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The Risk of Intergenerational Decline of the Rule of Law as a Result of Adverse Climate Change

*Aljosa Noga*

**Abstract**

The rule of law risks gradual and intergenerational decline due to the negative impact on human rights that results from the international community’s failure to mitigate and adapt to adverse climate change. It is not uncommonly argued that the concept of the rule of law also includes a human rights dimension. How States impact human rights therefore also risks impacting the rule of law. Adverse climate change and insufficient State measures impact the real enjoyment of human rights and, by extension, eventually also the rule of law. That detrimental impact can travel across generations and increase over time. This is supported by contemporary case law and State practice from the area of climate change litigation.

**Keywords**

Rule of law, human rights, risk, adverse climate change, intergenerational, climate change litigation.

**Introduction**

All areas of life seem to suffer some effects from adverse climate change and the pervasively tragic failures of the international community to adopt appropriate responses, and those effects seem to extend to the foundation of law: the rule of law. This paper shows how the rule of law risks gradual
and intergenerational decline due to the negative impact on human rights that results from the international community’s failure to mitigate and adapt to adverse climate change. It is not uncommonly argued that the concept of the rule of law also includes a human rights dimension. How States impact human rights therefore also risks impacting the rule of law. In turn, adverse climate change affects human beings negatively, contemporarily and intergenerationally (across generations and time). The fulfilment and enjoyment of human rights are, by extension, likewise affected. For these reasons, it is not uncommonly argued that States which contribute to adverse climate change and fail to undertake appropriate action to combat their adverse impact (or at least adapt to such change), also impose their inaction on succeeding generations and their human rights. These arguments are common in the context of international human rights law and in rights-centred climate change litigation.

This problem therefore begs an answer to the following question: How does the unwillingness or inability of States to combat adverse climate change intergenerationally impact human rights and by extension the rule of law? In order to answer and discuss the implications of this question, the paper first addresses how the well-being and rights of people are connected with the rule of law. Secondly, the paper addresses what the intergenerational relationship is between the rule of law (including human rights) and adverse climate change. And lastly, the focus is on how State inaction in regard to adverse climate change impacts freedoms and rights contemporarily and across generations.

Human Rights as an Integral Part of the Rule of Law

To connect human rights with the concept of the rule of law is not the most difficult task. There are several forms or descriptions of the concept of the rule of law, including formal and procedural rule of law (constitutional rules that enable, legitimize and limit new rules, mostly with a focus on formal legality), as well as substantial rule of law (principles, values and ideals that guide, define and distinguish law as an institution apart from other institutions, mostly with a focus on the substantive
contents of law). Although it is not the aim of this chapter to develop or adhere to one view over the other, the implications of the main argument are equally valid for both conceptions, debatably to varying degrees. The concept of rights in general, including beyond human rights specifically, is many times argued to be an essential component or aspect of the rule of law. What is law if not the production of rights for one person vis-à-vis another person? Of course, not all law necessarily amounts to a right or rights in general, but many of the core components of legal orders are connected to such institutional empowerment. Human rights in particular are more connected with the second (substantial) approach, but human rights also have both a formal and substantial role to play in the context of law, by, for instance, constitutionally limiting the extent of other laws and by providing substantial negative and positive obligations for the State in all other regards. Compared with other rights, human rights, as obligations for the State, go further as they empower individuals and offset or diffuse the sovereign power of the State. That human rights, with the importance granted to them through international human rights law and their place in the constitutional laws of States, could therefore stand out and attain a unique relationship with the rule of law, and form an integral part of it, is therefore not a difficult argument to substantiate.

2 See, e.g., J. Beatson, above note 1, 18–21; B. Tamanaha, above note 1, 3–4, 102.
3 In less-democratic States, the appeal of a rights approach is less obvious, at least in so far as democratic rights are concerned, such as the freedom of expression, freedom of opinion, and freedom of association. Friedrich Forsthuber, “Democracy–Human Rights–Rule of Law: European Developments and the Importance of an Independent Judiciary” in Helmut Kury and Sławomir Redo (eds), *Crime Prevention and Justice in 2030* (Springer International Publishing 2021) 27, 27–29.
6 See, e.g., J. Beatson, above note 1, 18–19; C. Carlarne, above note 4; James Crawford, *Chance, Order, Change: The Course of International Law* (Brill 2014) para 461, 487; F. Forsthuber, above note 3; M. Mahlmann, above note 5, 18, 21; Angelika Nußberger,
The durability and sustainability of a well-functioning order based on the rule of law is also often predicated on how well a State supports and adheres to human rights. At least historically, when States have moved towards more authoritarian rule, by gutting the separation of powers and strengthening the executive branch (whilst limiting the powers of the legislative and judicial branches), the result has been a debilitated rule of law and judiciary, and restricted human rights. It therefore stands to reason that the strength of the rule of law and the risks posed to the rule of law are demonstrated by how well States generally support, implement and comply with human rights.

Although the notion of an international rule of law is routinely subject to debate and criticism due to, for instance, the lack of a traditional separation of powers in public international law, the same risk ought to apply to international law as well. In the context of the international rule of law, there are likewise two main conceptions of the concept, where one is centred around the State and the other is centred around


7 Durability and sustainability are, arguably, qualities that correspond to stability and predictability, two major constituents of the rule of law. See Norma A Polizzi, “Can International Law Adapt to Climate Change?” (2020) 32 Environmental Claims Journal 233, 235.

