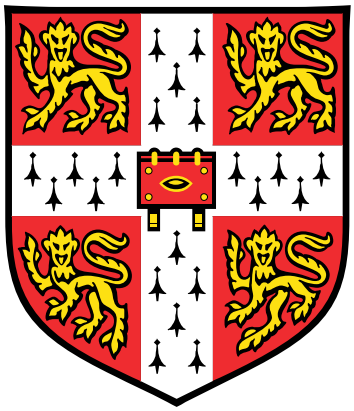
Rights and climate change mitigation

- Why the individual rights approach to climate change mitigation is not the right approach



AGNES HARRIET LINDBERG

Faculty of Law
University of Cambridge

This dissertation is submitted
for the purpose of
the PhD in Law
King's College, 31 October 2023

Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted, or, is being concurrently submitted, for any degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

Abstract

This dissertation examines the arguments of rights recently invoked in lawsuits addressing duties to mitigate greenhouse gas emissions. It asks whether these arguments correspond to how rights are typically understood in terms of philosophical ideas of rights. This question is not examined from a doctrinal but rather a philosophical lens: do the traditional philosophical ideas of rights extend to climate change mitigation? The dissertation analyses this question in the light of three philosophical theories of rights: (1) analytical theories of rights, (2) moral theories of rights, and (3) political theories of justice. The dissertation argues that duties to mitigate greenhouse gas emissions do not correspond, either conceptually or morally, to ideas of individual rights. An individual experiencing the detrimental effects of global warming does not hold a claim-right correlative to a duty to mitigate greenhouse gas emissions, and an individual's fundamental interest in avoiding these detriments does not justify the imposition of this duty. Instead, both the abstract duty to mitigate climate change, and also the specific duties to mitigate greenhouse gas emissions, concern the distribution of benefits and burdens of modern society. Distributional justice within and between political communities is a matter on which people legitimately disagree. The dissertation concludes that arguments claiming that there is only one "right" answer to climate justice are, at best, mistaken and, at worst, authoritarian.

Acknowledgements

I began pondering this project in 2015, the year that the Paris Agreement was adopted and the first legal cases invoking individual rights to establish duties to mitigate climate change reached both the courts and the global news. That pivotal year drew together my own engagement in both climate change and human rights student societies. Although I was fascinated by the combination of these two issues, I nevertheless harboured initial doubts as to their compatibility. When I formally embarked on this PhD project in 2018, I hoped to overcome these doubts by offering a sound argument for how climate change mitigation could be framed as an issue of individual rights. The dissertation submitted for examination does not, however, offer this argument. Instead, my research shows that individual rights do not provide an adequate framework for climate change mitigation. I hope the academic honesty in highlighting how philosophical ideas of individual rights do not provide ready answers for what each actor must do to mitigate climate change can inspire a more honest debate on how to solve this crucial question.

I am very grateful for having been given the opportunity to conduct my academic journey under the rigorous supervision of Professor Matthew Kramer. Being taken seriously by one of the greatest minds in legal and political philosophy, through regular meetings and numerous emendations and insightful comments on my chunks of texts, has been the greatest privilege and challenge of my life. Professor Jorge Vinuales has been a steadfast supporter of the journey and provided helpful advice throughout the process. I am also very grateful to Kjell Inge Røkke and Anne Grete Eidsvig for their generous support through the Aker scholarship. As an Aker scholar, I have been given the financial ability to pursue the project, while gaining friends for life. During the COVID-19 pandemic, with its public and private obstacles, I found the encouragement and support of Bjørn Blindheim, the scholarship's manager, of great help.

My work has matured through the opportunity to chair sessions of the Cambridge Forum for Legal and Political Philosophy, and by presenting at the Cambridge Legal Theory Discussion Group, the Research Training and Development Extension Programme Work-in-Progress Seminar, the Human Rights Doctoral Research Workshop, the Fridjof Nansen Institute 2019 Workshop, the International Political Science Association's 2020 conference, and the Climate Change and the Rule of Law Conference at the UCL. I am thankful to all the commentators and participants who engaged with my work at these events.

Writing a PhD takes a village, and I have been blessed with a very generous community. My cohort at the Cambridge law faculty has been a supportive extended family. I am especially grateful to my loyal library friends Nana Lalafaryan and Thea Chesterfield, and to my Cambridge Legal Theory Discussion Group co-convenors, Tony Zhou, Khomotso Moshikaro, and Giordana Campagna. Without Giordana's "Project 5", this thesis might not have seen daylight.

The King's community has provided me with pastoral care beyond my imagination. I am incredibly grateful to the formal and informal meetings of the Fax Society, with Api Hasthanasombat, Coen Vos, Suzette van Haaren, and Steph Crayton; to my rowing Gradmas Feli Pamatat, Janeska De Jonge, and Katie Staunton; to the Kingsfield Babes Roseanna Webster, Ruhi Patel, and Rini Gosh; and not forgetting the sauna club with Charlotte Johann. Barbara Steen deserves a separate thanks for being so generously available.

My community beyond Cambridge has also been of immense importance. Ane Sydnes Egeland and Guttorm Norberg Gundersen provided me with the necessary encouragement and support to pursue and finish this academic project. Their engagement with all aspects of this journey, as well as that of Hanna Nicholls, Hannah Hjeltnes, Mie Fuglseth, and Kristoffer Helton, has been invaluable. I am also grateful for the many discussions with Fred Zaumseil, Amin Afrouzi, Tomas Tobiassen, and Jenny Sandvig. A special thank you goes to the last-minute angels Heidi Sydnes Egeland and Sarah Whitehead.

I am very grateful to my family, Hanna Malene Lindberg, Hilde Mortvedt, and Leif Lindberg, for always being there for me, despite going through their own struggles. Stephen Oppong Peprah joined the last half of this journey, encouraging me to keep applying the necessary elbow grease. For that devotion, I will always be thankful.

I declare that this dissertation is the result of my own work, has not been submitted for any other degree and is within the word limit.

Agnes Harriet Lindberg
Cambridge, 31.10.2023

Contents

Chapter 1: Introduction
1.1 Overview of the project 9
1.2 The outline of my argument 11
1.2.1 Analytical theories of rights 11
1.2.2 Moral theories of right 12
1.2.3 Political theories of justice 15
1.3 The scope of the project 17
1.3.1 The focus on mitigation and human beings 17
1.3.2 The case law 18

Part I: Analytical theories of rights

Chapter 2: The Hohfeldian framework of rights
2.1 Introduction 26
2.2 The Hohfeldian table 27
2.2.1 The relation of correlations 29
2.2.2 The relation of opposites 34
2.3 Climate change mitigation and deontic duties 39
2.3.1 Rights as bulwarks against the aim of mitigation 39
2.3.2 Mitigation as an ostensible duty 41
2.3.3 Mitigation as pro tanto duties 43

Chapter 3: The Actors
3.1 Introduction 45
3.2 The bearers of duties to mitigate climate change 46
3.2.1 The global human community as a duty-bearer 47
3.2.2 Ad hoc collective of various actors as the duty-bearer 50
3.3 The holders of claim-rights correlated with duties to mitigate climate change 51
3.3.1 The will theory and mitigation duties 52
3.3.2 The interest theory and mitigation duties 57

Part II: Moral theories of rights

Chapter 4: Fundamental interests
4.1 Introduction 70
4.2 Three narratives of fundamental interests and climate change mitigation 71
4.2.1 The furthering of fundamental interests 72
4.2.2 A precondition for the fulfilment of fundamental interests 75
4.2.3 A minimum threshold for fundamental interests 77
4.3 Individual interests and the abstract duty to mitigate climate change 79
4.3.1 Interest-based justifications 80
4.3.2 Temperature targets 84
4.3.3 Groups 88
4.3.4 Implications 91
4.4 Individual interests and specific duties to mitigate greenhouse gas emissions 95
4.5 Conclusion 97

Chapter 5: Harm
5.1 Introduction 99
5.2 The current discourse on negative rights and climate change mitigation 100
5.3 A fictional narrative 104
5.3.1 The global climate as a glockenspiel of games of Russian Roulette 105
5.3.2 Four situations of causation 106
5.3.3 Fourt types of consequences 108
5.3.4 Adaptation 111
5.4 Climate change and harm to individuals 112
5.4.1 Human rights and tort law 113
5.4.2 A healthy environment 116
5.4.3 A safe climate 118
5.4.4 Implications 122
5.5 Greenhouse gas emissions and harm to individuals 123
5.5.1 The collective creation of climate change 125
5.5.2 Greenhouse gas emissions creating harm 126
5.5.3 Implications 135
5.6 Conclusion 138

Chapter 6: Wronging
6.1 Introduction 140
6.2 Salient aspects of the narrative of wronging 142
6.2.1 Side-effects 142
6.2.2 Doing and allowing 145
6.2.3 Implications 149
6.3 The structure and the force of the requirement to no emit greenhouse gases 151
6.3.1 Offsetting 151
6.3.2 Over-inclusiveness 156
6.4 Conclusion 158

Part III: Political theories of justice

Chapter 7: International justice
7.1 Introduction 161
7.2 Climate change mitigation as a topic of international justice 163
7.2.1 Extraterritoriality 163
7.2.2 Political justification 165
7.3 Just levels of climate change mitigation 170
7.3.1 Different principles of justice 171
7.3.2 Challenging the temperature limit 179
7.4 Just distribution of burdens 182
7.4.1 Different principles of justice 183
7.4.2 Challenging the current distribution 186
7.4.3 Implications 191
7.5 Conclusion 193

Chapter 8: National justice
8.1 Introduction 195
8.2 Political obligation 196
8.2.1 Obligation to follow mitigation laws 197
8.2.2 Illegitimate laws 206
8.2.3 The litigation trend 208

8.3 Legitimate authority 209
8.3.1 The abstract duty to mitigate climate change 210
8.3.2 Specific duties to mitigate greenhouse gas emissions 213
8.3.3 Two challenges 214
8.3.4 The litigation trend 218
8.4 Conclusion 220

Chapter 9: Standards of justice
9.1 Introduction 222
9.2 Moral standards 222
9.2.1 The jurisprudential idea of moral standards 223
9.2.2 Standards of just distribution in the discourse 223
9.3 Implications from the philosophical ideas of rights 229
9.3.1 Moral theories of rights 229
9.3.2 Political theories of legitimate disagreement 233
9.3.3 Analytical theories of right-holding 236
9.4 Conclusion 238

Chapter 10: Conclusion 240

Sources 243

Chapter 1: Introduction

1.1 Overview of the project

This dissertation examines the recent trend of so-called strategic climate change litigation in which rights are prominently invoked by plaintiffs to challenge duties to mitigate greenhouse gas emissions.[1] By the recent litigation trend, I mean the legal cases in a variety of jurisdictions that challenge governments and private companies for not mitigating greenhouse gas emissions, where rights found in legal instruments such as international or regional human rights treaties, constitutional or customary rights, or tort law are invoked by the parties who pursue the litigation. By strategic, I mean that the cases seek to bring about a broad societal change beyond the individual concerns of the claimants.[2] In discussing this trend, I typically refer to it as the case law on rights and climate change mitigation.

This litigation trend of connecting rights and climate change mitigation is not taking place in a vacuum. For instance, in the UN system, a Special Rapporteur on the promotion and protection of human rights in the context of climate change has been appointed.[3] The other UN human hights bodies have also addressed mitigation issues. In addition, the connection between rights and mitigation has become an important topic for many academics, especially for political scientists, moral philosophers, and legal scholars. The contribution of these academic and non-academic parties to the discourse is what I refer to as the "discourse on rights and climate change mitigation".[4] In this dissertation, I will often shorten the phrase "discourse on rights and climate change mitigation" to "the discourse".

To understand what is going on in this trend, for instance, why some litigants are successful, and others are not, the legal doctrine in question is an obvious focus of inquiry. Hence, a wide range of the legal discourse on rights and climate change mitigation is centred on the various doctrinal details of the legal instruments invoked or a comparative analysis of how such legal instruments are applied in different jurisdictions.[5] Although this project is not ignorant of these truly legal perspectives, it attempts something different.

---

[1] Often coined the rights turn by academics; Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?'; Rodríguez-Garavito, 'Litigating the Climate Emergency', 14.
[2] Here, I follow Setzer and Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot', 1.
[3] RES/48/14. Until 2021, the Special Rapporteur on Environment also covered climate change (mandate established in 2012).
[4] I will address this discourse further in section 1.2.
[5] In the political science discourse, many scholars investigate the success of not the legal case per se but the strategic aim of changing climate change policies – you can lose the battle but win the war. See, for instance,

The aim of this project is to analyse the philosophical ideas of rights underlying this litigation trend. Proposing the umbrella term "philosophical ideas of rights", I will examine three different types of rights theories: (1) analytical theories of rights, (2) moral theories of rights, and (3) political theories of rights, understood as theories of justice within a political community. This examination can be understood from two angles. The first angle takes its point of departure in the recent litigation trend and asks whether the invoked arguments of rights correspond to how rights typically are understood by these three philosophical ideas of rights. This angle sees the lawsuits as illustrations of various theories of rights and brings a new and philosophical lens to understand how the fast-emerging litigation trend seeks to invoke arguments of rights as a basis for duties to mitigate greenhouse gas emissions.[6] The second angle takes its point of departure in the philosophical ideas of rights and explores whether they can be successfully applied to the emerging issue of climate change mitigation. This angle is of theoretical interests to readers interested in philosophical analyses of rights and who are curious to know how such ideas apply to the global climate crisis.

Both angles offer a philosophical investigation and critique of the current discourse on rights and climate change mitigation. Thus, the contribution of this dissertation does neither rely on the practical doctrinal details of the material examined nor its direct relevance to any particular legal system. By examining the philosophical connection between rights arguments and duties to mitigate climate change, the project presents a perspective on theories of rights that the scholars of rights and doctrinal legal scholars might agree or disagree with.

The argument of this thesis is that the approaches to combine duties to mitigate climate change with ideas of rights are mistaken for at least three reasons. First, because an application of analytical theories of rights shows that individual human beings experiencing the detriment of climate change are not the holders of claim-rights correlative to specific duties to mitigate greenhouse gas emissions. Second, climate change mitigation is not justified by the conventional moral theories of rights. This applies both to the matter of grounding mitigation duties in fundamental interests and to the classification of greenhouse gas emissions as a detriment to fundamental interests. Third, there is legitimate disagreement

Batros and Khan, 'Thinking Strategically about Climate Litigation', 109. My project might lead to somehow similar conclusions, in that the trend represents important political claims for mitigation. However, the challenge I am interested in is whether we can understand the arguments as being true to the philosophical underpinning of rights.

[6] The dissertation is thus contributing to filling gaps recognised in the emerging scholarship on this trend. These gaps concern both the underlying philosophical ideas of rights and how these ideas relate to climate justice; Setzer and Vanhala, 'Climate Change Litigation', 2019, para. 3.4.

about both the level of mitigation and the distribution of mitigation burdens. Thus, we should recognise the political nature of allocating mitigation duties.

This latter point does not mean that there cannot be any moral standards applicable to duties to mitigate climate change. Rather, the main implication of my argument is that such moral standards should not be understood as issues of rights in the narrow sense. Philosophically, the alleged duty to mitigate does not have its appropriate legal authority in instruments protecting fundamental rights or the individual as the holder of the correlative claim-right. Instead of deriving duties to mitigate from ideas of rights in a narrow sense, I argue that they should be understood as a "new" type of duty based in principles of distributive justice.

Although the project undermines the ongoing attempts to argue that duties to mitigate climate change follow directly from the theories of rights typically accepted in the philosophical discourse, it does not imply that climate change mitigation is not of utter importance. Thus, the project can be understood as reinforcing a well-known criticism of seeing all salient issues as matters of "individual rights".[7]

1.2 The outline of my argument

In this section, I outline the arguments in the following eight chapters and comment on the relevance of the three accounts of rights investigated in those chapters.

1.2.1 Analytical theories of rights

Part I of this dissertation investigates rights analytically. Not all scholars begin with such an analytical examination but jump directly to the contents and justifications of rights. I will, however, argue that the resultant theorising is best understood within an analytical framework. In addition, the analytical investigation provides independent substantive answers to the assertion that climate change mitigation is an issue of rights.

Two analytical perspectives on rights will be examined. In Chapter 2, we explore what is meant by a reference to "rights" using the Hohfeldian framework. When applied to the topic of climate change mitigation, the entitlement at stake is a claim-right correlative to an abstract duty to mitigate climate change. For all practical purposes, we are mostly

[7] Marx, 'On the Jewish Question'.

interested in the specific duties to mitigate greenhouse gas emissions implementing this abstract duty. However, very little content can be derived from an abstract duty to mitigate. The establishment of the existence and contents of specific duties to mitigate greenhouse gas emissions is based on normative considerations of how the abstract duty should be rendered concrete, which is an important premise for the further discussions in the following Parts II and III.

Another central premise is the special structure and force of a claim-right or duty as a deontic position, shown in situations where a duty contradicts or conflicts with other considerations. Investigating climate change mitigation as an alleged matter of claim-rights and correlative duties thus requires us to ask whether the duties are ostensible or *pro tanto* obligatory.

The second analytical perspective tells us who the bearers of the duties to mitigate and the holders of the correlative claim-rights to mitigation are. Chapter 3 examines how we identify potential and actual actors, both duty-bearers and right-holders; examinations that also underlie the discussions in the following Parts II and III. In addition, the examinations provide independent insight into the appropriateness or inappropriateness of understanding mitigation as an issue of individuals' rights. The analysis emphasises that the connection between mitigation and rights does not amount to a situation in which the people adversely impacted by climate change are holders of rights correlative to specific mitigation duties.

These analytical aspects of rights are not only at play in the current trend of lawsuits. Rather, they are at the forefront of understanding what is at stake in the disputes. For instance, jurisprudential issues of standing typically engage both the analytical question of right-holding and the analytical question whether specific mitigation duties have been legally assigned to duty-bearers.

1.2.2 Moral theories of rights

Part II is concerned with moral rights-based justifications for climate change duties. Moral rights-based justifications are taken here to mean justifications that place individual human beings at the forefront of what is morally at stake in "rights". It is often connected with theories of "human rights" or "fundamental rights".[8]

[8] Identifying the underlying moral justification of the case law is challenging on at least two accounts. First, because the cases rarely provide an explicit moral justification and second, because it is often possible to provide different justifications for the same entitlement/correlative relation. Consequently, the examination in

One might question why analysing moral justifications is central to understanding a recent trend in legal lawsuits. One way to justify my interest in these underlying moral justifications is that it helps us understand the nature of duties to mitigate climate change. Although the philosophical analysis of the moral arguments is not directly linked to the concrete doctrinal context of the lawsuits, we can appreciate the philosophical insights as we ponder the morality of current law or how the current law should develop from taking account of these moral insights. This dissertation considers whether moral arguments associated with "rights" fit the pressing issue of climate change mitigation.

However, pondering these moral issues can also be given a more direct legal relevance. In its weakest form, this view holds that certain moral reasonings are already part of the current law. Many jurisdictions have incorporated moral ideas related to the treatment of human beings in, for instance, their constitutions, human rights acts, and tort law. Investigating how typical moral justifications of rights fit the issue of climate change mitigation can come to have legal consequences in these jurisdictions. This applies especially to hard cases where we have "run out" of ordinary legal sources and fall back on these underlying moral considerations.[9]

I think the current trend of strategic litigation presupposes the inclusion of moral considerations in the invoked legal doctrine. They are strategic and novel precisely in the sense that they seek to apply moral principles within the legal system to the issue of climate change mitigation. Although the conclusions reached in this part need to be subjected to a fine-grained doctrinal assessment before they can have any direct legal bearing in a particular jurisdiction, they target what I see as the crux of the moral arguments brought forward in the discourse. Thus, this part enables us to evaluate the moral appropriateness of justifying duties to mitigate greenhouse gas emissions by reference to in theories of rights.

There is also a stronger position on the connection between moral theories of rights and climate change law. From a natural law perspective, one could argue that regulations instituting high greenhouse gas emissions are so immoral that they are not to be classified as

---

this part will have to infer moral justifications from, for instance, statements of aims, factual backgrounds, and the further context.

[9] That moral reasoning enters legal reasoning has been forcefully emphasised by Dworkin, *Taking Rights Seriously*, chaps 2–4. He targets this insight against legal positivists insistence on the separability of law and morality. However, legal positivist can also take account of moral reasoning being part of legal reasoning; Green and Adams, 'Legal Positivism', para. 3. What the so-called the inclusive legal positivist/incorporationist and the exclusive legal positivist disagree about is whether this moral reasoning then is to be classified as being fully part of the legal system (like custom) or still remains external to it (like foreign law in a conflict-of-law case). See Kramer, *Where Law and Morality Meet*, chap. 1.

"law".[10] Another approach is to assert that there is a *natural necessity* to regulate certain behaviour for a society to exist, which extends to controlling emissions.[11] Part III of this dissertation addresses these issues from the angle of political justice. For Part II, the point is whether mitigation duties can be adequately justified through some standard moral rights theories.

Part II explores two types of justifications centred on the alleged holders of the potential claim-rights and analyses how they apply to mitigation duties:[12] (1) a justification maintaining that an individual's fundamental interest grounds duties to mitigate and (2) a justification maintaining that the emitting of greenhouse gases is a detriment to individuals' fundamental interests.

Chapter 4 engages with the idea that fundamental human interests ground duties to mitigate. This understanding of rights is associated with Joseph Raz and is currently being picked up in the climate change context. However, our analysis will show that this type of argument cannot adequately justify abstract or specific duties to mitigate climate change. It is the aggregated interests, rather than the interests of individual human beings, that can justify duties to mitigate emissions.

Another narrative on how moral ideas of rights and mitigation are linked focuses on how greenhouse gas emissions create a detriment to people. The perspective is no longer concerned with establishing mitigation as an optimal situation but with the negative duty to avoid emitting greenhouse gas emissions as such behaviour wrongs individuals.

Chapter 5 explores a central element of this reasoning, namely, that emissions of greenhouse gases harm individual human beings. The chapter argues that it is impossible to vindicate concrete duties to mitigate climate change based on the harm various emitting behaviour creates.

Since we cannot assert that an actor has wronged someone based on whether their emitting behaviour has caused harm, all moral theories of rights relying on such consequences fail. The further investigation of the narrative of mitigation being a duty justified in ideas of negative rights in Chapter 6 does not seek to overcome this challenge.

---

[10] Fuller, 'Positivism and Fidelity to Law'; Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)'.
[11] Drawn vaguely from Hart, *The Concept of Law*, 193–200.
[12] Ronald Dworkin has argued that the justification of duties can be divided into right-based, duty-based and goal-based; Dworkin, *Taking Rights Seriously*, 208. When the right-based types of justification are focusing on the interests of the alleged holders of claim-rights correlated to the duties in question, they are more appropriately denoted as interest-based. In Chapter 9, we will encounter a duty-based moral justification when we see that moral thresholds applicable to duties of mitigation can be understood as upholding the moral integrity of the duty-bearer.

Instead, I have included the chapter to highlight other aspects of the argument of wronging invoked in the discourse, like the emphasis on doing compared to allowing. However, this chapter ends up supporting the conclusion from Chapter 4: attempts to justify duties to mitigate climate change on the basis of typical moral theories of rights are bootless.[13]

1.2.3 Political theories of justice

Part III discusses another approach to climate change mitigation, namely, that of political theories of justice. According to Onora O'Neill, theories of justice take the perspective of identifiable agents and ask what they ought to do.[14] The duties established will have corresponding claim-rights, but these claim-rights and their holders do not play the same prominent part in the justification. Hence, theories of justice typically cover similar issues as the human/fundamental rights perspectives addressed in Part II, but they conduct their analysis from the opposite angle.

Another prominent feature of theories of justice is their particular way of being normative. Whereas the moral theories of rights explored in Part II typically justify claim-rights and their correlative duties by reference to fundamental features of the human condition,[15] theories of justice are political.[16] John Rawls has famously presented such a political form of normative justification through his method of a hypothetical agreement reached under a veil of ignorance.[17] In his *Theory of Justice*, Rawls lays out the principles that he considers to result from such a deliberation.[18] However, in his later works, he emphasises that the decisive feature of justice is its type of justification and not the details of his specific theory of justice. The political justification is characterised by how it can be

[13] To use a Dworkinian language; Even if we include justifications that are more centred on aspects of the duty-bearers, it is a goal-based reasoning about goodness and fairness that is at stake.
[14] O'Neill, 'Justice without Ethics: A Twenty-Century Innovation?', 136.
[15] Not all moral theories of rights are interest-based in this way. For instance, Matthew Kramer includes the perpetrator-focused reflection in his justification of moral rights; Kramer, *Torture and Moral Integrity*, para. 3.2.3.
[16] O'Neill, 'Justice without Ethics: A Twenty-Century Innovation?', 146. The political perspective is also normative; Rawls, *Political Liberalism*, xlii.
[17] Jürgen Habermas provides another take on how justice is political through his theory of inclusive public discourse. For an overview, see Bohman and Rehg, 'Jürgen Habermas'.
[18] The first is that everyone is to be vested with the greatest array of civil liberties and civil rights consistently with the vesting of an equal array in everyone else. This principle is widely accepted and represents the core of liberal theories. The second principle is more controversial regarding its subject matter: redistribution, and the solution Rawls provides: equal opportunities and the difference principle. The different principles says that social and economic inequality is acceptable as long as the difference is to the greatest benefit of the least advantaged; Rawls, *A Theory of Justice*, 266.

shared in a community independent of the member's moral commitments and positions.[19] In a liberal democracy, this political justification usually draws on liberal ideas such as equality and freedom.[20] Nevertheless, this justification can change, including the principles of justice and their concretisation underlying the justification.[21]

An additional way justice can be understood as political is by a reference to its subject matter: human communities.[22] This subject matter not only singles out the relationships between the members of a community; the relationships between members of the community and the governing authority and the relationships between communities are also at stake. Thus, we are asking how agents in such relationships should behave – or we question whether these relationships are of particular significance to our normative reasoning.

The part is composed of three chapters. In these three chapters, we encounter two questions about justice relevant to the current case law on climate change mitigation. The first type inquires into the content of climate justice. Can climate change mitigation be given a political justification? If so, what are the contents of a just abstract duty to mitigate and of the concrete mitigation duties? The second type investigates how disagreement about the specific contents of just mitigation duties should be approached. Can current climate change mitigation law be legitimate even though many people consider its content unjust?

The three chapters are not only distinct in their addressing of different actors – the international community, nation-states, and "everyone". They are also distinct in the way they address the issue of justice. Chapter 7 presents common theories of climate justice and explores how they apply to mitigation as an issue of international law. Chapter 8 takes a more foundational perspective of political philosophy, investigating what insight liberal theories of political obligation and authority give to the issue of legitimate disagreement within a political community. Chapter 9 discusses whether some normative views on distribution have entered into some legal systems as moral standards. This chapter summarises my analyses of how ideas of rights relate to climate change mitigation by showing how the conclusions from

[19] One way Rawls addresses this is through the requirement that arguments of justice are reasonable. There are two criteria to reasonableness; Rawls, *Political Liberalism*, 54. First, the willingness to propose fair terms of cooperation and abide by them provided others also abide by them. Second, the willingness to recognise the burdens of judgement, meaning the provision of arguments on evidence and assessments of their weight, interpretation of concepts, our total experience of life, the different kinds of normative considerations at stake and how we make an overall assessment and set priorities. On all these issues, reasonable agents will disagree; Rawls, 56–57.

[20] Hence, the parties share a justificatory framework of liberalism despite there being potential disagreement on how these values are to be spelled out; Quong, *Liberalism without Perfection*, 207.

[21] Rawls, *Political Liberalism*, 399; Quong, *Liberalism without Perfection*, chap. 7.

[22] Greek meaning of *politica* as "the affairs of the cities".

the foregoing chapters apply to a moral standards approach. The conclusion is that neither the existence of mitigation duties nor the outer limits of their content are about individual right. Rather, climate change mitigation is an issue of distributive justice.

1.3 The scope of the project

Before we embark on the argument outlined above, this section will say some few words on the scope of the project. Here, I briefly comment on mitigation and rights as the focus of this project, as well as on the case law under examination.

1.3.1 The focus on mitigation and human beings

This project follows the common distinction between climate change mitigation and climate change adaptation. Mitigative measures aim to avert the steady increase of concentrations of greenhouse gases in the atmosphere. This can either be done by reducing emissions of greenhouse gases or enhancing carbon sinks, like forests. Adaptive measures aim to make less serious the consequences of anthropogenic global warming. The contents of duties to mitigate and duties to adapt are different and this is reflected in the general engagement with climate change. For instance, the latest scientific knowledge on mitigation is assessed by the IPCC Working Group III, whereas the issue of adaptation is assessed by the IPCC Working Group II, and the international climate change regime distinguishes between duties of mitigation and adaptation.[23] In the climate change litigation, there is a clear distinction between claims for adaptation and claims for mitigation.[24] This project is concerned with mitigation. However, as will become evident in our subsequent discussion, the two are highly interlinked when seen from the perspective of fundamental interests.

When this dissertation investigates the connection between mitigation and rights, the rights in question are the claim-rights correlative to the duties to mitigate. However, the issue of climate change mitigation also brings up other issues of rights, for instance, how measures to mitigate might violate other entitlements, such as freedom of expression and the indigenous people' access to land. This project primarily addresses the connection of correlation between claim-rights and duties of mitigation, but also probes the connections to other entitlements.

[23] Paris Agreement Article 2 (a) and (b).
[24] An early famous adaptation case is *Leghari* from 2015.

A last point to raise about the scope of this project is my emphasis on human beings as the subjects of rights. For some, it might appear inappropriate to not expand the investigation to include the interest of animals or even natural phenomena in the examination of right-holding and moral justification of mitigation duties.[25] The reason why I have not included this perspective in this dissertation is partly that the current litigation trend involves legal provisions that protect human beings.[26] Including the controversial topic as to whether or not animals and inanimate entities are right-holders would take us away from the core issues of the litigation trend I am interested in.[27] So, for my purpose of understanding the current litigation trend, it is not necessary to expand the analysis.[28]

From the aim of understanding whether ideas of rights in a narrow sense are applicable to climate change mitigation, the emphasis on human beings also appears sufficient. When this dissertation concludes that the traditional ideas about rights do not apply to duties of mitigation, this would also hold true if human beings were replaced with other entities in the analysis: for instance, if the analytical account of right-holding were expanded to a polar bear experiencing the detriment of climate change or if the interest of the polar bear were to ground specific mitigation duties.[29] Hence, it is the general framework of the traditional theories of rights that renders them inapplicable to climate change mitigation. These challenges do not disappear by including individual animals or natural phenomena. Instead, we must draw on a theoretical framework other than individual rights to better understand duties to mitigate climate change.

1.3.2 The case law

The recent body of legal cases connecting individual rights and climate change mitigation is the backbone of this dissertation. Legal arguments about connections between individual rights and climate change mitigation duties had a precursor in the academic debate, which

[25] This is an area currently under rapid development both in the philosophical and legal discourse. See, for instance, Boyd, *The Rights of Nature*.
[26] An exception is how the litigants in *Klimaatzaak* also invoked the rights of 84 trees, a claim that was dismissed on standing; 56.
[27] In Chapter 4 and Chapter 8, I address the role of future generations. However, the claimants do not rely on future generations as the right-holders of their claims. They follow the previous UN Special Rapporteur on human rights and the environment John Knox, emphasising that children of today will live in the near-future when these adverse consequences materialise; A/HRC/37/58, para 67.
[28] The focus on human beings has also proven to be a fully adequate analysis within the limits of a dissertation. Strong pragmatic considerations therefore make it rational to engage with one type of question instead of spreading the attention too wide.
[29] There are philosophical attempts to extend traditional rights theories beyond human interests; see, for instance, Varner, *In Nature's Interests?*

mainly pertained to the use of economic cost-benefit analysis to justify the correct level of mitigation.[30]

Although often hidden as a critique of how the interests of future generations were weighted in the economic analysis,[31] the real issue appears to be a general concern with what is at stake: namely, people's fundamental interests. In the introduction to the seminal volume *Human Rights and Climate Change*, Humphreys notices with surprise the marginal role of human rights in the arguments for why climate change should be tackled.[32] In that volume, Simon Caney highlights the detrimental consequences climate change has on a wide range of fundamental interests.[33] Another similar perspective was put forward by John Broome, who argues that a correct moral understanding of mitigation takes into account the claim that the emitting of greenhouse gases harms people.[34]

This early philosophical highlighting of rights as the appropriate moral point of reference for climate change mitigation has been taken up by legal scholars.[35] For instance, both Sumudu Ataputta and Margaretha Wewerike-Singh wrote early books especially highlighting how mitigation duties follow from international human rights law.[36] By stressing the potential connection between mitigation and rights as a topical legal question, they paved the way for the connection to be tested in courts.[37]

A parallel precursor for the litigation trend in positing a potential connection between individual rights and climate change mitigation has been the UN human rights bodies. In the UN system, climate change was raised as a special issue by the Human Rights Council in 2008, and a year later the Office of the United Nations High Commissioner for Human Rights issued a report on the relationship between climate change and human rights.[38] The human rights bodies have since worked to raise awareness of how fundamental interests are affected

[30] The outcome of this economic analysis would rest on how much one should discount the future value. A main dispute was between William Nordhaus, who applied a discount rate of 4.5 and Nicholas Stern who argued that the correct rate was 1.5; Nordhaus, *A Question of Balance*; Stern, *The Economics of Climate Change*. The debate is still ongoing, although a recent study has found that most current economics agree on a discount rate of 2; Drupp et al., 'Discounting Disentangled', 111.
[31] Broome, *Climate Matters*, 111.
[32] Humphreys, *Human Rights and Climate Change*, 2–3.
[33] Caney, 'Human Rights, Responsibilities, and Climate Change', 229.
[34] Broome, *Climate Matters*, 74.
[35] See, for instance, Voigt, 'State Responsibility for Climate Change Damages'; Knox, 'Climate Change and Human Rights Law'; Knox, 'Human Rights Principles and Climate Change'.
[36] Atapattu, *Human Rights Approaches to Climate Change*; Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*.
[37] The question is now typically addressed in environmental law textbooks; See, for instance, Bodansky, Brunnée, and Rajamani, *International Climate Change Law*, 309; Dupuy and Viñuales, *International Environmental Law*, 394.
[38] A/HRC/RES/7/23, A/HRC/25/53

by a changing climate, and they argue that the international human rights system could meet new challenge of climate change mitigation.[39]

Against this background, a fast-expanding number of cases from around the world address climate change mitigation through various legal devices pertaining to individuals' fundamental interests.[40] This project will mainly be concerned with the high-profile, or strategic, cases.[41] These are cases which typically have strong NGOs behind them that informally collaborate to explore ways of successfully establishing climate change mitigation duties.[42] In addition, they are picked up as the common corpus referred to in other cases and in the academic literature and the media.[43] Thus, this project must not be read as a work of reference for an overview of the entire case law.[44] Rather, it is a study of the relation between theories of rights and climate change mitigation duties, drawing on how this connection is presented in recent case law.[45]

At this juncture, I should supply a terse overview of the judicial cases that will figure most prominently in this dissertation. The strategic litigation trend that will be under review in this dissertation started with the Dutch *Urgenda* case.[46] The case, launched in 2013 by the Urgenda foundation on behalf of 886 Dutch citizens, challenged the Dutch 2020 mitigation target of a 20% reduction in greenhouse gas emissions compared to 1990-levels. The plaintiffs claimed that the Netherlands had to reduce its greenhouse gas emissions by 25-40%

[39] While awaiting the decisions in the caselaw, I started the project by going through all the references to climate change made by the UN Human Rights Bodies since 2008. Once the decisions from the highest national courts started to emerge, my focus shifted to primarily engaging with them. When this dissertation still makes references to how the connection between rights and mitigation is understood within the UN system, this is because the caselaw often follows the lines of argument advanced by the human rights bodies. There is, moreover, an independent value to investigating the understanding of rights applied by the UN Human Rights Bodies when addressing mitigation. As I have not kept track of, for instance, the explosion of country reports now addressing the issue of climate change mitigation, this project should not be understood as an extensive mapping of how the UN Human Rights system currently addresses climate change mitigation.

[40] Various scholars have mapped this body of cases; for instance, Savaresi and Setzer, 'Rights-Based Litigation in the Climate Emergency'.

[41] Strategic in the sense that they aim at governing; Gloppen and Clair, 'Climate Change Lawfare'; Batros and Khan, 'Thinking Strategically about Climate Litigation', 104.

[42] Setzer and Higham, 'Global Trends in Climate Litigation: 2021 Snapshot', 23, 32. The Urgenda foundation has worked to replicate this type of case around the world, collaborating with Client Earth, Friends of the Environment, Greenpeace etc. Many of the conferences I have attended during the PhD have deliberately catered for sharing experiences amongst different initiatives.

[43] A challenge with this approach of gathering cases is that it might reinforce a potential blind spot of cases from the Global-South. See, for instance, Peel and Lin, 'Transnational Climate Litigation'.

[44] Such tracking of the development is done by, for instance, the Grantham Institute on Climate Change and the Environment and the Sabin Centre for Climate Change Law; Setzer and Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot'; Rodríguez-Garavito, 'Litigating the Climate Emergency', tbl. 1.1.

