

# SCELG DIALOGUE

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Human Rights Thresholds in the Context of  
Climate Change: A Litigation Perspective in  
the Wake of the IPCC Special Report on  
1.5 ° C or the Week in which Everything  
Changed...

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# ***Human Rights Thresholds in the Context of Climate Change: A Litigation Perspective in the Wake of the IPCC Special Report on 1.5°C or the Week in which Everything Changed...***

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This brief builds upon remarks made by SCELG at an Expert Workshop “Interpreting Human Rights Obligations in Light of the IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels” organised in Geneva by the Centre for International Environmental Law, Earthjustice and the Geneva Academy of International Humanitarian Law and Human Rights on 10 October 2018. The policy brief is also informed by an ongoing global project in which SCELG and the University of Geneva are assessing climate change litigation in over 30 countries using a scenario methodology that includes, also, a human rights component.

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<sup>1</sup> IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, Summary for Policymakers. (IPCC Special Report on 1.5°C, SPM)

In this policy brief we will discuss the role of human rights as providing thresholds for governmental action in the context of existing and future climate change litigation. We will do so in the aftermath of the recent release of the IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels.

## **IPCC Special Report on 1.5°C**

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On 6 October 2018 the Intergovernmental Panel on Climate Change (IPCC) released the summary for policy makers of its Special Report on the impacts of global warming of 1.5°C above pre-industrial levels (IPCC Special Report on 1.5°C).<sup>1</sup> Despite efforts from several countries to stall the negotiations leading to the approval of the summary for policy makers, the IPCC was able to adopt what some were awaiting as “[T]he moment of truth in the fight against climate change” [Greenpeace preview media briefing on approval of IPCC’s special report]. The IPCC Special Report on 1.5°C stems from a formal request present in the Conference of the Parties Decision that accompanied the Paris Agreement,<sup>2</sup> making the Report an important reference point when discussing and interpreting operative provisions of the Paris Agreement itself. The IPCC Special Report makes a number of very important conclusions:

- The risks of negative consequences that the planet, its people and its ecosystems will suffer are higher with global warming of 2.0°C than 1.5°C;<sup>3</sup>
- Current emission pathways, based on the pledges present in countries’ Nationally Determined Contributions, do not lead to a 1.5°C or a 2.0°C goal;<sup>4</sup> and
- In order to move towards a 1.5°C goal, countries must undertake a much more rapid decarbonisation process (using 2010

<sup>2</sup> Decision 1/CP.21, paragraph 21.

<sup>3</sup> IPCC Special Report on 1.5°C, SPM (n1) Sections A.3 and B.3.

<sup>4</sup> Ibid Section D.1.

as the baseline year, a 45% reduction in global CO<sub>2</sub> emissions by 2030 is needed, followed by a full decarbonisation by mid-century).<sup>5</sup>

Overall, the IPCC maintains that a world not aiming for 1.5°C will face serious “risks” and that “these risks depend on the magnitude and rate of warming, geographic location, levels of development and vulnerability, and on the *choices and implementation* of adaptation and mitigation options.”<sup>6</sup> In other words, countries now have an even better understanding of the risks that a 2.0°C rather than a 1.5°C climate objective poses. They are also aware that these risks can be minimised or addressed by their choice of mitigation and adaptation policies and actions and their effective implementation.

## Climate Change Litigation

IPCC reports have already been relied upon by national courts as scientific evidence and as tools to support standing and causation in climate change litigation. In two cases, *Urgenda* in the Netherlands and *Thomson* in New Zealand,<sup>7</sup> national judges have embraced the IPCC reports in a court of law.