8 See, generally, F. Forsthuber, above note 3. See also J. Beatson, above note 1, 115–20; J. Crawford, above note 6, para 445, 461. The separation of powers, which grants the judiciary its independence, is arguably an integral part of the rule of law. B. Tamanaha, above note 1, 123–24. See also David M Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004).

the individual and the protection of the individual.\textsuperscript{10} The normativity of international law, historically and contemporarily, may still be derived from the interactions between the subjects of law (primarily sovereign States),\textsuperscript{11} but the international rule of law is today both heavily dependent on human rights and heavily entangled with the domestic rule of law.\textsuperscript{12} Especially if one considers the increasing role of the individual in the international legal order (being able to lodge complaints against States before international bodies), the involvement of international organizations in the law-making process (such as through the International Law Commission, ILC, the Council of Europe, and the European Union), the expanse of human rights treaties and bodies, the incorporation, transformation, implementation and direct use of international human rights in national legal orders, as well as the promotion and reinforcement of the domestic rule of law through international fora and international law.\textsuperscript{13} International law, including international human rights law, helps to improve the rule of law in national legal orders as it sets the minimum standards to be attained, provides reinforcement of national rights and demands improvement of existing national standards.\textsuperscript{14} Domestic rule of

\textsuperscript{10} Denise Wohlwend, \textit{The International Rule of Law: Scope, Subjects, Requirements} (Edward Elgar Publishing 2021) 6–7.

\textsuperscript{11} See, e.g., Robert Jennings and Arthur Watts (eds), \textit{Oppenheim's International Law}, vol 1 Peace (9th edn, Oxford University Press 2008) para 1; J. Crawford, above note 6, para 461–62; Aljosa Noga, \textit{The Tragedy of the Global Commons in Public International Law} (Örebro universitset 2022) 188–90, 201–03. Moreover, States as subjects of law are usually portrayed as unitary entities that have no internal separation of powers, or which are represented by an executive branch. J. Crawford, above note 6, para 448, 453, 462; A. Noga, above, 152–53, 232–42. This implies that a State with a deficient rule of (national) law, can still be a viable subject of law with legal personality in international law, thus rendering international law devoid of similar sentiments for defining the international rule of law.

\textsuperscript{12} D. Wohlwend, above note 10, 8–11. See also C. Carlarne, above note 4, 16–17; Rodoljub Etinski and Bojan Tubić, “International Law and the Rule of Law” (2016) 64 Annals Belgrade Law Review 57; A. Nußberger, above note 6, 156.

\textsuperscript{13} See generally D. Wohlwend, above note 10.

\textsuperscript{14} R. Etinski and B. Tubić, above note 12, 70. See also, e.g., Inter-American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 (IACHR) preamble (“Recognizing that the essential rights of man … justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states …”); M. Mahlmann, above note 5, 20, 22, 112.
law cannot reasonably exist as it does today without the impact of international law. Moreover, the intimate relationship between the international rule of law and human rights is also difficult to dispute considering the references to and use of that relationship in official international discourse. The European Court of Human Rights (ECtHR), in the context of interpreting rights in the European Convention on Human Rights (ECHR), has perhaps been the loudest judicial advocate in this regard. For instance, in *Golder v United Kingdom*, the Court stated: “One reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’ was their profound belief in the rule of law.” And in *Ukraine-Tyumen v Ukraine*, the ECtHR stated that “the rule of law, one of the fundamental principles of a democratic society, is inherent in all

15 See, e.g., Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UNGA Res 67/1 (24 September 2012) UN Doc A/RES/67/1 [5] (adopted with consensus) (“We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”); J. Crawford, above note 6, para 461, 487. See also, e.g., Treaty on European Union (adopted 13 December 2007, entered into force 1 December 2009, as amended and revised up to March 2016) 2016 OJ C 202/1 (TEU) art 2 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”); *Continental Shelf (Libya/Malta) (Merits)* [1985] ICJ Rep 13, [45] (“Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.”); *Elettronica Sicula (ELSI) (USA v Italy)* [1989] ICJ Rep 15, [128] (“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.”); Universal Declaration of Human Rights, UNGA Res 217 A(III) (10 December 1948) UN Doc A/RES/217(III) (UDHR) (“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...”); C. Carlarne, above note 4, 16–17.

16 A. Nußberger, above note 6, 154–55.

17 *Golder v United Kingdom* App. no. 4451/70 (ECtHR, 21 February 1975) [34]. See also European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS no 005 (ECHR) preamble.
The durability of the rule of law, including the international rule of law, is arguably in many regards dependent on the support for human rights.\textsuperscript{19}

However, to focus on how well States comply with human rights law in order to say something about the state of the international rule of law also tends to miss the effectiveness of such law, particularly international human rights law.\textsuperscript{20} In national legal orders, non-compliance by State organs could evidence a failing or unstable rule of law, but in international law, compliance is, generally, an inappropriate measurement for effectiveness in this regard, for several reasons. The structure of many international rules, such as those in international human rights law, are meant to be progressively realized over time, which leads to compliance deficits to a varying degree, in regard to varying areas of such law, at

\textsuperscript{18} Ukraine-Tyumen v Ukraine App. no. 22603/02 (ECtHR, 22 November 2007) [49]. See also Amuur v France App. no. 19776/92 (ECtHR, 25 June 1996) [50].

\textsuperscript{19} It has also been argued that the international rule of law is so intertwined with environmental law that a notion of ecological sustainability ought to be considered as forming part of the international rule of law. C. Carlarne, above note 4, 23. On a more critical note, it has been suggested that while the rule of law is interlinked with human rights, the latter can be sacrificed in order to retain the vigour of the former. A. Nußberger, above note 6, 170–71. It has been argued that conceptions of human rights that are too distant from the will and practice of States Parties risk cementing a lack of support, a lack of compliance and legal uncertainty, all of which are necessary components for a strong rule of law. See generally \textit{ibid}. There is some strength in this argument, but at the same time it needs to be kept in mind that the rule of law in national legal orders is intertwined with the international rule of law, and the contents of international human rights obligations is often dependent on the practice of States. Furthermore, despite the promise that human rights epitomize, it is also important to remember that human rights, like other aspects of international law, are likewise routinely criticized for their anthropocentrism, individualism, and lack of general applicability. David Landau, “The Reality of Social Rights Enforcement” (2012) 53 Harvard International Law Journal 189; Margot E Salomon, “Nihilists, Pragmatists and Peasants: A Dispatch on Contradiction in International Human Rights Law” in Emelios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), \textit{Research Handbook on Critical Legal Theory} (Edward Elgar Publishing 2019) 509. See also C. Carlarne, above note 4, 36–38; David Kennedy, “International Human Rights Movement: Part of the Problem?” (2002) 15 Harvard Human Rights Journal 101; M. Mahlmann, above note 5, 116–21.

