeal. It found that, although Article 112 can be read as establishing an obligation for the state, it does not recognise a corresponding fundamental right. The absence of an internationally recognised human right to a healthy environment, according to the Court, reaffirmed this interpretation.[56] Moreover, the Supreme Court cited the doctrine of the separation of powers, observing that the threshold for the judiciary to invalidate a decision taken by the executive or the legislature is considerably high, requiring a 'gross breach' of the obligations enshrined in the Constitution.[57] In the Court's words:

> decisions in matters of fundamental environmental issues often involve political considerations and broader priorities. Democracy views therefore speak in favour of such decisions being made by an elected body, and not by the courts.[58]

The Supreme Court also found that the impact of emissions associated with the use of oil and the associated climate change were not significant or serious enough to justify the judicial review of decisions taken by the executive and the legislature. The court reached a similar finding on the alleged violation of rights enshrined in the European Convention on Human Rights. In this regard, the Court held that 'climate change is not a real and immediate risk to the lives of the people of Norway'[59] and that there was not a 'direct and timely connection' between oil licenses, the emissions resulting thereof and the privacy, family life or home of the applicants.[60]

The Norwegian courts' decisions well illustrate how even the explicit recognition of the right to a healthy environment in the constitution might not be decisive to support claims associated with alleged climate change-induced human rights violations. In this connection, the long-reported concerns associated with the judicialization of public

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[53] Amicus curiae brief of the United Nations Special Rapporteur on Human Rights and The Environment and the United Nations Special Rapporteur on Toxics and Human Rights in Case No. 20-051052SIV-HRET, 31 August 2020.
[54] Norges institusjon menneskerettigheter, *Written submission from the Norwegian National Human Rights Institution to shed light on public interests in Case No. 20-051052SIV- HRET*, 25/09/2020, 40.
[55] *Nature and Youth* et al. *v Norway*, HR-2020-2472-P (Case No 20-051052SIV-HRET), 22 December 2020, para. 175.
[56] Ibid, para 92.
[57] Ibid., para. 157.
[58] Ibid., para. 141.
[59] Ibid., para. 167-168.
[60] Ibid., para. 170-171.

interest decision-making on environmental matters [61] have surfaced also in relation to climate change litigation.[62]

3.3 Scenario 3: The courts' judgements rely on the right to a healthy environment, even though it is not explicitly recognised by domestic law

We found six climate cases where courts relied on the existence of an unwritten right to a healthy environment, notwithstanding the fact that it is not explicitly recognised in domestic laws or in the constitution. Two prominent examples are discussed here, in order to provide insights into the courts' reasoning in this group of cases.

In *Ashgar Leghari v Federation of Pakistan et al*, a farmer claimed that the lack of enforcement of existing national policies and strategies concerning adaptation to climate change amounted to a breach of the right to life. In analysing the risks posed by climate change, the Court found that the right to a healthy environment could be understood to be included in the right to life, as enshrined in the Constitution of Pakistan.[63] Accordingly, the court ordered the creation of a Climate Change Commission, with representatives of the government, NGOs and experts, tasked with the mission to monitor the appropriate implementation of the National Climate Change Policy.[64] The court here relied on its established caselaw recognising the right to a healthy environment in Pakistani law, and specifically applied to climate change related concerns.

In *Foster v. Washington Department of Ecology*, a group of young plaintiffs asked the Superior Court of Washington to order the Department of Ecology to issue appropriate rules limiting greenhouse gas emissions. The Court initially decided not to issue such an order, because the Department had started to develop the required regulation. It nevertheless affirmed that the applicants' claims were well founded, both on the public trust doctrine and on the unwritten right to a healthy environment, as derived from the State Constitution.[65] Subsequently, when the Department halted the rule-making procedure, the applicants went again before the Court and obtained the requested order.

These two cases well exemplify how courts might rely on their powers to interpret the law to recognise new human rights, and to apply these to climate change related concerns. This practice is far from new in environmental litigation,[66] and has now started to surface also in climate change litigation.