[45] Even if I have overlooked cases, for instance, because I am overly focusing on cases from the Global-North, the philosophical analysis of the connection between rights and mitigation still holds.

[46] Hence, I am concerned with the "third wave" of climate change litigation; Setzer and Higham, 'Global Trends in Climate Litigation: 2021 Snapshot', 23. Equally early cases were *Leghari* from Pakistan and *Our Childrens Trust* from the US. However, they have not been replicated in the same way as *Urgenda*.

by 2020. In 2015, the Hague District Court ordered the Dutch state to limit the joint volume of Dutch annual greenhouse gas emissions by 25 % (compared to the levels of 1990) by 2020. In 2018, the Hague Court of Appeal upheld this decision, and in 2020 the Dutch Supreme Court followed suit.

The Urgenda foundation invoked a variety of legal authorities to argue for the existence of a duty to reduce Dutch emissions by 25-40% by 2020. They relied on the Dutch constitution, the civil tort law obligation to take due care, and the right to life and the right to private and family life enshrined in Articles 2 and 8 of the European Convention on Human Rights (ECHR). Neither the District Court nor the Court of Appeal found that they had the authority to assess whether the Dutch Constitution was breached.[47] The District Court did not find that Urgenda had standing to bring a claim under the European Convention on Human Rights.[48] The court nevertheless found that these human rights constituted the content of the duty of care proclaimed in the Dutch Civil Code.[49] However, the Court of Appeal and the Supreme Court both based their decisions explicitly on the rights enshrined in the European Convention on Human Rights. Due to the success of *Urgenda*, many similar cases were launched in a wide range of jurisdictions.[50]

In addition to the final decision in *Urgenda,* 2020 saw a range of cases reaching their final decision in national courts. In *Arctic Oil,* the Norwegian Supreme Court decided that the granting of a petroleum search concession in the Barents Sea breached neither the constitutional right to a healthy environment nor the ECHR. The same year, the Swiss Supreme Court rejected *KlimaSeniorinnen* on the basis that the elderly women did not have standing according to Article 34 of the ECHR.[51] The Irish Supreme Court also made the final decision in *FIE*, where they denied that a right to a healthy climate was protected in the Irish constitution or the ECHR.[52] Nevertheless, they decided that the government's mitigation plan

[47] *Urgenda*, District Court, para 4.36.
[48] *Urgenda*, District Court, para 4.45.
[49] *Urgenda*, District Court, para 4.52. In *Shell*, the Dutch District Court used the same argument of a duty of care when it in 2021 decided that the multinational energy company Shell had to comply with a similar reduction target.
[50] As of 2021, 37 cases were filed based on Urgenda; Setzer and Higham, 'Global Trends in Climate Litigation: 2021 Snapshot', 23. The cases relevant for this project are *FIE, Shell, Sacchi, Arctic Oil, Neubauer, Family Farmers, Sharma, Klimaatzaak, Affaire du siècle* and *KlimaSeniorinnen.* When I started the PhD in 2018, these cases had either not yet reached court or if they were decided in the first instance they had been appealed. At the time of writing up in 2023, many of these cases have now been settled by the apex courts. *Shell, Sharma* and *Klimaatzaak* are exceptions to this.
[51] They were not affected any more than everyone else in Switzerland, and the targets in the Paris Agreement are currently not breached; *KlimaSeniorinnen*, para 5.4.
[52] *FIE*, para 8.17.

was *ultra vires* the national climate act.[53] Similar decisions were reached by the French Counsel of State in *Commune de Grande-Synthe* and the Paris Administrative Court in *Affaire du siècle*, both finding that the government must do more to fulfil its 2030 mitigation target but refusing to link this decision to fundamental rights.

2020 also saw most recent decision of substance in *Our Children's Trust*. In that case, several children sought an injunction ordering the US federal government to make a plan to phase out fossil fuels and curtail emissions to stop the breach of their constitutional rights. The US Ninth Circuit Court found it "beyond the power of the court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches".[54]

At the international law stage, the Human Rights Committee adopted its views on *Ioane Tetiota* in 2020. In that non-refoulment case against New Zealand, the Committee found that Mr Tetiota could be sent back to the low-lying island state of Kiribati despite the adverse consequences of climate change already being experienced in the country.[55]

Apart from *Urgenda*, the cases from 2020 did not establish a link between individual rights and climate change mitigation. This changed partly with the German Federal Constitutional Court deciding *Neubauer* in 2021.[56] The case has strong similarities to *Urgenda*, in that a group of individuals challenged the legality of the German climate change mitigation policy. However, the German Court did not rely on the ECHR in their decision, but only assessed the German climate act against the German Basic Law. The Court's decision is based on a wide range of assessments. First, the Court investigated whether the current German mitigation effort complies with the national targets. Then, they assessed whether the national targets comply with the right to life and the environmental provision of the Basic Law. For the latter assessment, the Court postulated a fair carbon emission budget for Germany. Although it found that the current 2030 target will be within this fair budget, they found that the budget will likely run out in the early 2030s.

[53] *FIE*, para 6.48.
[54] *Our Children's Trust*, p 5.
[55] The Committee found that it was not in a position to conclude that New Zealand's assessment of the adaptation measures taken by Kiribati was arbitrary and erroneous; para 9.12.
[56] Another German case that will be addressed is *Family Farmers* decided by the Administrative Court in Berlin in 2019. Inspired by *Urgenda*, a group of farmers challenged the German 2020 target on the basis that it violated a wide range of constitutional rights. The Court dismissed the case on the basis that the government had wide discretion in establishing such targets.

When the Federal Constitutional Court ordered the state to enact fresh legislation to concretise the plan for emission reduction in the period after 2030 to reaching net-zero in 2050, this conclusion was reached on the basis of two additional constitutional considerations. First, because people in Germany have a constitutional right to freedom, the government must make sure that the measures taken to mitigate are not restricting people's freedom disproportionately. When Germany's leeway is close to running out by 2030, the Court feared that the government would have to enact very comprehensive and invasive measures in the following years to come. To make sure this does not happen, the Court ordered the government to come back with a plan for mitigation after 2030.[57] Second, the procedure for establishing reduction targets for the years after 2030 was struck down because the Bundestag did not have sufficient influence on this process. Thus, the Court found that targets must either be provided in primary legislation or the criteria for secondary legislation must be outlined more clearly.

The year of 2021 also saw the UN Child Committee not granting the children in *Sacchi* standing in the cases brought against the G20 countries that have ratified the individual complaint mechanism of the Child Convention.[58] In all of these complaints, the main reason for rejecting standing was the subsidiary principle, as the children had not first brought cases in the respective countries.[59]

A decision on the merits was reached by the UN Human Rights Committee in *Torres Straight Islands* a year later, in 2022. However, the majority did not engage with the question of mitigation and only found that Australia had breached their duties by not implementing necessary adaptation measures.[60] 2022 also saw the Brazil Supreme Court delivered their decision in *PSB*, ordering the government to comply with its deforestation commitment.[61] I also address *Sharma* as part of the strategic litigation trend. That tort law case concerning the granting of a coal mining concession by the Australian government was dismissed by the

[57] The German Climate Change Act prescribed that the plan for mitigation had to be presented in 2025 but the Court pushed this forward.
[58] Argentina, Brazil, France, Germany and Turkey.
[59] It will be interesting to see if ECtHR will reach a similar conclusion in *Portuguese Children*, which is to be heard in 2023.
[60] The Committee did not find a breach of the Covenant's Article 6 right to life (para 8.8) but found a breach of the Article 17 right to home, private life, and family (para 8.12) and the Article 27 right to their indigenous culture (para 8.14).
[61] In 2022, the Human Rights of the Philippines issuing their long-awaited final report in *Carbon Majors*, looking into the role of fossil fuel companies in creating global warming. Because this is a long-awaited report from a semi-judicial national body that has been driving the research topic of connecting ideas of rights and climate change duties.

Federal Court in 2022 when the full court did not find a breach of a duty of care by the Australian government.

Now that we have reached 2023, many of the European cases from the past years have been brought before the European Court of Human Rights (ECtHR). The court has already held an oral hearing in the Grand Chamber for *KlimaSeniorinnen,* and a decision is expected in the early autumn.[62] The hearing of the new case *Portuguese Children*, which challenges the export of petroleum from a wide range of European countries, occurred just before the submission of this dissertation together with *Artic Oil*.[63] The failed implementation of *Neubauer* has also been brought as a claim to the ECtHR.[64] Moreover, the UN General Assembly has asked the International Court of Justice (ICJ) for an advisory opinion on states' responsibilities to protect the climatic system under international law.[65] This dissertation cannot await these decisions.

In addition to the central cases mentioned above, the dissertation will also sporadically address earlier mitigation cases,[66] or cases which do not mainly explore the connection between rights and mitigation but still provide some insight into the current legal assessments of mitigation.[67] A last group of cases are those that concern climate change mitigation and rights but from the opposite perspective of that investigated in this dissertation: namely, that measures of mitigation can violate people's rights.[68] For instance, there is a wide range of cases challenging mitigation measures, especially windfarms.[69] The case that I will use as the main reference for this perspective is *Fosen*. In 2021, the Norwegian Supreme Court decided that the granting of a permission to build a wind farm on land used to herd reindeers violated the indigenous rights of the affected Sami population.

[62] The hearing in the Grand Chamber was held on 29 March 2023. At the same occasion, the ECtHR also heard *Careme* based on *Commune de Grande-Synthe*.
[63] The *Arctic Oil* decision has been challenged by two different plaintiffs; *Greenpeace Nordic* and *The Norwegian Grandparents*. In addition, two new cases challenging the emissions from a wide range of European states have been launched by Italian children: *Uricchio* and *De Conto*.
[64] *Engels*. In addition, there is a pending case against Austria filled by a child who is wheelchair-bound in high temperatures (*Müllner*) and cases challenging the European Energy Treaty (*Soubeste*).
[65] A/RES/77/276.
[66] For instance, *Plan B* and *Colombian Amazon*.
[67] For instance, *Heathrow*, *Carvahlo* and *Lliuya.*
[68] An old case from the UK illustrating this point is *Dimmock* from the UK, in which the court found that schools had to highlight what was mainstream knowledge and what was a political opinion in *Al Gore's film An Inconvenient Truth*. Another example is how the company *RWE* is bringing a dispute under the EU Energy Charter challenging the Dutch government's abrupt policy to close coal plants in its implementation of *Urgenda*.
[69] See, for instance, Martin, 'Wind Farms and NIMBYs', 455.

Part I: Analytical theories of rights

Chapter 2: The Hohfeldian framework of rights

2.1 Introduction

This chapter is concerned with the central analytical question of what we mean when we refer to "rights" in a legal context. I will rely on the analytical framework provided by Wesley Newcomb Hohfeld.[70] The Hohfeldian framework shows how "rights" can be understood as four different entitlements (claim-right, liberty, power, and immunity) which all have their respective correlatives (duty, no-right, liability, and disability). In addition to this relation of correlations, the Hohfeldian framework also includes the relation of opposites. The four different entitlements (claim-rights, liberty, power, and immunity) all have their respective opposites (no-right, duty, disability, and liability), which enables us to distinguish between logical contradictions and conflicts. This latter distinction comes in useful when we explore a key feature of deontic duties and their correlative claim-rights: namely, that they retain their structure and force even when overtopped by more salient considerations.

Subsection 2.2.1 shows how mitigation can be an issue of all four entitlements and how they are all being invoked in courts. Nevertheless, the central entitlement asserted is a claim-right held vis-à-vis an entity to the mitigation of greenhouse gas emissions, meaning that this entity has a duty to mitigate greenhouse gas emissions. The decisive questions are thus to establish *who* the duty-bearers are and *how* they are to behave. How we establish such mitigation duties is the pervasive question of this dissertation. By briefly observing that these duties do not follow logically or conceptually from the abstract idea that global climate change must be mitigated, the section foreshadows the conclusions in later chapters: specific mitigation duties are the product of an allocation of the burdens to fulfil this abstract idea.

Subsection 2.2.2 elaborates on the relation of opposites and highlights the difference between a logical contradiction and a conflict between duties. In the context of climate change, this insight is primarily of interest when we investigate if the requirement to mitigate is a *pro tanto* duty that can come into conflict with other requirements: is greenhouse gas emission mitigation a deontic duty that retains its existence in the situation of conflict?

Investigating the deontic character of duties provides another explanation for why the pervasive question of this dissertation is how to establish the content of mitigation duties. In

[70] Following Matthew Kramer, I hold that Hohfeld's analysis also holds for moral rights as investigated in Part II of this dissertation; Kramer, *Where Law and Morality Meet*.

section 2.3, we discover that the general aim of mitigating global climate change is not a deontic duty, but rather a *prima facie* consideration. The content of actual mitigation duties, be it the abstract duty to mitigate climate change or specific duties of greenhouse gas emission mitigation, is therefore first established after an overall assessment drawing on a wide range of considerations. Thus, there are two sides to invoking arguments of rights (understood as arguments about fundamental interests) within the climate change discourse. Such arguments emerge both in opposition to efforts to mitigate greenhouse gas emissions and with reference to mitigation as such.[71] If greenhouse gas emission mitigation is to be understood as a *pro tanto* duty, we must first be able to circumscribe its content: what is the precise situation that is given deontic protection? This sets the stage for this dissertation to explore different strategies to fix upon the content of mitigation duties.

2.2 The Hohfeldian table

In his 1913 article on some fundamental legal conceptions and their applicability in judicial reasoning, Hohfeld provides an analysis of what he regards as the fundamental concepts of all legal problems.[72] He examines the common assumption that every judicial relation can be reduced to "rights" and "duties" and provides a more fine-grained understanding of these concepts. His analytical system is essentially a table linking the underlying entitlements commonly labelled as "rights," with the correlates of those entitlements which are borne by other parties.

	First-order concepts:		Higher-order concepts:	
"Entitlements"	Claim-right	Liberty	Power	Immunity
"Correlatives"	Duty	No-right	Liability	Disability

The first-order entitlements comprise any situation where an entity has a claim that another entity φ and any situation where an entity is at liberty to φ. Hohfeld uses the term "privilege" for this latter situation. His framework also consists of entitlements that pertain to these first-order rights and to one another. These higher-order entitlements are powers to change other legal positions (including other powers), and immunities from such changes. Each of these

[71] This is a common paradox in the literature, see, for instance; Pedersen, 'The Janus-Head of Human Rights and Climate Change'; Knox, 'Climate Change and Human Rights Law'.
[72] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 19.

four entitlements is correlated with a position held by another entity.[73] The correlative of a claim-right is a duty, the correlative of a liberty is a no-right, the correlative of a power to change a legal position is a liability to undergo the change, and the correlative of an immunity is a disability.

In the Hohfeldian system, the relationship between correlative positions is bi-conditional, meaning that the existence of either such position is both sufficient and necessary for the existence of the other. This means that they are two sides of the same coin. It does not matter from which angle the situation is looked at: "In other words, if X has a [claim-]right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty towards X to stay off the place."[74] Conceptually, one will not exist without the other.

The entitlements also stand in a relation of opposition to one another, meaning that they mutually exclude each other: they are logically duals or contradictories. A position on the left-hand side of the Hohfeldian table negates both the existence and the content of its opposite position. They are logical duals. For instance, a liberty to speak one's mind implies that one is not under a duty not to speak one's mind. Having a no-right in regard to a person's speaking their mind implies that one does not have a right that that person does not speak her mind. On the other hand, opposites on the right-hand side of the table negate only the existence of each other. They are logical contradictories. Thus, a power to change a legal position consists in not being disabled from changing that legal position, and an immunity from a particular change consists in not being liable to undergo that change.

	First-order concepts:		Higher-order concepts:	
"Entitlements"	Claim-right	Liberty	Power	Immunity
"Opposites"	No-right	Duty	Disability	Liability

According to the Hohfeldian system, all legal relations can be analysed as part of this scheme of correlatives and contradictories or duals. The following two subsections explore how the Hohfeldian table can help us understand the assertion that climate change mitigation is an issue of rights.

[73] This other entity might also be oneself (for instance a paternalistic claim-right/duty to wear seatbelts).
[74] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 32.

2.2.1 The relation of correlations

The Hohfeldian framework is helpful in pinpointing what is meant when arguments of rights are invoked in the context of climate change mitigation. In the following, this matter will be elucidated in two steps. First, I establish that the correlation in question is the claim-right and duty relation and second, I explore how a bundle of such relations make up abstract "rights".

Various entitlements

All of the four Hohfeldian entitlements are at play in the discourse on rights and climate change mitigation. In the academic discourse on rights and climate change mitigation, we commonly encounter Hohfeldian liberties, such as "rights" for individuals, organisations, or states to emit greenhouse gases.[75] In the lawsuits, claim-rights against interference with the exercise of liberties are typically asserted through arguments to practice one's culture. Such entitlements are often at stake in cases about how cultural practices of indigenous peoples are affected by climate change.[76] The constitutional liberty to practice one's profession was among the invoked rights in *Family Farmers*.[77]

Climate change law is arguably a field in which the changing of current legal positions is at the crux of the debate. In *Urgenda*, an underlying premise was that the Dutch government has the powers to impose regulations on private actors to fulfil the more ambitious mitigation target.[78] In the ongoing *RWE*, the question is whether the same government has the power to close a coal plant to fulfil its mitigation duty.[79] When someone is promoting the recognition of environmental rights because this would place them on an equal footing with often conflicting economic and social rights, they typically call for governments to acquire powers to regulate the emitting of greenhouse gases and reduce the effects of climate change.[80] Economic and social rights (or other rights such as property and investment rights) often comprise immunities. The argument is that, if the government is

[75] For a critical engagement with the emission rights, see, for instance, Caney, 'Climate Change, Energy Rights, and Equality'; Moellendorf, 'Common Atmospheric Ownership and Equal Emissons Entitlements'; Singer, *One World Now*, 54.
[76] For instance, *Torres Strait Islands*. However, cultural liberties can also be arguments against efforts to mitigate as was the case about how wind farms affect the Sami tradition of herding reindeers; *Fosen*.
[77] As we will see below, this is more appropriately a claim-right against interference with the exercise of liberties to practice one's profession.
[78] *Urgenda*, District Court, para. 4.66.
[79] Or if property rights established in investment treaties gives the company an immunity from such change without compensation.
[80] This is often a point in the environmental literature; Dupuy and Viñuales, *International Environmental Law*, 359.

provided with independent powers to regulate the issue of climate change, many of the current immunities that render those rights resistant to change will have been eliminated.

In the recent litigation trend, we also encounter rights-arguments in the form of immunities where the arguments are aimed at limiting governments from altering legal relations in ways that will increase greenhouse gas emissions. For example, such an argument might be aimed at preventing any grants of licenses for new fossil fuel projects. The issue in both *Arctic Oil* and *Sharma* is whether the people of a country have immunities from government decisions that would create emissions as a side-effect.

Nevertheless, Hohfeldian scholars generally regard claim-rights as rights in the strictest sense. The litigation trend mainly addresses claim-rights upfront. For instance, the dispute in *Urgenda* and *Neubauer* concerned a claim-right that the governments increase their greenhouse gas emission reduction targets. In addition, when the other entitlements are invoked, they are often done so in combination with a claim-right to the mitigate of emissions. In such cases, it is this claim-right that is really at stake. Hence, it is the claim-right against interference with the exercise of one's liberty to practice one's profession that the plaintiffs seek to enforce in *Family Farmers*. In *Arctic Oil* and *Sharma*, the government's asserted disability to grant fossil fuel licenses is seen to follow from their duty to prevent the possible emissions resulting from such fossil fuel extraction. Throughout this dissertation, the focus will therefore be on the claim-right and the corresponding duty to mitigate.

Abstract and specific entitlements

Legal positions commonly designated as "rights" are often complex combinations of Hohfeldian entitlements.[81] Mitigation can be understood as a parallel to property rights. Rights of property over a piece of land typically comprise claim-rights against encroachments on the land by other people, liberties to do what one wants on the property (e.g., cutting down trees at one's discretion), a power to sell the property, and an immunity from having the property expropriated by the government without the payment of compensation. Many other complex rights can also be clarified through the Hohfeldian framework. Constitutional rights are, for instance, often construed as immunities disabling the government from effecting certain changes in the law.[82] Similarly, a right to mitigation can have various levels of

[81] Wenar, 'The Nature of Rights', 225.
[82] See, for instance, the First Amendment to the Constitution of the United States of America: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." 'First Amendment'.

abstraction and an abstract and general right to mitigation might give rise to more concrete and specific rights.

The question then becomes how we ascertain which specific entitlements follow from an abstract right. Here, I will highlight two possible situations. Sometimes, a specific entitlement follows directly from a general one. For example, if I am allowed to park on a parking lot every day of March (liberty), I am allowed to park on the parking lot on March 3rd. Commonly, however, a specific entitlement is justificatorily rather than conceptually grounded in a more abstract one. For example, the claim-right to be taught to read might be justified by reference to the more abstract claim-right to education.[83] In this education example, the relationship between the more abstract claim-right and the more concrete claim-right is normative, as opposed to the conceptual relationship in the parking example. Nevertheless, the special duty to be taught to read is closely tied to the abstract duty to receive an education: it is hard to see how the morally salient parts of having a claim-right to be given an education can be fulfilled if the right-holder doesn't also have the specific claim-right to be taught to read.

The distinction between a conceptual connection and a close normative connection is also evident if we take the Hohfeldian framework as our point of departure. In the Hohfeldian framework, the logically necessary relations are those that obtain between correlatives. Thus, if a pair of correlatives is to be accompanied by other pairs of correlatives in a bundle, each pair needs to have a separate justification, such that one cannot necessarily be assumed from the other. There is, for instance, no analytical necessity between being at liberty to do something and having the claim-right not to be obstructed in doing it.[84] Hohfeld uses the example of X being at liberty to eat Y's salad without X simultaneously having a claim-right that Y does not try to hinder them from eating it.[85] The liberty to eat the salad does not *per se* imply a claim-right against interference with the exercise of the liberty. Yet, most liberties

[83] See Kramer, 'Rights Without Trimmings', 42–44.
[84] It is also possible to lack a liberty to do something while simultaneously having a right that no one interferes with you. Matthew Kramer illustrates this with a factory that is not at liberty to pollute a body of water on which some fishermen depend for their livelihood; Kramer, 15. Still, the factory might have a claim-right against the fishermen that they do not obstruct the discharges of the pollution. For example, a court might impose sanctions on the fishermen for their interference and on the factory's owner for its pollution. This example also reveals that a claim-right against being treated in a certain way might not be coupled with a liberty to prevent that treatment from occurring. The fishermen in the above example have a claim-right that the factory does not pollute the water, yet they are not at liberty to obstruct the pollution. Still, although the only logically necessary relations are between correlative positions, different entitlements can and often do coexist. Most claim-rights must, for instance, be combined with immunities from arbitrary changes to be of any value; there is little value to a claim-right not to be hit in the face, if the duty-bearer can be released from the duty by snapping her fingers.
[85] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 35.

would be of little value for the holder unless they are combined with basic claim-rights against being physically assaulted when exercising the liberties. In any society with a functional system of governance, liberties will be combined with claim-rights in this way.

As we saw above, the claim-right to mitigation is often the main entitlement at stake in the current discourse on rights and climate change mitigation. For example, a general right to indigenous culture would at its heart encompass a set of liberties to practice this culture. However, when climate change impacts culture, this is not because these liberties are compromised: arguments which invoke liberties are not concerned with correlative no-rights borne by the government or anyone else. Rather, what is at stake is an associated claim-right to protection from external threats to the exercise of these liberties. This claim-right is a concretisation of the abstract entitlement to culture. Thus, what is needed is a justification for the specifics of the bundle of entitlements making up the abstract right to culture.

If we look at the potential claim-right to being provided with the conditions that enable people to practice their culture, this is an abstract entitlement. Hence, it still does not provide much guidance as to what the potential duty-bearer is required to do. For example, in *Torres Straight Islands,* the Human Rights Committee found that Australia's specific duty to ensure that the indigenous community could practice their culture required the government to adopt adaptation measures that would protect the indigenous land from being destroyed by climate change. This entitlement was concretised even further when the Committee highlighted how seawalls were not promptly upgraded and constructed.[86]

What distinguishes climate change mitigation from the above examples of the specific claim-rights to being taught to read and to not being physically assaulted is that the content of the mitigation duties does not follow closely from any general ideas of rights, be it a "right to a safe climate", a "right to culture", a "right to physical integrity" etc. As we will explore in Part II of this dissertation, the content of a global mitigation duty and the content of more circumscribed mitigation duties will not follow straightforwardly from an examination of the fundamental interests which those duties protect.

Rather, the content of mitigation duties is only established after a broader assessment of how different interests relate to one another. At its most general level, this assessment concerns how the general benefits of emitting greenhouse gases relate to the general detriment of the alteration of the climate. At a more practical level, the assessment is about

[86] *Torres Straight Island*, para 8.12 (private and family life), para 8.14 (indigenous culture). The minority also argued that the abstract duty to ensure that people could exercise their cultural liberties encompassed a duty to mitigate climate change.

why we consider some emissions to be problematic, such as emissions from driving a fossil fuel vehicle for fun, and not others, such as breathing or being transported in a fossil fuel ambulance. In Part III, we explore how mitigation is primarily about distributive justice. Because there are many possibilities for which duties should follow from principles of justice, and people can and do legitimately disagree about them, the issue is political.

Before we leave the relation of correlations, I will make a last analytical point about the mitigation duties and their correlative claim rights explored in this dissertation. When we determine the content of the entitlements and their correlatives within the Hohfeldian table, we usually look at the active part of each Hohfeldian relation, meaning what is or is not to be done.[87] For the claim-right/duty-relation, we are interested in the duty to φ.[88] Although deontic logic has its limitations, it is a helpful structure for explaining the active first-order entitlements as being "obligations", "prohibitions", and "permissions" ("liberties"). For example, a duty might be viewed as either an obligation to undertake the act of φ-ing or a prohibition on not φ-ing. These duties correlate respectively with the common notion of positive claim-rights and negative claim-rights.[89] A general duty to mitigate greenhouse gas emissions might, for instance, be implemented through a duty not to emit certain greenhouse gases and through an obligation to produce renewable energy.

The vital point is that when we establish the content of claim-rights/duties to mitigation, we are interested in *who* is to do *what*. The narratives of rights often invoked in the context of climate change mitigation typically appear to focus on whether a state of affairs does or does not satisfy certain desirable conditions such as sufficient levels of fundamental well-being or risks. However, in a practical context, what we are interested in is how these arguments translate into an argument specifying which duty-bearer should undertake which conduct of φ-ing or which duty-bearer is prohibited from performing which conduct of φ-ing. I will revisit this general point throughout this dissertation when discussing the challenge in the litigation trend of establishing what the defendants should have done or omitted to do to ensure that climate change is mitigated.

[87] Kramer, 'Rights Without Trimmings', 13. In his forthcoming work, Kramer includes examples of how the content of a claim-right/duty is not always determined in this way; Kramer, *Rights and Right-Holding*, sec. 2.4.1. However, for the purpose of climate change mitigation, these counterexamples do not change the general outlook.
[88] The other active positions in the Hohfeldian table are liberty, power, and disability.
[89] We will revisit the distinction between positive and negative rights in Chapter 6 on wronging.

2.2.2 The relation of opposites

This subsection addresses the Hohfeldian relation of opposites. The purpose is to explore the distinction between contradictions and conflicts, providing examples of such situations in the context of climate change mitigation. The full implications of this examination will become evident when we explore the deontic character of rights in section 2.3.

Contradictions and conflicts

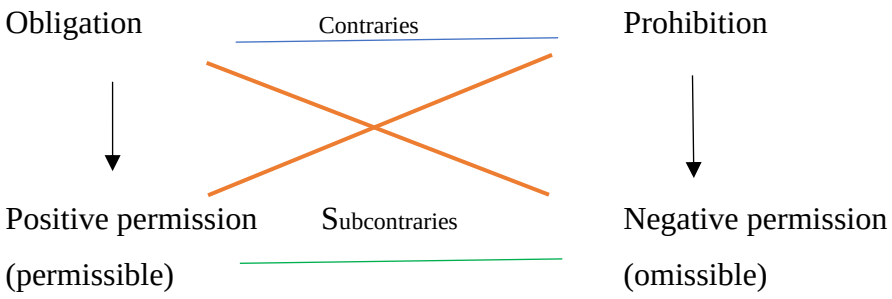
A legal system proclaiming that two opposites in the Hohfeldian table exist simultaneously would involve a legal contradiction. For example, if the law proclaimed both a duty to testify in a trial and a liberty not to testify in the same trial, we would encounter a legal contradiction as the two norms cannot be valid at the same time. These contradictions are often solved in a legal system by resorting to the rules of *lex posterior*, *lex specialis* and *lex superior*.[90] In the climate change context, a situation of such legal contradiction could arise if an actor is under a duty not to emit certain greenhouse gases and at the same time is at liberty to emit these gases. Since the two legal positions cannot be simultaneously valid, legal officials will resort to tools within their legal system to avoid the contradiction.

At present, however, such contradictions mainly arise between a moral position and current law and not within a legal system itself. Current law typically provides a liberty to emit certain greenhouse gases, but the agent is argued to be under a moral duty to abstain from emitting these greenhouse gases. Although this contradiction does not pertain to the legal system as such it nevertheless highlights two distinct positions about the legal system.[91] On the one hand, the contradiction reflects the liberal position that the law can accommodate different moral stances. Any moral positions regarding climate change and climate change mitigation are then considered to be a matter left to individual judgment.[92] On the other hand, the contradiction highlights the position that climate change mitigation is a conduct that should be encompassed by legal regulation. The current legal liberty should be changed to accommodate the moral stance. In this latter understanding, greenhouse gas emission mitigation is the content of an inchoate entitlement not yet established as a legal entitlement.[93]

[90] Courts might have other techniques to solve contradictions as well, such as finding one of them unenforceable, Kramer, 'Getting Rights Right', 75; Kramer, *Rights and Right-Holding*, sec. 2.4.3.
[91] This point will be discussed further in Chapter 8.
[92] In Chapter 8, we will encounter this liberal position in general to see how it applies to the issue of climate change mitigation.
[93] On the concept of inchoate entitlements, see Kramer, *Rights and Right-Holding*, sec. 3.9.

Many perceived conflicts are not oppositions in the Hohfeldian table. For instance, two conflicting duties can exist simultaneously, even if they cannot be fulfilled at the same time.[94] For example, it would not be possible to fulfil both a duty to testify in a trial and a duty to attend an examination for military service if they are scheduled at the same time. Yet both duties may be valid, so that a person might be breaching one duty while fulfilling the other. The Hohfeldian table thus varies from the most common understanding of deontic logic, according to which a conflict of duties cannot occur.[95]

Deontic logic examines the deontic operators of obligations, prohibitions and permissions.[96] These three operators stand in different relations to each other, so that an ascription of an obligation and an ascription of a prohibition cannot both be true (contraries), whereas an ascription of a positive permission and an ascription of a negative permission cannot both be false (subcontraries). An obligation to φ implies that one has a positive permission to φ but does not have permission to omit it. Similarly, a prohibition on φ-ing implies that one is permitted to refrain from φ-ing but is not permitted to φ. These relations are often illustrated by the "deontic square":



In contrast, in the Hohfeldian analysis, a duty to φ does not entail a liberty to φ. Here a duty to φ only means that one is not at liberty not to φ (and whether one is at liberty to φ is a separate matter).[97] As we have previously seen, the Hohfeldian table allows someone to be under conflicting duties without any contradiction. The situation is thus a conflict between a duty-to-φ and a duty-not-to-φ, and not the logical inconsistency of being under a duty-to-φ and not being under a duty-to-φ.[98]

[94] Kramer, 'Getting Rights Right', 73.
[95] The distinction is highlighted in Hurd and Moore, 'The Hohfeldian Analysis of Rights'. Matthew Kramer has argued that deontic logic can be modified to take account of possible conflicts; Kramer, *Torture and Moral Integrity*, chap. 1.
[96] An early example is Von Wright's examination of what a legal norm is; Wright, *Norm and Action*.
[97] Kramer, 'Rights Without Trimmings', 18.
[98] Kramer, *Torture and Moral Integrity*, 16.

In the climate change context, we can then imagine situations where a legal duty to mitigate greenhouse gas emissions comes into conflict with other legal duties not to undertake that measure of mitigation.[99] An example of such an apparent conflict is where a country must shut down a fossil fuel power plant to comply with a greenhouse gas emissions reduction target and where the country is at the same time required to run the plant in order to provide its citizens with energy for, for instance, heating.[100] Another example of a situation that seemingly creates a conflict is one where the country fulfils its mitigation duty by establishing a windfarm but also is under a duty to refrain from establishing this windfarm because it infringes the rights of indigenous peoples in the area.

The central question arising from these examples is whether we are faced with a conflict of circumscribed duties or only various considerations taken account of when establishing a circumscribed duty. It is only if the requirement to mitigate continues to be a valid requirement even if it comes into conflict with other considerations that it is a duty. Otherwise, it is only a factor to be taken into account in the overall process of establishing a duty.

The deontic characteristic of duties

In the following, we will explore the statement that duties retain their force even when conflicting with other considerations. Hence, the force of the correlative claim-right pertains to its deontic character, typically addressed in the rights literature through the question of how conflicts between rights or between rights and interests are to be solved.

Rights are often understood as deontological constraints on conduct undertaken by actors to realise what they consider to be good. Thus, a common understanding of the force of rights is that if a deontological right clashes with a consequentialist reason-for-action, any actions undertaken in accordance with that consequentialist reason will be violative of a duty.[101] Ronald Dworkin has famously described rights as trumps, a metaphor indicating that rights prevail over any considerations of utility with which they clash. Robert Nozick's notion of side constraints is another encapsulation of the resistance of rights to consequentialism. His theory contends that the rights of others limit what can be done permissibly in the pursuit of goals.

[99] The contents of these two duties are contraries.
[100] However, the next section will show that neither of these ostensible requirements is genuinely a duty; hence, no true conflict arises.
[101] Kramer, *Torture and Moral Integrity*, 26.

Both Dworkin and Nozick justify this characteristic of rights by reference to the content the rights protect. Dworkin bases his idea on the premise that people should be treated as equals. His argument is that because the ordinary utilitarian calculus includes external preferences, it is not capable of granting equal concern and respect to all. By establishing rights as trumps, the requisite neutrality of a political theory and the requirement to treat people with equal respect and concern are upheld.[102] Nozick sees rights as side constraints on actions because, in his view, this follow from the fact that people should be treated as ends and not solely as means. Infringing someone's right for the sake of realising other goals is to treat that person solely as a means.[103] Regardless of the justification offered, both theorists' view is that rights have a special deontological force.[104]

A central question arising from these views is whether any rights are absolute: they retain their force in all circumstances with no exceptions. Dworkin, for instance, does not maintain that rights are absolute in this sense. A government might restrict a right in order to protect another right, or even in order to obtain a clear and major public benefit.[105] In doing so, the government cannot rely on "the minimal grounds that would be sufficient if no such right existed", but must take due account of the fact that a right is at play.[106] Therefore, it is necessary to make an argument for what the correct outcome of the conflict would be, which takes account of the fact that a right is at play. This view resembles Raz's consequentialist position, where the exclusionary reasons are to be weighed against unexcluded reasons that might override the exclusionary reasons.

However, from a truly deontological perspective, one is less charitable to the notion that a right is to be balanced against other considerations. For instance, the libertarian position of Nozick sees rights as absolute limits on governmental (as well as private) actions. Nevertheless, there is usually a recognition that conflicts between duties can exist. When solving such conflicts, Rawls, for instance, argues that people in the original position would establish a lexical ordering between his principles of justice. Thus, no actions at odds with liberal rights are permissible, even when undertaken to create a better economic situation for the least well off. In addition, some theorists argue that – *ceteris paribus* – duties to refrain from harming others are more pressing than duties to benefit others.[107]

[102] Dworkin, 'Rights as Trumps', 158.
[103] Nozick, *Anarchy, State, and Utopia*, 29.
[104] We will revisit some of the classical justifications for fundamental rights in Part II.
[105] Dworkin, *Taking Rights Seriously*, 231.
[106] Dworkin, 232.
[107] This distinction will be further discussed in Chapter 6.

Thus, the decisive matter for theories of rights is how they diverge in their understanding of conflicts. The first position is the consequentialist position that moral conflicts never genuinely occur. Consequentialists believe the morally optimal outcome in any ostensible conflict overrides the clashing factor. The overridden factor is not constitutive of any duty in such circumstances, and thus there is no genuine conflict between duties.[108] The second position is a deontological position that sees rights as having an absolute structure. Even when a right is overtopped by a more stringent duty (so that it is morally correct to contravene the right), the right does not cease to exist. As this position recognises, there is no logical hindrance to being both under a duty-to-φ and under a duty-not-to-φ, although the two obligations cannot be fulfilled simultaneously. A breach of duty is inevitable in such a conflict, and the breach must then be remedied. However, the sanctions imposed for an actor's contravention of one of the two conflicting duties will typically be mitigated in light of the fact that the contravention was undertaken for the sake of fulfilling the other duty.