varying points in time for practically all States.\textsuperscript{21} Most States comply with most rules of international law most of the time, but most aspects of the effectiveness of international law also do not specifically aim at universal compliance. Many aspects of international law have instead a constitutive effect, rather than a traditional regulatory aim.\textsuperscript{22} International human rights law, with its close relationship with national constitutional law, is certainly of such a character.\textsuperscript{23} So, while some international law faces a risk of low compliance at certain points in time, the international law in question may still be highly effective.\textsuperscript{24} If one considers that much of international law, such as customary international law, changes on the basis of non-compliance, then non-compliance becomes a driving force for the change and amendment of contemporary international law.\textsuperscript{25} As discussed below, in order to argue that the rule of law faces risks, a series of events or a pattern of a lack of support needs to cement over time.\textsuperscript{26}

\textsuperscript{21} Ibid. 185.
\textsuperscript{22} Ibid. 187–88.
\textsuperscript{23} See, e.g., M. Mahlmann, above note 5, 20–22, 112.
\textsuperscript{24} J. Dunoff, above note 20, 190.
\textsuperscript{25} Ibid. 191–93.
\textsuperscript{26} It has also been argued that international law is facing a compliance trilemma, which means that many treaties have a choice between a high level of ambition, high participation levels or high levels of compliance. Ibid. 195–96. Most treaties can only afford to attain two of these attributes, because, for instance, a treaty with a high level of participation and high levels of compliance will have to produce a treaty with a low rate of ambition in its contents in order to ensure that as many States as possible consent to the treaty and abide by its clauses. Ibid. See also A. Noga, above note 11, 372–493. Examples of this trilemma include human rights law, with high levels of ambition and participation, but with compliance issues. J. Dunoff, above note 20, 195–96, 198; A. Noga, above note 11, at 456–79. A lack of universal adherence to international human rights in certain areas of such law at certain points in time, therefore says little about the general effectiveness of the international rule of law.
The Intergenerational Relationship Between the Rule of Law (Including Human Rights) and Adverse Climate Change

The threat of adverse climate change is substantial, not only due to the effects such change causes and will cause to our natural environment (natural systems), but also because of the threat such change presents for humanity and our man-made systems (human systems). Climate change negatively impacts humanity’s use of the natural environment, such as through the increase of resource scarcity and conflicts over resources. Naturally, that threat extends to the systems constructed by human beings and governance, which is why adverse climate change also threatens the rule of law. In this sense, there is a substantiated risk of decline of the rule of law. The reason being that an increase in adverse changes to the


29 The meaning of risk is somewhat elusive from a legal perspective, at least in international law. Some guidance can be found in the ILC’s work on transboundary harm, where risk is defined and described as some form of objectively known probability of harm, or a future possibility of harm that is known beforehand, and which requires an appreciation. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, in ILC, “Report of the International Law Commission on the Work of Its 53rd Session” (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 144, 151–52. See also ibid. 151 (“The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.”). As is demonstrated by the objective work of the IPCC, adverse climate change qualifies as a known anthropogenic harm to human
environment means an increase in adverse effects on human beings and, *ipso facto*, an increase in the number of people who suffer from adverse climate change, which in turn makes it more unlikely that States will be able to take necessary measures to protect those affected. This is a state of disruption where rational and optimal solutions and traditional legalistic measures and governance are no longer available. Therefore, what this risk entails is arguably a decline of the rule of law, including the decline of human rights, especially for those most affected by adverse climate change (such as vulnerable groups at the hands of rising temperatures and sea levels, but also eventually the greater majority of people), and the rise of authoritarian States which benefit from the increasing necessity of international cooperation by working against it in favour of national sovereign interests. Adverse climate change is aptly described as a human rights crisis, a planetary crisis, and, by extension, a rule of law crisis.

Many environmental matters are intergenerational in the sense that in general, environmental harms and consequences suffer the risk of longevity that travels across generations if left unattended. Not all negative environmental consequences are of such a nature, but those related to adverse climate change are certainly an important issue for current and future systems, which is appreciated to continue to cause harm and cause more harm in the future, and thus poses a risk to the rule of law.

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31 C. Voigt, above note 27, 60–62. See also C. Carlarne, above note 4, 20–26. Moreover, in this context, it has been argued that international law provides a good starting point to avoid such scenarios and that current treaties, such as the Paris Agreement, represent an ideal starting point. In this sense, international law is not lacking in power, but it falls short regarding the effective implementation of existing treaties. C. Voigt, above note 27, 54–55. Such arguments hold some merit but fail to address the inherent weaknesses of such law, including soft terminology and the lack of individual commitments. If the contents of international law are weak, what is there to effectively implement? See, e.g., A. Noga, above note 11, 456–79 (critically discussing the obligations in the UNFCCC and the Paris Agreement). Weak commitments result in a reinforcement of sovereign self-interest which is arguably the root cause of adverse climate change.

32 C. Carlarne, above note 4, 38–39. See also Anne Saab, “Discourses of Fear on Climate Change in International Human Rights Law” (2023) 34 European Journal of International Law 113.

future generations.\textsuperscript{34} Even if current negative consequences or harms are minimal or not particularly dire, they can accumulate and aggravate over time, increasing the harm done to succeeding generations.\textsuperscript{35} For these reasons, it is not a surprise that principles such as sustainable development and intergenerational equity (both of which embody the concept of present and future generations) are part and parcel of environmental law, especially international environmental law.\textsuperscript{36} For the rule of law, this means that whatever the impact on the rule of law may be, that impact will travel across generations and worsen as time progresses. If humanity is impacted to a degree that causes harm “intra”-generationally (rather than across generations), and that harm is left unattended, continuing to cause harm to the next generation, with new harms added as adverse climate change increases, the risk to the rule of law is heightened by each succeeding generation. In this way, the risk to the rule of law is inter-generational, or perhaps intergenerationally exponential, in character.