3.4 Scenario 4: The courts' judgements acknowledge the implicit existence of the right to a healthy environment as invoked by the claimants, but do not rely on it

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[61] See e.g. Teresa Kramarz, David Cosolo and Alejandro Rossi, 'Judicialization of Environmental Policy and the Crisis of Democratic Accountability' (2017) 34 Review of Policy Research 31.
[62] See e.g. Ahmad Mir Waqqas, 'From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights Is More Complex Than a Celebratory Tale' in Jolene Lin and Douglas A Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020).
[63] *Ashgar Leghari v Federation of Pakistan et al.*, Lahore High Court, W.P. No. 25501/2015, Order of 4 September 2015, para. 7.
[64] Ibid., para. 11.
[65] *Foster v. Washington Department of Ecology*, No. 14-2-25295-1 SEA, Order affirming the Department of Ecology's denial of petition for rule making, 19 November 2015, para. 9.
[66] See e.g. Dinah L Shelton, 'Developing Substantive Environmental Rights' (2010) 1(1) Journal of Human Rights and the Environment, 89-120.

We found three climate cases where courts have recognised an unwritten right to a healthy environment but have nevertheless dismissed the plaintiffs' claims for procedural reasons. We consider here two of these cases, with a view to illustrate the way in which the courts have treated climate claims related to the right to a healthy environment.

In *Juliana v. the United States,* 21 young plaintiffs filed a complaint for declaratory and injunctive relief before the District Court of Oregon against the United States. They alleged that the federal administration had known for decades that greenhouse gas emissions were causing climate change and the harms they would cause, but had nevertheless promoted and created the regulatory conditions for the continuous exploitation of fossil fuels. The plaintiffs requested the Court to order the US Government to stop promoting activities producing emissions and to devise a plan to reduce atmospheric concentration of greenhouse gas to a level that is consistent with scientific knowledge (350 ppm). In assessing whether the plaintiffs' complaint could proceed to the trial stage, the District Court of Oregon asserted that there are some rights that are so fundamental that they do not need to be expressly formulated in law.[67] The Court reasoned that the judiciary has a duty to identify and protect such unenumerated rights, through the interpretation of the Constitution.[68] In particular, the Court found that there exists a previously unenumerated 'right to a climate system capable of sustaining human life' which 'is fundamental to a free and ordered society'.[69] Although the Court of Appeals for the Ninth Circuit dismissed the case on procedural grounds, it didn't challenge the finding of the District Court on the existence of the right to a stable climate.[70] At the time of writing, the case is still pending, as plaintiffs have filed a motion to amend their complaint, focusing on declaratory relief, and the Court has ordered both parties to convene for a settlement conference with the District Court magistrate judge.[71]

In *Friends of the Irish Environment v. Fingal County Council*, an application for judicial review challenged the decision to issue an extension to the planning permission to construct a new runway at Dublin airport,[72] based, *inter alia*, on an unenumerated right to environmental protection.[73] The High Court of Ireland recognised the existence of such a right, connecting it to other fundamental rights, and observing that it is an essential condition for the fulfilment of all human rights.[74] The court devoted a sizeable portion of its judgment to assessing whether in Irish law recognises an unwritten right to a healthy environment. Justice Barret said:

> if the rule of law, in the form contemplated and tolerated by the people, is not to descend to the arbitrary rule of whoever comprises the current representative majority from time to time, then the only agency available to put rights, including unenumerated constitutional rights, between the claims of the executive or legislative and those of so-

[67] See *Juliana et al. v The United States of America et al.,* District Court of Oregon No. 6:15-cv-01517-TC, Opinion and Order, 10 November 2016, para. 30 and 50.
[68] Ibid., para. 31.
[69] Ibid., para. 32-33.
[70] Juliana et al. v. the United States et al., United States Court of Appeals for the Ninth Circuit, No. 18-36082 D.C. No. 6:15-cv-01517- AA Opinion, 17 January 2020.
[71] https://www.ourchildrenstrust.org/juliana-v-us.
[72] *Friends of the Irish Environment et al. v. Fingal County Council et* al., High Court of Ireland, Judgment, 2017 No. 201 JR, 21 November 2017, para. 246 and §256.
[73] Ibid., para. 196.
[74] Ibid., para. 264.

called 'ordinary' people, is the judicial branch of the tripartite government that the people have established directly.[75]

However, the Court ended up dismissing the case for procedural reasons. Specifically, it found that the applicants could not challenge the decision to extend the time limit to carry on the expansion works, as they had not done so when the original authorisation to extend the airport was granted.