The deontological position then resembles the possibilities of conflicts between duties within the Hohfeldian table. This dissertation will reserve the notion of rights in the narrow sense to deontological rights, meaning claim-rights with their correlative duties. The existence of rights in the narrow sense thus requires that the content of the entitlement and correlative be established, and that they have the force and structure of a deontological right/duty relationship. Another notion of this narrow right is a *pro tanto* right, which denotes a genuine obligation that is susceptible to being overtopped by competing factors but still remains in force.[109] In this deontological approach, a right *prima facie* denotes something that

[108] Many theorists who adopt this position emphasise that those who apply the law do not treat conflicting fundamental rights as clearly defined constraints that can be fulfilled in an all or nothing manner. Instead, fundamental rights are conferred by principles that each provide "a reason that argues in one direction, but does not necessitate a particular decision"; Dworkin, *Taking Rights Seriously*, 42. Today, this position is widely credited and is associated with the proportionality principle. When investigating proportionality reasoning in Germany, Robert Alexy argues that courts initially interpret rights inclusively so that they have a wide scope; Alexy, *A Theory of Constitutional Rights*, 210. A fundamental right is thus easily infringed. The method of the proportionality principle is in four steps to ask whether this infringement is a justified limitation of the right: (1) whether the infringing measure pursues a legitimate aim, (2) whether it is suitable for the attainment of that aim, (3) whether it is necessary for the attainment of that aim, and (4) whether there is a proportionate relationship between the infringed right and the aim pursued. If all these four criteria are fulfilled, a right violation has not occurred. The assessment under the fourth criterion is not necessarily a pure consequentialist balancing; Klatt and Meister, *The Constitutional Structure of Proportionality*, 11; Waldron, 'Fake Incommensurability', 819–21. It is nevertheless a position of threshold deontology – which would be better labelled as "threshold consequentialism" – where the mode of conduct prescribed by a right is only mandatory to a certain point. If other considerations override a right, it no longer holds deontic force.

[109] Some scholars use the notion of *prima facie* for such *pro tanto* rights. However, I will here follow Matthew Kramer who denotes genuine rights *pro tanto* and reserves *prima facie* for something that only supposedly is the case; Kramer, *Torture and Moral Integrity*, 23.

presumptively is the case upon an initial investigation. *Prima facie* is here used as an epistemic notion where we are left to discover the actual existence and content of the right. Hence, a conflict with *prima facie* rights might only be ostensible, for their existence and contents a genuine rights are not yet fully ascertained.

2.3 Climate change mitigation and deontic duties

In this section, we will explore whether arguments of mitigation can be understood as adverting to factors that possess the special deontic characteristic of duties when invoked in moral and legal disputes. The question to be explored is thus whether the invoked connection between rights and greenhouse gas emission mitigation should be understood as meaning that greenhouse gas emission mitigation is *pro tanto* obligatory.

The trajectory of the following three subsections presents a brief overview of the general position that will be further elaborated in Part II and Part III of this dissertation. The first two of those subsections share the same conclusion, namely, that there is no abstract *pro tanto* duty to mitigate emissions. If mitigation is a broad consequentialist aim, rights will typically be bulwarks against the realisation of such an aim (subsection 2.3.1). Another possibility is that *pro tanto* duties to mitigate greenhouse gas emissions will be established after a holistic assessment in which conflicting considerations are taken into account (subsection 2.3.2). However, in the last subsection, I will maintain that once requirements to mitigate are circumscribed and legally established, they can have this *pro tanto* character (subsection 2.3.3).

2.3.1 Rights as bulwarks against the aim of mitigation

It appears evident that the idea of rights in the analytical sense explored in this chapter fits best as a bulwark against measures to combat climate change. Thus, rights limit what actors can do when realising climate change mitigation. Henry Shue has warned against mitigation measures that obstruct people's ability to survive. Hence, he has been arguing that every person should be provided with the liberties to emit greenhouse gases in the amount that is necessary for ensuring their basic subsistence.[110] If people do not have immunities from being

[110] Shue, 'Human Rights, Climate Change, and the Trillionth Ton'.

deprived of these liberties by our endeavours to combat climate change,[111] this would result in a situation that Shue sees as a crime against humanity.[112]

A legal example of how rights are bulwarks against particular mitigation measures is the old case *Dimmock.* Here, the UK Secretary of State for Education and Skills had overstepped the non-partisan requirement to give a balanced view of political issues when Al Gore's film *An Inconvenient Truth* was shown in state schools without the disputed political issues being mentioned. In addition to political rights pertaining to how climate change should be adequately addressed as a political subject, civil and economic rights can also be at stake. The use of wind farms as a way of directing our energy supply away from fossil fuel sources is a common topic in litigation.[113] A prominent example is *Fosen*, in which the Norwegian Supreme Court decided that the biggest wind farm on land in Norway violated the Sami people's claim-rights against interference with the exercise of the liberties to practice their culture of reindeer husbandry.

The awareness that greenhouse gas emission mitigation may be realised in a way that does not grant human beings equal concern and respect, to paraphrase Dworkin, is a central concern for the UN human rights bodies.[114] They stress that taking action in response to climate change does not eliminate other obligations, [115] and many of the human rights bodies are calling for states to acknowledge the impact mitigation and adaptation measures have on human rights.[116] For example, human rights violations may include evictions and forced displacements, suppression of the freedom of expression and assembly, arbitrary arrests and extrajudicial executions.[117] Many renewable energy and forest preservation projects lack consultation and consent from indigenous people, violating their land ownership and cultural integrity.[118] Worries about crop cultivation for biofuel threatening food supplies[119] or mega-dam-projects obstructing water access[120] are general in scope. Nevertheless, the importance of not discriminating is often highlighted as a dominant substantive restriction on climate action.[121]

---

[111] Hence, people should have immunities against their removal. The entitlement at stake could also be a claim-right against interference with the exercise of these liberties to emit greenhouse gases.
[112] Shue, 'Human Rights, Climate Change, and the Trillionth Ton', 210.
[113] For instance, there are numerous cases from the UK on this issue.
[114] See for instance A/HRC/10/61, para 72.
[115] A/HRC/37/59, Commentary 54 to Framework Principle 16.
[116] A/HRC736/46, para 119
[117] A/HRC/36/46, para 108.
[118] A/HRC/36/46, para 50.
[119] A/70/287, para 60.
[120] A/74/197, para 4.
[121] A/HRC/37/59, Comment nr. 7 to Framework Principle 3.

UN human rights bodies have been worried in particular that many climate change-related financial mechanisms, such as the clean development mechanism (CDM) under the Kyoto protocol, the green climate fund, or the deforestation project REDD+, do not respect human rights in the projects they fund.[122] In many of the policy documents produced by UN human rights bodies prior to conferences of the parties to the UN Framework Convention on Climate Change, it is evident that one of their primary concerns is to ensure that climate change measures do not violate human rights.[123] These concerns have now largely been addressed in the international climate change regime. In a rule book to the Paris Agreement, a reference to how carbon trading projects need to ensure social and environmental safeguards has been included.[124] Moreover, references in the Paris Agreement to human rights appear generally to express the concern that climate change mitigation has the potential to violate human rights. The most prominent example in the preamble reads:[125]

> "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, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity"*

In a conflict between a right and a measure to mitigate greenhouse gas emissions, the right would generally be the overtopping consideration. However, even if mitigation takes precedence, this right remains in force. The breach does not nullify the right; rather, the breach gives rise to remedial obligations.

2.3.2 Mitigation as an ostensible duty

The matter of ensuring that fundamental rights are not contravened even when a worthy goal is reached is not the primary concern for those seeing the mitigation of greenhouse gas emissions as an issue of rights. What is at stake is a more audacious contention: that greenhouse gas emission mitigation is morally and perhaps legally obligatory.

[122] E.g., A/HRC/WG.2/19/CRP.4, a working paper on promoting rights-based climate finance for people and the planet by Tessa Khan.
[123] Joint Statement.
[124] The Decision CMA.3 adopted in the Glasgow Pact mentions the need to consider social impact in i.e., Article 6(c), 24(a)(x), 31(d)(iv) and 34.
[125] Other examples from the preamble include references that are more equivocal to being affected both by climate change itself and the responses to tackle climate change – such as effects on sustainable development and poverty eradication, as well as food security.

However, when the aim of mitigation comes into contradiction or a conflict with overtopping *pro tanto* rights it is not correct to say that the duty to mitigate has been breached. Let us use the "right to emit" highlighted by Henry Shue as a first example. A "right to emit" denotes that people have a liberty to emit those greenhouse gases necessary for their basic subsistence, such as breathing, eating, heating their homes etc.[126] Hence, human beings are not under a duty to refrain from these behaviours, and potential right-holders have a no-right in regard to the occurrence of these behaviours.[127] Within a legal system, people typically have immunities from changes to these liberties. The entitlements associated with a "right to emit" would then contradict a duty borne by these people to not produce these greenhouse gas emissions: only one of the two contradictory relata is in existence at any given time. It appears reasonable to say that the "right to emit" would negate the duty to avoid emissions.

Another example is a duty borne by a government to provide basic subsistence needs for its citizens. If emissions arise from activities required to fulfil the basic subsistence needs, and if non-emitting alternatives are unavailable, this duty to undertake activities that produce greenhouse gas emissions would conflict with the duty to not produce greenhouse gas emissions. However, even if a duty to fulfil people's subsistence needs overtops a mitigation duty, if the latter is a *pro tanto* duty, a duty would have been breached, requiring a remedy. This remedy would be attenuated by the strong moral claim for people's basic subsistence. Nevertheless, quite untenable is the notion that a remedy is needed when basic needs are met. Hence, it appears problematic to see mitigation as *pro tanto* obligatory, especially if it is *pro tanto* obligatory with such broad content.[128]

In both examples, the putative duty to mitigate is only ostensibly a duty. Mitigating greenhouse gas emissions is recognised as a broad aim which is not yet explicated into moral or legal requirements. Conduct that reduces emissions is only presumably required and further considerations are needed before it is covered by circumscribed duties. Because no mitigation measure appears physically necessary in bringing about abstract climate change mitigation, the actor may not be under a duty to undertake *this* conduct even though they are

[126] In the modern world, people cannot secure their basic subsistence in isolation and hence, do not by themselves produce the emissions. A more appropriate understanding of a "right to emit" is that people have claim-rights not to be deprived of those complex processes that ensure their subsistence, like the food and energy sector. These processes might or might not have greenhouse gas emissions as their side-effect.
[127] Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning'.
[128] Here, I am thankful to all the conversations with Ane Sydnes Egeland.

obligated to mitigate climate change.[129] That the existence of certain legal liberties and duties precludes the legal obligatoriness of certain measures of mitigation does not perforce thwart the goal of mitigating climate change: there might be other measures of mitigation that can be made legally obligatory.[130] From the outset, mitigation then appears to be a *prima facie* requirement, the content of which is first established after a thorough and holistic assessment.

Solely relying on fundamental rights in confining the content of mitigation duties could lead to very comprehensive obligations on the duty-bearers. Many of the behaviours that leads to greenhouse gas emissions do not fall within what is necessary to survive, and hence are not encompassed by "the right to emit" or a duty to fulfil basic subsistence needs. However, in most situations, the goal of realising abstract idea of climate change being mitigated clashes with the realisation of other desirable states of affairs. Resource scarcity requires us to prioritise between competing interests. These choices are usually made on the basis of normative assertions of which goal is most highly valued. Hence, we are arriving at a similar conclusion as in subsection 2.2.1: the challenging task is to provide a normative justification for which specific duties implement the abstract aim of mitigating climate change.

2.3.3 Mitigation as pro tanto duties

Once we have ascertained which duties are to make up the inchoate requirement to mitigate climate change, these circumscribed duties have a deontological character. This characteristic does not depend on the underlying justification for why these particular duties are considered part of the broad "right to mitigation". Hence, such duties might follow from a deontological assessment of, for instance, harm or the prohibition of using people as ends as explored in Part II of this dissertation. Alternatively, we can argue that such duties justly distribute the burden of fulfilling the collective requirement to mitigate climate change, as explored in Part III.

Even if deontological justifications fail, we can, in line with rule consequentialism, establish legal obligations that will generally create the best outcome. Although the assessments establishing these circumscribed obligations are based on consequentialist reasoning, the upshot can consist in the establishment of some binding duties. If the

[129] If I am under an obligation to be in London at 12, this does not mean that I have to be on the train to London at 11.
[130] See Chapter 5.

underlying justification is consequentialist, the mitigation requirement will not generate any absolute duties: the duties cease to be operative insofar as they cannot be fulfilled without unacceptable costs. However, such second guessing is usually not undertaken once a legal duty has been established. Thus, even though consequentialist reasoning is applied to establish mitigation duties, they can still be considered duties once established.

When this dissertation explores how the discourse invokes arguments of rights in the context of climate change mitigation, the main question is to work out whether or not we are faced with a *pro tanto* duty. Do we know how the particular actor is supposed to act, and is the actor under this obligation even when it comes into conflict with other requirements? Before we explore some of the so-called rights-based strategies to answer this question,[131] the next chapter addresses another aspect of rights in the narrow sense: namely, an individual human being as the holder of a claim-right correlative to a duty.

[131] In Chapter 4, we will see that it is more appropriate to denote such strategies as "interest-based".

Chapter 3: The Actors

3.1 Introduction

This chapter investigates the actors in the claim-right/duty relation from an analytical point of view. In the context of climate change, the parties are the bearers of the duties to mitigate (section 3.2) and the holders of the correlative claim-rights to the fulfilment of these duties (section 3.3).

My analytical investigation in this chapter provides two insights that will follow us throughout the dissertation. The first is that there is currently no agent akin to a global human society that can bear mitigation duties. This means that mitigation duties are to be borne by various existing entities, such as states, individuals, and corporations, which together make up the collective effort needed for tackling the global issue of climate change. The second insight is more directly linked to ideas of rights in a narrow sense: namely, the role of individuals as the holders of claim-rights correlative to mitigation duties. We will see that a question at the heart of this dissertation is whether individuals, on balance, typically will benefit from global climate change mitigation and/or concrete mitigation measures. The chapter also highlights that a general interest in such measures is not sufficient for the holding of claim-rights, as we also need to ask whether a setback to this interest constitutes a set of facts minimally sufficient to establish a breach of a duty.

This chapter is primarily concerned with the analytical question of identifying who the actual parties to some claim-right/duty relationships are. In contrast to much of the discussion in this dissertation, this chapter assumes the existence of the relevant legal duties.[132] According to all analytical theories, the bearer of a duty is the party to whom a legal norm assigns the duty. Thus, the answer to this chapter's question rests on legal interpretation, which in its practical details goes beyond the scope of this dissertation. In contrast, all analytical theories of identifying to holder of a claim-right correlative to a duty see this task as depending implicitly or explicitly on a general philosophical account of the conditions necessary and sufficient for such a status. According to the analytical will-theory, right-holding requires the power to waive and enforce a duty. The analytical interest-theory, on the other hand, requires that a duty inherently protects some aspect of the situation of a party that is typically beneficial for someone like that party. Hence, both the will theory and

[132] Hence, this chapter assumes the existence of *pro tanto* mitigation duties.

the interests theory offer a philosophical analysis of right-holding independent of any specific doctrinal contexts.

The second analytical question is to establish a philosophical account of the sorts of beings who can hold claim-rights and bear duties. Such an account is particularly relevant when this dissertation engages with normative questions of which mitigation duties should be recognised and for which reasons.

3.2 The bearers of the duties to mitigate climate change

As explored in Chapter 2, the central question concerning climate change mitigation is *who ought to do what*? In this section, we explore the *who* of this question. The question of who bears an actual legal duty can first be ascertained after an interpretation of any relevant legal requirement. The class of actual bearers of an obligation is often directly specified in the relevant legislation or doctrine, and, where this is not the case, an answer to or question is a matter of further interpretation.

Most legal systems view human individuals, corporations, organisations, and political institutions as potential duty-bearers. It may seem silly to impose duties on entities that cannot fulfil them – such as animals or objects.[133] Nevertheless, being under a duty does not entail being able to fulfil the duty.[134] Conceptually, there are therefore very few restrictions on who the duty-bearer might be,[135] as the crucial point when identifying duty-bearers is that an entity is placed under a legal obligation.[136] Still, the placing of parties under obligations which they cannot fulfil is usually unfair.[137] In any event, the possession of powers and immunities rests on the ability of a party to fulfil them.[138]

What makes climate change mitigation so special is its nature as a global phenomenon, both in its effects and causes. This global scope implies that successful

[133] This is why Joel Feinberg does not consider animals to be potential duty-bearers; Feinberg, 'The Rights of Animals and Unborn Generations', 162.
[134] As we saw in Chapter 2, conflicting duties cannot be jointly fulfilled. Nevertheless, both of the conflicting duties continue to exist.
[135] Matthew Kramer argues that inanimate entities and insentient organisms such a mushrooms or trees cannot bear duties. Even if a legal system purports to place them under legal duties, such classifications are not to be taken at face value; Kramer, *Rights and Right-Holding*, chap. 5.
[136] Kramer, 'Getting Rights Right', 42. Hence, agency as a question in analytical philosophy does not come directly to the forefront.
[137] Fuller, *The Morality of Law*, 37. However, Fuller himself states many examples where a request for the impossible is not unfair; for instance, in situations where strict liability is appropriate; Fuller, 70–79.
[138] They are modal and not deontic; Kramer, *Rights and Right-Holding*, sec. 2.6. The duty to use a power is still deontic. Hence, one can technically be under a duty to regulate an issue even though one does not possess the power to regulate it.

mitigation requires that a vast range of actors (if not all or nearly all) are involved. Hence, it is interesting to ask whether it makes sense to view the human community as a unified group agent bearing the abstract duty to mitigate climate change (subsection 3.2.1). The alternative is to assert that climate change is a product of collective action and that therefore the solution also requires collective action (subsection 3.2.2). Because it is only the latter perspective that applies to the climate change context, the questions defining the rest of this dissertation are: which actors make up this collective of actors and what are their respective duties in this collective effort?

3.2.1 The global human community as a duty-bearer

Scientifically, we know that human activity has already changed the climate and that human activity is able to mitigate further changes. This subsection asks whether humanity can be seen as a global community or more precisely a circumscribed entity bearing legal responsibilities.[139] Within moral and legal theories, there is a standard view that groups of human beings can be agents on their own account. Such theories of group agency have in common that they require some conditions to be satisfied. Typically, a group operates as an agent if it has a defined structure of membership and decision making, as well as durability over some time.[140] The decisive criteria appear to be that the decisions taken are taken as and for a group and not simply as an aggregation of the individual human beings constituting the group.[141] States, companies, colleges, and football teams are typical examples of human conglomerates that can operate as agents on their own accord.

The climate change and rights discourse can be understood as relying on group agency for their analysis. For instance, we can construe Simon Caney's argument about how the phenomenon of climate change is depriving people of their right to life, health and subsistence as pointing in this direction. In his analysis, the fact that we can trace the dire consequences of lost lives and degraded health and subsistence levels to *anthropogenic* climate change means that there is a duty not to create this anthropogenic climate change.[142]

---

[139] In Chapter 5, we encounter a fictional narrative that directly alludes to this alternative of seeing climate change as a harm created by the global community. People at an imagined marketplace are shot at because the town's activity triggers games of Russian Roulette, and it is the town that bears the duty to change its behaviour. "The town" is more than the agency of the human beings embodying it – it is an independent agent that can act on its own behalf.

[140] Smiley, 'Collective Responsibility', sec. 3.

[141] Philip Pettit argues that groups can have procedures where the past judgements of the group constrain later decisions; Roth, 'Shared Agency', sec. 5.

[142] Caney, 'Climate Change, Human Rights, and Moral Thresholds'.

This duty appears to be owed by the human society as such.[143] The argument that climate change violates people's fundamental rights thus seems to rely on a notion of a unified human entity that bears this abstract duty. With the emphasis on climate change as anthropogenic, Caney invokes a duty that is likewise borne by humanity as a whole. Thus, from "human-made", we get a "human duty to avoid", an argument I understand as placing the duty on the human community writ large.

If this human community writ large is to be understood as a group agent, a central challenge to this position is the lack of existence of such a group agent. The loose idea of humanity invoked by Caney lacks the features commonly ascribed to group agents. Even though humans share interests, needs, lifestyles, etc., these common features are not enough to say that this all-encompassing group of human beings cooperates as a coherent agent. Thus, even though one might be able to see all human beings as members of a human society, these human beings are not deliberately coming together in an organised way to realise common aims as a global human society.

The conclusion that there is currently no global human society that can be understood as a group agent holds even though there are examples of how humans all around the world come together in international fora like the UN.[144] The UN and its various bodies are examples of circumscribed collective human entities with explicit purposes and procedures. However, even though these systems of governance are circumscribed collective entities this does not mean that they preside over the human society as a group. Not all humans are represented as members of these entities and the UN agencies do therefore not act on behalf of all humans.[145] In addition, the UN does not preside over the broader human society with a global jurisdiction within which it has power to decide matters for the human community, hence, the group. That the vague idea of "humanity" as a potential group is not equivalent to current international organisations also becomes evident when we look at another point that the climate discourse seeks to address. When the discourse invokes the vague entity of a

[143] Caney does not explicitly address this topic because he only defines the content of the right from the side of the right-holders. However, implicitly he refers to "us" and the political reality of a possible "international treaty"; Caney, 86,89. Derek Bell, in his review of Caney's argument, sees this problem. His suggestion is that this supply-side can only be determined when we know how this duty should be distributed on various actors; Bell, 'Climate Change and Human Rights', 166.

[144] The UN is an example of a group agent that can act on its own. In a legal context, the question if which duties the UN actually bears is, however, not so straightforward because the UN enjoys wide immunities. A typical illustration is the longstanding dispute over remedies for the victims of cholera that was brought to Haiti by UN peacekeeping missions. See, for instance a recent complaint; International Human Rights Clinic, Harvard Law School, 'Violations of the Right to Effective Remedy: The UN's Responsibility for Cholera in Haiti'.

[145] For example, Taiwan does not have a seat in the UN General Assembly.

global human society, "humanity", this is often to allocate the general blame for the creation of climate change and the general possibility to change the global path. [146] This general description of the situation is not targeted at specific actors, such as the UN.

The notion that a global group agent bears a duty to mitigate global warming can also be challenged on the ground that it rests on a misguided understanding of the phenomenon of global warming. The behaviour that emits greenhouse gases is not conducted as part of the human society coming together to realise a common aim. Climate change is a side-effect of industrialised modernity, and this industrialised modernity is not a focused purpose that humankind deliberately coordinates itself globally to achieve. Rather than being a result of the deliberate agency of a group as such, the prevailing high-emitting modern way of life and its side-effects are the cumulative results of diffuse human behavioural patterns. In that respect, climate change is akin to the prices that prevail in a free market. Even though climate change is anthropogenic, it is not an effect of behaviour conducted by humanity as an independent agent. Instead, climate change is the product of the accumulation of greenhouse gases emitted by various actors since the industrial era.

A way to overcome this objection to the appropriateness of invoking a global group agent in the context of climate change is to shift the focus from the causes to the solutions. Thus, the duty in question could be a second-order duty to prevent other actors' behaviour.[147] When we call on humanity as a group agent to mitigate climate change, we call on it to coordinate the behaviour of the various actors who emit greenhouse gases. Such argumentation is typical in the recent lawsuits, in which states are asked to take political action to reduce emissions from agents within their jurisdiction.[148] However, at the global level, no agent with this power exists. As this second-order duty to impose a global mitigation effort requires the powers over the global community, this duty remains fully notional.[149]

Again, the UN could be a possible candidate for the bearing of an actual duty of this second-order kind. However, if such an abstract duty to mitigate climate change exists, it is not the UN that bears it. The UN does not currently possess the power to prescribe or enforce

[146] All the legal cases reviewed for this dissertation start with a description of the anthropogenic nature of climate change.
[147] This second-order duty is a duty to exercise the Hohfeldian higher-order entitlement of power over the first-order entitlements of claim-rights and liberties. The phrase "second-order duty" is coined by Onora O'Neill; O'Neill, 'The Dark Side of Human Rights', 428.
[148] What is at stake in, for instance, *Urgenda* and *Neubauer* is not the emissions directly from the states' activity but the emissions from actors within the states' jurisdiction.
[149] However, there is nothing conceptually against the future creation of an agent bearing the duty to exercise such powers.

measures that would reduce greenhouse gas emissions. Moreover, singling out the UN as the bearer of the abstract global duty to mitigate removes the responsibility from the actors closer to the practices that emit greenhouse gases.

3.2.2 Ad hoc collective of various actors as the duty-bearer

Another way of paraphrasing Simon Caney's argument and addressing the global nature of climate change mitigation is to focus on how the various entities can act together to prevent the adverse side-effects of modernity. This line of reasoning resembles the classic thought experiment of how three people on a riverbank witness a person drowning. If these three people cooperate, they can easily save the person; consequently, they have a duty to cooperate to avoid this adverse side-effect of their joint inaction.[150] Even if the cooperation is minimal, by their joint action they form an ad hoc collective with a shared agency.[151] This perspective appears to capture what is at stake in the climate change context: various actors are asked to come together to mitigate the aggregated side-effects of their collective behaviour. The bearer of an abstract global duty to mitigate climate change is thereby a collective of various actors.

Hence, if an abstract global duty to mitigate climate change exists, we can ascribe the bearing of this duty to a collective of various actors. Nevertheless, the question at stake in the litigation trend, as well as in the broader discourse on rights and climate change mitigation, is not this abstract duty *per se*, but the specific duties making up the bundle of duties required for the fulfilment of abstract mitigation. From the perspective of duty-bearers, the central questions are who the bearers to these specific mitigation duties are and what requirements are laid upon them by the duties.

We need here a fine-grained understanding of the universal quantifier. As Matthew Kramer has elaborated in his forthcoming book *Rights and Right-Holding*, the universal quantifier has three different modes, "aggregative", "distributive" and "disjunctive", which approximately correspond to the differences among usage of "all", "each" or "every", and "any".[152] He writes: "[w]hen a proposition is governed by an *aggregative* universal quantifier, it ascribes some property to all the members of the relevant domain as an

[150] Elisabeth Cripps has explored a wide range of thought experiments about how actors have duties to cooperate to avoid different outcomes and how these thought experiments apply to the issue of climate change mitigation; Cripps, *Climate Change and the Moral Agent*.
[151] Smiley, 'Collective Responsibility', sec. 2.
[152] Kramer, *Rights and Right-Holding*, sec. 2.5.5.

overarching collective or assemblage.".[153] This captures our situation where the responsibility for averting global warming by mitigating emissions is incumbent on the whole of humanity. An ascription of that responsibility applies to all the members of the collective taken together and not to any member in isolation.

In contrast, the distributive universal quantifier covers each member of the collective: "[w]hen a proposition is governed instead by a *distributive* universal quantifier, it ascribes some property to every member of the relevant domain taken individually.".[154] Does every member of a community owe a specific duty to mitigate emissions, where the content of that duty is the same for everyone? Part II of this dissertation answers this question negatively.

As for the *disjunctive* universal qualifier, a proposition governed by it ascribes a property to at least one member of the relevant domain.[155] This dissertation does not provide an answer to the *who* and the *what* components in the *who ought to do what* question, as this requires the specification of a distribution of the burdens to mitigate climate change – something that is beyond the scope of the dissertation.

3.3 The holders of claim-rights correlated with duties to mitigate climate change

When climate change mitigation is considered an issue of *rights*, the issue is typically approached from three different perspectives. Moral theories of rights explore particular kinds of justifications of the *who ought to do what* question. Political theories of rights explore the establishment of duties in particular ways. For analytical theories of rights, the focus is on identifying the holders of claim-rights correlative to a duty.[156]

This section investigates how the two leading analytical theories of right-holding, the "will theory" (subsection 3.3.1) and the "interest theory" (subsection 3.3.2), identify holders of claim-rights. Although both theories see sane human adults as the paradigmatic holders of claim-rights correlative to duties, they do not exclude other possible actors as right-holders. From an analytical point of view, there is nothing problematic in a conclusion that the holder of the claim-right correlative to a mitigation duty is, for instance, the political authority

[153] Kramer, sec. 2.5.5.
[154] Kramer, sec. 2.5.5.
[155] The claim-right to the disjunctive universal duty that greenhouse gas emissions must be mitigated means that at least one member of the global collective of human actors has to mitigate greenhouse gas emissions; Kramer, sec. 2.5.5.
[156] In addition, it is a question of examining which actors might potentially hold rights.

issuing the duty. My application of these analytical theories of right-holding to mitigation duties is nevertheless influenced by the underlying concern in the current litigation trend and wider discourse on rights and climate change mitigation: to establish a connection between those experiencing the detriments of climate change and duties to mitigate climate change. Thus, I reserve the description of mitigation as an issue of "rights in the narrow sense" to situations in which these individuals are the holders of the claim-rights correlative to the mitigation duty in question.

The conclusion emerging from this section is that it is not necessarily the case that those experiencing the detriment of climate change are the holders of any claim-rights correlative to duties to mitigate climate change. This preliminary conclusion will be bolstered in the following chapters. Although the two next parts of this dissertation engage with perspectives very different from the analytical perspective explored in this section, at least two of the central questions asked are the same: first, whether an individual human being has an interest in the fulfilment of the abstract duty to mitigate; and second, whether the breach of a particular mitigation duty causes a detriment to an individual's interest.

3.3.1 The will theory and mitigation duties

One analytical approach to identifying the holder of a claim-right correlated with some specified duty is captured under the rubric of the "will theory". What the adherents to the will theory have in common is that they consider the right-holder to be the agent that is competent and authorised to control the duty in question.[157] For the will theory, the sufficient and necessary condition for identifying the right-holder to a duty is to identify the person who has the power to preserve or discontinue the duty and the power to demand or waive the enforcement of the duty.[158] In Hohfeldian language we would say that a will-theory right is a claim correlative to, and a power over, the duty in question.

In the following, I will look at whether the will theory can consider those experiencing the detriment of climate change as the holders of claim-rights correlative to two different types of mitigation duties. The first duty is the abstract duty borne by a collective of various actors to mitigate the global phenomenon of climate change. The second category of duties comprise the many specific duties borne by various actors to undertake mitigation

[157] Joel Feinberg argues that it is the claiming that gives rights their special moral feature; Feinberg, 'The Nature and Value of Rights', 252. Hillel Steiner emphasises the right-holders as "small-scale sovereigns"; Steiner, 'Working Rights', 262.
[158] Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights', 247.

measures as part of the collective effort to mitigate climate change. The focus will primarily be on the power aspect of the will theory. Although the contents of the duties and the identities of the duty-bearers vary, the question of whether those experiencing the detriment of climate change possesses powers over these duties can be examined generally. The question of whether these individuals also hold claim-rights correlative to these duties will be examined when we look at the interest theory in subsection 3.3.2.

The abstract duty to mitigate climate change

This subsection examines the abstract duty to bring about a comprehensive transition away from high levels of greenhouse gas emissions, ensuring that the average global temperature does not exceed certain levels. According to the will theory, an individual is the holder of a right that correlates to this obligation only if they, at all times, have the power to preserve or discontinue the duty and the power to waive or demand enforcement of this duty. This is not the case for the global abstract duty of climate mitigation, for at least four reasons.

The first reason follows directly from the will theory's central criterion for being a holder of rights: being competent and authorised to control the correlative duty.[159] Most of the people who will benefit from the fulfilment of the abstract duty to mitigate – namely, current children and future generations – do not fall within the class of entities that potentially can hold rights according to the will theory. Nether children nor future generations are able to control any acts and omissions undertaken here and now: hence, they do not possess powers over this current duty.[160]

The second challenge pertains to the will theory's emphasis on the role of claim-rights in providing the right-holders with important choices.[161] Unwaivable rights (such as the right to life) or rights which cannot be enforced by the people who seem to hold them (such as a right not to be killed) are then not really rights according to this theory. In the same way, the existence of climatic conditions within which humans can survive is a fundamental feature of the human condition that is unwaivable by individuals. The abstract duty to mitigate climate change would be in place irrespective of whether an individual demands that it remains in place. Similarly, the duty will be in place even if an individual waives it.

[159] Joel Feinberg has argued that it is the claiming that gives rights their special moral feature; Feinberg, 'The Nature and Value of Rights', 252. Hillel Steiner emphasises the right-holders as "small-scale sovereigns"; Steiner, 'Working Rights', 262.
[160] Steiner, 'Working Rights', 248.
[161] The will theory sees rights almost entirely in the domain of private law, whereas the rights envisaged in discussions of climate change are largely in the domain of public law.

The third reason is that, even if individuals could possess such powers, the situation arising is absurd. It is silly to say that person A can waive her right to climate mitigation and person B can simultaneously demand its continuation and enforcement. Granting powers to certain individuals would threaten to deprive others of their similar powers. What is left is only the power to demand or waive remedies.[162] Given that the abstract duty to mitigate greenhouse gas emissions is a duty to produce a non-excludable and non-separable good, individuals cannot hold claim-rights correlative to this truly global duty.

This latter point, that it appears absurd to grant individuals the power to waive abstract mitigation duties, also holds if a group of individuals are considered the holder of a claim-right correlative to this duty. Since human beings can form groups with structures that make them able to exercise powers to enforce and waive rights, the will theory can accommodate for, for instance, corporations and nations as potential right-holders.[163] The abstract duty to mitigate remains unaffected by its being waived by, for instance, Norway. Nevertheless, even if Norway had this power, the silly situation arises: if Norway was given the power to waive the claim to abstract climate mitigation, this would imply that Kiribati loses its potential power to enforce the same claim to mitigation and ends up with only a remedial power.

A solution out of this senseless situation could be to consider the entire human community as a holder of a claim-right correlated with the abstract duty of climate change mitigation. However, as has been observed in section 3.2, the human community has not come together in any meaningful way that could see them as a unified group agent with the ability to hold such powers as a group. In other words, no agent can genuinely speak on behalf of all those who would benefit from the mitigation of climate change.

The fourth reason the will theory does not identify the individuals experiencing the detriment of climate change as holders of claim-rights correlative to the abstract duty to mitigate climate change is closely related to the fact that there is no simple way to enforce such a duty. Since abstract climate mitigation is a product of the fulfilment of multitudinous specific mitigation duties, it is for all practical purposes impossible for a potential right-holder to track down all possible duty-bearers to enforce the duty. Moreover, it does not follow from this abstract duty exactly which agent is to do what.

---

[162] This is, as Matthew Kramer pointed out, because we can consider a power of waiver to be a power to waive her liability to acquire a remedial power that would enable her to purse a remedy in the event of the non-occurrence of the requisite mitigation. Rendered this way, both A's and B's powers can be exercised in conjunction.

[163] Steiner, 'Working Rights', 248.

This practical and principled obstacle to enforcement is reflected in some of the recent legal cases by the issue of standing. For example, in *Our Children's Trust*, the US Ninth Circuit Court denied standing as there was no way a decision from the court could enforce the claim to a safe climate. In *Portuguese Children*, it will be interesting to see if the ECtHR refuses admissibility because the children have not first brought the case in the legal systems of the 32 states.[164] The claimants omitted to bring the case in all these jurisdictions precisely because they found it too demanding, or even impossible, to track down all the duty-bearers needed for their asserted claim-rights to be fulfilled.[165] If the will-theory requirement of possessing a power of enforcement of global climate justice is a requirement for the holding of a claim-right to such justice, then climate mitigation at this abstract level is not an issue of rights.

Specific duties of mitigation

The content of specific mitigation duties and the identities of the actors bearing these duties vary greatly. Based on the discussions in the latter chapters of this dissertation we can, however, classify specific duties by two categories. The first is to understand them as universal (*distributive*) duties to not emit greenhouse gas emissions because these emissions have a particular role in causing a detriment to individual human beings.[166] From a will-theory perspective, we do not need to assert the invalidity of this claim to conclude that an individual human being will not hold any claim-rights correlative to such duties. This is due to the conclusion in the foregoing discussion. Even if a specific pattern of behaviour had a particular role in creating climate change or achieving climate change mitigation, its existence is not affected by it being demanded or waived by an individual.