\textsuperscript{35} This is sometimes described as a tragedy of the commons. See generally A. Noga, above note 11. See also R. Lazarus, above note 34, 1175.

\textsuperscript{36} See, e.g., \textit{Paris Agreement} (adopted 12 December 2015, entered into force 4 November 2016) \textit{3156 UNTS 79} preamble (“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights … as well as … intergenerational equity …”); \textit{Gabčíkovo-Nagymaros Project (Hungary/Slovakia)} [1997] \textit{ICJ Rep} 7 [140] (“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature… Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades… This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”). See also Jutta Brunnée, “International Environmental Law and Climate Change: Reflections on Structural Challenges in a ‘Kaleidoscopic’ World” (2020) 33 \textit{Georgetown Environmental Law Review} 113, 115; Stephen Humphreys, “Against Future Generations” (2022) 33 \textit{European Journal of International Law} 1061; J. Wood, above note 34.
The interrelationship between human rights and the environment might seem somewhat vague and uncertain, but when you consider the aim and purpose of human rights to protect human dignity and ensure the actual enjoyment of rights, and the effects of environmental harms on human beings, the connection is logical. For that same reason, the impact on human rights due to adverse climate change has been greatly recognized in international and regional fora, international law, national law, declarations and more. The Inter-American Court of Human Rights (IACtHR), in its *Environment and Human Rights* Advisory Opinion, provided an extensive general overview on this interrelationship, and stated:

Owing to the close connection between environmental protection, sustainable development and human rights…, currently (i) numerous human rights protection systems recognize the right to a healthy environment as a right in itself…, while it is evident that (ii) numerous other human rights are vulnerable to environmental degradation, all of which results in a series of environmental obligations for States to comply with their duty to respect and to ensure those rights.

For that same reason, the IACtHR, as well as the United Nations (UN) and others, has “recognized the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights.” And

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38 C. Carlarne, above note 4, 28–35.
39 *Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity)* Advisory Opinion no OC-23/17 (IACtHR, 15 November 2017) [47]–[70].
40 Ibid. [55].
41 Ibid. [47]. See also, e.g., *Kawas-Fernández v Honduras (Merits, Reparations and Costs)* Series C No 196 (IACtHR, April 3, 2009) [148]; Joint Statement on Human Rights and Climate Change, above note 27; Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, UNGA Res 77/276 (29 March 2023) UN Doc A/RES/77/276 (referring to several other resolutions and documents on the connection between human rights and climate change that express concerns in regard to the enjoyment of human rights).
interestingly, under certain, although restrictive, circumstances, harm that originates in one State and which travels across territorial boundaries (transboundary harm), causing significant harm to human beings elsewhere, can also activate the jurisdiction and human rights commitments of the State in which the harm arose. Human beings are likewise part of the environment, and so when harm done to the environment also affects human beings and results in human rights violations, such violations can also travel across generations when the harm is continuous.

While a causality between adverse effect and the individual State is a general issue in the context of climate change and human rights, it is not always an issue for invoking State responsibility and nor does the causality issue detract from the threat posed by adverse climate change to the rule of law. In order for a State to be held responsible for an internationally wrongful act, there needs to be, among other criteria, an action or omission that “[i]s attributable to the State under international law.” Particularly in regard to this criterion on attribution, adverse climate change poses some difficulties in a human rights context. Causality is, however, not always an issue when one consider, for example, the traceability of emissions and, more importantly, the impact of acts and omissions on the environment within a State, as shown by the case law in the next section. If a State willingly or unwillingly continues to adversely affect the climate or allows for the climate to be adversely affected in its jurisdiction, with negative consequences to its environment and people as a result, the impact on that State’s particular environment and people can fall under the responsibility of the State. Not all changes to the natural environment are attributable to an individual State’s conduct, but several changes can be attributed on the basis of, for instance, the impact

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42 See, e.g., IACtHR, Environment and Human Rights, above note 39, [95]–[104], [244] (focusing on the IACHR, but also extensively referring to other treaties and other sources of international law). See also J. Brunnée, above note 36, 119–23.
on the surrounding environment due to the State omitting to adopt relevant measures.\textsuperscript{45} In any event, the risks posed to the rule of law are the result of the general impact on the enjoyment of human rights, and not the possibility of invoking a State’s responsibility before international or national courts of law.

Notwithstanding that human rights have an intimate intergenerational relationship with the environment, it would be wholly illogical to conclude that singular, or even a group of, human rights violations are evidence of a decline in the rule of law in this regard. As discussed above, certainly compliance could be evidence of a decline, but when such non-compliance is accompanied by, for instance, a gutting of the separation of powers or a general ineffectiveness of international obligations. What ought to be required, therefore, is some pattern or series of events which prove or at least indicate that the human rights obligations are not complied with or are no longer effective despite an established substance of obligations, and that the non-compliance or ineffectiveness is the result of something more than an individual State’s, or a group of States’, opposition to a singular obligation or a set of defined obligations. In other words, a pattern or a series of acts or omissions by States which is the result of an inability or unwillingness to support and uphold human rights in a manner which puts all other human rights obligations at risk as well. A temporal effect, such as an intergenerational effect, lends further support to the decline, as it affirms that it is more than just a fleeting scenario, when considered in connection with the contemporary situation and how that situation will develop over time. For the sake of the discussion here, it suffices to ask the question of whether the inaction of States in regard to adverse climate change is such a pattern or series

\textsuperscript{45} See, e.g., IACtHR, \textit{Environment and Human Rights}, above note 39, [119]–[120] (“The Court has indicated that a State cannot be held responsible for every human rights violation committed by individuals within its jurisdiction … In addition, bearing in mind the difficulties involved in the planning and adoption of public policies, and the operational choices that must be made based on priorities and resources, the State’s positive obligations must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities.”); \textit{ibid.} [139] (“The [ECtHR], when examining cases of alleged interference in private life caused by pollution, has indicated that the [ECHR] is not violated every time that environmental degradation occurs, insofar as the [ECHR] does not include a right to a healthy environment.”).
of events which results in an intentional or unintentional disregard for human rights in general, if this inaction is already taking place and how it extends temporally across generations.