Like those in scenario 3, therefore, the courts in these two cases relied on their powers to interpret the law and established the existence of the right to a healthy environment in national law, but were unable to reach conclusions concerning its applicability to climate change related concerns, due to procedural constraints. The High Court of Ireland acknowledged that the exercise of the power to declare unenumerated fundamental rights calls for restraint and prudence. Indeed, in spite of the judgements analysed above, the constitutional right to a healthy environment has not been firmly established neither in the law of the United States nor in the law of Ireland.

3.5 Scenario 5: The courts deny the existence of the right to a healthy environment

We found three climate cases where courts rejected the applicants' attempts to rely on the right to a healthy environment in order to protect the climate system. Not only have the courts dismissed the existence of such a right, but they have also dismissed its relevance to climate related complaints. Two recent lawsuits well illustrate this approach.

In *KlimaSeniorinnen*, a group of Swiss elderly ladies filed a judicial review request contesting the Swiss government's greenhouse gas emission reduction targets. They argued that climate change had already had an impact on their lives and health, violating rights protected under the European Convention of Human Rights. Although they conceded that the Convention does not recognise a right to a healthy environment as such, they noted that the rights to life and to family life have already been used to protect the rights that are negatively affected by environmental harm. The applicants further argued that climate change poses a threat to the enjoyment of rights that is much more pressing than environmental risks considered in past judgements by the European Court of Human Rights.[76]

The Swiss Federal Administrative Court found that the complaint was an *actio popularis*, which is not allowed under Swiss law, and thus rejected it at the admissibility stage.[77] The Swiss Supreme Court confirmed these findings, affirming that the fundamental rights of the elderly applicants were not likely to be affected, since global mean temperature increases would not reach 1.5ºC, let alone 2ºC, until at least 2040.[78] The applicants have

[75] Ibid., para. 257.
[76] *Verein Klimaseniorinnen Schweiz et al. v. the Federal Council et al*., Request to stop omissions in climate protection pursuant to Art. 25a APA and Art. 6 para. 1 and 13 ECHR, 25 November 2016, para. 146-180.
[77] *Verein KlimaSeniorinnen Schweiz gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation UVEK*, Bundesverwaltungsgericht, Abteilung I A-2992/2017, 27 November 2018, para. 7.4.2-7.4.3 and para. 9. [Unofficial translation prepared on behalf of KlimaSeniorinnen]
[78] *Verein KlimaSeniorinnen Schweiz gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation UVEK*, Bundesgericht, 1C_37/2019 judgment of 5 May 2020, para. 5.2-5.5. [Unofficial translation prepared on behalf of KlimaSeniorinnen]

subsequently filed an application before the European Court of Human Rights,[79] which relies on the rights to life and to family life[80] as 'the vehicles by which environmental damage that adversely affects life and health can be brought before the Court'.[81] They furthermore relied on Articles 6 and 13 of the Convention to lament lack of access to justice before domestic courts, as well as lack of access to an effective remedy.[82]

Finally, in *Friends of the Irish Environment v. the Government of Ireland,* the Irish Supreme Court revisited the arguments made in *Friends of the Irish Environment v Fingal County Council,* taking a dim view over the existence of the right to a healthy environment in Irish law. In what may be regarded as a bittersweet victory for climate litigants, the Supreme Court quashed the government's climate change plans as inadequate, but also rejected some of the findings of the High Court of Ireland in *Friends of the Irish Environment et al. v. Fingal County Council.* First, the Supreme Court refused to recognize the standing of the applicant NGO to allege human rights violations.[83] Secondly, the Court also affirmed that there is no right to a healthy environment in Irish law, either because such a right is not distinct from other human rights; or because, even if it were, its contents are not clear nor precise enough.[84] In the end, the Supreme Court quashed the government's climate plan because it was not detailed enough, and not because it was inadequate to protect human rights.[85] So, while *Friends of the Irish Environment v. the Government of Ireland* provides a welcome recognition of the legal force of Ireland's Climate Change Act's and of the judiciary' powers to enforce it, it also represents a setback in terms of standing rights for environmental NGOs, as well as regarding the recognition of the right to a healthy environment in Ireland. The Court has however left open the possibility for individuals - as opposed to groups - to make human rights-based complaints regarding the government's climate action. [86]