Specific mitigation duties can also be seen as more diverse (*disjunctive*) duties established by political authorities with the aim of collectively fulfilling the abstract duty to mitigate climate change.[167] In this situation, the holders of claim-rights correlative to such

[164] This is what happened in *Sacchi*, in which the UN Child Committee refused to review the merit of the claims because of the subsidiarity principle; *Sacchi v Germany*, para 9.20.
[165] Petition.
[166] This is the perspective of Chapter 5 of this dissertation.
[167] In Chapter 4, this dissertation investigates whether moral considerations about fundamental interests determine the content of specific *in personam* duties. However, we will see that a more accurate normative lens for the allocation of such duties is distributive justice ideas investigated in Chapter 7. Because of the high disagreement about both the principles of justice and how such principles apply to climate change mitigation, Chapter 8 shows how such duties first become legal duties when they are enacted by a political authority. Chapter 9 challenges this view by arguing that, in some legal systems, certain principles of justice have currently emerged as recognised standards.

specific duties are also not those who will be affected by climate change. Instead, those who will be affected by the consequences of climate change can only be potential third-party beneficiaries of these duties.[168] Although such third parties might benefit from the duty-bearers' fulfilment of a concrete mitigation duty, this fulfilment is beyond the third parties' control and, hence, they are not the holders of any claim-rights correlative to this duty. The agents with the power over particular mitigation duties are typically the political authorities acting on behalf of the political community allocating the mitigation burdens through various regulations. For instance, the political authority would generally be the right-holder under the mitigation regulation targeting those within its jurisdiction. Moreover, a country's legislature typically holds powers over the executive's duty to fulfil a national emission reduction target.[169]

How political authorities have organised the power to enforce and waive these duties will vary between the different political communities. In some jurisdictions, the enforcement of general regulations is allocated to organisations or institutions acting in the public's interests. For instance, NGOs have been the claimants in many recent lawsuits, like *Urgenda* and *Arctic Oil*.[170] Such rules of standing give the impression that the third-party beneficiaries can be the holders of claim-rights correlative to these duties by being capable of controlling these duties.[171] However, from a will-theory perspective, the main reason to dismiss this argument is that the granting of the power of enforcement is in itself not enough to have control over a claim. The control required by the will theory also encompasses the power to waive the claim.[172] This power to waive the existence of particular mitigation duties is not given to the NGOs and remains a matter for the political community to decide. The NGOs' role is rather that of a monitor to ensure that the regulations enacted on behalf of the political

[168] In the next section on the interest theory, we will anticipate the conclusion from the following Part II of this dissertation: namely, that it is extremely unlikely that an individual human being is the beneficiary of a particular mitigation duty.
[169] In the Paris Agreement, there is a clause on dispute resolution allowing states to enforce duties in the agreement. However, the requirements in the Paris Agreement are mostly of procedural character. Notably, there is no duty to fulfil a specific greenhouse gas reduction target. For the current discussion, the important point is that particular parties to the agreement would not possess the power to waive even these procedural duties. Hence, according to the will theory, singular parties to the Paris Agreement are not the holders of rights correlative to any duties in the Agreement.
[170] *Urgenda*, Court of Appeal, para 38.
[171] This is a solution offered by will-theorists when categories of agents, like children and future generations, lack the capacity to be potential right-holders according to this theory.
[172] Many rights are of such importance that they are inalienable; Kramer, 'Rights Without Trimmings', 73.

community are followed.[173] Assigning NGOs limited powers of enforcement by allowing them to bring cases to court is one way of ensuring such scrutiny.

Here it is appropriate to foreshadow the thesis advanced in Chapter 8 on how issues of distributive justice are at the core of political disagreement. Political philosophers argue whether a political authority has the legitimacy to settle disagreements that impact a wide range of fundamental interests. Most of those philosophers maintain that such a role can be legitimate for political authorities. However, these arguments are not directly transferrable to NGOs. A will-theory approach that grants NGOs control over justice would need to produce convincing arguments for why such general power is, or should be given, to specific organisations advancing particular interests.

In addition to specific duties of mitigation being enacted by regulation, specific duties can also come into existence by agreement.[174] These agreements could be between a political authority and a private actor, such as requirements in procurement agreements. Moreover, mitigation issues could be part of agreements between private parties, for instance, in the energy sector or the developing carbon capture and storage (CCS) sector. Both examples make clear that the direct parties to these agreements are those possessing the power to waive and enforce them, rather than the third-party beneficiaries. The individuals indirectly benefitting from these agreements are therefore not the holders of rights under them, according to the will theory. In the following section 3.3.2 on the interest theory, we will see that third-party beneficiaries similarly do not hold claim-rights correlative to these duties.

3.3.2 The interest theory and mitigation duties

The adherents to the so-called "interest theory" oppose the will theory by denying that a claim must be accompanied by powers of enforcement and waiver in the hands of the claim-holder if the claim is to count as a right. Yet the adherents to the interest theory also hold it necessary to specify the conditions for the holding of claim-rights. The central criterion of the

[173] This is an under-addressed issue in the climate cases brought by NGOs. In *Arctic Oil*, it was not controversial that Greenpeace, Natur og Ungdom, and Naturverforbundet could bring claims over the environmental provision in the Norwegian Constitution. These organisations were allowed to bring claims of alleged individual rights without the court discussing whether their statutory powers of enforcement covered such individual claims. In *Urgenda*, the NGO Urgenda gained such powers of enforcement through the legal mechanism of a mass claim whereby the organisation represented 886 specific Dutch citizens. However, it is questionable whether these individuals had any direct claims.

[174] In addition, there is an issue concerning who has the power over duties of negligence. In Chapter 5 we investigate whether it is appropriate to address specific instances of greenhouse gas emissions as negligent acts towards individuals.

interest theory has been formulated by Matthew Kramer: "Necessary and sufficient for the holding of a claim-right by *X* are (1) the fact that the duty correlative to the claim-right deontically and inherently protects some aspect of *X*'s situation that on balance is typically beneficial for a being like *X*, and (2) the fact that *X* is a member of the class of potential holders of claim-rights."[175]

Where the will theory emphasises the role of legal rights in providing right-holders with important choices, the interest theory emphasises the role of legal rights in providing right-holders with the protection of interests. Any application of the interest theory must differentiate between what is generally beneficial and what is generally detrimental or neutral.[176] Let us, for instance, imagine that a state fulfils its duty to reduce greenhouse gas emissions by imposing on everyone an obligation to inform on anyone who denies climate change. Who holds a right correlative to this duty? Being betrayed due to divergent opinions is generally not beneficial for people and thus not within the range of interests ascribed to right-holders. The right-holder in this situation would rather be the state prescribing the duty.[177]

My discussion of the interest theory follows the same structure as the previous subsection on the will theory. We examine whether the interest theory classifies those experiencing the detriment of climate change as the holders of claim-rights correlative to (1) the abstract duty to mitigate climate change and (2) the specific duties to mitigate greenhouse gas emissions. Both strands of the enquiry draw preliminary conclusions about the role of individual interests in the context of climate change mitigation which will be the subject of further investigation in Part II of this dissertation. Although the content and function of fundamental interests in the moral justification of mitigation duties are not the same as the content and function of interests in analytical theories of rights, they do have important overlaps.

The abstract duty to mitigate climate change

From the outset, the existence of an abstract duty to mitigate climate change looks like something that, on balance, is typically beneficial for an individual. At least, it is generally assumed in the discourse on rights and climate change mitigation that individuals hold claim-

[175] Kramer, *Rights and Right-Holding*, sec. 3.1, 4.1.
[176] See Kramer, 'Rights Without Trimmings', 92.
[177] A parallel example is given by Matthew Kramer regarding a son who has an obligation to inform on his parents when they utter seditious sentiments, Kramer, 91.

rights correlative to this duty.[178] However, it is important to remember that this connection cannot just be assumed. For the abstract mitigation duty to have individuals as holders of claim-rights correlative to this duty, we have to ascertain whether the obligation to mitigate climate change inherently protects something that is typically beneficial for someone like the individual.

One line of argument to answer this question is to pinpoint how a particular individual will be affected by the level of mitigation at stake.[179] The identification of holders of claim-rights correlative to this duty is then a context-specific exercise based on how specific human beings are faring from some state of affairs. Some of the recent legal cases conduct this exercise. For instance, in *Sacchi*, the children bringing the case present a very detailed report on how they have already been affected by climate change.[180] Other cases provide more general statements of how the consequences of climate change will manifest in the particular country of interest.[181] In both approaches, the general state of justice is translated into some concrete, or potentially concrete, benefits for those human beings in question.[182]

Another line of argument to assess whether individuals hold claim-rights correlative to the abstract duty to mitigate is to emphasise how the terms "on balance" and "typically" in Kramer's formulation of the interest theory allow for a more general assessment of whether mitigation inherently protects a benefit to a human being. Thus, we investigate whether the fulfilment of the abstract duty would constitute a global state of affairs with qualities that human beings generally benefit from encountering – like equality, sufficient levels of subsistence, or a high degree of control over their powers-of-disposition.[183]

Because human thriving is based on societal as well as climatic conditions, there is no guarantee that our realisation of abstract mitigation will, on balance, be typically beneficial for an individual, as this also depends on the responses taken. We have already encountered both concerns that our mitigation efforts could deprive people of their basic subsistence and more hopeful predictions that mitigation will lead to other positive synergies.[184] People's

[178] See, for instance, how the Brazilian Supreme Court shortly stated that climate change is an issue of human rights; *PSB*, para 17.
[179] Hence, we need to know more about the content of this abstract duty.
[180] *Sacchi*, petition. Another example is the arguments by the plaintiffs in *KlimaSeniorinnen*.
[181] *Arctic Oil*, para 55. *Urgenda* does not even look particularly at the Netherlands, para 4.
[182] Attributional science is seen as an approach that can pinpoint the consequences of climate change more accurately, which is seen as an advantage for climate change cases; Mayer, 'Attribution Science and the Fate of Climate Litigation'; Burger, Wentz, and Metzger, 'Climate Science and Human Rights'.
[183] In Chapter 5, we discuss these qualities from the perspective of harm whereas in Chapter 7, we see that they also are common in the climate justice discourse.
[184] See, for instance, Railton, 'A Convenient Truth? Climate Change and Quality of Life'.

exposure to the adverse consequences of a changing climate also depends on measures of adaptation. In addition, there is a general problem of establishing causation between an experienced detriment and the occurrence of climate change. Both when the assessment is about certain individuals and when it is about the general aspects of individuals, the assertion that the state of affairs that emerges is inherently in their interest need a considerable amount of argumentation.[185]

A central task throughout this dissertation is to examine the lines of reasoning that underlie these two perspectives further: are the interests of individual human beings at stake in a way that makes it relevant to consider climate change mitigation a matter of rights in a narrow sense? We will see that both lines of reasoning seem to allow for the possibility that individual human beings are the holders of claim-rights correlative to the abstract duty to mitigate. However, the requirement that the protection inherently protects these interests is hard to fulfil. This tenant of the interest theory can be approached through the Bentham's test presented in the following subsection on specific duties. According to the Bentham's test, an individual only holds a claim-right correlative to a duty if some detriment suffered by the individual is included in at least one set of facts minimally sufficient to constitute a breach of the abstract duty. In Chapter 5, we will see that this is mainly the case when we construe the detriment as a general risk. I will here leave the details of this point for later discussions and concentrate on two other challenges.

A first challenge is the general challenge of the time delay between emissions and global warming. Thus, the beneficial situation climate change mitigation will bring about is primarily one that would occur in the future. Due to their confidence interval, the IPCC, for instance, operates with an estimate of the temperature in 2100 for their predictions of the various temperature targets when discussing mitigation pathways. The beneficiaries in this situation will primarily be those alive at that time, making the abstract duty of mitigation mainly an issue for future generations and those who can expect to be alive in this future, in other words, people who are currently children.

There are two questions at stake here. The first is whether future generations can be *potential* holders of claim-rights. At its heart, it is a question of whether human beings not yet born fall in the class of entities that can hold claim-rights. A common way of including those not yet born in this category is by the argument of intergenerational linkage; I harbour

[185] For instance, if mitigation prevents predicted global inequality or instability, it must be shown that this has an independent value.

concern for my unborn children and grandchildren and thus take actions now that would further their interests in the future, for instance, through savings.[186] This is also true at a more general level of the existence of human beings in the future: many of the pursuits conducted by people currently living would be meaningless if no future generations were to exist.[187] The upshot both for the future generations and for the currently alive human beings of recognising them in the community of entities that can hold claim-rights thus speaks for their inclusion in this group.

The second question is the much-explored *non-identity* problem described by Derek Parfit.[188] The non-identity problem is, in short, that what we do or not do today will affect the identities of those who will actually be born in the future. Political decisions that close down or open a factory will for instance affect where people live and which decisions they make, thus having an impact on which couples will form and their eventual decisions on whether and when to have children (and if such a decision is postponed by a month a different ovum will be fertilised). Similarly, both resignation to climate change and striving against it will influence which individuals will exist in the future. Regardless of what we do today, future individuals will owe their existence to our acts and omissions. Given the non-identity problem, we have not harmed the people living in the future by not combating climate change, because if we had taken other actions, they would not be alive. There are thus no future persons who will be made worse off by our acts or omissions.

The question of whether we can harm future generations even though no one will be worse off appears difficult. Parfit solves this problem by not seeing this as a question of the actual individuals who will exist in the future, but rather by comparing the different individuals who might come into existence.[189] Will the potential persons in the future be better or worse off by our current acts and omissions? Rights held by future generations corresponding to our current duties are thus rights held by the group of the potential persons that might come into existence, and not by any particular individuals.[190] Hence, we encounter an aggregative universal quantifier.[191]

[186] Kramer, 'Getting Rights Right', 54. See also Newman, 'Collective Interests and Collective Rights'.
[187] Kramer, *Rights and Right-Holding*, sec. 5.5.2.8.1.
[188] This scholarly doubt is also shared in the legal discourse. For instance, by the former UN Special Rapporteur on human right and environment John Knox; A/HRC/37/58, para 67.
[189] Parfit, *Reasons and Persons*, 377.
[190] See for instance Kramer, 'Getting Rights Right', 56; Feinberg, 'The Rights of Animals and Unborn Generations', 181.
[191] See subsection 3.2.2.

In one way, this appears to be a sufficient solution. In the same way as the abstract duty to mitigate climate change is borne by a collective, the holder of claim-rights correlative to this duty is also a collective. However, the discourse on rights and climate change mitigation puts forward a stronger assertion, namely, that the issue of mitigation is an issue of individual right-holding. Hence, it becomes crucial to establish whether individual human beings who are not conceived yet hold claim-rights correlative to the abstract duty to mitigate.

We can answer this question in the affirmative by applying Matthew Kramer's interest theory. Suppose current actors bear legal duties now, which will improve the lives of people living in the future. In that case, correlative legal claim-rights are vested now in the people who exist in the future and whose interests are inherently protected by these duties. In his forthcoming book, Kramer argues that this duty inherently protects two types of interests.[192] First, the interests the duty directly promotes, such as the climatic conditions. Second, following Parfit's insight, the duty protects these people's interest to materialise rather than the alternative possible people. In both cases, those future people are straightforwardly holders of claim-rights correlative to the duty. The worry about the other possible people whose interest in coming into existence would be "protected" if this duty did not exist is irrelevant to the analysis: this latter sort of "protection" would occur through the absence of any relevant legal duties and would therefore not involve any relevant legal claim-rights.

Depending on how we construe the interest at stake, the universal quantification applicable to the holder of claim-rights correlative to the abstract duty to mitigate is either distributive or disjunctive. If the interest at stake is the protection of the good climatic condition as such, we are faced with a distributive universal qualifier: every future person holds a claim-right correlative to the duty to bring this state of affairs about. However, if the interests at stake are construed as circumscribed issues of well-being, such as access to food or adequate health, we are faced with a disjunctive universal quantifier: some future people might experience this particular benefit, but not all.

The second challenge I want to address in this subsection is a reminder of the limited relevance of establishing that individuals might be holders of claim-rights correlative to an abstract duty to mitigate. This is because the duties meaningfully at stake in any lawsuit are special mitigation duties borne by identifiable duty-bearers. Hence, the interest theory of

[192] Kramer, *Rights and Right-Holding*, sec. 5.5.2.8.4.

right-holding faces the same practical obstacle encountered in our exploration of the will theory: that the abstract duty to mitigate climate change addresses the entire collective action situation. Because there is currently no easy way this state of affairs can be enforced, the failed realisation of this situation cannot be remedied.[193] More importantly, when the abstract duty covers the final state of affairs, it does not follow that any particular duty-bearers must contribute to realising the abstract duty.

The current litigation trend often overlooks whether we are investigating the abstract mitigation duty or specific duties within the bundle encompassing it. For instance, in *Urgenda*, Dutch citizens who are currently alive were considered right-holders as they were expected to experience the adverse consequences of climate change generally. As I have intimated above, not experiencing these consequences directly or not being subjected to the general risk of such consequences could, on balance, typically be beneficial for humans.[194] Nevertheless, the acts and omissions by the Dutch government to reduce Dutch emissions are not equivalent to the fulfilment of this abstract duty to mitigate climate change. It is not in the power of the Netherlands to bring this state of affairs about. Hence, it is a different question whether the Dutch citizens are also holders of claim-rights correlative to the Dutch government's duty to reduce Dutch greenhouse gas emissions.[195] It is this latter question that appears to be the genuine concern for the climate change and rights litigation trend.

Specific duties of mitigation

Individual human beings may be holders of the nominal claim-right to abstract climate change mitigation. Yet the critical question in the current litigation trend is whether they are holders of claim-rights correlative to the various circumscribed duties to mitigate greenhouse gas emissions. Recalling subsection 3.3.1 on the will theory, the situation under review is one where those experiencing the detriment of climate change might be a third-party beneficiary to these duties. Here we will explore this third-party beneficiary situation.

---

[193] Even though a legal system does not make a duty enforceable, it is nevertheless a genuine deontic duty; Kramer, sec. 2.4.4.

[194] The Court of Appeal did not assess whether future generations or people outside of the Netherlands also were holders of claim-rights correlative to the duty to mitigate climate change, as this was not necessary to decide the case; *Urgenda*, Court of Appeal, para 37.

[195] A similar conflation of the abstract duty and its concretisations appears to be found in *Neubauer* when the Court granted people from Nepal and Bangladesh standing in the constitutional complaint seemingly because they would be affected by climate change; para 90, 132. The Court's granting of standing presupposes that the people from Bangladesh and Nepal are affected by climate change owing at least in part to emissions attributable to Germany; para 175.

In the current litigation trend, an important category of specific duties is the duty to realise a national mitigation target. The holders of claim-rights correlative to this duty are mainly the other bearers of the abstract duty to mitigate climate change. We come to this conclusion from three angles. First, we can examine a national mitigation target as a contribution under an international agreement to bring about an overall mitigation of climate change. The holders of claim-rights correlative to this duty to fulfil a national mitigation target are the other parties to this agreement.[196] This is because the keeping of a promise is, on balance, typically beneficial.

The second angle is to view a national mitigation target as part of a collective action situation independently of any actual agreement on how to distribute the burdens. The contribution from a party in a collaboration is an inherent benefit for the other parties to the collaboration. This benefit could be linked to the contribution being directly necessary for the fulfilment of the collaboration. Since each member has an interest in the success of the collective action, each has an independent interest in the fulfilment of the specific duty to enable the fulfilment of the abstract duty. However, even in the absence of such a necessary role of the contribution, the parties can have an interest in the collaboration that the contribution promotes.

This latter point becomes more evident if we anticipate the discussion in Part III of this dissertation, namely, that the burdens of fulfilling the abstract duty are to be justly distributed between the various parties to the collective action situation. This distribution occurs between the different agents and it is towards these other agents that one is either taking on one's fair share of the burdens or not. Thus, those having a claim-right that the burdens are justly distributed are those who share the burdens. The climate change and rights discourse often states that every emission reduction counts because it frees up space in the so-called budget of remaining greenhouse gases that can still be emitted to the atmosphere if specific temperature limits are to not be exceeded. I understand this argument to imply that the greenhouse gases that one nation-state (or multinational company) refrains from emitting give room in the total budget for another agent to emit such gases instead. In Chapter 5, I will describe this situation through the metaphor of a glockenspiel of games of Russian Roulette.

[196] As we will explore further in Chapter 7, the content of the duties in the Paris Agreement is to report a nationally determined contribution (NDC) and track progress, not to fulfil a specifically assigned mitigation target. Thus, any legal claim-right that the other members of the agreement fulfil their part of the agreement is unenforceable.

A game of Russian Roulette starts when a tube is filled up with marbles. A marble not added to the tube might make space for another marble to be added.

All these three angles highlight that specific mitigation duties are part of a cooperation between different actors, a cooperation that seeks to benefit those negatively affected by climate change. An important question is therefore whether these third-party beneficiaries themselves hold claim-rights correlative to these duties benefitting them. An advantage of the interest theory, compared to the will theory, is that it can account for third parties as right-holders under agreements made to benefit them. A classic example can be found in international human rights systems where states enter into these types of agreements with each other to protect individual human beings. The interest theory can consider these humans as the right-holders under international human rights agreements even though they are not direct parties to them.[197]

However, the interest theory has sometimes been criticised for supposedly countenancing a proliferation of right-holders. For instance, if an individual enters into a labour contract with a company and spends some of the earned salary at a furniture shop, does the furniture shop hold a right to the company's paying the individual the salary? Although it is in the shop's interest that the contract is fulfilled, extending right-holding to the shop is overly inclusive and misguided.[198] To show that these outcomes do not follow, Matthew Kramer has included in his theory the following test, which he denotes as Bentham's Test:

> *"Bentham's Test provides as follows. To ascertain whether someone holds a legal claim-right correlative to some specified legal duty D, we need to ask what facts are minimally sufficient to constitute a breach of D. Let "R" designate the party who bears D, and let "Q" designate some party who is capable of holding legal claim-rights.* ***If and only if at least one set of facts minimally sufficient to constitute a breach of D includes the fact that the situation of Q has been affected by R in a way that is normally detrimental for someone like Q, Q holds a legal claim-right correlative to D****."*[199]

In the above example, no set of facts minimally sufficient to establish a breach of the contractual duties will include the existence of any furniture shop. This example differs from the international third-party agreements on human rights, where the detriment to an

[197] The will theory can reach a similar result if individual human beings are given the power to enforce or waive the fulfilment of these duties. Not all international human rights agreements allocate such powers to individuals. Whereas for those agreements that do assign such powers, not all countries have ratified the granting of such powers.
[198] The example is from Kramer, 'Rights Without Trimmings', 80.
[199] Kramer, *Rights and Right-Holding,* sec. 4.1.2.1.

individual human is contained in at least one set of facts minimally sufficient for a breach of the duties designated by the agreement.

In the climate change context, the question is which type of situation we face. Political authorities establish measures to mitigate emissions in order to contribute to the fight against climate change. Some such measures might inherently protect the interests of human individuals as third-party beneficiaries. However, it is inappropriate to conclude that an individual human being who might face the consequences of climate change holds a claim-right to all mitigation measures. To see this, we must take the conclusion from the following Part II in advance. In Chapter 5, I conclude that we cannot establish the content of a circumscribed mitigation duty by looking at any detriment happening to an individual human being. No particular emission creates a specific harm, and no reduction in any single person's emissions can prevent a certain harm. This is even more so if we consider the issue to be the abstract duty of reaching an overall just state of affairs – like not crossing a specific average global temperature limit.[200] Applying Bentham's Test to the issue, we see that the infliction of a detriment on an individual is not an element in any minimally sufficient set of facts for a breach of the mitigation duty. The violation of a particular mitigation duty is then constituted by facts other than any effects on the interests of any ordinary citizen.

Employment contracts with decent salaries might benefit the whole economy, including the furniture shop in the above example. However, this does not make the furniture shop a right-holder under a particular work contract between two other agents. The same applies in the climate change context. Although the many mitigation measures together are forming the collective effort to bring climate justice about, this does not make all those who benefit from this just state of affairs the right-holders under any particular measures to bring this state of affairs about.[201]

An exception to this conclusion may be found for nations with a level of emissions so high that their mitigation target is necessary to bring about the abstract mitigation duty.

[200] As we will see in Chapter 5, this is only the case if we construe the detriment as the risk, understood as the deprivation of power-of-disposition over one's physical integrity, posed by climate change.

[201] One might want to challenge this conclusion by drawing on examples where it is appropriate to consider the generally benefiting public the holder of claim-rights correlative to duties otherwise held between two individuals. For instance, the beneficiary of the prevention of crimes, like murder or rapes, is the community in addition to the potential victim. However, this example is well suited to highlight the difference from the climate-change cases which I am scrutinizing. In the example of crimes, the detriment to the public by experiencing an instance of murder or rape is a minimally sufficient set of facts to establish that the duty not to murder or rape has been breached. In the climate change context, the detriment to the public by experiencing climate change cannot be seen as a minimally sufficient set of facts for the breaching of any particular mitigation duty. A further discussion of this issue will be provided in Chapter 5.

However, the detriment individuals experience if the abstract duty of climate justice is not fulfilled is not a minimally sufficient fact for establishing that the concrete national mitigation target has been breached. The compliance of a high-emitting nation may be necessary for the fulfilment of the abstract duty, but it is not sufficient. Hence, from the fact that the abstract duty has not been fulfilled, we cannot validly infer that a high-emitting nation has not complied with its concrete duties. Insofar as a national mitigation target ensues from an international agreement construable as a third-party beneficiary agreement, the right-holders are the parties in the agreement and not the individuals benefitting from climate change being mitigated.

We reach similar conclusions when we turn our investigation towards a national context. Here, the political community is asked to fulfil a national mitigation target by distributing the burdens amongst its members. It is hard to imagine how a particular source of emissions within a political authority's power plays a necessary role in fulfilling or jeopardising the global abstract duty to mitigate climate change. Hence, those impacted by climate change are generally not right-holders under any regulations by a political authority. Instead, the main right-holder under particular mitigation measures introduced by a political authority, like insulating homes, using biofuel in combustion engines, the authority's withdrawal or lack of renewal of coal plant concessions etc., is the political authority. The political community, on behalf of which the authority operates, also holds claim-rights correlative to the enacted mitigation duties. The analysis of mitigation measures then resembles that of the more widely studied issue of taxation.[202] The holder of the claim-right correlative to the duty to pay taxes is not any particular individual who might benefit from how the political authority uses this revenue. Instead, the duty is towards the authority imposing the duty to pay taxes.

If we move away from the enactments of political power to the private power to enter into agreements with consequences for greenhouse gas emissions, we reach similar conclusions. Contracts between a public authority and a private agent, or between private individuals, are third-party beneficiary agreements in which Bentham's Test does not indicate that claim-rights are held by the third parties.[203] This is also the case for high-emitting enterprises, like petroleum extraction, or massive renewable projects, like wind farms. Both

[202] Kramer, 'Rights Without Trimmings', 83–84.
[203] As Matthew Kramer has pointed out, there might sometimes be some third parties whose interests are *inherently* protected by the provisions of such agreements, but clearly most if not all members of the public at large will not be such third parties.

measures lack direct causation in fulfilling or jeopardising the abstract duty to mitigate climate change. Under the interest theory, the holders of claim-rights to the pursuit of such projects are limited to the agents that are parties to the agreement. Therefore, also according to the interest theory, the holders of claim-rights correlative to the abstract duty of mitigation are generally the other agents working collectively to combat climate change, and not those affected by climate change.

Part II: Moral Justifications of Rights

Chapter 4: Fundamental Interests

4.1 Introduction

The rights and climate change mitigation discourse invokes arguments of rights to establish duties to mitigate greenhouse gas emissions. This Part II of the dissertation analyses whether these arguments of rights coincide with traditional moral theories of rights. By moral theories of rights, I understand theories that justify moral duties mainly by reference to the interests or autonomy of the holder of the claim-rights correlative to the duties.[204] In the current context, individual human beings are the potential holders of the claim-rights to mitigation and the justifications for mitigation duties are centred on these individuals.

This part comprises three chapters. Chapter 4 investigates strategies to justify duties to mitigate climate change by invoking fundamental interests which are commonly adduced as the basis for mitigation. The chapter is divided into three main sections. Section 4.2 highlights how such narratives prevail in the current rights and climate change mitigation discourse. The section shows that the discourse mainly highlights climate change mitigation as a *state of affairs* – a factual situation – that should be realised because it best fulfils a wide range of fundamental interests. In section 4.3, I argue that the consequentialist aggregation of interests underlying the current discourse is not an interest-based justification proclaimed to be about rights in a narrow sense.

The analysis in section 4.3 centres on Joseph Raz's interest theory of rights as the paradigmatic framework for consequentialist interest-based moral theories of rights. However, a correctly formulated interest-based theory of rights would not be able to establish a global duty to mitigate climate change. If the discourse asserts that the abstract duty to mitigate climate change is justified by invoking an individual's interest, its reasoning cannot be sustained. Similarly, if climate change mitigation is deemed to be obligatory through an overall assessment of interests, there is no right to it in the narrow sense. Because an individual's interests in, for example, life, health, or subsistence are not *inherently* protected by an abstract duty to mitigate, it is neither appropriate to derive a duty to mitigate from these interests nor to consider the individual to hold a claim-right correlative to such a duty based on these interests.

[204] Thus, I prescind from other theories of rights, for instance, theories that focus on the duty-bearers.

In section 4.4, I contend that these conclusions also apply to specific duties to mitigate greenhouse gas emissions borne by various actors. Invoking the detrimental consequences of climate change on individuals' fundamental interests does not provide an answer to the more circumscribed question of *which actors ought to do what* to mitigate climate change.

Chapters 5 and 6 explore strategies to justify mitigation duties by reference to the constraints imposed by individual interests on the latitude of others to pursue their various ends. There are two aspects of this narrative. First, it asserts that the production of greenhouse gas emissions *harms* an individual's fundamental interests. Second, it explores the alleged morally salient difference between the obligation to not actively set back fundamental interests and the obligation to take affirmative steps to fulfil fundamental interests. In Chapter 5, I apply a fictional narrative of a glockenspiel of games of Russian Roulette to show that the harm associated with climate change is one of *risk*. I also argue that no singular production of greenhouse gas emissions is a cause of this risk that warrants the imputation of responsibility for it. Hence, special duties to mitigate greenhouse gas emissions are not justified by reference to the harm they avoid. This conclusion is further substantiated in Chapter 6, which explores how the detrimental consequences to human beings are the unintended side effects of emitting behaviour often is allowed and not done by an actor.

This Part II does not undermine the need to mitigate greenhouse gas emissions. Its theoretical aim is to scrutinise the assertions that mitigation is justified by reference to the interest or autonomy of individual human beings. It concludes that the consequentialist narrative of individual interest fulfilment in Chapter 4 and the deontological narratives of not wronging human beings in Chapters 5 and 6 prove unsuccessful in justifying and circumscribing mitigation duties. An appropriate moral justification both for the abstract duty to mitigate climate change borne by all and specific duties to mitigate greenhouse gas emissions borne by some must be found in overall assessments encompassing a wide range of interests.

4.2 Three narratives of fundamental interests and climate change mitigation

The discourse on rights and climate change mitigation typically invokes fundamental interests to justify the need to mitigate climate change. In this section, I categorise how the UN human rights bodies and academics working on international and regional human rights treaties apply such arguments. First, it is said that mitigation *furthers* fundamental interests

(subsection 4.2.1). Second, mitigation is a *precondition* for the realisation of fundamental interests (subsection 4.2.2). And third, mitigation ensures that a *threshold* of fundamental interests is realised (subsection 4.2.3). In the following sections, I explain how these arguments relate to the paradigmatic interest-based moral theories of rights.

4.2.1 The furthering of fundamental interests

The human rights community often invoke the impacts climate change has on the fundamental interests of human beings as the central basis for why it should be mitigated.[205] In its basic form, this is an argument of optimisation: climate change mitigation will protect against violation of many types of fundamental entitlements for a wide range of people. This type of argument was included in the political agreements of the international climate change system when the parties to the UN Framework Convention on Climate Change (UNFCCC) in their *Cancun* meeting adverted to the direct and indirect impact of climate change on human rights.[206] The current trend of strategic litigation also takes this link between mitigation and the human interests as its point of departure when the detrimental consequences to various fundamental interests protected in the invoked legal authority are either elaborately explored or tersely acknowledged.[207]

The basis for this argument is the scientific insights compiled in the Intergovernmental Panel on Climate Change (IPCC) reports. Indirectly, the IPCC addresses a variety of fundamental human interests when it highlights the likelihood of adverse consequences such as heatwaves, extreme weather events, and loss of land. That these conclusions can be viewed as an exercise in quantifying human interests becomes evident in their report on a 1.5°C limit to the increase of average global temperatures compared to a 2°C limit. Here the IPCC mentions, for instance, that up to 10 million fewer people would be exposed to risks from sea-level rise if the lower temperature target is pursued.[208]

Many UN human rights bodies explore the link between climate change and the furtherance of fundamental interests by drawing on these scientific insights.[209] For instance,

---

[205] Highlighting the numbers of people potentially affected by climate change is the usual line of argument in human rights and climate change scholarship. See, for instance, Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*, 105; Atapattu, *Human Rights Approaches to Climate Change*, 76.
[206] FCCC/CP/2010/7/Add.1
[207] See, for instance, *Neubauer*, para 22-28.
[208] IPCC 1.5C, 'Summary for Policymakers', 7.
[209] Summary statements are given in the many Human Rights Council's (HRC) Resolutions on human rights and climate change, such as: "Emphasizing that the adverse effects of climate change have a range of implications,

the Special Rapporteur on the right to food addresses how the more frequent droughts, groundwater salinisation and algal blooms in the oceans affect food availability.[210] The availability, accessibility, acceptability and quality of water will all be threatened by climate change.[211] The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living emphasises how peoples' homes are threatened by natural disasters, such as flooding, landslides, heavy rainfalls, and sea level rises.[212] The Rapporteur also stresses how climate change will increase population mobility. People will move voluntarily to places less affected by climate change or do so out of desperation when their lives, health, property, and livelihoods are threatened.[213]

The permanent UN human rights bodies also increasingly address the impact of climate change on human rights.[214] For example, the Office of the United Nations High Commissioner for Human Rights conducted an analytical study on the relationship between climate change and the right to health. The study emphasises that climate change affects health: heatwaves cause premature deaths, higher temperatures lead to higher outbreaks of water-borne and insect-borne diseases, and declining biodiversity has an adverse effect on the ability to identify potential new medicines.[215] According to the study, extreme weather events and natural disasters increase premature mortality and injuries, infections, and mental health problems. In addition, multiple Special Rapporteurs warn that the "failure of the international community to take the health impact of global warming seriously will endanger the lives of millions of people across the world."[216] In its General Comment on the Right to Life, the Human Rights Committee declares: "Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[217]

However, the international human rights community's main take on climate change mitigation is that a patchwork of human interests is at stake. Thus, the required level of

---

both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination, the right to development and the right to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence." A/HRC/RES/26/27, Minor variations on this formulation are also found in HRC resolutions A/HRC/10/4 and A/HRC/32/33.

[210] A/70/287, para 7-11.

[211] A/74/161, para 38.

[212] A/64/255, para 14, 31.

[213] A/64/255, para 23. That climate change will lead to displacement has been emphasised by the General Assembly in various resolutions; A/RES/68/180; A/RES/70/165; A/RES 41/15.

[214] A/74/161, para 66.

[215] A/HRC/32/23, para 12-22.

[216] See, for instance, A/74/161, para 32, referring to A/62/214.

[217] CCPR/C/GC/36, para 62.

mitigation must also account for the impacts on fundamental interests from the measures to mitigate climate change.[218] In their reports, the IPCC addresses upfront the trade-offs climate change mitigation can have on fundamental interests.[219] Many UN human rights bodies are equally interested in the negative impacts climate change mitigation has on fundamental interests and the negative impacts of climate change itself. The international climate change system picks up this view. The most prominent example is this statement in the preamble of the Paris Agreement: "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity." [220]

Although some concerns are framed as warnings against human rights violations, many address trade-offs of interests within limited budgets. Trade-offs among interests due to the cost of mitigation are often discussed under the broader topic of development.[221] The UN human rights bodies typically find that all countries must make plans to mitigate climate change,[222] and also stress that the burden must be shared unevenly between developed and developing countries so that the latter are not compelled to divert funding away from social policies.[223] An example from 2021 is how the Indian government, in the *Glasgow Pact,* managed to water down the global commitment to phase out coal due to the importance of ensuring basic subsistence for India's population.[224]

For now, it is sufficient to point out that these statements signal a general perspective on climate change mitigation: they presuppose that fundamental interests support and oppose mitigation, and that the desired state of affairs must adequately account for both of them. Although the fundamental interests on the side of curbing emissions are vital and numerous, the interests secured by emitting activities go against setting the abstract mitigation target too ambitiously.

---

[218] This was highlighted in the early scholarship on climate change and human rights. See, for instance Knox, 'Climate Change and Human Rights Law'; Pedersen, 'The Janus-Head of Human Rights and Climate Change'.
[219] For instance, they often look at trade-offs and synergies between mitigation and the other 16 UN Sustainable Development Goals (SDGs); IPCC 1.5C, 'Summary for Policymakers', 20; IPCC AR6 WGIII, 'Summary for Policymakers', fig. SPM.8.
[220] The preamble further addresses the need for balancing mitigation with concerns of food security and poverty.
[221] The advisory committee to the Human Rights Committee has, for instance, stated that climate change policies might "become real obstacles when supporting the implementation of national sustainable development agendas"; A/HRC/41/50, para 33.
[222] A/HRC/25/53; A/64/255, para 46.
[223] A/HRC/36/46, para 43.
[224] Decision -/CMA.3, para 36.