State Inaction to Adverse Climate Change and the Negative Impact on Human Rights

There is no shortness of international and national case law that relate to climate change, and there is a constant increase in such cases that concern human rights. This is evidenced by the phenomenon known as climate change litigation and the expanding academic literature on the concept in general. Although some cases, notably international

46 The choice of case law in this short paper is strategically in favour of recently settled cases. See the vast amount of climate change litigation case law, international and national, available at Climate Change Litigation Databases <climatecasechart.com> accessed 27 July 2023. See also UN Environment Programme (UNEP), *Global Climate Litigation Report: 2023 Status Review* (UNEP 2023). The UNEP provides annual reports on the state of climate change case law.

ones, deserve special attention due to their overarching implications for national law and arguments before domestic courts, national case law is still a primary source to consider. National case law can be a source of law and a form of practice that demonstrates State conduct. From an international perspective, national case law is conventionally a form of State practice and not traditionally a source of law per se. Which is why national case law also exemplifies the real impact of adverse climate change on human rights. For instance, while climate change litigation has not traditionally centred on human rights, it has recently evolved into what has been described as a “rights-turn”, which of its own accord bodes badly for the extent of the failure of States to combat climate change, since the mere existence of rights-centred litigation is evidence of a potentially disastrous impact on human rights. From the perspective of the rule of law, what both international and national cases show is not the inadequacy of human rights obligations in connection with adverse climate change (although that may very well be the case in many regards), but rather the demands posed on States in general and the


49 C. Carlarne, above note 4, 34.

50 Inadequacies include the difficulty to establish jurisdiction and admissibility. See, e.g., Sacchi et al v Argentina et al UN Doc CRC/C/88/D/104/2019 (Committee on the Rights of the Child, 22 September 2021); E. Fisher, E. Scotford and E. Barritt, above note 28. See also D. Kennedy, above note 19.
difficulties to meet such obligations as time progresses. It is noteworthy that even if several cases, or rather applications, have been unsuccessful, a lack of success does not necessarily imply that there has not been any harm done to the environment or humanity. There are several rights of interest in this regard, such as the right to life, property, privacy, and health, but also the right to a healthy or a safe environment (a right which has recently been heavily advocated for, which has found its way into the constitutional laws of some States and which may very well be an emerging rule of customary international law). What rights are harmed and violated naturally varies between human rights systems, but generally all human rights systems acknowledge the application of human rights obligations in an environmental context and often interpret the extent of human rights obligations on the basis of States’ environmental obligations, such as those in the United Nations Framework Convention on Climate Change (UNFCCC). In the long run, how States manage to

51 See also E. Fisher, E. Scotford and E. Barritt, above note 28, 183 (arguing that case law in this context demonstrates a disruption of the role of law). Such case law also shows how judges engage in more expository justice, rather than traditional adjudicative justice. Ibid. 197.

52 Often, the obstacles that have prevented success in such climate change applications have been procedural in nature. See, e.g., E. Fisher, E. Scotford and E. Barritt, above note 28. The variety of constitutional rules and constitutional traditions likewise impact potential outcomes in such cases, despite universal requirements in international human rights law. Ibid. 197.


54 See, e.g., IACtHR, Environment and Human Rights, above note 39, [58]–[59] (“The Court underscores that the right to a healthy environment is recognized explicitly in the domestic laws of several States of the region, as well as in some provisions of the international corpus iuris … The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.”). See also Joint Statement on Human Rights and Climate Change, above note 27, [3]; C. Carlarne, above note 4, 28–35.
cooperate to face adverse climate change over time could be the ultimate determinant for how well States are able to live up to such human rights obligations. But providing States fail to satisfactorily cooperate in the face of adverse climate change (whatever such satisfactory cooperation may entail), what do these human rights obligations imply for the rule of law for succeeding generations?

Before tending to select settled case law, it is worth commenting on pending cases. At the time of writing, the International Court of Justice (ICJ) has received a new request for an Advisory Opinion which could prove to be quintessential for the underlying issue addressed in this paper. The request, concerning Obligations of States in Regard to Climate Change, was submitted by the General Assembly of the United Nations (UNGA). In it, the UNGA requested that the ICJ renders an Advisory Opinion on the following questions:

a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to: (i) States, including, in particular, small island developing

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55 Other than the ICJ, there are also ongoing climate change cases at ECtHR, such as the so-called Portuguese youth case and the Swiss climate case, as well as notable national proceedings with a similar human rights approach to climate change, such as the Aurora lawsuit in Sweden. See Youth4ClimateJustice <youth4climatejustice.org> accessed 8 August 2023 (providing ongoing updates on the Portuguese youth case); Aurora Case <auroramålet.se> accessed 8 August 2023. See also Verein KlimaSeniorinnen Schweiz and Others v Switzerland (relinquishment) App. no. 53600/20 (ECtHR, 26 April 2022); Duarte Agostinho and Others v Portugal and Others (relinquishment) App. no. 39371/20 (ECtHR, 29 June 2022); Climate Change Litigation Databases <climatecasechart.com> accessed 8 August 2023 (providing information on several other pending cases before, inter alia, the ECtHR).

56 Obligations of States in Respect of Climate Change (Advisory Opinion) (Pending) (Request for an Advisory Opinion) 2023 <icj-cij.org> accessed 2 August 2023. See also Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, UNGA Res, above note 41.
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States…? (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?\textsuperscript{57}

The importance of the questions for the issue at hand includes the references to individuals, peoples, present and future generations, small island States (the territories of which are threatened by climate change, and potentially also their existence as States), and that the request enumerated major human rights instruments before laying forth the questions to the ICJ.\textsuperscript{58} The systemic implications of the issue will, hopefully, generate an Advisory Opinion that sheds some light on international law as a whole and human rights in relation to climate change in general. Whether or not such an Opinion would be useful remains doubtful to some,\textsuperscript{59} but having a judgment which clarifies the extent of obligations is always preferable for the sake of having an established official measurement for what international law currently provides and for what it lacks (legal lacunae).