Like those in scenario 3, therefore, the courts in these two cases relied on their powers to interpret the law but reached opposite conclusions in relation to the existence of the right to a healthy environment in national law, and its applicability to climate change related concerns.

4. Conclusion

This article has taken stock of the role of the right to a healthy environment in climate litigation. It has provided a bird's eye perspective on the use of this right in the growing body of human rights-based climate litigation, as well as an in-depth analysis of how this right has furthered the prospects of applicants in domestic cases that have been decided already.

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[79] *Klimaseniorinnen v. Switzerland*, Application to the European Court of Human Rights, 26 November 2020, para. 40.
[80] Convention for the Protection of Human Rights and Fundamental Freedoms, (European Convention on Human Rights) (Rome 4 November 1950, in force on 3 September 1953), Articles 2 and 8, respectively.
[81] Application to the ECHR (n 79), para. 37.
[82] Ibid, para. 41-48.
[83] *Friends of the Irish Environment v. the Government of Ireland, Supreme Court*, Appeal No: 205/19, Judgment of 31 July 2020, para. 7.2-7.22.
[84] Ibid., para. 8.10-8.14.
[85] Ibid., para. 6.27 and 6.37-6.38.
[86] Ibid., para. 8.14-8.17. See also, O Kelleher, 'A critical appraisal of *Friends of the Irish Environment v Government of Ireland*' (2021) 30:1 RECIEL, 138, 145.

Admittedly, the data available to carry out this exercise is limited. Most human rights-based climate cases remain pending at the time of writing, rendering any conclusions merely tentative. Even with these caveats in mind, it seems clear that the right to a healthy environment has been invoked in an increasingly large number of climate cases, and not only by applicants, but also by the courts themselves. Whenever courts adjudicate cases invoking the right to a healthy environment, they often find in favour of the applicants. It seems therefore possible to affirm that, so far at least, the recognition of the human right to a healthy environment seems to have contributed to the success of human-rights based climate cases.

The article has furthermore reflected on the extent to which climate litigation has bolstered the recognition of the right to a healthy environment around the world. Courts seem to have increasingly taken to rely on the right to a healthy environment, even in countries where the right is not explicitly recognised by domestic law. However, the decisions by the Supreme Courts of Norway and Ireland do show that caution is needed when assessing the impacts of climate litigation on the recognition of the human right to a healthy environment. The doctrine of judicial restraint remains a powerful counterargument to the expansive interpretation of fundamental rights by courts.

Time will tell whether the positive trend recorded in this article will continue and what impacts it will produce on the ground. The meaning of success in litigation is relative. As we have already noted elsewhere, the history of human rights law is full of pyrrhic victories, especially in the environmental context.[87] Human rights are no silver bullet, and neither is the right to a healthy environment.[88] Human rights obligations are no replacement for effective climate legislation, and human rights remedies are no replacement for effective preventative and remedial measures against harm caused by climate change.[89] Nevertheless, the evidence presented in this paper suggests that, where it is recognised, the right to a healthy environment provides a precious ammunition to bridge the accountability and enforcement gaps associated with climate law and policy. In this context, the right to a healthy environment serves as a safety net and provides avenues to bring forward climate related grievances. And in time, the explicit recognition of the right to a healthy environment at the international level might provide additional ammunition to enable litigants all over the world to take state and corporate actors to task for failing to tackle the climate emergency.

[87] Savaresi (n 13) 244.
[88] ibid 245.
[89] ibid 246.