4.2.2 A precondition for the fulfilment of fundamental interests

The previous subsection highlighted how the morally justified level of mitigation is perceived as a state of affairs that furthers the most interests. In this subsection, I categorise another interest-centred justification in the discourse: mitigation as a precondition for fulfilling many fundamental interests. This narrative encompasses statements like the one from the Special Rapporteur on human rights and the environment: It is "beyond debate that human beings are wholly dependent on a healthy environment in order to lead dignified, healthy and fulfilling lives".[225] A similar statement is found in *PSB* when the leading judge quotes the representative of the UNEP in Brazil: "There are no human rights on a dead or sick planet".[226] In 2022, the UN General Assembly endorsed this view by recognising that climate change, as well as other environmental issues, "constitute some of the most pressing and serious threats to the ability of present and future generations to effectively enjoy all human rights".[227]

The narrative takes its point of departure in abstract entitlements widely recognised as protecting interests fundamental to the human condition, such as the abstract rights to life, basic subsistence, or culture. It investigates how the consequences of climate change relate to the underlying interests at stake in these rights. The narrative seeks to establish that a specific entitlement within the bundle of entitlements making up these abstract rights is a claim-right to have the environmental preconditions required to sustain the underlying interests secured. A safe climate is one of these preconditions.

The current litigation trend invokes the argument that a safe climate is a *sine qua non* for fulfilling fundamental entitlements. In their petition to the Inter-American Commission of Human Rights (IACHR), the Arctic Athabaskan people argue that Canada must mitigate climate change by regulating black carbon.[228] One strand of the argument relies on their abstract right to engage in their indigenous culture, more precisely, their right to hunt. A changing climate obstructs the hunting practice. The changing conditions in the Arctic force the hunted animals to move to new places or make them go extinct, and the hunting method itself is becoming dangerous due to the unstable melting ice sheets. Mitigating climate

[225] A/73/188, para 37.
[226] *PSB*, para 17.
[227] A/76/300. Similar statement is found already in a 2014 Open Letter from 27 UN special rapporteurs and independent experts stating that "there can no longer be any doubt that climate change interferes with the enjoyment of human rights recognised and protected by international law".
[228] *Athabaskan People*, petition.

change is then a duty to ensure that the Athabaskan people are not deprived of the preconditions that enable the traditional hunting practice.

It might be that the liberty to practice an indigenous culture and the claim-right against the obstruction of this practice are both parts of an abstract right to culture. But as explored in Chapter 2, they have no logical relationship. The relationship between these entitlements is one of ethical justification. The scientific insights compiled by the IPCC can nevertheless be read as supporting this normative connection. With increased average global temperatures, climate impact-drivers change,[229] and with the change to climate impact-drivers, central aspects of human societies are threatened.

Similarly, we can interpret the international climate change system as justified by the importance of securing the preconditions for realising fundamental interests. The UNFCCC states in its Article 2 that the objective of the Convention is "the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent *dangerous* anthropogenic interference with the climate system".[230] The flip side of this formulation can be found in the many constitutional provisions protecting a "safe", "healthy", or "sustainable" environment.[231]

There are three ways to construe the narrative of climate change mitigation as a precondition for the realisation of fundamental human interests. The first is to take the narrative's dramatic warnings at face value. The outer climatic boundary for human life on planet Earth is at stake, pointing to global warming of a magnitude that will create a Dante's inferno on Earth. However, as the current discourse on rights and climate change mitigation is not about these outer extremes, I am construing the narrative in a way that makes it relevant to the present moral, political and legal landscape. I will engage with the more dramatic understanding in Chapter 8.

The two other ways of construing the narrative are related to the current discourse pondering a temperature increase of around 1.5°C and 2°C.[232] One way of understanding these targets is as the precondition for fulfilling the *specific interests of particular individuals*. The content of global climate change mitigation is then directly related to some

[229] IPCC AR6 WGI, 'Summary for Policymakers', 26. addresses 15 climate impact-drivers, spanning from extreme heat, to landslides, costal erosion, and ocean acidity.
[230] My emphasis.
[231] See, for instance, Boyd, *The Environmental Rights Revolution*. In addition to recent developments of international law; see, for instance, Spano, 'Keynote Speech'.
[232] The strategic litigation trend is based on the worry that the trajectory of emissions at the time of filing their claims showed a big gap between global policies and these targets.; see, for instance, *Urgenda*, District Court, para 2.29-2.33; *Urgenda*, Appellate Court, para 13.

aspects of the human condition that require these climatic circumstances for their realisation.[233] The other way sees mitigation as the precondition *for every state of affairs meaningfully fulfilling fundamental interests*. This latter understanding resembles the narrative presented in the previous subsection, 4.2.1: mitigation is justified in an aggregation of a wide range of interests.

4.2.3 A minimum threshold for fundamental interests

The last interest-centred type of narrative often found in the discourse understands climate change mitigation as obligatory to ensure a minimum threshold of the fulfilment of fundamental interests. The "threshold approach", like the previous narrative on mitigation as a precondition for interest fulfilment, justifies mitigation by reference to how the fulfilment of fundamental interests depends on a protected climate system. The current narrative diverts from that previous narrative by following Henry Shue's basic rights theory, in which basic rights are about establishing thresholds that no one should fall below.[234] In other words, the narrative seeks to establish what level of mitigation is required to ensure the minimum threshold of interest fulfilment.

However, many of the arguments related to thresholds and climate change mitigation are confused about what they attempt to justify. Instead of maintaining that the appropriate threshold of the fulfilment of fundamental interests justifies the level of climate change mitigation, many of the arguments work the other way around.[235] For instance, the UN Special Rapporteur on human rights and the environment states that a "failure to fulfil international climate change commitments is a prima facie violation of the State's obligations to protect the human rights of its citizens".[236] In this statement, it is unclear whether the mitigation duties in the international climate change system are justified because they spell out the adequate threshold of fundamental interest fulfilment or if the adequate level of fundamental interest fulfilment is found by looking at the international climate change system. I think the latter is often the case in the rights and climate change mitigation discourse, as this line of reasoning is reflected in the efforts of Margaretha Wewerinke-Singh

[233] This investigation of an individual's interest can either pertain to their specific circumstances or to what, on balance, typically is beneficial for individual human beings.
[234] Shue, *Basic Rights*, 18.
[235] This idea that "human rights can be defined and expanded by reference to environmental commitments" is not new; Boyle, 'Climate Change, the Paris Agreement and Human Rights', 775.
[236] A/74/161, para 74. Moreover, all "States should prepare rights-based deep decarbonisation plans intended to achieve net zero carbon emissions by 2050, in accordance with article 4, paragraph 19, of the Paris Agreement."; A/74/161, para 75.

and others to advocate ideas of *systemic integration* when combining human rights and climate change mitigation duties. They argue that we should understand the temperature goals already established in international climate change law as the appropriate threshold for fulfilling fundamental interests.[237]

The argument has the following structure. Let us take for granted that the right to life and right to privacy and health in their typical legal enactments require that states realise a state of affairs furthering these fundamental interests. Authors like Wewerinke-Singh find the doctrinal task following this assumption to be an examination of whether any other legal sources pinpoint the required minimum threshold. If states have enacted or agreed to standards covering the issue in question, these standards concretise this general positive obligation.[238] In the climate change context, this doctrinal exercise is typically done by first looking at the UNFCCC and its general objective and then arguing that the safe level of climate change has been spelt out further in the Paris Agreement to be a global average temperature increase of below 2°C, preferable 1.5°C.[239] The conclusion drawn from this doctrinal exercise is that these temperature targets spell out the legal minimum threshold of the right to life and the right to privacy and health.[240]

These doctrinal arguments attempt to fix upon a threshold based on an overall assessment of various interests that underlies the enacted mitigation duties. The litigation trend typically follows this line of reasoning. Recognising that the international duties established in the UNFCCC and the Paris Agreement have not been adequately implemented, strategic human rights litigators takes the matter into their own hands.[241] In Part III of this dissertation, I look at ideas of minimum thresholds from the angle of politically agreed levels of abstract global mitigation and the just distribution of the burdens to realise these levels.[242]

---

[237] Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*, 11; Atapattu, *Human Rights Approaches to Climate Change*.

[238] This is the main point in Stefan Theil's analysis of environmental cases brought before the ECtHR. He even goes further, arguing that also emerging standards can be relied upon; Theil, *Towards the Environmental Minimum*, chap. 3. Theil does not directly include climate change in his environmental minimum theory. However, this is due to "a lack of respect for human rights and the absence of institutions that are willing to enforce environmental regulations globally", and not because the theory itself does not fit; Theil, 275.

[239] Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*, 97–98.

[240] This line of reasoning is also invoked for constitutional environmental rights; see, for instance, NNHRI, 'Written Submission from the Norwegian National Human Rights Institution to Shed Light on Public Interests in Case No. 20-051052SIV-HRET', para. 2.6.

[241] In Chapter 7, I will observe more thoroughly that international climate change law itself has established its own type of accountability mechanism. The trend of linking mitigation and rights can be understood as circumventing these procedures and seeking out other ways of ensuring compliance.

[242] The argument is then a purely legal exercise of interpretation. The doctrinal perspective of international law is explicitly taken by Wewerinke-Singh when she refers to the practice established in VCLT art 31 (1) of interpreting international human rights law according to agreements between the parties that relate to the treaty's

However, in this chapter, the focus is on moral interest-based justification. From this perspective, invoking already established thresholds as the correct levels of fulfilment of fundamental interests does not answer the question of why this level appropriately fulfils fundamental interests. In the following section, I ask whether interest-based moral theories of rights can justify and circumscribe these targets.

4.3 Individual interests and the abstract duty to mitigate climate change

In this section, I analyse the three narratives presented above through the lens of interest-based moral theories of rights. The analysis in this section focuses on the abstract duty to mitigate climate change. As we saw in Chapter 3, this is a duty that only can meaningfully be held by a global collective of various actors. In the following section, 4.4, I investigate whether the interest-based approach can justify specific duties to mitigate greenhouse gas emissions borne by particular actors.

In subsection 4.3.1, I draw on Joseph Raz's interest theory of rights as a paradigmatic interest-based moral theory of rights. I show how an interest-based justification is not appropriate to justify an abstract duty to mitigate borne by a global collective of various actors. Although both the narrative of mitigation furthering fundamental interests and the narrative of mitigation being a precondition for the fulfilment fundamental interests might successfully justify climate change mitigation, these argumentative strategies are not about rights in this interest-based sense. In subsection 4.3.2, I reach a similar conclusion regarding the third narrative of mitigation securing a minimal threshold of the fulfilment of individual interests. I argue that an individual's interests cannot justify temperature targets currently agreed under the Paris Agreement, and these targets are not about moral rights in this narrow sense. In subsection 4.3.3, I then present a possible successful adjustment to the interest-based justification strategy by invoking the interests of some groups. However, the heavy weight of the numerous burdens imposed on all the alleged bearers of the corresponding duties equally obstructs this adjustment. Lastly, in subsection 4.3.4, I address two implications that follow from the conclusion that the abstract duty to mitigate is not justified in interest-based moral theories of rights but rather is the outcome of an overall assessment of a wide range of interests.

conclusion; Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*, 31.

4.3.1 Interest-based justifications

Arguments of rights are often invoked as a moral justification for duties. In the following, I take such arguments to imply that aspects of the potential holder of an entitlement justify the entitlement and correlative in question. In the human rights or fundamental rights discourse, the human being is the potential holder of the entitlements of concern.[243] These moral theories take their point of departure in fundamental features of the human condition. The theories typically associate these features with human rationality and sensibility, which then translate into the narrower interests of, for instance, being autonomous or avoiding excruciating pain. In the next step, the theories establish how these fundamental interests ground abstract entitlements to life, basic subsistence, freedom of speech, freedom from torture, and so forth.[244]

These interest-based moral theories of justifications centre on the characteristics or interests of individuals as human beings and how these characteristics or interests are to be protected in every individual as an individual. Jeremy Waldron summarises well what is at stake for interest-based moral theories of rights when he writes that fundamental rights are founded on *universal features of human beings* applied to *every individual*.[245]

Regardless of which fundamental feature a fine-grained rights theory includes in the human condition, an interest-based argument holds that possessing these features grounds the entitlement and correlative in question. Joseph Raz provides a schematic example of this argumentative structure when defining an individual right as a reason for holding someone to be under a duty, based on the right-holder's interests.[246] In Raz's own words: "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being

[243] There are philosophical attempts to extend traditional rights theories beyond human interests; see, for instance, Varner, *In Nature's Interests?* As justified in Chapter 1, this dissertation abstains from engaging with such attempts.
[244] Human rights scholars have put forward various theories of this link. See, for instance, Griffin, *On Human Rights*; Nussbaum, *Frontiers of Justice*; Nickel and Reidy, 'Philosophical Foundations of Human Rights'. These theories differentiate between flourishing and the existence of rights, highlighting the need for quite elaborate arguments on which entitlements are justified in these interests; Griffin, *On Human Rights*, 37.
[245] Waldron, 'Nonsense upon Stilts? - A Reply', 167, 185. This focus on the individual resembles the emphasis on the inviolability of every human being or the idea of separateness of persons, see, for instance, Dworkin, *Taking Rights Seriously*, 240.
[246] This is Raz's *moral* theory of rights, and he is not suggesting this justification results in the existence of any *legal* rights. Raz himself is a legal positivist, who maintains that human rights as legal entitlements conferred by international institutions or conventions exist in any particular jurisdiction only if the prevailing system of governance explicitly or implicitly endorses the limits on its own authority involved in the existence of those legal entitlements; Cruft, Matthew Liao, and Renzo, 'The Philosophical Foundations of Human Rights: An Overview', 6.

(his interest) is a sufficient reason for holding some other person(s) to be under a duty."[247] Many other human rights theories apply this reasoning, even if they are more restrictive in what universal characteristics they allow to enter into the formula.[248] The central point for an interest-based approach is that whichever φ-ing is asked of a duty-bearer, the justification for this duty is found in aspects of the holder of the correlative claim-right.

Many authors writing on the connection between rights and climate change mitigation have taken their point of departure in Raz's theory. For instance, in his early work on the topic, Simon Caney uses Raz's formula to conclude that because human beings have fundamental interests in not suffering from drought and crop failure, heatstroke, infectious diseases, etc., every one of them holds the human right not to suffer from the disadvantages caused by climate change.[249] However, the fact that fundamental interests are at stake is not enough to justify duties under Raz's formula. What must be shown is that an actor is under a duty to φ *because of* the individual's interest in question.[250]

An obligation to limit climate change to a specific temperature can only be achieved by substantially altering the current business-as-usual emitting pathway. As forcefully argued by the German Constitutional Court in *Neubauer*, nearly all everyday human activities involve direct or indirect emissions.[251] Although many scenarios might be available to realise the mitigation target, a huge number of actors and conduct are needed to fulfil an abstract duty to mitigate climate change. From the outset, arguing that a single individual's interest morally forces the world to undertake this enormous endeavour is preposterous.

The narrative from subsection 4.2.1, according to which mitigation maximises the furtherance of interests, acknowledges this challenge. According to this narrative, mitigation is not justified by how climate change affects a particular individual; instead, the aggregation of interests negatively impacted by climate change makes it necessary to mitigate the business-as-usual situation. This justification based on the realisation of an overall desirable state of affairs is supported by the Dutch Supreme Court in *Urgenda* when it states that the

[247] Raz, *The Morality of Freedom*, 166. According to Raz, X can hold rights if X's wellbeing is of ultimate value or if X is an artificial person (e.g., a corporation).
[248] See, for instance, Griffin, *On Human Rights*; Nussbaum, *Frontiers of Justice*; Nickel and Reidy, 'Philosophical Foundations of Human Rights'.
[249] Caney, 'Cosmopolitan Justice, Rights and Global Climate Change', 259; Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change', 767–68; Caney, 'Human Rights, Climate Change, and Discounting', 114–16.
[250] Caney assumes that his vague reference to these interests is enough to have shown a global duty to mitigate and establishes the content of specific mitigation duties by reference to theories of distributive justice.
[251] "Practically all forms of freedom are potentially affected because virtually all aspects of human life involve the emission of greenhouse gases (see para. 37 above) and are thus potentially threatened by drastic restrictions after 2030." *Neubauer* para 117.

"interests of the applicants can be pooled".[252] In the same spirit, the Dutch Procurator General found it "extraordinary for a violation of cumulative human rights not to be covered … while each of some innumerable violations of smaller scale would".[253]

Suppose these statements imply that each individual provides sufficient argumentative weight for the existence of the abstract duty and the fact that climate change is threatening multiple peoples' rights only increases the severity of the wrong committed. In that case, the Dutch Supreme Court was correct to treat the issue as one of rights in the narrow sense. However, outspokenly stating that climate change mitigation is an aggregation of interests can also imply an admission that the duty is not based on an individual's interests but rather a broader aim of society. Legally, there is nothing wrong with having claim-rights derived from the pursuit of a goal. However, such entitlements would not be rights in this narrow moral interest-based sense.

The narrative of climate change mitigation being a precondition for fulfilling fundamental entitlements explored in subsection 4.2.2 runs into equal challenges. In the following, I argue that Raz himself would not embrace a narrative of climate change as a precondition for interest fulfilment in his interest-based theory of rights. Raz gives three reasons when elaborating on why he does not think an obligation to create a tolerant society or a beautiful environment is right-based.[254] The first is that rights are individual, understood as being separable: they are interests that can be satisfied or denied for a particular person.[255] Raz contrasts this with public goods, where the fulfilment of a public-good-based duty benefits all of us equally: no one can be excluded.[256] As a matter of sustaining the preconditions for well-being, climate change mitigation struggles to satisfy this condition. A particular concentration of greenhouse gases in the atmosphere concerns the whole of planet Earth and cannot be granted to some and not others.[257] Thus, the climate is a truly global phenomenon, as a person can only be excluded from enjoying a safe climate by leaving the Earth. The second reason Raz provides is that the realisation of these states of affairs relies on collective effort. This reason is particularly valid for climate change mitigation, as a specific

[252] *Urgenda*, para 5.9.2.
[253] *Urgenda*, procedural general statement, para 3.15.
[254] In Raz's account of autonomy, the preconditions he is ultimately interested in are the valuable options needed for a person to be autonomous; Raz, *The Morality of Freedom*, chaps 14, 15.
[255] Raz's argument is that public goods that can be distributed are only considered instrumental to the underlying individual interest by individualistic rights-based moralities. For example, water supply systems can potentially be designed to enable control over its individual distribution; Raz, 198.
[256] Raz, 199.
[257] This is an argument pertaining to duties to mitigate. Contrast this with duties of adaptation, such as providing flood-relief or air conditioning, which can be targeted to individuals as separable and excludable right-holders.

temperature limit can only be realised if humanity pulls together. Climate change is a genuinely global phenomenon and a paradigmatic matter of a collective action situation. The third reason equates with the problem already addressed: whether the individual interests are sufficient to ground the duty. The individual interests would need to possess a strong argumentative force, which they typically do not have in these matters.

Exploring the first reason further, we see that climate change mitigation would be excluded from any individual interest-based justifications if we follow Raz and understand *individual* rights as being about separable and excludable fulfilment of duties.[258] The disputed question is whether these two characteristics are essential criteria. Waldron denies this because Raz has not argued why these two criteria have this constitutive role. Rather, Waldron stresses that only the weight of the interest at stake matters. If something that concerns everyone is also very central to an individual, it might very well be an issue of individual rights.[259] Similarly, an individual's interest can justify a collective action situation if the interest at stake is strong enough to impose the obligations in question.[260]

Nevertheless, these two issues of individualisation make it hard to see from the outset how an individual's interest can provide the sufficient justification needed. Raz's intuition that it is difficult to imagine that the interests of one individual can impose such wide-ranging duties benefiting everyone as, for instance, the obligation to create a tolerant society seems correct.[261] Waldron points to a similar example within the debate on pornography; it might appear distorted to argue that the interests of an individual woman not to be raped or assaulted justify forbidding pornography. Instead, the discourse on how pornography affects women in a society (insult, degradation, and normalisation of violence by such stereotypes) might be better addressed in other terms than individual rights.[262] Similarly, the debate about climate change mitigation is better approached from the angle of the general conditions of society than by a focus on one individual's interest.

In subsection 4.3.4, I revisit Raz's intuition of individualisation from the perspective of the analytical interest theory of right-holding. According to this analytical theory, the connection between an individual and a duty is not about separability and excludability. Instead, there is a connection between an individual and a duty if the duty inherently protects an aspect of an individual's situation that is typically beneficial for the individual, and a

[258] Waldron, 'Can Communal Goods Be Human Rights?', 303.
[259] Waldron, 308.
[260] Waldron, 305.
[261] Raz, *The Morality of Freedom*, 203.
[262] Waldron, 'Nonsense upon Stilts? - A Reply', 159–60.

detriment experienced by the individual is included in at least one set of facts minimally sufficient to establish the contravention of this duty.

4.3.2 Temperature targets

A central question in the current debate about climate change mitigation is how ambitious the mitigation effort should be, meaning what the limit to the global average temperature increase should be, currently formulated as a "temperature target".[263] Within our current context of interest-based moral theories of rights, this question harks back to the narratives of thresholds explored in subsection 4.2.3: the correct level of mitigation is found by looking at the interests at stake to ensure that the adequate thresholds of the fulfilment of these interests are secured. This argumentative strategy resembles that of many other fundamental rights, for instance, the assessment of what level of excruciating pain would amount to torture. To stick with the example of torture, if the human body is exposed to a certain level of heat for a certain amount of time, this might be classified as severe pain that can fall under the fundamental interests a right against torture protects.[264] If such heat is caused by climate change, this could indicate that the accepted level of temperature increase has been transgressed.[265]

When Stefan Theil invokes Joseph Raz's interest-based formula to justify his minimum environmental standards, I understand him to rely on this reasoning.[266] The essential fundamental interests underlying currently recognised entitlements, such as a right to life or a right to health, are affected by various environmental factors. The minimal threshold of the fulfilment of these interests then informs the thresholds of environmental protection needed, such as the level of asbestos a human can be exposed to before they develop life-threatening cancer.[267]

---

[263] It is important to note that the climate change debate has not always had this focus on a target, and there has been debate about whether a temperature limit is the best type of target. Concentration of greenhouse gases in the atmosphere, global energy uptake, or global sea level rise are examples of alternative targets; Knutti et al., 'A Scientific Critique of the Two-Degree Climate Change Target', 14.

[264] However, an equally central part of torture is the reason for why pain is inflicted on someone, in that the pain is inflicted intentionally – as a means to an end or as an end in itself – or in an extravagantly reckless fashion. See, for instance, Kramer, *Torture and Moral Integrity*, 105. But, as I will explore in Chapter 6, this is not the case for greenhouse gas emissions.

[265] Because torture is not only about such levels, the right against torture is not highlighted in the UN or mitigation material. However, the line of reasoning can apply to other fundamental entitlements.

[266] Theil, *Towards the Environmental Minimum*, 41, 59.

[267] Theil is not suggesting that a population-wide increase in a harmful outcome establishes causation in the individual case; Theil, 106. However, this general risk is still what matters when selecting the minimum threshold.

However, in the discourse on climate change mitigation, fundamental interests are not at stake in this individual way. A closer look at the currently enacted mitigation targets, such as "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risk and impacts of climate change",[268] reveals the conclusion that the targets do not equate to minimal thresholds of the fulfilment of individual interests.[269]

The IPCC has shown that interests usually encompassed by fundamental rights are already impacted by climate change.[270] These impacts will be more severe and increase as the average global temperature increases.[271] At some point on the gradual scale of average temperature increase, the crucial threshold for the fulfilment of these interests would be breached. However, the scale is not based on the fundamental features of the human condition *as it would manifest in an actual human being*. Instead of being based on individual interests, the scale cuts across the world's current and future populations. It shows statistical risks based on aggregations, and the decisive question is what risk we as a global community are or are not willing to tolerate.[272] From an individual's perspective, the threshold of the fulfilment of some of their fundamental interests might be transgressed even if the temperature target is within the globally accepted range.[273]

The Swiss Supreme Court's reasoning in *KlimaSeniorinnen* illustrates this point. The Court denied standing to the claimants to challenge whether the Swiss mitigation target aligns with the European Convention on Human Rights (ECHR) Articles 2 and 8. The claimants showed that older women were more susceptible to suffering from heatwaves than other members of the general population.[274] Nevertheless, the Court did not accept that the effects of current levels of greenhouse gas emissions in the atmosphere on these women should affect the relevant threshold of protection, which would first be breached by an average increase in temperature of above 1.5°C. The transgression of this threshold would first

[268] *Paris Agreement*, Art 4 (1)(a). The previous target of 2°C was first introduced in the *Copenhagen Accord* in 2009 and formally decided in *Doha* in 2012.
[269] In Chapter 7, we will see that these targets are politically enacted without any scientific justification.
[270] IPCC AR6 WGI, 'Summary for Policymakers', 8–10.
[271] IPCC AR6 WGI, 18.
[272] Knutti et al., 'A Scientific Critique of the Two-Degree Climate Change Target', 17; Randalls, 'History of the 2°C Climate Target', 602.
[273] Many examples come to mind here, like road standards or regulations governing side effects of medications or food additives.
[274] *KlimaSeniorinnen*, para 5.1.

happen at a future point when the claimants would not be alive.[275] The women invoked arguments based on the threshold they perceived to affect their fundamental interests crucially. However, these thresholds of the fulfilment of their interests were not directly relevant to the content of the threshold of global mitigation of climate change.

The temperature targets are not linked to the experienced consequences of an individual's interest. However, the strategic litigation trend sometimes gives the impression that they could be. Many of the lawsuits take the interests of the inhabitants in the particular jurisdiction to be the issue at stake. For example, in *Arctic Oil*, the Norwegian Supreme Court relied on evidence showing how the consequences of an average rise in temperature of 4.3°C will impact people living in Norway.[276] The Court took the average rise of temperature of 4.3°C from a Climate Risk Report assessing the risk in Norway associated with a global high emission trajectory. The risks to people in Norway associated with this highest expected global temperature may differ significantly from those associated with this temperature in other places.[277] The courts in *Neubauer*, *Urgenda* and *Sharma* based their assessments on the targets in the Paris Agreement. The courts relied on evidence of how these temperatures would particularly impact people in Germany, the Netherlands and Australia. The courts accepted the temperature targets partly because the consequences for the people living in these particular countries would be within what the courts held as acceptable thresholds.[278] Even though the thresholds of acceptable consequences and the temperature targets in the Paris Agreement coincide, the Courts base their justification on the national context. Hence, the interests of those inhabiting the state determine the necessary level of protection.

The problem with this line of reasoning is that it becomes arbitrary *whose interest* determines the desirable state of affairs. Because climate change has a global character, we

[275] *KlimaSeniorinnen*, para 5.4.
[276] *Arctic Oil*, para 55. The temperature was taken from a Climate Risk Report assessing the risk in Norway associated with the global temperature trajectory at the time of writing. It might therefore be misleading to suggest that the Court considered 4.3°C as the appropriate threshold. Nevertheless, the risks in Norway associated with this high temperature may still differ significantly from the risk associated with this temperature in other places of the world.
[277] The Appellate Court in *Arctic Oil* stated more explicitly that it is the effects in Norway that are central; para 2.4. It stated that the "effects in Norway may be serious enough, but they appear to be more limited and of a different nature than the global effects"; para 3.3. A national focus could, however, also lead to stricter requirements being introduced. The Norwegian Supreme Court recognised that the difference between the consequences of 2°C and 1.5°C would be immense for the Arctic region; *Arctic Oil*, para 52.
[278] For instance, in *Neubauer*, the constitutional duty to ensure a sustainable environment was not exceeded because the government assumed that Germany could adapt to the consequences of an average temperature rise of well below 2°C and possibly 1.5°C; para 165. With regard to the people living in Bangladesh and Nepal, the German Federal Constitutional Court did not perform a similar assessment of temperature targets in the Paris Agreement, partly because Germany does not possess the power to adopt adaptation measures in these countries; para 178, 181.

misrepresent the issue from the start. For instance, the relevant fundamental interests of those living in most of the developed north might be adequately protected at a higher temperature than a global target suggests. Likely, climate change's severe consequences will particularly affect tropical or subtropical areas. In addition, developed states can better adapt to and thus avoid these consequences. Therefore, focusing on a particular individual's interests can justify a high-temperature target, which will obstruct the ability to reach lower-temperature targets. Such lower average temperature increases might be necessary to fulfil the fundamental interests of other individuals in parts of the world more susceptible to the consequences of climate change and with less ability to adapt to them.[279]

However, even setting a temperature target based on the individuals most affected and least able to adapt is not as straightforward as it might appear. The next chapter on harm will comprehensively discuss this type of reasoning. For the current analysis, the emphasis is on the biconditionality of the claim-right/duty relation, as understood in Chapter 2. An argument might be desirable from one side of the conditional. If we find a human being who will experience a detrimental effect from climate change of, for instance, 1.2°C, it appears that this lower temperature should be our target. However, we must also take into account the content of the duty this line of reasoning implies. For example, it might be very undesirable to demand that all greenhouse gases stop tomorrow for the global collective of actors to be able to fulfil *this individual's* claim to a 1.2°C target. Not only would this be an extremely onerous duty, but it would also detrimentally affect a wide range of other fundamental interests. Thus, a moral theory arguing that a particular individual's interest dictates which temperature limit the world should pursue is unsuccessful.

So far, we have encountered two main reasons why an individual's interest is not a sufficient justification for the abstract duty to mitigate. The first is that climate change's global nature affects everyone. My interest cannot be singled out as the justification for the abstract duty; the justification is found in the importance abstract mitigation has for all of us. If I were the only one to experience the benefit from the duty, my interest would not suffice to justify the abstract duty to mitigate. This insight relates to the second reason: the duty is exceptionally demanding. It requires a transformation of most of today's behavioural patterns. A wide range of additional interests are at stake when fulfilling the duty. The appropriate way of understanding the existence and content of the abstract duty to mitigate is

[279] This is highlighted among the UN human rights bodies in, for instance, A/74/161, para 46; A/HRC/32/23, para 38.

as a question of which state of affairs takes account of these various interests in the most appropriate way.[280]

Of course, the optional state of affairs would not transgress the outer climatic boundaries for human civilisation or other extreme outcomes that cannot be outweighed by the burden of transiting away from the current high-emitting society. Apart from such very basic moral considerations, which I take to not be at stake in the current discourse, this optimal state of affairs might strike an average of all interests at stake or maximise interests, or it might instead err on the side of caution and emphasise the interests of those most affected by climate change.[281] The conclusion drawn from the current analysis is more limited: we cannot establish the existence and content of the abstract duty to mitigate by applying the argumentative structure of interest-based moral theories of rights.

4.3.3 Groups

In the two previous subsections, I found that an individual's interest is not a sufficient justification for an abstract duty to mitigate climate change. When rights are understood in accordance with interest-based moral theories of rights, climate change mitigation is not about rights in this narrow sense. Instead, an overall assessment of a wide range of interests justifies climate change mitigation and circumscribes its content. This conclusion might be challenged by invoking the fundamental interests of groups instead of individuals. Whereas it is implausible that the fundamental interest of a single individual would be a sufficient ground for the global duty to mitigate climate change, the fundamental interests of a group might lead to a different result.

In the rights and climate change mitigation discourse, this line of reasoning is usually pursued with reference to vulnerable groups. Many UN human rights bodies have focused on how the adverse effects of a changing climate affect certain groups of people who are already vulnerable. Their emphasis on how climate change primarily affects those already vulnerable typically takes three forms. The first line of argument stresses that some people are not getting their basic needs fulfilled and that climate change threatens to make this fulfilment

[280] The climate justice literature sees this point clearly. Indirectly, they take issue with the unchallenged belief that an individual's interests are the only morally salient foci for pressing issues in our society. This indignation resembles Marx's critique of rights; Marx, 'On the Jewish Question'.
[281] I will revisit this matter in Chapter 7.

even more difficult: for instance, poor or developing communities.[282] The second holds that some people have an inferior status in their societies and that this lack of equal treatment and concern makes them likely to be severely affected by the consequences of climate change: for instance, women or Dalits.[283] The third line of argument emphasises vulnerable groups as a matter of justice. Many UN bodies highlight the imbalance inherent in the fact that those who are least responsible for anthropogenic changes to the climate and who have the fewest resources to handle the resulting crisis are also those most affected by it.[284] The Special Rapporteur on extreme poverty and human rights warns against future climate apartheid, where the wealthy pay to escape overheating, hunger and conflict while the poor are left to suffer.[285]

In all three forms of the argument emphasising vulnerable groups, the group in question has interests by reference to the underlying interests of the members constituting the group. Following Raz, the group has the capacity to hold rights because the individual right-holders cumulatively endow the group with it.[286] However, this justificatory strategy renders the group identity redundant.[287] It is the members' individual rights that matter, rather than the interests of the group *qua* group. The reference to the group only alludes to a common efficacy of these individual interests. Many of the climate change lawsuits rely on vulnerable groups in this way: as a placeholder for the underlying interests of the members. For example, when *KlimaSeniorinnen* addresses the effect of heatwaves on older women or *Sacchi* ponders children's right to health, the topic is how the individual claimants are affected. Instead of invoking universal features of all humans, this strategy draws on characteristics typical for women or children. Still, the litigation is concerned with the individual manifestations of these characteristics.

A group can be a genuine right-holder, not just a placeholder for the cumulative interests of its members. Waldron argues for the existence of genuine communal interests by using the example of the conviviality of a party. The individuals' experience of conviviality

[282] "People in poverty tend to live in areas more susceptible to climate change and in housing that is less resistant; lose relatively more when affected; have fewer resources to mitigate the effect; and get less support from social safety nets or the financial system to prevent or recover from the impact." A/HRC/41/39, para 12.
[283] CEDAW/C/GC/37, para 3; A/HRC/31/56, para 91. The Committee on the Elimination of Discrimination against Women, for example, contends that because women's higher vulnerability to risks arising from climate change-related disasters is economically, socially, and culturally constructed, it can also be reduced. CEDAW/C/GC/37, para 6.
[284] For instance, A/74/161, para 46; A/HRC/32/23, para 38.
[285] A/HRC/41/39, para 51, also referred to in A/74/161, para 26.
[286] Raz, *The Morality of Freedom*, 208.
[287] See, for instance, Griffin, *On Human Rights*, 273.

can only occur with reference to others. The interest in question thus belongs to the group *qua* group, as the group is the prerequisite of the interest.[288] This communal character can, according to Waldron, be found regarding many goods such as fraternity, a shared language, culture, and traditions.[289] The individual interests are indirectly relevant to the interest of the group, but the group itself also holds an interest in the good in question.

Even when we are not explicitly concerned with the indirect interests in the benefits the group produces, the community as such can have interests. Kramer uses the constitutive example of the interest in the group's cohesion. He argues that it is only as an association that the members have a direct interest in staying together.[290] This interest is not reducible to the interests of the individual members in the group's cohesion.[291] Only as long as the group stays together is it an entity with a direct interest in its own continuation.

These statements concern the analytical question of whether groups have the potential to hold entitlements. Nevertheless, these statements also suggest when groups can provide an independent justification for goods: (1) when the group is the precondition for the good or (2) when the good is required for the group's existence.[292] In the context of climate change mitigation, the first relation does not occur. There is a crucial difference between being interlinked in enjoying a safe climate and considering that this human interlinkage is constitutive of the interest in a safe climate. The interest in climate change being mitigated does not depend on the existence of a human collective. Whereas desiderata such as conviviality and fraternity cannot be experienced without a community, the last person on Earth would still enjoy a safe climate.

The second type of justification appears more promising. For instance, ice sheets in the Arctic are the prerequisite for some indigenous cultures and, thus, an indigenous community as such.[293] Moreover, an island nation that disappeared into the sea would cease to be a nation. However, for several vulnerable groups emphasised in the climate change discourse, this is not the case: groups such as children, women and the poor do not depend on climate change mitigation to exist as a group.

---

[288] Waldron, *Liberal Rights*, 355.
[289] Waldron, 358–59.
[290] Kramer, 'Rights Without Trimmings', 54–59.
[291] "This direct interest of the members qua collectivity cannot be reduced to a welter of indirect interests, in part because no congeries of indirect interests can in themselves add up to a direct interest, and in part because the direct interest can abide even while the indirect interests shift or partly disappear."; Kramer, 55.
[292] In these situations, we are dealing with the fundamental features of being a group as such. This line of reasoning is parallel to how rights for individual human beings are about the fundamental features of the human condition.
[293] *Athabaskan People*, petition.

The question becomes whether the interests of this subcategory of groups, like indigenous communities and small island states, can justify climate change mitigation. The interest of these groups to exist is a strong interest. However, the decisive question is still whether the existence of one of these groups is sufficient to ground the global duty to mitigate climate change. As explained in subsection 4.3.2, it is very demanding to mitigate climate change as it requires all types of actors and behavioural patterns to transform.

When the international community included a reference to a 1.5°C average temperature increase limit in the Paris Agreement, this was after pressure from small island nations, which held such a lower limit crucial for their survival as a nation. This historical fact might shed light on the strength of this interest. Nevertheless, mitigation to this level may also have so many other benefits that it is not correct that the interests of a small island state alone carry all the argumentative burden. Including groups in an interest-based justification does not change the conclusion that climate change mitigation is an objective not justified in interest-based moral theories of rights.

4.3.4 Implications

So far, I have concluded that the three narratives linking fundamental interests to climate change mitigation from section 4.2 do not provide an interest-based justification of mitigation in the way required by interest-based moral theories of right. I have shown that a specific fundamental interest held by an individual does not justify an abstract duty on the global collective of actors to mitigate climate change. Instead, various interests are affected by climate change and the efforts to tackle it, and the moral justification for the existence and content of an abstract duty to mitigate relies on how these interests come together in an overall assessment. Hence, the abstract duty to mitigate climate change is not an issue of moral rights in a narrow sense. This conclusion has implications for the analytical theories of rights explored in Part I and the appropriateness of including climate change mitigation duties in legal systems of fundamental rights.