In terms of settled case law, a recent case which has attracted attention, partly due to the fact that it was initiated by renowned climate activists, is \textit{Sacchi et al v Argentina et al} before the Committee on the Rights of the Child,\textsuperscript{60} in which five respondent States were the subjects of the complaint.\textsuperscript{61} Despite being dismissed due to the claimants not having exhausted local remedies (which might seem like an unrealistic requirement to adhere to considering the global issue at hand),\textsuperscript{62} the Committee provided several interesting comments on the impact of climate change

\textsuperscript{57} ICJ, \textit{Obligations of States in Respect of Climate Change}, above note 56.

\textsuperscript{58} \textit{Ibid}. See also \textit{Obligations of States in Respect of Climate Change (Advisory Opinion) (Pending) (Materials Compiled Pursuant to Article 65, Paragraph 2, of the Statute of the ICJ) 2023} <icj-cij.org> accessed 2 August 2023 (listing all the documents submitted by the Secretariat of the UN to the ICJ).

\textsuperscript{59} P. Sands, above note 27.

\textsuperscript{60} Committee on the Rights of the Child, \textit{Sacchi et al}, above note 50.

\textsuperscript{61} The claimants referred to Articles 3, 6, 24, and 30 which stipulate, among other provisions, the rights to life, survival and development, the best interests of the child, the highest attainable standard of health, and the rights of children who belong to minorities and indigenous peoples. Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

on human rights. According to the Committee, which heavily relied on the Advisory Opinion of the IACtHR mentioned above:

[W]hen transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated… if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question… The Committee considers that it is generally accepted and corroborated by scientific evidence that the carbon emissions originating in the State party contribute to the worsening of climate change, and that climate change has an adverse effect on the enjoyment of rights by individuals both within and beyond the territory of the State party. The Committee considers that, given its ability to regulate activities that are the source of these emissions and to enforce such regulations, the State party has effective control over the emissions.63

Notwithstanding being dismissed, the complaint still highlights the negative impact of climate change on States’ human rights commitments and the Committee acknowledged that for the sake of a prima facie, jurisdictional, assessment of the claim.64 Moreover, the Committee also acknowledged that it is substantiated that carbon emissions that originate from States contribute to adverse climate change, that adverse climate change has a negative impact on human rights, in and outside the territory of that particular State, as well as in other States, and that States have effective control over emissions when they have the ability to regulate activities that cause such emissions. What this case shows is that while the

63 Ibid. [10.7], [10.9].
64 Ibid. [10.13]–[10.14] (“[T]he Committee notes the authors’ claims that their rights under the Convention have been violated by the respondent States parties’ acts and omissions in contributing to climate change and their claims that said harm will worsen as the world continues to warm up… [T]he Committee concludes that the authors have sufficiently justified, for the purposes of establishing jurisdiction, that the impairment of their Convention rights as a result of the State party’s acts or omissions regarding the carbon emissions originating within its territory was reasonably foreseeable. It also concludes that the authors have established prima facie that they have personally experienced real and significant harm in order to justify their victim status.”). See also CRC, “General Comment No. 26 (2023) on Children’s Rights and the Environment, with a Special Focus on Climate Change” (22 August 2023) UN Doc CRC/C/GC/26.
invocation of State responsibility is dependent on the restrictions in the human rights system in question (for example, procedural requirements such as the exhaustion of domestic remedies, qualified harm such as significant harm or damage, or foreign State immunity in national proceedings), the real enjoyment of human rights is still affected by climate change regardless of the current potential to invoke responsibility. And so, while the contemporary situation may not always, if not most of the time, meet the condition of, for instance, significant harm, as adverse climate change continues to worsen, the harm done to current generations risks amounting to significant harm for succeeding generations. An increase in adverse climate change will then yield significant intergenerational harm which risks extending to other human rights as well. Therein lies the risk to the rule of law.

A national case which has attracted certain academic attention, is Urgenda Foundation v the Netherlands before the Supreme Court of the Netherlands, in which the claimant successfully argued that the ECHR obliges States to take certain measures against adverse climate change.

The ECHR, like many human rights instruments, lays forth a fundamental general obligation in connection with specific rights. This includes the duty to “secure to everyone within their jurisdiction the rights and freedoms defined in” the ECHR, such as “[e]veryone’s right to life” and “the right to respect for his private and family life.” Referring aptly to the ECtHR’s case law in relation to environmental issues, the Supreme Court argued that these obligations demand that a State takes reasonable and appropriate steps, such as adaptation or mitigation measures, in the face of potential environmental threats that pose a real and immediate risk or pose a risk of serious damage to individuals’ environment or society

65 See, e.g., E. Fisher, E. Scotford and E. Barritt, above note 28, 189; P. Sands, above note 27.
66 Urgenda Foundation v the Netherlands No 19/00135 (Engels), ECLI:NL:HR:2019:2007 (Hoge Raad, Supreme Court of the Netherlands, 20 December 2019). See also Climate Change Litigation Databases <climatecasechart.com> (providing English translation).
67 ECHR, above note 17, arts 1, 2(1), 8(1).
at large, so as to safeguard the lives under the jurisdiction of the State.\(^{68}\) Both acts and the failure to act (omission) can result in a violation, but the obligations do not require the cessation of the threat if cessation is not achievable.

The Supreme Court then proceeded to apply these obligations in relation to climate change. According to the Court:

Pursuant to the findings above… no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 ECHR [on the right to life and the right to respect for private and family life] to take measures to counter the genuine threat of dangerous climate change … Given the findings above … this constitutes a “real and immediate risk” … and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to, \textit{inter alia}, the possible sharp rise in the sea level, which could render part of the Netherlands uninhabitable. The fact that this risk will only be able to materialise a few decades from now and that it will not impact specific persons or a specific group of persons but large parts of the population does not mean … that Articles 2 and 8 ECHR offer no protection from this threat … The mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken.\(^{69}\)

In order to come to this conclusion, the Supreme Court, referring to several notable sources (such as the Intergovernmental Panel on Climate Change), noted the seriousness of adverse climate change and its effects, including extreme weather events, heat, drought, precipitation, rising sea levels, that such effects will worsen over time or abruptly in certain areas that are particularly vulnerable to so-called tipping points, and that the effects are already being felt in certain areas.\(^{70}\) While instruments like the UNFCCC recognizes that adverse climate change is a global problem.