Annex

List of cases analysed in the article
(last update: 31/5/2021)

Here is the list of cases with an additional column showing the relevant scenario (or their pending status). No JD means that no judicial decision has been made on the case as on 31/5/2021. Unsuccessful cases, which are not subject to further appeal, are marked with*

1.	Ali v. Federation of Pakistan (Pakistan)	No JD
2.	Alvarez v Peru (Peru)	No JD
3.	Asociación Civil por la Justicia Ambiental v. Province of Entre Ríos, et al. (Argentina)	No JD
4.	Association for Protection of Democratic Rights v. The State of West Bengal and Others (India)	3
5.	Carballo et al. v. MSU S.A., UGEN S.A., & General Electric (Argentina)	No JD
6.	Carbon Majors inquiry (Philippines)	No JD
7.	Citizens' Committee on the Kobe Coal-Fired Power Plant v. Kobe Steel Ltd., et al. (Japan)	No JD
8.	EarthLife Africa Johannesburg v. Minister of Environmental Affairs (South Africa)	1
9.	ENVironnement JEUnesse v. Canada (Canada)	2
10.	FOMEA v. MSU S.A., Rio Energy S.A., & General Electric (Argentina)	No JD
11.	Foster v. Ecology (US)	3
12.	Friends of the Earth Germany v Germany (Germany)	No JD
13.	Friends of the Irish Environment v. Fingal County Council (Ireland)*	4
14.	Friends of the Irish Environment v. Ireland (Ireland)	5
15.	Salamanca Mancera *et al*. v. Colombia (Colombia)	1
16.	Greenpeace et al v. Spain (Spain)	No JD
17.	Greenpeace Mexico v. Ministry of Energy and Others (Mexico)	1
18.	Nature and Youth and Greenpeace Nordic v. the Government of Norway (Norway)*	2
19.	Hahn et al. V. APR Energy S.R.L (Argentina)	No JD
20.	In re Court on its own motion v. State of Himachal Pradesh and others (India)	3
21.	Institute of Amazonian Studies v. Brazil	No JD
22.	Instituto Socioambiental, Abrampa & Greenpeace Brasil v. Ibama and the Federal Union (Brazil)	No JD
23.	Klimatická žaloba ČR v. Czech Republic (Czech Republic)	No JD
24.	Jóvenes v. Gobierno de Mexico (Mexico)	No JD
25.	Juliana v. United States (US)	4
26.	Korean Biomass Plaintiffs v. South Korea (South Korea)	No JD
27.	Leghari v. Federation of Pakistan (Pakistan)	3
28.	Maria Khan et al. V. Federation of Pakistan et al. (Pakistan)	No JD

29.	Mbabazi and Others v. The Attorney General and National Environmental Management Authority (Uganda)	No JD
30.	Neubauer v. Germany (Germany)	3
31.	Notre Affaire à Tous and Others v. France (France)	2
32.	Notre Affaire à Tous and Others v. Total (France)	No JD
33.	OAAA v. Araucaria Energy SA. (Argentina)	No JD
34.	Pandey v. India (India)*	4
35.	Partido Socialismo e Liberdade (PSOL) v. Federal Union ['AmazonFund Case'] (Brazil)	No JD
36.	Partido Socialista Brasileiro (PSB) v. Federal Union ['Climate Fund Case'] (Brazil)	No JD
37.	Philippi Horticultural Area Food & Farming Campaign, et al. v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape, et al. (South Africa)	1
38.	Push Sverige and Fältbiologerna v. Sweden (Sweden)*	5
39.	Rights of Indigenous People in Addressing Climate-Forced Displacement (US)	No JD
40.	Ruling on Modification to Ethanol Fuel Rule (Mexico)	1
41.	Sheikh Asim Farooq v. Federation of Pakistan (Pakistan)	3
42.	Shrestha v. Office of the Prime Minister et al. (Nepal)	1
43.	Six Youths v. Minister of Environment and Others (Brazil)	No JD
44.	Verein Klimaseniorinnen Schweiz et al. v. the Federal Council et al. (Switzerland)	5