The *Urgenda* Court found that the Dutch climate policy was “based on the climate science findings of the IPCC”<sup>8</sup> and further held that “[t]he court ... considers these findings as fact.”<sup>9</sup> The *Thomson* Court declared that “IPCC reports provide the most up to date scientific consensus on climate change”<sup>10</sup> and that they “provide a factual basis on which decisions can be made.”<sup>11</sup>

In a further case, *Leghari* in Pakistan,<sup>12</sup> climate science played an important role. In all three cases, with different nuances, the question at

the heart of the dispute was a request to find that the government was not doing enough to tackle climate change (lack of ambitious mitigation efforts). A human rights angle was also present in the *Urgenda* and *Leghari* cases whereby the claimants argued that the government was in breach of its duty of care to protect its citizens’ human rights by failing to take adequate action against climate change. In the *Thomson* case the presence of a new IPCC Report was considered as a ground for the government to review its existing climate policy in light of the most recent IPCC science.

With an appreciation of the rise of climate change litigation and of these kind of rulings, maybe it should not have come as a surprise that just two days after the release of the IPCC Special Report on 1.5°C, a Dutch Court of Appeal confirmed the *Urgenda* ruling that the Dutch government breached its duty of care by failing to adopt adequately ambitious emission reductions.<sup>13</sup> What is interesting in the context of this policy brief is that, on the one hand, the judgment relies even more heavily on human rights norms than the first judgment and, on the other hand, that it refers several times to the 1.5°C temperature goal.

## IPCC Special Report on 1.5°C and Climate Change Litigation

It is against this background of already existing case law that we proceed to discuss the three questions laid out by the organisers of the event attended by SCELG:

- Do human rights mandate a specific level of action by states on climate action? Does

<sup>5</sup> Ibid Section C.1.

<sup>6</sup> Ibid Section A.3, emphasis added.

<sup>7</sup> *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and Environment)* [2015] C/09/456689/HA ZA 13-1396 (English Translation) District Court, The Hague. *Thomson v Minister for Climate Change Issues* [2017] HC, New Zealand CIV 2015-485-191, 2017 NZHC 733.

<sup>8</sup> *Urgenda* Decision (n7) para 4.12

<sup>9</sup> Ibid.

<sup>10</sup> *Thomson* Decision (n7) para 94.

<sup>11</sup> Ibid para 133.

<sup>12</sup> *Leghari v Federation of Pakistan* [2015] W.P. No. 25501, Lahore High Court Green Bench Pakistan.

<sup>13</sup> *The State of The Netherlands v Urgenda Foundation* [2018] C/09/456689/ HA ZA 13-1396 (English Translation) The Hague Court of Appeal, Civil-law Division.

the IPCC report contribute to strengthening the case for such a threshold?

- How do human rights obligations apply in the context of the uncertainties identified in the Special Report?
- Are the particular concepts contained in the Special Report likely to undermine or to strengthen human rights legal arguments stressing the imperative to keep temperature increases below 1.5°C?

Firstly, human rights do not appear to mandate a “specific” level of action when it comes to climate action, if by specific we imply a quantitative greenhouse gas emission reduction. However, now that the linkage between current climate change trends and the impossibility or difficulty to enjoy key human rights has been made,<sup>14</sup> countries do have an obligation vis a vis the protection of such human rights. In the context of litigation, we can consider this government human rights obligation as a “duty of care” towards its own citizens. The IPCC Special Report on 1.5°C definitely strengthens legal arguments regarding such a duty of care due to the stronger scientific evidence of the climate change-human rights nexus presented in the Report.

Secondly, one of the key criteria to action a case under a government’s duty of care is the foreseeability of the harm. With the publication of the Special Report on 1.5°C, it will be very difficult, if not impossible, for countries to justify their inaction, or lack of strong mitigation action, on grounds that they did not foresee the possible harm that climate change would cause. Referring to the uncertain nature of climate change is not an option anymore. The IPCC Special Report on 1.5°C will be, in this context, a further element in favour of a claimant arguing that the government has failed in its duty of care towards its citizens.

Thirdly, and again from a litigation perspective, the various concepts present in the IPCC Special Report on 1.5°C will further open the door to

rights based litigation in national courts. It will do so by not only providing claimants and their legal teams with solid pieces of scientific evidence, but it will also bolster activists and vulnerable communities to voice their concerns about how their human rights are being violated by their government’s inaction, or lack of strong climate action.