Analytical theories of rights

Most appropriately understood, the three narratives invoke fundamental interests as inputs to an overall assessment. Recalling Chapter 2, this has a crucial analytical implication: when fundamental interests are inputs in an overall assessment, they do not have the deontic

character associated with an analytical understanding of the claim-right/duty relation.[294] Instead of retaining their structure as a deontic claim-right even when overtopped by conflicting considerations, the argumentative force of the invoked interests ceases to exist once a balance has been struck between the many interests at stake.

Two further implications arise for the analytical interest theory of right-holding discussed in Chapter 3. The first follows directly from the structure of the justification: not all fundamental interests affected by climate change are *inherently* protected by the abstract duty to mitigate. The specific fundamental interest in, for instance, one's physical integrity is not inherently protected by the abstract duty to mitigate climate change. Some interests have been outweighed in the overall assessment setting the current mitigation target. This nullification can take two forms: (1) it is accepted that some detriments will happen within the current temperature targets; (2) it is decided to protect the interests by adapting to the changing climate.

For a complex matter like climate change mitigation, it is not easy to tell which interests prevail and which have been outweighed. In addition, some detriments would occur irrespective of anthropogenic changes to the climate. The conclusion is that when our focus is the specific interests, it is challenging to assert whether an individual's interests have indeed been protected by the climatic state of affairs achieved through the fulfilled of the mitigation duty. The protection therefore has more of an accidental than inherent character.

Looking at the matter by reference to Bentham's test, I reached a similar conclusion. According to Bentham's test, we ask if some detriment experienced by an individual is contained in at least one set of facts minimally sufficient to constitute a contravention of a specified duty. Because the abstract mitigation duty strikes a balance between a wide range of considerations, the occurrence of some detriment to any particular individual is not included in any set of facts minimally sufficient to establish a breach of this abstract duty. Thus, we cannot infer from the occurrence of a detriment to an individual's interest that the abstract duty to mitigate has been breached.

The above assessment relies on the current discourse, considering the content of the global mitigation duty to be in the area of around 1.5°C to 2°C, maybe a bit below or above.[295] However, the above assessment looks different if these targets are breached in such

[294] Academics have frequently highlighted that the distinction between deontic rights and interests to optimise is blurred in much of the general discourse on human rights and constitutional rights; see, for instance, Simmonds, 'Constitutional Rights, Civility and Artifice'.
[295] In 2022, the implemented policies would lead to a temperature increase of 2.8°C; UNEP, 'Emissions Gap Report 2022', XVI.

magnitudes that we reach extreme temperatures.[296] If the average temperatures increase beyond 15°C, the Earth will approach the limits of its ability to sustain life.[297] At some point before this collapse of life, humans will live in a Dante's inferno in which the climate has changed so drastically that we are beyond the scope of the balancing of different interests. No morally acceptable overall assessment can subordinate any of the detriments experienced in such a future: the effects on the specific interests are so extreme, and the ability to adapt so low. The abstract duty to avoid these extremes would inherently protect an individual's direct interests in life, health, subsistence, etc.

That future individuals hold claim-rights correlative to the abstract duty to avoid extreme global warming does not mean that this duty is justified by reference to these individuals' fundamental interests. It could still be the aggregative fact that *all* future people will experience them that does the moral lifting. The second implication of this chapter on analytical theories of rights follows this insight. The interest really at stake is the interest in good climatic conditions as such. The abstract duty to mitigate inherently protects the distinct interest in the state of affairs of a good climate. With this general interest in a safe climate, holder of a claim-right correlative to that abstract duty humankind as a collectivity.

Legal systems of fundamental rights

The next set of implications of this chapter goes beyond the issue of appropriately understanding the matter of climate change mitigation. Instead, it highlights how the conclusion that mitigation is not justified in interest-based moral theories of rights impacts legal systems of fundamental rights, such as human rights. Equating the threshold of global mitigation and the minimum threshold of interest fulfilment represents a significant shift in the underlying rationale for the existence of legal human rights: away from the protection of individuals and towards the realisation of an optimal state of affairs.[298]

---

[296] The IPCC focuses their risk-assessments on temperatures up to 4°C, above which most parameters are "very high risk"; IPCC AR6 WGII, 'Summary for Policymakers', fig. SPM.3.

[297] That's the temperature of the great extinction ending the Permian time; 'What's the hottest Earth's ever been?'

[298] This resembles the criticism of the proportionality principle because it does not treat fundamental rights as a deontic firewall; Habermas, *Between Facts and Norms*, 258–59. It is important to remember that the proportionality principle only applies to so-called negative rights. It is a tool to assess whether a political community has infringed someone's fundamental rights in their pursuit of various aims and not whether someone's fundamental rights should have been furthered in a specific way or to a specific degree. In this section, we are specifically addressing a view that equates fundamental rights with ideas on what a good society looks like. Hence, it does not apply to the understanding of mitigation currently under investigation (only to the narrative explored in Chapter 6). However, if proportionality is understood as a general requirement for interest optimisation, the criticism is applicable: it glosses over any legitimate disagreements of justice and pretends that normative issues have technocratic solutions; Simmonds, 'Constitutional Rights, Civility and Artifice', 186–87.

This descriptive observation also has a normative side. If everything regarded as the optimal state of affairs drawing on human interests is part of the legal fundamental rights systems, we run into political legitimacy problems. I will engage more thoroughly with this issue in Chapter 8. The following two paragraphs, however, relate these legitimacy problems directly to the underlying moral justification of legal duties.

When theorists conflate interests (which are balanced in overall assessments of what societies should strive towards) and individual claim-rights, they are easily led into the view that a society is obliged to provide everything that is beneficial for human beings.[299] This view implies that the answers to essential political questions follow directly from this idea of human interests. However, this promise does not hold in a political reality where interests compete for limited resources and often conflict. Thus, what is at stake is a political program proposing an answer to how a wide range of interests should be balanced against each other. The assertion that there is only one correct answer to this task of relating a wide range of interests with each other masks one's own preferred political view the only "right" view – revealing an authoritarian view of society.[300]

Equating the contents of fundamental rights with the politically agreed outcomes of an overall assessment of different interests is also problematic. If this method is endorsed generally, fundamental rights collapse into whatever a political authority finds good for its members.[301] Product-safety laws and building laws, as well as welfare, health and labour laws, are all examples of areas of law that encompass duties on authorities or private individuals/entities because the political authority finds them to account for the interests of the members of the political community in the best way.[302] If the enacted political programs are perceived as involving fundamental rights, then either fundamental rights are thought not to encompass immunities against the enactment of countervailing political policies or else the political policies are thought to be protected by immunities that shield them against any future changes.[303] Both views distort the key characteristic of fundamental rights: they

[299] This is a criticism that may be target at some of the UN human rights bodies. For instance, when the Human Rights Committee argues that right to life requires states to address the general conditions in society like pervasive traffic accidents; CCPR/C/GC/36, para 26.
[300] The proportionality principle is often understood to take such an initial wide approach to fundamental rights.
[301] An example of this reasoning is *PSB*, in which the functioning of a mitigation fund was a constitutional matter.
[302] Most of the interests that make the regulation beneficial are vaguely associated with ideas of fundamental interests, like security, autonomy, and health – this is mainly the reason the society has decided to enact such laws. However, this vague association does not make the duty in question one of a fundamental right; see, for instance Griffin, *On Human Rights*, 37.
[303] Immunity from changes is generally part of fundamental rights, ref. Chapter 2.

inherently protect some fundamental aspects of individuals and thereby set limits to what can permissibly be done in pursuit of political policies.

What we might gain from this perspective is a uniform way of enforcing duties. By linking legal duties with fundamental interests, the tools for enforcement and remedy available in fundamental rights systems become available for most duties in society. However, the value of regularly effectuating the laws of a society is an independent value associated with the Rule of Law. It should be recognised as such instead of conflating it with the contents of substantive individual rights.[304] In addition, it is questionable whether specific duties to mitigate greenhouse gas emissions are correlated with claim-rights held by individuals.[305] In the following section and the next chapter, I deny this to be the case.

4.4 Individual interests and specific duties to mitigate greenhouse gas emissions

The three narratives presented in section 4.2 address the abstract duty of mitigating climate change. In the above section 4.3, I found that this abstract duty is not justified and circumscribed by any individual's interest. In this section, I address whether interest-based moral theories of rights can justify the existence and contents of any specific duties to mitigate greenhouse gas emissions.

At first glance, it appears easier for an individual's interest to be a sufficient ground for a specific duty to mitigate greenhouse gas emissions than for this interest to justify the abstract duty to mitigate climate change. Here a fundamental interest is not invoked to justify the transformation of nearly all behavioural patterns of the modern world. Instead, the individual's interest must only be sufficient to ground a more circumscribed duty, like a national emission reduction target, insulating a building, or not taking a Sunday drive in a gas guzzler. As long as the content of the duty is rendered concrete enough, this intuition holds that an individual's fundamental interests could pull sufficient argumentative weight to justify its existence and content.

However, this intuition is flawed. The reason is that the fundamental interests at stake in the three narratives presented in section 4.2 are related to the general phenomena of

[304] The Norwegian Supreme Court in *Arctic Oil* recognised this distinction when arguing that a full disregard of the environmental duty enshrined in the constitution without the courts being able to intervene would breach general rule of law principles; para 123.
[305] For instance, to have standing before the ECtHR, the claimants have to show that that they are victim of a violation by at least one state; Spano, 'Keynote Speech'.

climate change and climate change mitigation. The optimal state of affairs (subsection 4.2.1), the precondition for an optimal state of affairs (subsection 4.2.2), and the minimal threshold of the fulfilment of fundamental interests (subsection 4.2.3) are not realised by compliance with any of the specific duties. Their realisation depends on a worldwide effort to combat global warming.

When asserting that the interest only needs to justify a specific duty, we misconstrue the matter. The specific duty has a connection to the interest in question solely when it forms part of a bundle of other specific duties that together can fulfil the individual's interest. The specific duty in the bundle of duties making up the abstract duty *derives* its justification from the abstract duty. In isolation, a duty to mitigate greenhouse gas emissions is utterly meaningless. Since we cannot separate the justification for the specific mitigation duty from the justification for the abstract mitigation duty, how climate change mitigation and individual interests relate remains a question about the abstract duty to mitigate climate change. Because the abstract duty is not justified in interest-based moral theories of rights, such theories will also not justify specific duties.

An important implication follows from this conclusion: we cannot decide the *who ought to do what* question from the narratives explored in this chapter. The answer to this question requires a normative assessment of how we should distribute the burdens of fulfilling the abstract duty, in which a wide range of additional considerations are at play. These considerations include issues pertaining to the alleged duty-bearers, for instance, if the mitigation is required to fulfil basic subsistence (Chapter 6) and issues pertaining to the relations between different alleged duty-bearers, such as equality considerations (Chapter 7). The analysis in this chapter supports one of the main conclusions in this dissertation: specific mitigation duties are *disjunctive* duties: a wide range of normative considerations impact the incidence of duties to mitigate greenhouse gas emissions on duty-bearers (Chapter 8).

That burden distribution is the heart of establishing specific mitigation duties has made many courts reluctant to engage with cases about duties to mitigate greenhouse gas emissions. An example from the strategic litigation trend is *Our Children's Trust*. The US Ninth Circuit Court dismissed the case because it was beyond the Court's power to order, design, supervise or implement the plaintiff's requested mitigation plan. The Court noted that "any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches."[306] Some courts have

[306] *Our Children's Trust*, 25.

been willing to address this issue upfront.[307] When assessing whether the alleged duty-bearer has undertaken their "fair share" of the burdens, the assessment typically looks at whether any moral, legal or political norms prescribing this burden distribution apply in the jurisdiction. Hence, these courts at least indirectly acknowledge that this issue is about burden distribution and that the contents of specific duties are not determined by the interests of individuals experiencing the adverse consequences of climate change.

In Chapter 5, I examine whether the argument that all instances of greenhouse gas emissions harm individual human beings can circumvent this conclusion. If mitigation is morally incumbent on every actor, perhaps the individual harm caused can justify this duty.

4.5 Conclusion

I have shown three things in this chapter. First, an individual's interest is not a sufficient justification for the abstract duty to mitigate. Therefore, traditional interest-based moral theories of rights do not apply to climate change mitigation. In the same way as we take account of human interests in a normative argument about a single speed limit on all roads, human interests are essential reasons for climate change mitigation. But in the same way as no feature of an individual morally determines which single speed limit to apply, no individual's interest determines the moral argument that climate change must be mitigated and the content of this mitigation.[308]

The second point is that specific duties to mitigate greenhouse gas emissions are also not an issue of moral rights in this narrow sense. Specific mitigation duties derive their justification from the abstract duty to mitigate, which does not have an interest-based justification. Because there are many ways to fulfil the abstract mitigation duty, the contents of specific mitigation duties need additional justification.[309] Thus, the question of *who ought to do what* is one of burden distribution and does not follow from any aspects of the individuals experiencing the detrimental effects of climate change.

[307] For instance, *Urgenda* and *Neubauer*.
[308] Knutti et al., 'A Scientific Critique of the Two-Degree Climate Change Target', 17.
[309] However, we might object that this view allows us to count the interests against climate change mitigation twice. First, these interests are included in the overall assessment establishing the limit to the global average temperature increase. Second, when turning this abstract duty into specific duties of greenhouse gas mitigation borne by particular actors, we ask whether this burden collides with the actor's other interests. *Urgenda* can be read as an example of this crux when the Dutch Supreme Court mentioned that the government had not adduced any other goals that would be jeopardised from reducing the Dutch emissions by 25% in 2020 compared to 1990 levels. Thus, the Court did not find this burden disproportionate; para 7.5.3.

The third point from this chapter is that the current discourse on rights and climate change recognises that climate change mitigation is an issue of bringing together a wide range of often conflicting interests. To illustrate this point, we can look at *Neubauer*, in which the German Federal Constitutional Court decided that the German state had to draw up a mitigation plan for how it would reduce greenhouse gas emissions after 2030 to avoid the possibility that future mitigation measures would deprive the German inhabitants' of too many current liberties.[310] The Court stated that because Germany had duties to mitigate climate change – to reach net zero and stay within a national emission budget – Germany might get very little time to fulfil these duties after 2030 if it were to adhere to the current emission reduction trajectory.[311] To stay within the national emission budget following the current policy ahead of 2030, the government would need to impose a wide range of strict mitigation measures in an extremely short time after 2030, impacting almost all aspects of people's lives. However, because climate change would also obstruct people's exercise of their liberties in the near future, more restrictive measures might be called for in this near future without them being found "disproportionate".[312] Hence, people's freedoms were an issue on both sides of the assessment.

[310] The court was concerned with both the general constitutional right to freedom in Article 2 of the Basic Law and freedoms as part of specific constitutional rights.
[311] *Neubauer*, para 246.
[312] *Neubauer*, para 244.

Chapter 5: Harm

5.1 Introduction

In the previous chapter, I concluded that the abstract duty to mitigate climate change was a positive duty to bring about a desirable state of affairs. In the following two chapters, I investigate if a deontological narrative can challenge this consequentialist perspective. Do mitigation duties derive from the negative duty to not wrong human beings?[313] Emphasising that it is the *committing of injustice* that is morally at stake,[314] the deontological narrative asks whether both the abstract duty to mitigate climate change and the specific duties to mitigate greenhouse gas emissions follow from the prerogative of *respecting* people's fundamental interests.[315]

The deontological narrative is prevalent in the strategic litigation trend in its attempt to provide a straightforward answer to the question of who ought to do what to mitigate climate change: every actor ought to not produce greenhouse gas emissions. The lawsuits against governments frame this narrative as a duty to ensure *protection* from such disrespectful behaviour.[316] There are two components to the deontological narrative: (1) cause and effect and (2) the qualities that make the potential causing of this effect a wrong. In this chapter, I explore the detrimental impacts greenhouse gas emissions may have on individuals under the headline "harm". In Chapter 6, under the category of "wronging", I address whether any potential harm from climate change is caused in such a way that it transgresses a negative duty of not *committing* injustice and *disrespecting* human beings.

By exploring the topic of harm in this chapter, I engage deeper with an issue already discussed in this dissertation: Is it possible to establish a connection between the detriment suffered by an individual and behaviour that produces greenhouse gas emissions? Section 5.2 discusses how the negative narrative of a duty to avoid depriving people of their fundamental well-being is part of the current discourse on rights and climate change mitigation. Section

[313] Such a line of argument is central to most moral theories of harming; see, for instance, Feinberg, *Harm to Others*, 34.
[314] This line of reasoning follows the Socratic position that it is better to suffer injustice than to commit injustice; Plato, *Gorgias*, 469b.
[315] This traditional side of negative rights is often associated with "liberty rights" and contrasted with abstract rights to goods and services; O'Neill, 'The Dark Side of Human Rights', 427–28.
[316] As I explored in section 4.3, Shue argues that any general right correlates with a bundle of duties, namely, (1) duties to avoid depriving, (2) duties to protect from deprivation, and (3) duties to aid the deprived; Shue, *Basic Rights*, 52–53. Whereas the last chapter investigated the third type of duties, I am currently interested in the two first types of duties.

5.3 moves on to disentangle the underlying structure of this argument. With a fictional narrative of a glockenspiel of games of Russian Roulette as a metaphor for the emissions that induce anthropogenic climate change, I focus the analysis on two central components of the argument: the creation of a detriment to individuals (subsection 5.3.2) and the detriment suffered by individuals (subsection 5.3.3). Through this fictional narrative, I show that the main components of this argument concern causation and risk. The following two sections investigate these two components further. In section 5.4, I explore whether not being exposed to risk is a protected desideratum in the legal material typically invoked in the rights and climate change discourse. In section 5.5, I argue that no emitting behaviour creates a relevant risk: no emission is necessary to fulfil the abstract duty to mitigate, nor is it a cause of an independent harm. Hence, the narrative of harm cannot answer the question of who ought to do what to mitigate climate change.

5.2 The current discourse on negative rights and climate change mitigation

According to the conclusion presented in Chapter 4, fundamental interests are inputs in the overall arguments that determine the existence and content of mitigation duties. No individual's interest was a sufficient justification for the abstract duty to mitigate climate change, nor for any specific duties to mitigate greenhouse gas emissions. The narrative investigated in this chapter follows the intuition explored in section 4.4: Are an individual's interests sufficient to justify specific duties to mitigate greenhouse gas emissions because these emissions harm the individual?

Indebted to Thomas Pogge's work on global poverty,[317] the deontological perspective on climate change mitigation stresses the human involvement in the creation of the adverse impacts on people's fundamental interests and argues for a duty to refrain from producing the greenhouse gases that create this harm.[318] Simon Caney pioneered this type of argument after his earlier reliance on Joseph Raz's interest theory. Drawing on the UN Universal Declaration of Human Rights and the two Covenants, Caney provides three formulations of this minimum conception of rights:

[317] Tomas Pogge made a similar twist when arguing that abstract rights, such as claim-rights against poverty, may yield concrete implications in specific contexts; Pogge, *World Poverty and Human Rights*, 73–75. For Pogge, such claim-rights can be invoked to generate duties on international actors to not create trade systems that cause poverty.
[318] Caney, 'Climate Change, Human Rights, and Moral Thresholds', 75; Bell, 'Climate Change and Human Rights', 163.

"HR1 – the human right to life: all persons have a human right not to be 'arbitrarily deprived of his life'".[319]

"HR2 – the human right to health: all persons have a human right that other people do not act so as to create serious threats to their health".[320]

"HR3 – the human right to subsistence: all persons have a human right that other people do not act so as to deprive them of the means of subsistence".[321]

All these formulations state that every human has a claim-right to not have their fundamental interests in life, health and subsistence stymied or threatened by other actors.[322] Applied to climate change, these moral claim-rights encompass obligations directed at *everyone* to not deprive human beings of their fundamental well-being by emitting greenhouse gases.

What is the nature of the universal quantifier "everyone"? Is it an *aggregative* universal quantifier through which a duty is ascribed to the collective entity of human actors, or a *distributive* universal quantifier through which a duty is ascribed to each member of this collective?[323] In the first instance, mitigation is a collective problem and other normative standards are needed to allocate the specific duties to sources of greenhouse gas emissions. In the second instance, the abstract duty entails the specific duties to not produce greenhouse gas emissions. Caney and the broader discourse on rights and climate change provide a somewhat mixed answer to this question.

Sometimes, Caney suggests that duties to mitigate greenhouse gas emissions apply distributively to every actor. For example, he writes that inviolability entails that "one does not act so as to arbitrarily deprive people of their lives",[324] that "persons should not act in such a way as to create an unhealthy environment",[325] and that "to engage in activities which creates serious health hazards for others constitutes a severe failure to recognise their moral standing and their inherent dignity as persons".[326] By these statements, he appears to be targeting greenhouse gas emitting behaviour in general. However, in other statements, he qualifies the mitigation duty to encompass only some emitting behaviour: "the majority of emissions come from the advantaged, who do not need to engage in such health-endangering

[319] Caney, 'Climate Change, Human Rights, and Moral Thresholds', 76.
[320] Caney, 79.
[321] Caney, 80.
[322] Similar types of negative arguments have been put forward in the context of extraterritorial harm: a state should not allow activities within its jurisdiction that harm other states, or the individuals in other states. See for instance *Advisory Opinion OC-23/17* para 81 and Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics'; Voigt, 'State Responsibility for Climate Change Damages'.
[323] See section 3.2.2.
[324] Caney, 'Climate Change, Human Rights, and Moral Thresholds', 77.
[325] Caney, 79.
[326] Caney, 79.

behaviour".[327] In some passages, he goes even further to deny implicitly that the argument covers individual emitters. He makes a central distinction between "our evaluation of the impacts of climate change" and "the distribution of the duties to uphold the human rights threatened by climate change",[328] a distinction that addresses mitigation as an aggregative duty.

The most coherent way to understand Caney's position on climate change as a wrong is that he allocates the duty to the human collective through an aggregative universal quantification. Taking into account that Caney is one of the central writers on climate justice, he is interested in global emissions and how greenhouse gas emissions collectively frustrate people's fundamental interests. [329] Then, as a second question, he is interested in how to justly distribute the burden of fulfilling this duty.[330] Nevertheless, the muddle that stems from looking at the creation of harm alternatively from the collective perspective and from the perspective of the members of the collective carries over to the legal discourse.

The growing consensus amongst UN human rights bodies is to condemn how global anthropogenic emissions create harm or threaten to create harm to central aspects of people's lives.[331] For a long time, the UN Special Rapporteur on human rights and the environment saw this as an aggregative duty and was reluctant to derive specific duties from it. Therefore, John Knox refused to qualify the effects of climate change as human rights violations in a strict sense.[332] Nevertheless, in 2019, the new Rapporteur David Boyd issued a report emphasising that "states must not violate the right to a safe climate through their own actions",[333] implying that specific duties follow from global climate change. In the words of the UN Child Committee: "Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activity contributing to such harm, could constitute a violation of States' human rights obligations."[334]

---

[327] Caney, 81.
[328] Caney, 89.
[329] See, for instance, Caney, 'Just Emissions'; Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change'. I will explore theories of climate justice in Chapter 7.
[330] A human rights approach also guides this latter assessment: any international or national distribution of "emission rights" "should not jeopardise the human rights to life, health and subsistence."; Caney, 'Climate Change, Human Rights, and Moral Thresholds', 89.
[331] Joint Statement.
[332] A/HRC/10/61, para 70. "Billions of people contribute to climate change and will experience its effects, and the causal chains linking individual contributions with specific effects may be impossible to discern with certainty."; A/HRC/31/52, para 34.
[333] A/74/161, para 65.
[334] *Sacchi* (Germany), para 9.6.

The lawsuits target particular members of the global collective and not the collective itself. Therefore, it is not enough to show that there is an aggregative duty to mitigate greenhouse gas emissions incumbent on the human collective. We must show that the duty to mitigate greenhouse gas emissions applies to the actor in question, either because the duty applies to every member of the collective (through distributive universal quantification) or this member (through disjunctive universal quantification).

When litigants target national emission policies, they mainly ask the responding governments to protect against the threat from national emissions. As an argument about harm, the litigation trend presupposes that the abstract mitigation duty applies distributively to every actor. For instance, when the German Federal Constitutional Court in *Neubauer* discusses the duty correlative to the right to life,[335] it emphasises that a national policy that does not pursue climate neutrality is unsuitable for realising people's right to life since global warming can only be stopped if greenhouse gases are kept at climate-neutral levels.[336] When the Court concludes that people will still be harmed if national emissions are not eventually stopped, it presupposes that the abstract duty to reach climate neutrality applies distributively to Germany.[337]

Sometimes, the distributive aspect is more explicitly addressed, such as when the Norwegian Supreme Court in *Arctic Oil* asks "whether there is a sufficient relationship between the production licences … and possible loss of human life", which the Court denies.[338] This distributive perspective is also at stake when the duty is framed as a violation of the standard of due care in, for instance, *Sharma*, *Shell*, and by the Hague District Court in *Urgenda*. In these cases, the premise is that every actor is obliged to mitigate greenhouse gas emissions.

Two sets of questions emerge from the rights and climate change mitigation discourse. The first concerns whether an abstract duty to mitigate follows from the assertion

[335] The Court uses the phrase "protect" but its meaning is one of fulfilling/realising the fundamental interests despite increasing climatic obstacles. Under the assessment of the right to life, the German state was not asked to protect people from the exposure to emissions from German soil (which we will see later in this chapter would not have been discretely harming them anyway). Rather, the Court requires the government to ensure beneficial conditions in Germany for people to live their lives, implying, for instance, measures of adaptation and international cooperation.
[336] *Neubauer*, para 155.
[337] It is theoretically possible to reach global net-zero without Germany being net-zero if other countries have negative emissions.
[338] *Arctic Oil*, para 167-8. *Urgenda*, on the other hand, finds some of the Dutch emissions to have a role in creating the danger. Here, the Supreme court draws on, for instance, the international law "no harm principle" claiming that each country can be held accountable for its part in creating climate change (para 5.7.5) and how several states may be responsible for "the same internationally wrongful act" in relation to their national conduct (para 5.7.6).

that anthropogenic climate change thwarts the fulfilment of their fundamental rights to life, health, and subsistence. Does this negative duty have a different content than the positive duty to bring about a desirable state of affairs? Is this negative mitigation duty inherently protecting the fundamental desiderata of life, health, and subsistence? In section 5.4, I will ask this latter question from a legal perspective: do various legal instruments associated with fundamental rights safeguard the interest in living on an Earth with good climatic conditions?

The second set of questions concerns whether this abstract duty applies through distributive universal quantification to the separate members of the global collective of actors: nation-states, companies, individuals. Does forbearance from greenhouse gas emissions play a necessary role in fulfilling the universal duty? Does each instance of greenhouse gases produced set back the fundamental interests of people?

Through this intricate web of questions, I will show that specific duties to mitigate greenhouse gas emissions are not justified by how particular greenhouse gases set back people's fundamental interests. Thus, the question of *who ought to do what* to combat global warming remains an issue of justly distributing these mitigation burdens.

5.3 A fictional narrative

The above engagement with the idea of greenhouse gas emissions depriving people of their fundamental well-being reveals a highly knotty set of questions. To disentangle the many connections, I have constructed a fictional narrative of a glockenspiel of games of Russian Roulette.[339] Its simplified form shows that risk and causation are the two key issues in the arguments that advert to the infliction of harm. Later in the chapter, I will apply these two concepts as an illuminating lens on the current discourse on rights and climate change mitigation. However, I will also show how climate change is more complicated than this straightforward narrative allows, which results in problems especially for the aim of establishing specific duties to mitigate greenhouse gas emissions.

In the following subsections, I will present various aspects of the fictional narrative portraying climate change as a glockenspiel of games of Russian Roulette. After setting up the basic scheme of the fictional narrative (subsection 5.3.1), I describe the situation first from the behaviour that generates games of Russian Roulette (subsection 5.3.2) and then

[339] Various analogies are invoked by authors to disentangle climate change. See, for instance, Stefan Theil's football analogy; Theil, *Towards the Environmental Minimum*, 268.

from the position of those subjected to the games of Russian Roulette (subsection 5.3.3). Lastly, I see what happens with the fictional narrative if we assume that some of the detrimental consequences can be prevented through adaptive behaviour by those subject to the games of Russian Roulette (subsection 5.3.4).

5.3.1 The global climate as a glockenspiel of games of Russian Roulette

Suppose a glockenspiel of games of Russian Roulette was placed in a tall building facing a busy marketplace in a town. Sometimes, a key in the glockenspiel was pressed down by natural causes and randomly resulted in instigating a game of Russian Roulette. Most times, nothing happened when a game of Russian Roulette was triggered, but sometimes a gunshot was fired towards the marketplace. These gunshots sometimes hit a human being, resulting in various casualties, from just a brush to deadly wounds.

Now, imagine that the town's activity could also trigger the glockenspiel of Russian Roulette. Let us assume that various human activities in the town gradually fill up a long tube outside the tower with marbles. When the tube was full, and the town still added marbles, some would drop down on the keys of the glockenspiel, instigating games of Russian Roulette. The human intervention caused the induced games of Russian Roulette to be repeated multiple times as the weight of the marbles continually pushed the keys down. Over time, the gunshots over the marketplace became both more frequent and severe due to the constant marble stones dropping onto the keys.

In this fictional narrative, the glockenspiel of Russian Roulette is the global climate. Whenever a gunshot is fired at the marketplace, an extraordinary weather event occurs, such as a flood, drought, heatwave, or storm of various degrees. The gunshot, aka weather event, sometimes hits a human, inflicting various injuries. From the setup of this narrative, injuries happen naturally by the Force of Nature. But by adding marbles into the tube, the whole glockenspiel of Russian Roulette is changing, leading to more gunshots and injuries – a parallel to how human activity adding greenhouse gases to the atmosphere beyond the current cycle (net-zero/climate neutrality) changes the global climate and leads to adverse consequences on the Earth's surface.[340]

[340] There are two important points to notice here. First, a marble is not to be understood as equivalent to a singular instance of greenhouse gas emission. Greenhouse gases have a natural fluctuation in and out of the atmosphere that does not create any problems for the overall concentrations of greenhouse gases in the atmosphere. Hence, it is only the adding of greenhouse gases beyond this natural cycle that is problematic. However, as will be discussed in section 5.4, we cannot determine which greenhouse gases are part of this cycle or not. Thus, in translating the fictional narrative to a real-world setting, we will have to make a choice of

5.3.2 Four situations of causation

I will start by looking at the role of a marble in this glockenspiel of Russian Roulette. I am only concerned with the issue of factual causation.[341] However, as will become evident in the section 5.5 below, the topic of harm requires us also to engage with normative assessments relevant to establishing causation.[342]

My discussion of causation will cover territory familiar to both philosophers and lawyers. I am not upholding the narrow understanding of causation, where an element is only a cause of an effect if it is necessary or sufficient for the effect. If this were the case, causation could not have been established in a simple case of, for instance, me causing a house to burn down by toppling over a lit candle. The candle toppling over is not a necessary but-for element for the house to burn down, as it could have happened in countless other ways. For instance, it could have been struck by lightning. Strictly speaking, the toppling of a candle is also insufficient for the house to burn down. In addition to the heat from the candle, oxygen and burnable material must have been present, as well as a vast number of negative elements such as a lack of sprinkler systems, the fire brigade not being able to extinguish the fire, the sales assistant not refusing to sell me the candle etc.

I rely on Wright's Necessary Element of a Sufficient Set (NESS) test to overcome these obstacles.[343] For most instances, we reach similar conclusions when applying Mackie's theory of a cause as "an *insufficient* but *necessary* part of a condition which is *unnecessary* but *sufficient* for the result", a so-called INUS condition.[344] At the heart of these theories is the notion that an element can be a cause of an event if it is a necessary element in a set of elements sufficient to bring about the event. In the sufficient set of elements for the house to burn down, the candle topples over in the presence of oxygen and burnable material without a

ordering some emissions as permissibly part of the net-zero balance and others as impermissibly exceeding the balance. Second, introducing the tube into the fictional narrative allows us to accommodate an understanding that not all alterations of the concentrations of the greenhouse gases in the atmosphere are harmful. In this fictional narrative, this can either be when the tube is filled up and anthropogenic games of Russian Roulette are played, or when the frequency of games reaches a certain threshold. We will return to the various aspects of harm encompassed in the narrative in the next subsection 5.3.3.

[341] From the perspective of the marble's role in starting a game of Russian Roulette, we can talk about *ex post facto* causation because we can scientifically establish whether the marble is added to the tube and whether the tube is filled up or not. What we cannot establish is which marble at the top of the tube falls down on which key in the glockenspiel. This distinction is relevant for climate change mitigation. Although we cannot pinpoint which emissions were responsible for a harm usually required in cases about compensation (like *RWE*), we can assess the wrongness of behaviour creating a risk. However, as we will see in section 5.4, we cannot even establish this causal relation.

[342] This latter issue is often referred to as the "proximate cause"; see, for instance, Moore, 'Causation in the Law'.

[343] Wright, 'Causation in Tort Law', 1788.

[344] Mackie, 'Causes and Conditions', 34.

functioning sprinkle system, etc., my toppling over of the candle is a necessary element. Hence, we can classify it as a factual cause.

The fictional narrative can be divided into at least four situations of causation between adding a marble and a game of Russian Roulette being played at the marketplace. The first situation is when the tube is full of marbles. In this situation, we know that when the town adds another marble to the bottom of the tube, one marble at the top will fall out on a key in the glockenspiel, and the people at the marketplace will be subject to a game of Russian Roulette. Adding this particular marble is neither sufficient nor necessary for a game of Russian Roulette to be played. Only in combination with all the other marbles already in the tube can a sufficient set of conditions exist to bring about a game of Russian Roulette. The marble is a necessary element in a sufficient set of marbles starting a game. Hence, we can ascribe a causal role to the marble under both Mackie's INUS condition (insufficient but necessary part of a condition which is unnecessary but sufficient for the result) and Wright's NESS test (a necessary element of a sufficient set).

Let us turn to two other situations concerning overdetermination when the tube is still full. In the first situation, a marble triggers a game of Russian Roulette. Still, we know that another marble will follow suit directly after and, thus, would replace the first marble if this first marble was not added to the tube.[345] This situation resembles the discussion in *Arctic Oil* about whether a reduction in Norwegian petroleum production would be entirely replaced by production in other countries.[346] From the perspective of factual causation, the marble is a cause because, in the sufficient set that actually started a game of Russian Roulette, it was an element necessary for the set's sufficiency.

The other situation of overdetermination is when two events simultaneously cause the effect. A typical example is when two deadly shots hit a person simultaneously. Here, the NESS test allows both situations to be a cause, but the INUS test does not.[347] However, a central feature of the setup of this fictional narrative is that overdetermination from the side of the town's activity does not happen.[348] At least for the foreseeable future, a new key will be available in the glockenspiel so that each marble added to the full tube will be the decisive

[345] Mackie, 43.
[346] In this example, the emission equals adding a marble to a full tube. This is at least contested in the case, and it is more appropriate to see the case as being about the adding of a marble to a tube that is not yet full.
[347] Kramer, *The Quality of Freedom*, 297. Contrast Mackie, 'Causes and Conditions', 44.
[348] Here, I am addressing two marbles pressing the same key. However, what might happen is that two gunshots fired by two different games of Russian Roulette hit the same person at the same time. This situation cannot be properly examined *ex post facto* in the fictional narrative (or according to current climate science) because we cannot trace a gunshot back to a particular game of Russian Roulette.

cause of a separate effect. In contrast to other thought experiments where additional contributions beyond a threshold are superfluous, every further alteration of the glockenspiel, hence the climate, has an effect.

However, the fourth situation more seriously challenges the appropriateness of speaking about causation: namely, the situation when the tube is not yet filled up. When a marble is added to the tube at this time, we do not know whether it will be a necessary part of a sufficient set of marbles that will start a game of Russian Roulette. If we think that the probability of the marble being part of a sufficient set is very high, it might still be natural to ascribe a potential causal role to it at this present time. For example, we might think the situation parallels the first situation described above, so the tube is full for all practical purposes. If we assume that the tube is filled up later, the marble will be part of the sufficient set and, hence, be a cause.

However, we are left in a hopeless situation if all behaviour that might turn out to be part of a sufficient set of conditions resulting in a detrimental consequence implies responsibility for this detriment. This conclusion would mean that we could never light a match, for instance, as this might become a part of a sufficient set of conditions which puts a house on fire. Hence, our establishment of causation must include the normative assessments of whether the risk of the marble being part of a sufficient set triggering a game of Russian Roulette is so proximate that it is appropriate to ascribe a causal role to it. In addition, that a marble is a factual cause in an event does not mean that it automatically is appropriate to ascribe moral or legal responsibility to it. Especially in the situation of overdetermination it is often inappropriate to classify the overdetermined behaviour as a proximate cause.

5.3.3 Four types of consequences

The previous subsection explored the role of a marble in causing games of Russian Roulette. Equally crucial for the arguments that advert to harming are the consequences associated with games of Russian Roulette: what constitutes the detriment in question?