\(^{68}\) Supreme Court of the Netherlands, \textit{Urgenda Foundation}, above note 66, [5.2.1]–[5.2.4], [5.3.2]. Although these may seem like impossible goals to meet in relation to adverse climate change, the Court also provided that “[i]f a state has taken reasonable and suitable measures, the mere fact that those measures were unable to deter the hazard does not mean that the state failed to meet the obligation that had been imposed on it.” \textit{Ibid.} [5.3.4]. The reason being that the obligation regards measures, and not achievements. \textit{Ibid.}\(^{69}\) \textit{Ibid.} [5.6.2].

\(^{70}\) See, e.g., \textit{ibid.} [4.1]–[4.8].
which requires a global solution, and which results in joint responsibility among States, the partial fault of an individual State also means that the individual responsibility of the State is invocable.\footnote{Ibid. [5.7.1]–[5.7.9], [5.8] (reaching this conclusion by referring to the no harm rule in international environmental law which requires that States do not cause harm to each other, and the ARSIWA on joint responsibility and the potential of invoking responsibility for each individual State). See also ARSIWA, above note 44, art 47(1) (“Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.”).} This means that regardless of whether a State’s contribution to the problem of climate change, or the solution, is minimal, and regardless of whether all other States are doing their part, a State is still individually responsible for its own failures.\footnote{Supreme Court of the Netherlands, Urgenda Foundation, above note 66, [5.7.7].} It therefore follows, according to the Court, that as adverse climate change is a threat to human rights, that the rights ought to be invocable on an individual basis.\footnote{Ibid. [5.7.9].} In this regard, the Court also considered what exactly were the measures to be taken in line with obligations in the ECHR, and concluded that there was international consensus that certain States needed to reduce greenhouse gas emissions by at least 25% to 40% by 2020, and that this consensus comprised a common ground among States Parties to the ECHR.\footnote{Ibid. [7.1], [7.2.1]–[7.2.11].} The Supreme Court did not rule in favour of the State of the Netherlands.\footnote{Ibid. [7.5.1] (“[T]he State has insufficiently substantiated that it would be possible for a responsible policy to prevent dangerous climate change to include a greenhouse gas emissions reduction target of less than at least 25% by 2020. Therefore, in accordance with the foregoing considerations… there is reason to come to the conclusion that the State should in any event adhere to the target of at least 25% reduction by 2020. As stated above, there is a large degree of consensus in the international community and climate science that at least this reduction … is urgently needed … Proper legal protection means that this consensus can be invoked when implementing the positive obligations incumbent on the State pursuant to Articles 2 and 8 ECHR … In the context of the positive obligation on the State under Articles 2 and 8 ECHR to take appropriate measures to prevent dangerous climate change, this target can therefore be regarded as an absolute minimum.”).}
well-being, in terms of limiting the number of claims against it, the effects
on the human rights in the jurisdiction of that State are still prevalent
due to the actions and omissions of all other States. Even if invoking the
individual responsibility of the individual State is successful, the shared
problem still yields shared consequences. More importantly, what cases
such as these recognize, is the already contemporary widespread harm
caused by adverse climate change on human rights that affects society
in general, including States in parts of the world where climate change
will cause less detrimental harm than in States with large proportions of
marginalized groups and human suffering.

Another national case of interest that has likewise attracted some
academic attention,76 is Neubauer et al. v Germany, before the Federal
Constitutional Court, also known as the German Climate Change Case.
In this case, several complainants argued, although only partly success-
fully,77 that certain aspects of Germany’s climate change legislation are
incompatible with their human rights, or fundamental rights as laid
down in the Basic Law (Grundgesetz). The rights in question include the
right to life and physical integrity, human dignity, the right to property,
certain future, or intergenerational, aspects of these rights, namely the
right to a future consistent with human dignity and the right to an
ecological minimum standard of living, as well as the general concept of
fundamental rights.78 But, unlike the Dutch case above, Germany had
reduction targets of 40% by 2020, and 55% by 2030,79 and as the Court
did not find violations of all rights claimed (did not declare all aspects
of the climate change legislation as unconstitutional), it also commended
parts of Germany’s climate change legislation.

76 See, e.g., Andreas Buser, “Of Carbon Budgets, Factual Uncertainties, and Intergenera-
tional Equity – The German Constitutional Court’s Climate Decision” (2021) 22 German
Law Journal 1409; Petra Minnerop, “The ‘Advance Interference-Like Effect’ of Climate
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77 Neubauer et al. v Germany 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR
288/20 (English translation) (Bundesverfassungsgericht, Federal Constitutional Court
of Germany, 24 March 2021) [1], [266].
78 Ibid. [266]. The complainants also relied on the right to life and the right to respect
for private and family life in the ECHR. Ibid. [1], [38]–[89].
79 Ibid. [4]–[5].
While there are several noteworthy aspects of the case, such as the fact that the Constitutional Court did not find a violation of the right to the protection of life and health or the right to property despite its recognition of the scope of those rights in relation to climate change,80 of primary relevance is perhaps the Court’s reasoning in regard to what it referred to as the “advance interference-like effect.” The Court’s main conclusion was that parts of Germany’s climate change legislation were unconstitutional “insofar as they lack provisions that satisfy the requirements of fundamental rights … on the updating of reduction targets from 2031 until the point when climate neutrality is reached.”81 In order to reach this conclusion, the Constitutional Court expounded on the temporal aspects of the issue by stating the following:

[T]he legislator has violated fundamental rights by failing to take sufficient precautionary measures to manage the obligations to reduce emissions in ways that respect fundamental rights – obligations that could be substantial in later periods due to the emissions allowed by law until 2030 … The legislator’s decision to allow the amounts of CO2 specified … to be emitted until the year 2030 has an advance interference-like effect … on the freedom of the complainants … It is true that this risk to fundamental freedoms is not unconstitutional on the grounds of any violation of objective constitutional law … However, [certain provisions in the climate change act] are unconstitutional to the extent that they create disproportionate risks that freedom protected by fundamental rights will be impaired in the future. Since the … provisions specify emission amounts until 2030 which … significantly narrow the emission possibilities available after 2030, the legislator must take sufficient precautionary measures to ensure that freedom is respected when making a transition to climate neutrality. Under certain conditions, the Basic Law imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of

80 The Constitutional Court did not find a violation of those rights mainly because the climate change legislation included appropriate, although still contemporarily insufficient, reduction targets and measures. Ibid. [143]–[172]. By comparison, an unacceptable approach would have been, according to the Court, an approach where no action was taken to implement reduction or where only adaptation measures (alleviating measures) were the focus, as was the case in the case before the Supreme Court of the Netherlands. Ibid. [157].
81 Ibid. [266].
freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed … being unilaterally offloaded onto the future …**82**

The Constitutional Court also greatly expanded on this statement, stating, *inter alia*, that States cannot allow climate change to develop *ad infinitum*, that CO2 emissions pose a substantial risk to future generations, that the risk increases as more measures are delayed, that the advance interference-effect operates both *de facto* and *de jure*, but also that States cannot resolve climate change on their own without international support.**83** While this case contrasts the decision in *Urgenda Foundation v the Netherlands* in several ways, such as in relation to the rights (the ECHR compared to the Basic Law and the overlap between the latter and international human rights law), differences in State practice are to be expected.**84** The *German Climate Change Case* is notable due to its temporal aspects. Essentially, despite the far-reaching measures in

**82** *Ibid.* [182]–[183].

**83** See generally *ibid.* [184]–[265].

**84** Not all climate change litigation has so far yielded positive results. For instance, in Norway, applicants unsuccessfully argued violations of a right to a healthy environment in Norwegian constitutional law, as well as the right to life and the right to privacy and family life in the ECHR, before the Norwegian Supreme Court. *Nature and Youth v Norway* HR-2020-2472-P, Case no 20-051052SIV-HRET (Høyesterett, Supreme Court of Norway, 22 December 2020) [2]–[3]. According to the Court, while the activities at the centre of the complaint (regarding a set of licences granted by the State for the exploitation of petroleum on the continental shelf) affect Norwegian efforts against climate change, the specific activities alluded to would only have a minimal effect on Norwegian emissions in the future and hence would only fractionally impact adverse climate change. *Ibid.* [157], [159], [161], [167], [170]–[171]. The Court further distinguished the case from *Urgenda Foundation v the Netherlands* and partly disagreed with the Dutch Supreme Court in other regards. *Ibid.* [172]–[175]. As the Norwegian Supreme Court also argued its position with reference to and support with ECtHR case law, it cast some doubt on the future of pending climate change cases before the ECtHR. See generally *ibid.* [166]–[174]. See also, e.g., *Friends of the Irish Environment v Ireland* Appeal no 205/19 (Supreme Court of Ireland, 31 July, 2020) [9.4]–[9.5] (“[Friends of the Irish Environment], as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR … [T]he asserted right to a healthy environment is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights) … [S]uch a right cannot be derived from the Constitution.”).
Germany’s climate change law, the failures of the State to account for more emissions, which result in certain emissions being allowable until 2030, interfere with the rights and freedoms of future generations in advance. In other words, the situation creates an advance interference-like effect, or perhaps an intergenerational interference, that is contrary to the rights of future generations. That interference will increase in the future and no State will be able to single-handedly manage and completely prevent inconsistencies with human rights law. Another facet to this conclusion is that States can take measures to prevent widespread human rights violations for the time being, but what this also implies is that as adverse climate change continues to unfold and worsen, States would need to adopt more wide-ranging measures. And there does not seem to be an end to the need for such measures if adverse climate change continues to spiral out of control. The threat to the rule of law is intergenerationally grounded, as highlighted by such intergenerational facets of human rights.

Conclusion

How does the unwillingness or inability of States to combat adverse climate change intergenerationally impact human rights and by extension the rule of law? Whether States willingly or because of an inability, fail to adopt appropriate measures to combat adverse climate change, the impact on human rights risks becoming inadvertently negative. The harm caused to our environments by adverse climate change likewise extends to humanity, which is why the real enjoyment of human rights is affected by climate change. In addition, due to the intimate relationship between human rights and the rule of law generally, if the negative impact becomes unmanageable, the threat of adverse climate change also extends to human systems, including the rule of law. The negative impact on human rights is felt in the present, as is demonstrated by selected case law and State practice, but more importantly, a lack of action has the risk of spiralling and increasing. If more human rights are affected across society, with harms becoming increasingly widespread and difficult to abate and prevent, the effects on succeeding generations would accumulate and worsen over time. The risk to the rule of law could then morph into an existential crisis for law as we know it, in all States and in all
legal orders, even if one single State or a smaller group of States assume responsibility to tackle adverse climate change on their territories, due to the global nature of such global problems. This would at least apply until States change their practices for the betterment of the individuals residing under their jurisdiction (for instance, by using human rights as one of the standard setters for combating adverse climate change), or until States change their laws and human rights to the detriment of those same individuals. Failing this, the issue might then concern at what stage the damage done to the rule of law would suffer a point of no-return as the last rights of humanity stop yielding a desired effect or are bargained with and disposed of. There does not yet seem to be sufficient support to claim that the inaction of States in regard to adverse climate change is such a pattern or series of events which result in an intentional or unintentional disregard for human rights in general that extends temporally across generations. Certainly, the case law and practice are partly damning, but at the same time, it is too premature to say that the rule of law is being directly harmed. The rule of law is certainly at risk. That risk will increase over time if left unattended, and so now is the time to act in order to minimize and, hopefully, prevent a collapse of the rule of law.

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