We wish to conclude this section with one final remark and this refers to the presence of human rights language in the Preamble of the Paris Agreement and its powerful effect in combination with the IPCC Special Report on 1.5°C. The latter provides countries with the results of the best available science that needs to be taken into account when developing their future revised NDC.<sup>15</sup> Taking into account a 1.5°C climate resilient pathway is the best (if not the only) way for countries to effectively protect, promote and fulfil human rights from the negative impacts of climate change. If countries fail to revise their NDC in light of the IPCC Special Report on 1.5°C, their obligations under the Paris Agreement should be interpreted also in light of the language of the preamble that requires “Parties ..., when taking action to address climate change, [to] respect, promote and consider their respective obligations on human rights.”

## A momentous week

Only time will tell whether the week that started with the release of the IPCC Special Report on 1.5°C, continued with the upholding of the Uganda ruling by a Dutch Court of Appeal and finished with the (less important) event attended by SCELG, will be considered a turning point in the fight against climate change. What we can say already is that in October 2018 a stronger relationship has been forged between climate science, human rights and climate change litigation. We truly hope that this relationship will reap benefits for those communities around the world

<sup>14</sup> UNGA “Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights” (15 January 2009) UN Doc A/HRC/10/61.

<sup>15</sup> In particular, see Paris Agreement, Article 4.1 regarding global peaking of GHG emissions and rapid reductions thereafter, which are to be undertaken ‘in accordance with best available science’.

who are suffering the most from the negative effects of climate change and contributed the least to its causes.

### **Key resources:**

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IPCC Special Report on Global Warming of 1.5°C, Summary for Policymakers, available at [http://report.ipcc.ch/sr15/pdf/sr15\\_spm\\_final.pdf](http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf)

UNSR David Boyd's press statement on the IPCC Special Report, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23692&LangID=E>

UN Committee on Economic, Social and Cultural Rights statement on the IPCC Special Report, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

UNGA "Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights" (15 January 2009) UN Doc A/HRC/10/61, available at <https://www.ohchr.org/en/issues/hrandclimatechange/pages/study.aspx>

Urgenda Foundation v. The State of The Netherlands, Hague District Court Decision, available at [https://elaw.org/system/files/urgenda\\_0.pdf](https://elaw.org/system/files/urgenda_0.pdf)

The State of The Netherlands v. Urgenda Foundation, Court of Appeals Decision, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>

Leghari v. Federation of Pakistan, available at [https://elaw.org/system/files/pk.leghari.090415\\_0.pdf](https://elaw.org/system/files/pk.leghari.090415_0.pdf)

Thomson v. Minister for Climate Change Issues, available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171102\\_2017-NZHC-733\\_decision-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171102_2017-NZHC-733_decision-1.pdf)

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### SCELG Working papers

C Wambua, Promoting Public Acceptance of Wind Energy Projects in Kenya: Towards a Wind-Wind Solution, SCELG Working Paper 10/2017

LS Lynes, Climate Change Law and Colonialism: Legal Standing of Three Rivers and a Hypothetical Case of Bison Personhood in Canada, SCELG Working Paper 9/2017

### SCELG Policy Briefs

M Geelhoed, Response to the Public Consultation 'Environmental Principles and Governance in Scotland', SCELG Policy Brief 11/2019

M Geelhoed, Response to the Public Consultation 'Good Food Nation Proposals for Legislation', SCELG Policy Brief 10/2019

### SCELG Dialogues

F Sindico and K McKenzie, Human Rights Thresholds in the Context of Climate Change: A Litigation Perspective in the Wake of the IPCC Special Report on 1.5°C or the Week in which Everything Changed..., SCELG Dialogue 7/2018

F Sindico and S Switzer, The Transformation of Environmental Law and Governance: Risk, Innovation and Resilience, SCELG Dialogue 6/2018

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<https://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/ourwork/latestoutcomesfromourwork/>



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