Direct injury

According to Caney's analysis of the connection between human rights and climate change presented in section 5.2, life itself, health, and subsistence are the least controversial

fundamental desiderata at stake.[349] At least the first two are well accommodated by the fictional narrative. A central feature of the narrative is that people can experience direct consequences to their physical integrity by being killed and injured by a gun firing. Hence, the first type of harm is the direct physical detriment experienced by being hit by a gunshot.

A crucial challenge to this first type of consequence is that *ex post facto,* we cannot confidently establish the connection between the occurrence of such detriments and the adding of a marble.[350] We do not know whether an injury resulting from a gunshot was caused by the Force of Nature or marbles added by the town's activity.[351] Thus, we cannot tell if a marble caused any physical detriment.[352] We are left looking at the harm from an *ex ante* position. There is certainty about the general setup of the narrative, but our causality assessment can only rely on probabilities that particular marbles have deprived someone of their physical integrity.[353] This lack of knowledge has implications for the consequences that we ascribe to adding a marble. From the perspective of the people at the marketplace, they cannot know *ex post* whether they have encountered a humanly-induced gunshot or have been the unlucky target of the Force of Nature. What they can know, however, is that *ex ante*, the setup of the glockenspiel places them at a higher risk of undergoing such injuries to their physical integrity.

A similar analysis follows when we look at the situation of adding a marble. Even when a marble is a cause of a game of Russian Roulette as described in subsection 5.3.2, we cannot know whether this game of Russian Roulette will lead to a gunshot being fired, much less if such a gunshot will hit anybody at the marketplace.

In the fictional narrative (as well as in climate science), we can determine the probability of whether an injury resulting from a gunshot was caused by the marbles or by the Force of Nature. Based on this probability, the town might decide to remedy the injured inhabitant according to a mathematical proportion of probability to make up for the town's

[349] This view is shared by most of those working on the connection between human rights and climate change. See, for instance, Knox, 'Climate Change and Human Rights Law'; Wewerinke-Singh, State Responsibility, Climate Change and Human Rights Under International Law.
[350] See, for instance, Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics', 91–92.
[351] Attribution science is rapidly improving, but until the entire climatic base-line has shifted scientists resist the question of whether an event was caused by climate change; Marjanac and Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation', 273; Stuart-Smith et al., 'Filling the Evidentiary Gap in Climate Litigation', 652.
[352] We are not able to fingerprint a greenhouse gas molecule; Marjanac and Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation', 278.
[353] For instance, the scientific predictions of possible futures in different climate scenarios in IPCC AR6 WGI, 'Summary for Policymakers', sec. B.2, B.2.2. Deducting impact from these scenarios is part of the storyline model; Lloyd and Shepherd, 'Climate Change Attribution and Legal Contexts'.

involvement in filling up the tube with marbles. However, such an arrangement would be an ethical question of the fair distribution between the risk of not being rightly remedied when hurt by others' actions and the risk of having to remedy something that one did not cause.[354]

Risk of injury

If we instead see the risk of being exposed to a gunshot as an independent detriment, we can establish a more solid consequence experienced by a human being.[355] This classification of the exposure to risk as an independent harm is philosophically contested. If the risk does not materialise, how can we say someone has been harmed? [356]

One way to establish that exposure to this risk deprives people of something valuable is by seeing it as an involuntary transfer of physical powers-of-disposition over their bodies during a certain stretch of time.[357] When a gun is shot at people, the shooting takes dominance over the nearby people's material world. People are deprived of control in the presence of such a dominant factor. Since some of the gunshots are anthropogenically created, they can also anthropogenically be averted.[358] If the physical integrity of people is a fundamental desideratum, not being deprived of control over it might appear equally fundamental.

We can best prescribe this unauthorised dominion as a lack of respect for the bodily integrity of people. Even though the risk does not materialise, there is an independent value in the paying of due respect to one's physical integrity.

This second type of consequence has limited usage in our analysis of the fictional narrative. It describes a situation where a gun is fired at people, and we do not know whether the shot will inflict harm. In our narrative, we still cannot tell if this gunshot resulted from the Force of Nature or marbles being added to the tube. Hence, we do not know if a game of Russian Roulette will indeed fire a gunshot at the marketplace. A third type of consequence is at stake: the risk of being shot at.

---

[354] From a practical, legal perspective, this distribution of risk might be settled by general rules of evidence and a "more likely than not" standard or by rules in particular areas such as occupational injury compensation that might set the evidential bar even lower.

[355] What such a remedy looks like is a separate question. If looked at from the perspective of corrective justice, what could be at stake is the gain won by opting for the risky behaviour if alternatives were available; Kramer, 'Of Aristotle and Ice Cream Cones', 290.

[356] Many philosophers does not find risk to be an independent harm; see, for instance Thomson, *The Realm of Rights*, 243–47.

[357] Kramer, 'Of Aristotle and Ice Cream Cones', 287.

[358] I will return to the question of voluntariness in subsection 5.4.3.

Risk of a risk of injury

The risk of being shot at is a third type of harm: a risk of a risk of injury. The detriment at stake is more remote from the physical injury we started with. However, the interest in not being deprived of powers-of-disposition over one's physical integrity or not being subjected to disrespect is still valid in this situation. Therefore, this third type of consequence is an independent harm to the people at the marketplace.

The risk of creating a risk of a risk of injury

The last type of consequence I need to address is occurrent when the tube is not yet filled up. Adding a marble creates a risk that the tube will be filled up and will eventually induce the further detrimental effects on people at the marketplace. There are three harms at play: first, people's security is threatened by the exposure to games of Russian Roulette; then, potentially their immediate surroundings are threatened by a gun shooting at them; and finally, the gunshot may potentially harm their physical integrity itself. In all these situations, the people at the marketplace risk being deprived of some powers-of-disposition over their physical integrity. If people were to be harmed by the adding of a marble when the tube is not filled up, this is a fourth type of harm: the risk of being exposed to a risk of a risk to their physical integrity.

Whether this hypothetical consequence is an independent harm to the people at the marketplace is questionable.[359] Whether this risk materialises, and people are deprived of powers-of-disposition over their physical integrity, depends on the overall situation of other potential marbles being added or avoided. Hence, the recognition of this "third-order" risk is a normative question of proximity: how close is the tube to being full?

5.3.4 Adaptation

The presentation of the fictional narrative is incomplete without addressing the fact that people at the marketplace can influence whether the risk from the glockenspiel materialises in physical injury. For instance, they can wear bulletproof vests and helmets or invent a warning system to stay inside if a gunshot is due to be fired. Adding the option of adaptation prompts us with three important points of reflection. First, if these adaptation measures are successful,

[359] Another example of a risk of a risk is the risk of being exposed to someone driving recklessly. If this is a consequence that someone has a legitimate interest in being protected from, a relevant claim-right could be a claim-right against the serving of alcohol to people that might drive.

they defuse the consequences that make the glockenspiel problematic: the physical detriment to people's lives and health may disappear. When a marble is added to a full tube in this adaptation situation, the risk of it creating any damage is, if not eliminated, substantially reduced. Successful adaptation affects the whole chain of risks – the glockenspiel is no longer depriving people of powers-of-disposition over their physical integrity. Adding a marble to a full tube might no longer cause physical detriment to anyone.

Second, with adaptation, any minimally sufficient set of conditions causing an eventual physical detriment changes. If someone is injured now, it is because gunfire hit them and there was faulty adaptation (for instance, because people fail to wear protective gear for various reasons).[360] The possibility of adaptation makes the risk of adding a marble to a full tube seem more like adding a marble to a tube with space left because a range of human activity determines the outcome. The town can coordinate its actions and avoid harm by either not adding marbles to the full tube or protecting those at the marketplace. When we ascribe moral responsibility for the elements in the causal chain leading to harm, we can equally emphasise the absence of adaptation or the starting of a glockenspiel. Nevertheless, the continuous adding of marbles will make the gunshots so frequent and severe that, at a point in time, the adaptation measures will no longer provide sufficient protection. At this point, the occasional detriment to people's physical integrity is unavoidable.

Nevertheless, the third point to note is that a new kind of adverse effect might come into existence by introducing adaptation as an issue. For example, being forced to wear protective gear or stay inside not to get seriously injured can be a type of unfreedom so grave that it constitutes an independent harm. Hence, adding a marble to the full tube could still cause a detriment to the people at the marketplace: the need to adapt.

5.4 Climate change and harm to individuals

In this section, I explore how various areas of law typically protect against the four different types of consequences explored in subsection 5.3.3, (1) direct injury, (2) risk of an injury, (3) risk of a risk of injury, and (4) the risk of creating a risk of a risk of injury. Singling out these different consequences enables us to understand what type of harm climate change poses to individuals and, thereby, what types of interests duties to mitigate protect. Climate change

[360] Here an analogy to the recent covid-19-pandemic is appropriate: any chances of illness can be reduced both by not being exposed to the virus by already infected people and by wearing a proper mask (and to some degree by being vaccinated) when exposed.

mitigation is primarily about the third type of consequence, a risk of a risk of injury. The strategic litigation trend addresses the fourth type of consequence, namely, a risk that the risk posed by climate change materialises.

My main aim in this section is to relate these different interests to some areas of law central to ideas of rights. The assessment is more concerned with the current legal discourse on establishing the duty to mitigate in legal systems protecting humans against harm than with the philosophical relationship between rights and climate change mitigation. In subsection 5.4.1, I show that areas of law protecting against the first type of consequences, such as human rights and tort law, do not protect against the types of risk relevant to climate change mitigation. In subsection 5.4.2, I highlight similar concerns regarding laws about a healthy environment enacted to protect against the second type of consequence: a risk of injury. Only legal provisions about the safe climate as such inherently protect the interest against being exposed to a risk of a risk of injury, which I will explore in subsection 5.4.3. I conclude the section by discussing the implications of this latter finding for the analytical interest theory of right-holding and the legal system of fundamental rights.

5.4.1 Human rights and tort law

Academics like Caney link climate change and rights by looking at the occurrence of detriments to fundamental interests such as life, health, and subsistence.[361] As illustrated by the fictional narrative, we know that increased concentrations of greenhouse gases in the atmosphere will increase the frequency and severity of extreme weather events and, thus, the potential injuries to human beings. However, when and how this will happen, or which events and injuries additional emission creates, are beclouded with uncertainty.[362] Thus, climate change is a risk that adverse weather events will happen and that these adverse weather events will inflict injury on human beings.

Human rights and tort law are areas of law protecting people from direct injury. However, these areas of the law do not only address the materialisation of physical harm. Instead, they include protection against risks by granting injunctions so that a claim-right against violation of one's physical integrity is not rendered meaningless by having to await

[361] Caney, 'Climate Change, Human Rights, and Moral Thresholds'.
[362] The climate science gains increased confidence in predicting the broad lines of the future, but it still cannot predict exactly how the future will look like for particular areas and people. For an overview of the causal problems with a person-injury-based account see, Dupuy and Viñuales, *International Environmental Law*, 395–96.

the transgression of the duty before a court can intervene. Hence, human rights require a proximate relation between the risk and the materialising of the detrimental consequence. The relevant claim-right only encompass the risk of injury if the protection against this risk is necessary to prevent an injury that would occur with a high degree of certainty. Applying the fictional narrative as an illustration: the risk typically protected in human rights law arises when someone is just about to be hit by a gunshot.

The European Court of Human Rights (ECtHR) often captures this proximity requirement in the language of the approaching injury being "real and immediate" or "direct and immediate".[363] The risk accepted by the ECtHR concerns such real and direct materialisation of noise, pollution, failed dam constructions, mudslides from heavy rain, etc.[364] When the court considers whether a risk is immediate, an often-invoked example is *Taskin*, concerning sodium cyanide in a proposed gold mine where the harm would materialise in twenty to fifty years.[365] As I understand it, this harm was considered immediate by the ECtHR not because of the time itself but because of the straightforward causal relationship.[366] In the climate change context, it is not the timeframe itself that is problematic. The challenge is to ascertain the injury that will result from the emissions. Although the general setup is certain, it is nearly impossible to establish the aetiology of detrimental effects on a person in the future.

More generally, *Ioane Teitiota* is an example of how an issuance of an injunction in human rights law usually requires a high degree of proximity between the risk and the effects materialising. In that case, the UN Human Rights Committee was asked to assess whether the consequences of climate change in Kiribati exposed Mr Teitiota to a concrete risk that justified a non-refoulement obligation on New Zealand.[367] However, the Committee did not find that Mr Teitiota had sufficiently established that he would lack access to potable water, means of subsistence, or be injured by weather events if returned to Kiribati, illustrating the concreteness of the task of assessing the risk.[368]

---

[363] The ECtHR has used "real and immediate" for the risk under Article 2 on the right to life (e.g., *Öneryildiz*, para 100-101) and "direct and immediate" for the risk under Article 8 on the right to privacy (e.g., *Atanasov*, para 66).
[364] ECtHR, 'Factsheet on Environment and the European Convention on Human Rights'.
[365] See, for instance, ENNHRI, 'Third Party Intervention Klimaseniorinnen', 5–6.
[366] It is akin to Parfit's example of someone burying broken glass in the wood that a hundred years later hurts a child; Parfit, *Reasons and Persons*, 356. However, whereas the harm from sodium cyanide is readily foreseeable this is more questionable for the broken glass.
[367] Only in extreme cases does the UN Covenant on Civil and Political Rights establish non-refoulment obligations in a general situation of violence. Kiribati was not yet such an unstable society, *Ioane Teitiota*, para 9.7.
[368] *Ioane Teitiota*, para 9.8-10.

Regarding the question of avoidance of direct injury, *Ioane Teitiota* also illustrates the significant role of adaptation: people in Kiribati can be protected from probable future injuries to their physical integrity by a wide range of measures, including the drastic measure of a planned relocation.[369] *Torres Straight Islands* also emphasised adaptation. In this case, the Human Rights Committee found that the Australian government had not done enough to protect the indigenous people from the consequences already experienced from climate change on the islands.[370] The Committee framed this harm as a lack of various concrete adaptation measures, and the majority did not address the claims of inadequate mitigation.[371]

Philosophically, risk can implicate an independent type of interest: retaining powers-of-disposition over one's physical integrity.[372] Although related to one's direct physical integrity, it is a different interest.[373] To borrow the tenet from the analytical interest theory of right-holding, a duty not to create a risk *inherently* protects a different interest than the duty not to create an injury.

The lawsuits recognise the difference between the two types of interests. In the context of the European Convention on Human Rights (ECHR), it is often emphasised that it is an explicit policy decision by the parties to the Convention not to include a right to a healthy environment in the Convention itself. [374] Hence, the Convention does not include the interest in avoiding a general risk to the protected interests.[375] Another example is how the Irish Supreme Court in *FIE* refrained from deriving a right to a healthy environment from the constitutional protection of life. The Court argued that such a right would either not add anything to the original right to life or be impermissibly vague for recognition by a court and not the legislator.[376] In an *obiter dictum* in *Sharma*, the full Federal Court of Australia gave tort law reasons for why the avoidance of risk is not an independent interest that tort law

[369] *Ioane Teitiota*, para 9.12.
[370] For instance, the tidal surge scattered human remains from family graves; *Torres Straight Islands,* para 2.4.
[371] *Torres Straight Islands,* para 8.12, 8.14.
[372] Subsection 5.3.3.
[373] This is according to the academic distinction between individual rights and environmental rights; Dupuy and Viñuales, *International Environmental Law*, 398. Here, I understand an healthy/sustainable environment as related to human interests and not to the integrity of the environment itself or the interests of other living organisms. In contrast to *Advisory Opinion OC-23/17,* para 62-3.
[374] ECtHR has rejected cases about general environmental degradation; *Arctic oil*, para 170 and Council of Europe, 'Manual on Human Rights and the Environment'. However, what is at stake in our question is not the quality of the environment as environment, but aspects of people's physical integrity that can be jeopardised if the environment is unstable. Climate change is the first time this right to an environment that does not pertain to a direct risk of physical injury or damage is addressed in its pure form. Other regional instruments might be more open to include the risk of climate change as such; see, for instance, *Advisory Opinion OC-23/17*, para 54.
[375] The Parliamentary Assembly of the Council of Europe proposed in 2021 that the Committee of Ministers should adapt a protocol to the ECHR on a right to a healthy environment, but this was not followed up by the Committee of Ministers when addressing the issue in 2022; Spano, 'Keynote Speech'.
[376] *FIE*, para 8.11.

protects. Although the Court found the situation to resemble the English *Fairchild* case, in which multiple sources of asbestos increased the risk of mesothelioma, the Court stated that the common law of Australia does not recognise protection against sheer risk.[377] Accordingly, the Court was not willing to recognise it in that case.

Some courts have found that human rights and tort law encompass the protection from a general risk.[378] In *Urgenda,* the Dutch Supreme Court held the general risk to people's physical integrity posed by climate change was covered by the ECHR's protection of life and privacy.[379] Similarly, in *Neubauer,* the German Federal Constitutional Court ascertained that the German state must uphold people's right to life. This requirement includes becoming a net-zero society at some point and, thus, not increasing the risk of injury resulting from unabated greenhouse gas emissions.[380] In *Ioane Teitiota*, the UN Human Rights Committee found that future climate change may expose individuals to rights violations.[381]

5.4.2 A healthy environment

In the foregoing subsection, I showed that people's surroundings can pose a direct and immediate risk to their physical integrity. For instance, the levels of toxins in the ground can be an imminent threat life and health. Consequently, the imposition of legal duties to protect against these risks and not cause them is fully justified.[382]

Legal instruments can also offer direct protection against being deprived severely of one's powers-of-disposition over one's physical integrity, where the deprivation is caused by

[377] *Sharma,* 266, 269. The court argued that the risk in question from the mining concession was a "risk of contribution to an increased risk of harm"; 269. This was a scenario where "multiple contributing causes by persons not acting in concert, none of which alone would be sufficient to cause injury, but which in combination caused the injury alleged"; 268. However, this risk does not capture the situation in *Fairchild*, where in fact each exposure to asbestos could be sufficient to cause a tumour – see following subsection 5.4.5. When the Australian Federal Court did not recognise risk as a remediable harm, they directed the causal assessment to actual damage suffered by the children in the future. Although the assessment of this causal connection might be more sophisticated in the future, the court rejected establishing such a causal link at this stage; *Sharma* 270.
[378] The High Court in *FIE* stated that ECtHR had not ruled on the matter of mitigation, leaving the court reluctant to declare the existence of such a specific right as part of ECHR Article 2 and 8; para 139.
[379] "Given the findings above [IPCC AR5], after all, this constitutes a 'real and immediate risk' as referred to above [ECtHR interpretation] and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised." *Urgenda,* para 5.6.2.
[380] "The state's duty of protection arising from Art. 2(2) first sentence GG also includes the duty to protect life and health against the risks posed by climate change." *Neubauer,* para 148. "A manifestly unsuitable protection strategy would be one that concerned itself with reducing greenhouse gas emissions without pursuing the goal of climate neutrality. … Global warming can only be stopped if greenhouse gas emissions are kept down to climate-neutral levels." *Neubauer,* para 155.
[381] *Ioane Teitiota,* para 9.11. However, it is unclear whether the Committee envisages the general risk of climate change as giving rise to contraventions of individuals claim-rights, or if it only alludes to the fact that individual harm will manifest in the future making it more likely for individual non-refoulement assessments to succeed.
[382] *Cordella* and *Taskin*.

environmental conditions. The legal norms can be constitutional provisions that call for a healthy/sustainable environment or other national and international environmental laws.[383] The duties can involve restoring people's powers-of-dispositions by, for instance, building dams, restoring wetlands, and draining properties. The duties can also involve not depriving people of powers-of-disposition by degrading the environment.

In this subsection, I am interested in whether legal provisions ensuring a healthy/sustainable environment offer protection from the risk posed by climate change. In the above example of the positive duties that safeguard people's powers-of-disposition, this is a question of climate change adaptation. More relevant for my project is whether greenhouse gas emissions deprive human beings of some of their powers-of-disposition over their physical integrity in a relevant way.

In the current litigation trend, adjudicators are comfortable addressing the issue of climate change mitigation as a concretisation of the acceptable level of risk under the healthy/sustainable environment rubric.[384] For instance, in *Neubauer*, the Federal Constitutional Court held that the German Basic Law provision ensuring a sustainable environment meant that the German government had to negotiate a global response to the collective action problem of climate change.[385] Through the negotiation and adoption of the temperature targets in the Paris Agreement, these targets become the concretisation of the constitutional provision itself.[386] The German Federal Constitutional Court conducts a doctrinal interpretation relying on systemic integration.[387] However, the Court also assesses independently whether the level of risk accepted in the international climate change system is within the government's discretion or whether the risk jeopardises safe environmental conditions protected in the Basic Law.[388]

The connection between a healthy/sustainable environment and the risk posed by climate change to this environment is twofold: (1) an injunction to avoid making the right to a

[383] An entitlement to a healthy environment was recognised as a human right by the UN General Assembly in 2022; A/RES/76/300.
[384] However, in *Urgenda*, the constitutional environmental provision was not justiciable.
[385] This was also a requirement under the safeguard of life provision; *Neubauer*, para 149.
[386] *Neubauer*, para 200, 202, 207.
[387] The structure of the argument follows the structure proposed by Benoit Mayer, namely, that international cooperation is an effective strategy to secure the rights within one's own territory; Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?', 433.
[388] The Basic Law provision requires an independent assessment of the sufficiency of the international regime which currently is within the government's leeway; *Neubauer*, para 207.

healthy/sustainable environment meaningless; and (2) a general risk of jeopardising the realisation of a healthy/sustainable environment.[389]

Regarding the latter case of independent risk, we may run into the same challenge addressed in the previous subsection, namely that it is not appropriate to expand environmental provisions to include the distinct problem of climate change. However, the interests at stake are closer in this situation than between physical injury and risk in the previous situation. Both the risk from an unhealthy environment and the risk from a changing climate concern the interest in having powers-of-control over one's physical integrity. With regard to the harm created, the expansion does not represent something radically different for those who experience the consequences. Nevertheless, from the perspective of particular duty-bearers, the duty to avoid environmental damage is much more circumscribed than the duty not to degrade the global climate. I will look at this question in more detail at the start of section 5.5.

5.4.3 A safe climate

The main legal source for the duty to protect individuals from the risk posed by climate change is the UN Framework Convention on Climate Change (UNFCCC) with its Paris Agreement from 2015. In the following, I will treat this abstract mitigation duty as borne aggregatively by the global collective of human actors/international community.[390] Hence, I am not yet concerned with how this abstract duty should be fulfilled.

In this subsection, I return to the question of justification. In Chapter 4, I argued that the moral justification of the existence and content of the abstract duty to mitigate climate change required an overall assessment of many different interests. The narrative of mitigation being a negative duty not to inflict harm challenges this description. Instead of conceptualising mitigation as an overall balance of many interests, the detriments climate change causes are at the forefront of the assessment.

However, I question whether this argumentative move is possible when the main interest at stake is not to be exposed to a risk. The whole premise for the interest of not being deprived severely of one's powers-of-disposition is not that humans can never legitimately be exposed to risk, because then we would not be able to live in societies with other people.

[389] See subsection 5.4.1.
[390] I explicitly address the Paris Agreement as an international agreement in Chapter 7 and as a manifestation of moral standards which have entered into various legal systems in Chapter 9.

Instead, the issue at stake is that humans should not be exposed to risks beyond acceptable levels. The acceptable levels depend on the possible detriment and the benefit of undertaking the activity in question. For instance, not driving recklessly is obligatory because reckless driving deprives people of more powers-of-disposition over their physical integrity than what people legitimately can accept to give up for the benefit of using a road.[391] How much control pedestrians, cyclists and fellow motorists are willing to give up for the benefits of using roads varies between different societies and within societies over time. For instance, the UK recently changed its traffic laws to require motorcyclists to show greater care for pedestrians and cyclists.[392] Hence, more behaviour is now legally classifies as unacceptably jeopardising the powers-of-disposition of other people.[393]

A moral assessment of how much risk a society accepts might have the adverse consequences the risk involves as its point of departure. There are three potential strategies when investigating the unacceptable levels of deprivation of powers-of-disposition in the climate change context. One strategy is to look at the probability of an individual experiencing anthropogenic-induced extreme weather events during their lifetime. For this strategy to work, we must qualify the extreme weather event to a certain magnitude, for instance, weather events that currently only happen every 50 years or 100 years. In addition, we will have to qualify the number of such events an individual would deem acceptable. We need to note that this reasoning is not able to put forward fine-grained probabilities but relies on the risk for the world at large or different regions. For instance, according to the IPCC's recent reports, 50-year hot temperature events will likely occur 8.6 times more often in a 1.5°C warmer world and 13.9 times more often in a 2°C warmer world compared to the pre-industrial baseline.[394] On a scale of increasing impacts, the normative task is to draw a line between acceptable and unacceptable consequences.[395]

---

[391] The argument of reckless driving as an independent harm is taken from Kramer, 'Of Aristotle and Ice Cream Cones'.
[392] 'The Highway Code'.
[393] Another example is how the perceived tolerable levels of air-pollution in London has changed drastically over the years since the industrial revolution.
[394]; IPCC AR6 WGI, 'Summary for Policymakers', fig. SPM.3.
[395] The scientific knowledge compiled by the IPCC has prompted political international action. The first assessment report was released in 1990 and the UNFCCC signed in 1992. In 1995, the second assessment report was released, leading to the Kyoto protocol in 1997. The Paris Agreement was reached in 2015, a year after the release of the fifth assessment report. The international political reality has also influenced the scientific lens. For instance, the fourth assessment report followed the divide of responsibility laid down in the Kyoto protocol. After the adoption of the Paris Agreement, the IPCC was asked to make a special report on the difference between aiming for a global average temperature increase of 2°C and 1.5°C. These temperatures are the main points of reference in the recent sixth assessment report. Nevertheless, settling on an acceptable rise in temperature is ultimately a political decision; see Part III.

Another strategy is to focus on tipping points.[396] From a scientific perspective, we do not know much about tipping points.[397] However, based on what is known, the normative debate highlights that at some temperature, feedback loops will start, accelerating the occurrence of some of the adverse consequences (e.g. sea-level rise due to melting of ice sheets) and the increase of the global average temperature (e.g. abrupt release of greenhouse gases from forest dieback or melting permafrost). Pinning down acceptable levels of risk is in part dependent on pinning down the crossing of such tipping points. A challenge for coupling rights with tipping points is that we do not know at what global average temperature increase the tipping points will occur.[398] Hence, this line of reasoning only provides us with a new risk to evaluate: the acceptable risk of a tipping point occurring.

A last strategy is to look at the point at which humans can no longer adequately adapt to the consequences of a changing climate.[399] Successful adaptation intervenes in the connection between climate change and physical injuries.[400] The first question is factual: can adaptation successfully hold off harm for temperatures under these limits? The IPCC has found that we are already behind the point for some soft limits of adaptation, for instance, that rising sea levels will submerge specific areas. Still, we can overcome these challenges by addressing human constraints, such as relocating people.[401] Although adaptation does not prevent all direct harm, the current knowledge suggests that there are feasible and effective adaptation options that can reduce the risk.[402] With proactive adaptation, temperature increases up to 2°C could only pose a moderate risk to basic health.[403] The second question is normative: should adaptation, and not mitigation, be prioritised until this temperature

[396] *Urgenda*, para 4.2, 4.4, 7.2.10 and *Neubauer*, para 161, 210.
[397] "A tipping point is a critical threshold beyond which a system reorganizes, often abruptly and/or irreversibly."; IPCC AR6 WGI, 'Summary for Policymakers', para. B.5.2. The report states that tipping points, such as Antarctic icesheet melt and forest dieback, cannot be ruled out and must be part of risk assessment; para C.3.1.
[398] The risk increases at a steep and accelerating rate once there is warming between 1°C and 2°C; *Urgenda*, para 4.4.
[399] This was one of the central issues in the economic analysis of mitigation in the 1990s and early 2000s. However, in the current assessment, adaptation is meant to erase harm rather than to strike the optimal balance between detriment and benefit.
[400] This argument was put forward by the German Federal Constitutional Court: "If the executive and legislative branches therefore assume that by limiting the increase in the average temperature below 2°C and preferably 1.5°C …, the impact of climate change in Germany could be alleviated using adaptation measures to an extent that would allow the level of protection required under Art. 2(2) first sentence to be reached, they are not overstepping the decision-making leeway afforded to them in fulfilling the duty of protection arising from fundamental rights – at least not presently." *Neubauer*, para 165.
[401] IPCC AR6 WGII, 'Summary for Policymakers', para. C.3.1. Some ecosystems will reach their hard adaptation limits by an increase of 1.5°C and freshwater resources might reach hard limits in certain areas; IPCC AR6 WGII, para. C.3.3, C.3.4.
[402] IPCC AR6 WGII, 'Summary for Policymakers', para. C.3.5, C.2.
[403] IPCC AR6 WGII, fig. SPM.3.

increase is reached? This prioritisation implies that when injuries occur at a lower temperature increase, the normative responsibility rests on the failure to adapt appropriately, not the altered climate.[404] If this is our preferred normative lens, adaptation is a global responsibility as adaptation is the guarantee for the global permission to emit greenhouse gases until this later point.[405]

It is a general challenge for moral and political theories to "decide which 'harms to notice'", even from morally benign or socially beneficial activities.[406] For example, Darrel Moellendorf has shown many plausible moral reasons for allowing the risks from climate change because behaviour that produces greenhouse gases, for instance, provides current people with energy or reduces indoor pollution from biomass by switching to fossil fuels.[407] Thomas Pogge's theory of poverty as a human right, which inspired the "negative" framing of the duty to mitigate climate change, faces a similar argument. When Pogge argues that the international trade regime has created global poverty, critics respond that international trade has pulled many people out of poverty.[408]

The adverse aspects of climate change are often addressed in conjunction with the adverse aspects of capitalism, market economies, and globalism.[409] However, all these humanly-created phenomena have vastly improved many people's lives. Abandoning them would give rise to severely negative consequences. Although those phenomena do carry some clear drawbacks, they also produce immense gains.

The conclusion is that even though the narrative under investigation started with the physical injuries caused to human beings, it becomes a more complex assessment of a wide range of interests. The justificatory role of each individual's fundamental well-being fades, and I reach a similar conclusion as in Chapter 4: climate change mitigation is an issue of conducting an overall assessment of multiple competing factors.

---

[404] This is indirectly the responsibility argued for in *Neubauer*, when the German Federal Constitutional Court argued that the German state did not have responsibility to safeguard the rights to people living in Bangladesh and Nepal by mitigating German emissions because the German state did not have the power to implement measures of adaptation in these countries; para 178.

[405] If it is evident that adequate adaptation is not taking place, this rationale for waiting to acknowledge harm occurring until this temperature increase has been reached fails. There are currently major gaps between adaptation options and implemented adaptation measures, especially in developed countries; IPCC AR6 WGII, 'Summary for Policymakers', para. C.3.2.

[406] Powers, 'Ethical Challenges Posed by Climate Change: An Overview', 42.

[407] Moellendorf, *The Moral Challenge of Dangerous Climate Change*, 17.

[408] Blake and Smith, 'International Distributive Justice', sec. 4.2.

[409] Heath, *Philosophical Foundations of Climate Change Policy*, 2.

5.4.4 Implications

The conclusion of seeing climate change mitigation as the question of an acceptable level of risk has two implications akin to those reached in Chapter 4: (1) human beings can hold claim-rights correlative to the abstract duty to stay within this level of risk; (2) the level of acceptable risk is based on an overall assessment not traditionally part of legal systems to protect fundamental rights.

Analytical theories of rights

The abstract duty to mitigate climate change represents the limits to the acceptable anthropogenic deprivation of people's powers-of-disposition over their physical integrity. We can apply the analytical interest theory of right-holding to this duty: the duty inherently protects something that, on balance, is typically beneficial for human beings, namely, to retain these powers-of-dispositions over their physical integrity.

Human beings can therefore hold claim-rights correlative to the general aim of the UNFCCC to combat "dangerous" changes to the climate and the more circumscribed temperature targets in the Paris Agreement.[410] Whereas it is hard to spell out exactly which deprivation of powers-of-disposition of an individual the UNFCCC protects against, the content of the abstract duty in the Paris Agreement is less open for interpretation. If the global average temperature reaches temperatures beyond the limits in the Paris Agreement, people are deprived of more powers-of-disposition than has been deemed acceptable. The occurrence of this deprivation is one element in a set of facts minimally sufficient to constitute a breach of the abstract duty. As a legal duty, the Paris Agreement *inherently* protects against such a breach.[411]

That individuals hold claim-rights correlative to this abstract duty to mitigate climate change does not entail that these individuals possess the power to enforce them. As shown in Chapter 3, the requirement to possess the power to waive the existence and enforce the fulfilment of duties is not part of analytical interest theories of right-holding. Moreover, it is

[410] UNFCCC, Objective; Paris Agreement Article 2(1)(a): "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risk and impacts of climate change".

[411] Whether these temperature goals in the Paris Agreement are legally binding on the collective of parties to the Agreement is a doctrinally uncertain question. Benoit Mayer, for instance, has argued that the Paris Agreement only contains the many explicitly circumscribed duties and that the temperature goals themselves are not duties under the treaty; Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change', 595–97.

challenging to establish that individuals can enforce this abstract duty to mitigate climate change. The abstract duty to stay within these acceptable levels of risk is borne by "all" of us aggregatively. There are currently no legal avenues where the global collective of human actors can be held responsible. In addition, as I discussed in Chapter 3, there are challenges associated with granting individuals these powers.

Legal systems of fundamental rights

As I briefly discussed in Chapter 1 and will return to in Chapter 7, the unenforceability of the UNFCCC and the Paris Agreement appears to motivate the strategic litigation trend seeking rescue in other legal categories, such as human rights/tort law and constitutional provisions about a healthy environment. I will highlight two possible implications of the analysis in this section for our current understanding of legal systems which uphold fundamental rights.

Through the fictional narrative, I have demonstrated that these various kinds of legal categories involve certain types of interests. Hence, to derive the abstract duty to mitigate from the legal categories of human rights and tort law is to include a different kind of interest in these systems.

Sometimes, various claim-right/duty relations are present in the same situation. When a reckless driver causes a physical injury, the duty not to inflict physical injury recklessly will have overshadowed the duty not to deprive people unacceptably of powers-of-dispositions. Similarly, the interest in the avoidance of physical injury protected in human rights/tort law sometimes overshadows the abstract duty not to deprive people unacceptably of powers-of-dispositions above the temperature levels in the Paris Agreement. However, in the above discussion, I emphasised a central problem with this reasoning: the complexity of the climate makes it difficult to establish when an injury has happened or will happen due to climate change. Hence, even when the litigation trend invokes the exposure to individual detriments, the main claim-right sought enforced is the claim-right against the exposure to future risks.[412]

The reckless driving example shows how different interests can be at play in the same situation. It also highlights another intertwined problem: the physical injury arising is only a breach of duty if the driving was reckless. The occurrence of an injury does not settle the moral and legal assessment of whether the actor contravened a duty. We also need to figure out whether the injury occurred because the driver was reckless and behaved beyond what the society accepts. In the climate change context, this brings us back to what level of risk we

[412] See, for instance, *Sacchi*; *Our Childrens Trust*; *Portuguese Children*.

deem acceptable. That level could be zero or something else, such as the temperature targets in the Paris Agreement.

Hence, the second implication if climate change is included in the legal domains of human rights and tort law is that it requires the adjudicators to take a stand on the general question of what levels of risk are acceptable for human beings on Earth. This implication pertains to the political nature of this complex overall assessment of many interests, a characteristic of climate change mitigation that I will discuss in Part III. The implication also pertains to the more modest conclusion in line with Chapter 4: the morally acceptable level of risk does not derive solely from the interests of those experiencing the detriment of climate change.

In addition to these two implications, a third remains: the abstract duty to mitigate is borne by the global collective of human actors as aggregatively. Even if litigants utilise the legal instruments of human rights and tort law, the abstract duty cannot be enforced against this global community. However, the issue at stake in the litigation trend concerns the specific duties to mitigate greenhouse gas emissions. The topic for the following section will be whether such duties derive from the negative rationale of not committing injustice.

5.5 Greenhouse gas emissions and harm to individuals

In this section, I will turn to the specific duties to mitigate greenhouse gas emissions borne by particular actors such as states, companies, and individuals. There are two ways of approaching this question. The first reinforces the conclusion from section 4.4: since the abstract duty to mitigate is an aggregatively borne duty, there are no specific duties that follow directly from the abstract duty. Instead, the specific duties to mitigate greenhouse gas emissions must be distributed according to other normative standards. In subsection 5.5.1, I investigate this point through the fictional narrative.

The deontological line of reasoning where behaviour that produces greenhouse gas emissions commits injustice towards human beings may also voice a more substantial claim: the abstract duty to mitigate greenhouse gas emissions applies to everyone individually. Each member of the collective community of actors has a duty not to emit greenhouse gas emissions because they harm human beings.

The fictional narrative tallies with this line of reasoning by giving each marble a causal role in creating singular instances of gunshots over the marketplace. In subsection

5.5.2, I present two arguments for why this aspect of the narrative represents a mistaken understanding of the specific duties to mitigate greenhouse gas emissions. First, it is erroneous because it is not the case that each emission of greenhouse gases is a factual cause of climate change. Second, even if we assume that particular emissions are factually causative, this is not enough to establish their status as proximate causes – because of overdetermination and the marginal role of each instance of emission. These conclusions imply that the risk created by emitting greenhouse gases differs significantly from the risk currently protected against in human rights and tort law.

5.5.1 The collective creation of climate change

Let us return to the fictional narrative. Adding marbles to the tube can harm people at the marketplace in two ways: (1) when the tube with marbles fills up so that anthropogenic games of Russian Roulette play over the marketplace; (2) when the severity and frequency of the anthropogenic games of Russian Roulette reaches a certain level. Both emphasise that harm first takes place after several marbles are added. In a real-world scenario, these two situations equate with a concentration of greenhouse gases in the atmosphere, leading to an unacceptable global average temperature increase. The Paris Agreement sets these temperature limits as "well below 2°C" and "pursuing efforts to limit the temperature increase to 1.5°C".[413]

However, I am not interested in this abstract duty to mitigate climate change but rather in the specific duties of not producing greenhouse gases. In this subsection, harmful climate change is an issue of the total number of marbles added to the tube. The question then becomes whether discrete emissions have such a role in fulfilling the abstract duty that it is an independent duty not to produce emissions or protect people from the production of these emissions.[414] Many of the current lawsuits take this perspective: the behaviour of states or enterprises might jeopardise the Paris Agreement.

For instance, in *Arctic Oil,* the claimants argue that there would be no room for searching for more petroleum resources if the world were to keep within the global temperature limits in the Paris Agreement.[415] There are two ways to understand this

[413] Paris Agreement Article 2(1)(a).
[414] This question is applicable to states: see, for instance, *Urgenda*, para 5.1 (a).
[415] *Arctic Oil,* para 26, 230.

argument.[416] First, avoiding these emissions is necessary to keep within the temperature limits. However, because keeping this limit is a global effort that can be coordinated in many ways, no single national decision or project plays such a necessary role from the outset. The world can reach or miss the global target with emissions originating from these new petroleum fields or without them – depending on the vast number of other emissions taking place or not taking place.[417]

Most of the courts addressing rights and climate change mitigation recognise that the specific duty asked for by the claimant is not necessary to fulfil the global mitigation targets.[418] This conclusion worries the courts because it could make countries evade their shared responsibility to do their part in fulfilling the abstract duty. For instance, in *Urgenda*, the Dutch Supreme Court inferred from the right to life and privacy in the ECHR a duty to do one's fair part to overcome this problem.[419] In *Neubauer*, the German Federal Constitutional Court recognised that Germany's emissions only account for 2% of the worldwide emissions. However, since "Germany's climate action measures are embedded within global efforts, they are capable of playing a part in the overall drive to bring climate change to a halt".[420]

Therefore, a second way of understanding the claim in *Arctic Oil* that the government could not grant the petroleum search concession because it jeopardises the Paris Agreement is that this duty is part of Norway's just burden to fulfil the abstract duty. As will become evident in Part III, when the discourse invokes the argument of "fair share," it relies on diverse types of legal authority: the National Determined Contributions (NDCs) as part of the Paris Agreement or as enacted in national law, or normative principles of just distribution. At this stage of the dissertation, my key lesson is the following: the appropriate allocation of the burden to fulfil the target is a separate normative question from the question of whether the emission plays a necessary role in fulfilling the abstract mitigation duty.

5.5.2 Greenhouse gas emissions creating harm

The argument in *Arctic Oil* could also be construed in another way: that all greenhouse gas emissions constitute independent harms. Facilitating these future emissions would then be a

[416] The claimants did not elaborate much on this, as they indirectly sought to challenge the entire Norwegian climate policy, para 23, 162.
[417] In theory, all other emission sources except the one under review could be omitted.
[418] *Urgenda*, para 5.7.7. An exception is the recent *Held* case where the judge said that the greenhouse gas emissions originating in Montana were "nationally and globally significant"; 88.
[419] *Urgenda*, para 5.8.
[420] *Neubauer*, para 201.

self-standing breach of a duty regardless of how these emissions relate to all other emissions.[421] The issue at stake is whether the abstract duty entails a concrete duty on every actor not to produce greenhouse gas emissions.

In the following, I will argue that this line of reasoning is untenable for two reasons. The first is that not all emissions cause alterations of the concentration of greenhouse gases in the atmosphere. The second is that even if emissions cause alterations of the atmosphere, they do not cause harm to human beings in such a proximate way that it is appropriate to ascribe responsibility to particular actors for such harm.

Factual cause

According to the fictional narrative, a marble plays a causal role in the activation of a game of Russian Roulette. However, we must recall that the marble in the fictional narrative represented emissions beyond net-zero: adding a marble means emissions ending up in the atmosphere. In the real-world situation, on the other hand, some emissions will end up in the atmosphere, and other emissions will not end up in the atmosphere. The latter will not be a factual cause of the changing climate. These greenhouse gases instead play a crucial role in creating a liveable temperature at the Earth's surface and are parts of the vital carbon cycle.[422] A specific greenhouse gas molecule might eventually end up in the atmosphere or a carbon sink at the Earth's surface.[423] Hence, establishing a factual cause is challenging.[424]

In the following, I will look at two argumentative strategies to overcome this conclusion: (1) to discriminate against different sources of emissions; (2) to emphasise the likelihood that an emission becomes a factual cause. I show that these strategies only bring us back to the conclusions from subsection 5.5.1, that assignments of specific mitigation duties are about distributing the burden and blame of the abstract climate change phenomenon.

---

[421] *Sharma* is more explicitly framed in this way. The different strategic litigation trend seeking to establish liability for current losses and damages is also based on this line of reasoning where *all* the emissions related to the actor breached were in breach of the duty to not produce greenhouse gas emissions; see, for instance, *Lliuya.*

[422] I am here not engaging with other problematic issues related to greenhouse gas emissions, such as ocean acidification from its increased absorbance of CO_2.

[423] In all the scenarios assessed by the WGI, stretching from 1.5°C warming to 8.5°C, land and ocean are sinks for between 70% and 38% of the anthropogenic CO_2 emissions; IPCC AR6 WGI, 'Summary for Policymakers', fig. SPM.7.

[424] John Broome argues that over centuries, the emission has the chance of causing harm on innumerable occasions so that it certainly will do harm; Broome, *Climate Matters*, 79. However, as Ewan Kingston and Sinnott-Armstrong object, an actual CO_2 molecule will likely cycle in and out of the atmosphere within that time; Kingston and Sinnott-Armstrong, 'What's Wrong with Joyguzzling?', 181. In addition, "even if my emissions do cause a permanent marginal increase in CO2, since there are billions of acts of emitting greenhouse gases every day, and not billions of harmful weather events, it seems very implausible to say that this increase *will* make the difference between some harmful event occurring or not, even over centuries."; Kingston and Sinnott-Armstrong, 181.

The first strategy to overcome the challenge that not all greenhouse gas emissions end up in the atmosphere is to argue that what matters is not whether a greenhouse gas emission factually ends up in the atmosphere but rather our categorisation of it as a part of a carbon cycle in equilibrium. The task is no longer to pinpoint the destiny of particular molecules after they have been emitted but rather to ascertain from what sort of carbon sink they were released.

John Broome makes this distinction when he claims that emissions from human breath and livestock have their sources in carbon from plants, and the carbon from these plants has been taken from the air shortly before. Hence, emissions from human breath and our food stem from what he sees as an immediate and unproblematic carbon cycle.[425] Broome contrasts these emissions with the CO_2 emissions from fossil fuel usage, which come from permanent sinks that would not be part of such an immediate fluctuation of gases in and out of the atmosphere.[426] Hence, the problem is that humans tamper with processes that otherwise would take very long.[427]

We may attribute both the distinction between sources of emissions and the normative exercise of deciding which sources of emissions to mitigate to the IPCC material. In the latest report from Working Group I, which assesses the most up-to-date physical understanding of the climate system and climate change, global warming has resulted from fossil fuel usage since pre-industrial times. Climate science shows a near-linear connection between the added CO_2 from fossil fuel usage and the increase in the global average temperature.[428] Working Group I thereby emphasises that the relevant emissions beyond the natural equilibrium (a marble in the fictional narrative) are emissions from fossil fuels. However, in the report from Working Group III, on how the world can mitigate the problem of global warming, the focus is deliberately changed to the many more sources of greenhouse gas emissions controllable by human behaviour.[429] Thus, strategies to stabilise the temperature at certain degrees do not only include the reduction of CO_2 from fossil fuels but also CO_2 from changes to land usage or other types of greenhouse gases like CH_4 (methane), N_2O and Fluorinated-gases.[430]

[425] Broome, *Climate Matters*, 22.
[426] Broome also includes emissions from our land use as part of this tampering with longer processes – such as deforestation and swamp drainage.
[427] Thom Brooks encourages us to see that the climate changing is inevitable and our task is to slow down the current speed of the change, instead of 'solving' the problem once and for all; Brooks, *Climate Change Ethics for an Endangered World*, 8–9.
[428] IPCC AR6 WGI, 'Summary for Policymakers', fig. SPM.10.
[429] IPCC AR6 WGIII, 'Summary for Policymakers', n. 36.
[430] However, they frame it as net-zero CO_2.

One way to interpret this divergence is to see them as two different moral approaches. Working Group III's approach resembles the consequentialist perspective explored in Chapter 4. What matters is the result: stabilising the global temperature at a certain level deemed optimal. If the aim is to bring good about, it does not matter which emissions are reduced or emitted.[431] In contrast, Working Group I's approach appears from the outset to be one centred on a negative duty not to harm human beings. This deontological moral lens changes the perspective from the overall result to a particular type of emissions being inherently problematic. Although other human efforts can counterbalance the consequences of the potential harm, creating the potential harm constitutes the morally problematic behaviour. Emissions from fossil fuels are a "wrong".[432]

There are three apparent challenges to the invocation of a duty not to emit greenhouse gases from particular sources. First, it is not certain that a particular greenhouse gas emission would end up in the atmosphere and not be absorbed by natural sinks just because it comes from a particular source.[433] The second challenge is that the distinction between the sources of emissions does not hold much independent value if mitigation duties are justified in the physical integrity of human beings – hence, in the actual harm created. If, for instance, emissions from cars powered by fossil fuels are replaced with emissions from deforestation to produce biofuel to run the same cars, the potential consequences appear to be the same. It is not the case that harm to a human being can exclusively occur from the first type of emissions and not from the second. A third challenge is the problem of drawing a line between what is an artificially created interference in a carbon sink and what is a "natural" cycle in the current modern world. For example, are emissions created in the process of making cement different from the methane produced in the stomach of an industrial meat-producing cow? If anthropogenic emissions include all livestock and human waste emissions, how can human breath be distinguished from these emissions?

---

[431] This rationale has been a dominant contributor to the idea of offsetting emissions that take place in one part of the world by making sure that potential emissions elsewhere do not take place. Abandoning the use of a coal-fired stove in one part of the world could offset an aviation flight conducted in another part of the world. As long as it is the same amount that reaches the atmosphere it does not matter if it is the flight that is omitted and the use of stoves continues, or the flight takes place, and the use of the stove is omitted. See, for instance, Broome, *Climate Matters*, 87. I will discuss offsetting in section 6.3.1.

[432] Remedying this wrong could then only take place by offsetting efforts that remove the same quantity of emissions from the atmosphere – as this would annul the contribution to the minimally sufficient set. For instance, by creating new natural or artificial carbon sinks. Thus, the flight and the coal-fired stove from the previous footnote are each a wrong. As long as emission from one of them enters the atmosphere, harm takes place. If Broome's argument that we can offset our wrong behaviour shall work, we would be required to offset the double amount of what we emit; Broome, 87.

[433] The Working Group I has shown that until now, the land and ocean have absorbed more than 2/3 of anthropogenic emissions; IPCC AR6 WGI, 'Summary for Policymakers', fig. SPM.7.

Whether a fossil fuel power plant, a cement factory, or a livestock farm must close to reach net zero depends on a normative evaluation. When operationalising the Paris Agreement, the parties have negotiated distinctions for which sources of emissions a country shall report. That the current international legal system draws a line that excludes non-fossil waste and international fossil-dependent aviation bespeaks the many challenges facing such a task. However, it does not preclude the task from ultimately being normative.

The categorisation of the source of greenhouse gas emissions is not related to alterations in the concentration of greenhouse gases in the atmosphere. There is an incongruity between the cumulative effects of a vast array of emissions and the possibly non-existent effect of discrete emissions. Although certain emission trends are causing climate change, we cannot infer that a particular emission will be a cause of the change. The lack of inference makes it inappropriate to invoke a moral theory that relies on the infliction of inevitable adverse consequences to justify duties to mitigate greenhouse gas emissions. Thus, when we are concerned with ascribing "harm" to particular instances of emitting behaviour, we must acknowledge that categorisation is a normative exercise of distribution.

Another tack in response to the problem that we cannot know whether a specific emission will indeed be part of a minimally sufficient set of facts creating harm is to allude to the possibility or expectation of an emission being such a cause. In the fictional narrative, I described this as the fourth situation, in which we do not know if a marble will become a factual cause of a game of Russian Roulette. The fictional narrative might give the impression that there is a high chance of this happening: when the tube eventually fills, and marbles are still added, all the marbles are factual causes of the occurring consequence. Broome assumes this situation when he writes that over the years, there is a high chance that the emission in question will be causative of a detrimental consequence. Based on this assumption, Broome puts forward a mathematical argument for how much harm an average American's emissions likely will create over their lifetime.[434]

In a real-world situation, by contrast, the chances of a particular emission being a cause of a harm are exceedingly small. Instead of this being so likely that we can take such occurrence for granted, we should recognise that it is rather unlikely that a greenhouse gas molecule is a member of any set of actually occurring facts minimally sufficient to cause

[434] In his recent work, Broome concludes that in a scenario where the global average temperature reaches 2.4C, the "amount of killing done by a person who emits 1200 tonnes [in her lifetime] is in the region of half a life-year; Broome, 'How Much Harm Does Each of Us Do?', 288. This is quite similar to the estimates he gave in his earlier work; Broome, *Climate Matters*, 74.

harm. In addition, Broome's mathematical exercise does not target the probability of all the emissions from this actor actually being part of a minimally sufficient set of emissions having the consequence of reducing person X's life. As Ewan Kingston and Walter Sinnott-Armstrong point out, "we should not assume that one can find the morally relevant effect of one individual act by dividing the effect of the set of acts it belongs to into chunks that correspond to the effects of an individual act".[435] We must attend to the effect of a particular emission to assert that this particular emitting behaviour is wrong due to the harm it causes.[436] Consequently, it is implausible that an emission is part of any minimally sufficient set creating a harm.

Proximity cause

The previous subsection concluded that not all behaviour that produces greenhouse gas emissions would contribute causally to climate change. In addition, I concluded that it is not appropriate to ascribe responsibility for a detrimental consequence to a particular behaviour producing greenhouse gas emissions based on the risk that it might be a factual cause. The conclusion in this subsection further substantiates this latter conclusion: even if we assume that greenhouse gas emissions end up in the atmosphere, it does not make it appropriate to attach responsibility for a detriment to the production of this emission. That a greenhouse gas molecule can be a factual cause of climate change does not mean that it is a proximate cause of a detriment to a human interest.

I will address three reasons why no particular emission is a proximate cause of harm: (1) the incremental role of each emission; (2) overdetermination; (3) no behaviour producing greenhouse gas emissions is minimally sufficient to cause a harm.

The challenge most often highlighted in the caselaw is each actor's tiny contribution to the collective alteration of the global climate. For instance, in *Urgenda* and *Neubauer*, one issue was how the Dutch or German emissions are minimal in the worldwide welter of emissions.[437] The contribution is even less for more circumscribed behaviour, like granting permissions to petroleum projects at stake in *Arctic Oil* and *Sharma*.[438] A necessary condition for the existence of a moral duty to discontinue greenhouse gas emissions, where the duty

[435] Kingston and Sinnott-Armstrong, 'What's Wrong with Joyguzzling?', 173.
[436] Kingston and Sinnott-Armstrong, 174.
[437] *Urgenda*, para 5.1., *Neubauer*, para 201.
[438] For instance, in *Arctic Oil*, the yearly emissions from the petroleum production at stake was between 286,000 and 568,000 tonnes CO_2, which was compared to the approximate emission of 15 million tonnes from the whole Norwegian petroleum production and the total Norwegian annual emission of 50 million tonnes; para 152.

would apply to every instance of such emissions, is that each instance of emitting behaviour is harmful. However, due to the minuscule contribution from each instance of greenhouse gases being emitted, this condition is not met. With an often-invoked metaphor, we can assert that each emission would only be a drop in the ocean.[439]

There are two concerns at play here. First, assigning responsibility for the entire risk or harm under review to any particular instance of greenhouse gas emissions as a factual cause would appear absurd in the same way as it appears misplaced to assign moral and legal responsibility for my birth to someone building a particular factory in the 19th century. Even though the construction of the building might be a factual cause in the long chain leading up to my procreation, it is not a proximate cause.[440] Second, even when responsibility depends on the particular role the emission could have in the gradual change, this would be incremental. The marginal difference to the risk, and, hence, deprivation of powers-of-disposition over individuals' physical integrity it implies, is of such an insignificant kind that it would be equally absurd to label it a harm.

The incremental role of each greenhouse gas emission is related to the previous subsection on expected harm. The extremely tiny probability that an emission is part of a minimally sufficient set causing a harm is testimony to its equally tiny role in creating any harm.

Overdetermination is the second reason why it is mistaken to assert that it is appropriate to attach responsibility to each emission.[441] The fictional narrative only illustrates this point to a limited degree. In the fictional narrative, marbles are added and pop out of the tube neatly after each other so that there is only one minimally sufficient set of marbles for each key pressed down in the glockenspiel. In the real-world scenario of climate change, however, a vast amount of greenhouse gases is simultaneously emitted all the time. Thus, each alteration of the risks posed by climate change is imponderably overdetermined. Singling out any minimally sufficient set of facts as *the* causally responsible set would thus be untenably arbitrary.

---

[439] Walter Sinnott-Armstrong uses the example of how someone emptying their water bottle upstream of a river that floods downstream because of torrential rain is not a cause of the flood; Sinnott-Armstrong, 'It's Not My Fault', 335.

[440] This is built on the non-identity problem of Derek Parfit. Where people move and work will influence when and with whom they have children, influencing the identity of these children; Parfit, *Reasons and Persons*, chap. 17.

[441] The NESS test presented in subsection 5.3.2 is particularly developed to account for factual causation, even in a situation of overdetermination. However, that an emission is factually a cause does not imply that such a factual role should make us ascribe responsibility for the occurrent harm.

The overdetermination problem is evident in all the approaches trying to show how emitting behaviour "makes a difference".[442] Even if a specific emission is "a straw that breaks the camel's back", another emission would have created the same outcome just after that event. Thus, had some particular emissions not crossed a decisive threshold of concentration of greenhouse gases in the atmosphere at t_1, the threshold "would still [have been] crossed, if not at t_1 then at an imperceptible amount of time later".[443] Because of overdetermination, no discrete emission can meaningfully be singled out as proximately causative.

Julia Nefsky replies to this timing challenge by arguing that an emission will make a difference if emitted after global emissions have started to peak. She argues that at this time emissions from, for instance, my Sunday drive in a gas guzzler would not be riddled with overdetermination. "This is because it's not true in this scenario that had your drive not happened, the threshold would still have been reached at basically the same time anyway".[444] But as Nefsky points out: this "peak-emission threshold-crossing scenario coincidence seems highly unlikely".[445] In addition, this argumentative move does not overcome the underlying challenge of overdetermination. Even if global emissions have peaked, implying that the total yearly number of emissions is declining, a colossal number of emissions are still being emitted, altering the concentration of the greenhouse gases in the atmosphere. Thus, each of these alterations is still imponderably overdetermined.

It is not only misguided to classify an emission as a proximate cause of a harm because of its incremental factual role and overdetermination. It is misguided even to consider that emissions are harmful in an aggregated way where the total effect is made up of the effect of the parts, regardless of how small the parts are.[446]

Kingston and Sinnott-Armstrong illustrate well the third reason we should deny that a duty is borne by everyone to discontinue greenhouse gas emissions. They argue that the harm of climate change is analogous to the sliminess of oil spills: the harmful characteristic only

[442] See, for instance, Kagan, 'Do I Make a Difference?'; Nefsky, 'How You Can Help, without Making a Difference'. That this is an important condition for a human rights approach, see, for instance, Brooks, *Climate Change Ethics for an Endangered World*, 79.
[443] Nefsky, 'Climate Change and Individual Obligation: A Dilemma for the Expected Utility Approach, and the Need for an Imperfect View', 204.
[444] Nefsky, 205.
[445] Nefsky, 205.
[446] Kingston and Sinnott-Armstrong, 'What's Wrong with Joyguzzling?', 175.

applies to the collective and not to any greenhouse gas or oil molecule.[447] Adding or removing a particular molecule does not alter the problematic characteristic, and no molecule retains this characteristic. To suppose otherwise "would be tantamount to flatly asserting that plucking a single hair has the chance of making someone bald or not".[448]

The point is that an emission alone can never be responsible for the adverse consequences of climate change. Only a vast number of greenhouse gases can make up a minimally sufficient set leading to climate change. Both the INUS condition and the NESS test take account of the fact that there is a wide range of negative background elements in the sufficient set bringing about an effect: the sufficient reasons for why the house was ablaze include the non-installed sprinkler system, that the fire brigade did not stop it, that the shop assistant had not refused to sell me the candle that eventually tipped over etc. However, if we accept the background conditions as given, my tipping over the candles was a key element in a minimally sufficient set of facts for the house to catch fire. Contrast my role with, for instance, the shop assistant selling me the candles. We can assess this element as a *factual* cause of the house catching fire. However, even taking the other background conditions for granted, selling me a candle cannot plausibly be classified as a *proximate* cause of the harm.

Tort law is a good example of how responsibility typically is only assigned when the tortfeasor's behaviour is a proximate cause of the detriment in question, taking the background conditions as given. In *Fairchild*, the crucial premise was that all the employers had exposed the claimant to asbestos, behaviour which independently could have caused mesothelioma.[449] Lord Rodger formulated the test as "injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way".[450] Even if it was impossible to establish which actor had indeed caused the cancer, each of them had a duty not to expose the claimant to an independent risk of this particular and severe kind.[451] Hence, every actor contravened the claimant's claim-right against usurping of her powers-of-disposition over her body.

In contrast, no behaviour producing greenhouse gas emissions can deprive a human being of any powers-of-disposition over their body. A claim-right against the deprivation of

[447] "Just as individual molecules of oil do not cause parts of the sensation of sliminess (or yellow colour), so individual molecules of greenhouse gas do not cause parts of dangerous climate impacts."; Kingston and Sinnott-Armstrong, 175.
[448] Kingston and Sinnott-Armstrong, 180.
[449] *Fairchild*, Lord Bingham, para 2, 34.
[450] *Fairchild*, Lord Rodger, para 170.
[451] *Fairchild*, Lord Bingham, para 9.

powers-of-disposition can only be contravened by the coming together of a vast number of emissions changing the climate.

5.5.3 Implications

The fact that specific duties to mitigate greenhouse gas emissions are not justified by the detrimental effects of the emissions on individuals has implications for (1) individuals' roles as holders of claim-rights correlative to specific mitigation duties and (2) our recognition of specific mitigation duties in existing legal provisions.

Analytical theories of rights

In this chapter I have shown that the duty to mitigate greenhouse gas emissions is not borne by everyone individually, because singular instances of greenhouse gas emissions do not cause any detriments to human beings. Individual detriments do not justify a duty to not emit greenhouse gases. For the analytical interest theory of right-holding explored in Chapter 3, this means that the individuals experiencing detriments from climate change do not hold claim-rights correlative to specific duties to mitigate greenhouse gas emissions.

A specific duty to mitigate greenhouse gas emissions does not *inherently* protect any interest of an individual, even when the relevant interest is avoiding the usurpation of powers-of-dispositions over their physical integrity. A specific behaviour producing greenhouse gas emissions *cannot* deprive anyone of this interest. The detriment to the individual's interest only occurs because of climate change's genuine cumulative nature. It is the behavioural patterns of modern society that, taken together, produce that outcome.

The protection is merely accidental if the specific duty protects an individual because some emission could have been part of a minimally sufficient set of a vast number of greenhouse gases that eventually could have deprived individuals of some of their powers-of-disposition over their physical integrity. The detriment is caused or avoided by an interaction of the behaviour of billions of humans on planet Earth. Hence, the individuals experiencing the detrimental effects of climate change do not hold claim-rights correlative to specific duties to mitigate greenhouse gas emissions.

However, as has already been highlighted and as will be pondered further in Part III, this implication does not mean that no one holds claim-rights correlative to such specific duties: the governing system imposing these duties holds a claim-right correlative to them, and so do other parties to agreements on greenhouse gas emission mitigation.

From the conclusion that each instance of behaviour producing greenhouse gas emissions does not cause a detriment to human beings, there are further implications for the moral and legal discourse on rights and climate change mitigation. As pointed out in Chapter 3, the litigation trend often conflates the abstract duty to mitigate climate change and the specific duties to mitigate greenhouse gas emissions. This conflation is especially evident when the lawsuits discuss risk under human rights and tort law. For instance, in *Urgenda*, the Dutch Supreme Court found that climate change posed a "real and immediate" threat to the right to life and the right to privacy of people living in the Netherlands.[452] As discussed in section 5.4, the assessment of this statement depends on whether the risk currently posed by global climate change is a harm to these people's direct physical integrity (first type of consequence), to their powers-of-disposition over their physical integrity as such (second and third type of consequences), or to their interest in not being subjected to a risk of being deprived of these powers-of-disposition over their physical integrity in the future (fourth type of consequence). As I concluded in section 5.4, the ECHR currently protects against only the first type of consequences. However, regardless of how we assess this matter, the Court is not asking the relevant question.

According to the narrative of harm, the courts in *Urgenda* instead had to assess whether the Dutch government must protect its citizens from the greenhouse gas emissions originating in the Netherlands because allowing these emissions would pose a real and immediate risk to protected interests of the people in the Netherlands.[453] Within the context of the ECHR, the question should have been whether the court had to increase the 2020 mitigation target by 5% to prevent that the protection of these individuals' physical integrity from becoming illusionary.[454] The answer to such a question would be negative. The mitigation of these emissions is not necessary to fulfil the Paris Agreement, nor is it appropriate to single them out as the relevant cause of any detrimental consequences experienced in the Netherlands due to climate change. With regard to the causing of

[452] *Urgenda*, para 5.6.2.
[453] The Dutch Supreme Court itself reformulated this question into the international "no harm principle", according to which a state shall not cause harm to another state; *Urgenda*, para 5.7.5. As I will show in Chapter 7, this is a mistaken approach when harm to individuals is what is at issue.
[454] The government's 2020 mitigation target was 20% and the target ordered by the courts was 25%. The factual background of *Urgenda* was that the government in 2011 adjusted its target for 2020 downwards to 20%; para 7.4.2. I take this retrogression of commitments, later prohibited in the Paris Agreement, to be the real reason for why the Dutch courts were comfortable increasing the target back to a 25% emission reduction in 2020 compared to 1990.

detrimental effects, the Norwegian Supreme Court's blunt dismissal of any direct relationship between the petroleum production license and possible loss of life and privacy in *Arctic Oil* is, therefore, entirely appropriate.[455]

I reach a similar conclusion from the perspective of tort law. The rights and climate change mitigation discourse considers tort law an appropriate legal tool to address specific mitigation duties because it assigns responsibility in situations where it is unknown whether a particular behaviour resulted in the occurred harm. A typical example is when an individual has been exposed to harmful substances by many actors and develops a disease, where we lack the empirical knowledge to pinpoint the cause. The disease could have been caused by pharmaceutical product or tobacco of producer A, B, or C, or by exposure of the individual to asbestos in workplace D, E, or F. The rights and climate change discourse applies different tort principles to allocate damages "according to the proportion of emissions for which they are responsible".[456] The discourse also invokes tort law principles to assess whether defendants can be held responsible for "changes in an event's probability even if they make only a partial contribution to this change".[457]

The problem with this blunt allocation of responsibility among different tortfeasors is that it ignores the preceding question of what harm the actor is at risk of causing. For instance, in *Fairchild*, it is telling that the amount of asbestos the tortfeasor exposed the claimant to was so substantial that it could independently cause mesothelioma. Regardless of whether this risk materialised in the end, the tortious behaviour could have been included as the most salient element of a minimally sufficient set for the detrimental effect. When transferred to the issue of whether an actor has created a similar risk of harm by emitting greenhouse gases, the issue is the independent harm that risk could create and not the general harm of climate change. Thus, even if the Federal Court of Australia in *Sharma* had applied *Fairchild* to their case, they would not only have doctrinally altered Australian tort law to now include risk as an independent harm, but they would also have altered the requirement of a tortuous behaviour being able to create a harm.[458]

The proponents of "attributional science" argue that it is possible to establish what harm different actors and regions cause as part of the collectively created global warming.[459] They use statistical analysis to model the various contributions. The problem is that they

[455] *Arctic Oil*, para 167-8.
[456] Stuart-Smith et al., 'Filling the Evidentiary Gap in Climate Litigation', 651.
[457] Stuart-Smith et al., 652.
[458] See the discussion under subsection 5.4.1.
[459] See, for instance, Burger, Wentz, and Metzger, 'Climate Science and Human Rights'.

assume harmful climate change as the starting point and seek to establish for which portion of this totality the actor is responsible.[460] However, we must start from the opposite angle when establishing a wrong. What harm could result from the actor's independent behaviour? Due to the collective nature of climate change, it is overwhelmingly unlikely that a scientific investigation of the impact at different temperature levels can succeed in tracing any discernible harm to a particular instance of emitting behaviour. The more appropriate approach for attributional science is to hold the group of actors responsible *in solidum.* However, this perspective only brings us back to an abstract duty to mitigate climate change borne by the global collective of all actors as an aggregative universal quantifier. Establishing specific duties requires allocating the burdens and responsibilities by different principles of just distribution, which will be the topic of Part III.

5.6 Conclusion

I have demonstrated two main points in this chapter. The first is that the abstract duty to mitigate climate change can be linked to the detrimental consequences inflicted by climate change on individual human beings. The second point is that specific duties to mitigate greenhouse gas emissions cannot be linked to such detrimental effects.

Although the abstract duty to mitigate can be linked to its detrimental consequences on individual human beings, this does not mean that the content of this duty is justified by its direct impact on individuals' physical integrity. In this chapter, I have given two reasons for this conclusion. The first reason is that climate change mitigation is mainly about the risk climate change poses to individuals' physical integrity; hence, the individuals' respective interest in not being deprived of powers-of-disposition over their physical integrity. This shared interest makes it possible to classify individuals as the holders of claim-rights correlative to the abstract duty to mitigate. Nevertheless, not all existing bodies of law associated with fundamental rights, such as human rights and tort law, protect the interest in not being exposed to a general risk. Hence, they do not constitute appropriate legal bases for this abstract duty.

The second reason is that humans cannot live in modern societies without being exposed to risks. The relevant perspective is not that all risk is automatically a breach of a duty. The relevant perspective is rather the extent to which one's powers-of-disposition over

[460] See, for instance, Otto et al., 'Assigning Historic Responsibility for Extreme Weather Events'.

one's physical integrity are appropriately abridged. This question takes us back to the conclusion from Chapter 4: abstract climate change mitigation is about an overall assessment of both the benefits and detriments of greenhouse gas emissions.

The second conclusion of this chapter is that the abstract duty to mitigate is borne by actors aggregatively and individually: the duty to mitigate greenhouse gas emissions is borne by the global collective and not by every member of this collective. There are two reasons for this conclusion. First, no mitigation of a particular instance of greenhouse gas emissions is necessary to fulfil the abstract duty to mitigate climate change. Second, no instance of greenhouse gas emission causes a detriment to a human being. The risk of a greenhouse gas molecule being part of a sufficient set creating a detriment is extremely low. Even if it did become a factual cause in a minimally sufficient set, its contribution is incremental and overdetermined. In addition, on its own, it is not minimally sufficient to bring about any detriment. Hence, the specific duties to mitigate greenhouse gas emissions are not justified by the avoidance of harm to individuals. This conclusion implies that individuals experiencing the adverse consequences of climate change are not holders of any claim-rights correlative to specific duties to mitigate greenhouse gas emissions. It also means that areas of law which protect against the infliction of harm do not supply justifications for specific duties to mitigate greenhouse gas emissions.

Indirectly, this latter point is recognised in many lawsuits when litigants and courts emphasise the importance of doing one's "fair share" of the collective effort to mitigate climate change. Because of the lack of direct harm inflicted on the claimants by the emissions in question, the fairness of burden sharing amongst countries to fulfil the abstract duty to mitigate is at the forefront.[461] The normative issue is whether the duty-bearers have fulfilled their just part in a collaboration, not whether anyone has been harmed. Before engaging with this matter in Part III, the following chapter investigates condemnation of emitting behaviour as a negative duty to not "wrong" people. If instances of greenhouse gas emissions can cause harms, is this enough to label such behaviour as wrong? Is the mitigation of emissions about not "committing" injustice and not "disrespecting" individuals?

[461] *Neubauer,* para 201.

Chapter 6: Wronging

6.1 Introduction

In the previous chapter, I argued that behaviour that emits greenhouse gases does not contravene people's fundamental rights, as no instance of greenhouse gas emission is the cause of any detriment to an individual. In this chapter, I investigate another aspect of the deontological narrative that behaviour producing greenhouse gas emissions *commits* injustice or *disrespects* human beings, namely, that these harms have come about in a morally repugnant way.

In Chapter 4, I investigated Joseph Raz's interest theory as a classic example of an interest-based moral theory of rights. For Raz, the existence of a moral right is dependent on an individual's interest being the sufficient justification for a duty. However, another paradigmatic moral theory of rights is that rights are deontological constraints on an actor's behaviour, even when the actor seeks beneficial outcomes.[462] This is the lens through which I examine climate change mitigation in this chapter.

A typical illustration of rights understood in this deontological way is Philippa Foot's trolley problem. The trolley problem asks what the correct thing to do is when a trolley runs wild towards a group of people. These people will be killed unless an agent switches the trolley onto a different rail track. This track is, however, occupied by one person who would then be killed. A deontological perspective argues that there is a morally relevant difference between the two options of (a) letting the group of people die and (b) saving them by killing the person on the alternative track.[463] The idea of wronging can apply to both situations.[464] However, the deontological position is that the consequentialist considerations cannot ever have the effect of cancelling or suspending the deontological moral requirement.[465] The deontological position thus emphasises how the single person on the trolley's alternative course has a claim-right against the actor's otherwise good behaviour to save the group.[466]

---

[462] See, for instance, Nozick, *Anarchy, State, and Utopia*, 29; Habermas, *Between Facts and Norms*, 258–59; Thomson, *The Realm of Rights*, 123.
[463] Contrast to Thomson's idea of trade-off; Thomson, *The Realm of Rights*, 200.
[464] Kramer, 'The Demandingness of Deontological Duties', 30.
[465] Kramer, 25–26, 35.
[466] Another example is how a group of patients will die unless they get organ transplants. A healthy human being could provide all the organs needed to save the people, but this healthy human nevertheless has a claim-right against being killed for this purpose. According to Judith Thomson, this case is not subject to a valid trade-off; Thomson, *The Realm of Rights*, 200.

Hence, the deontological focus is on the second situation (b). According to this moral theory of rights, rights primarily demand that agency is not used in a way aimed against any fundamental features of being human.

The crux of most moral theories is to refrain from undermining fundamental features of human beings when using one's agency for various purposes.[467] Simon Caney sought to give the connection between rights and climate change mitigation a stronger moral footing when he changed his justification away from Raz's interest theory to instead argue that climate change deprives people of compliance with their fundamental rights.[468] Similarly, John Broome argues that our individual infliction of harm when we emit greenhouse gases is what makes greenhouse gas emissions so morally salient: "You emit greenhouse gas to benefit yourself, but in doing so you harm other people. It is an elementary principle of common-sense justice that, with certain exceptions such as self-defence, you should not harm other people for your own benefit."[469] Even though actors might have good reasons for undertaking behaviour that produces greenhouse gases, realising these ends by emitting means is not permissible because it jeopardises various fundamental interests of a human being.

An interest-based moral theory and the deontological theory currently under review rely on a causal connection between behaviour and detriment. Chapter 5 investigated this link under the heading of "harm". In this chapter, I examine whether the deontological setup of wronging is applicable to justify specific duties to mitigate greenhouse gas emissions. This setup requires that there is something more to the moral notion of "wronging" someone than the consequence this behaviour produces. In Section 6.2, I engage with two salient aspects of the focus on deontological wronging: such a focus asks (1) whether there is an intention to cause a detriment to the fundamental interests of human beings to bring about some ends; and (2) whether the detriment is caused by something the actor does and not something the actor merely allows. I show that emitting greenhouse gases is mostly *allowed* and not *done* by an actor: the behaviour producing emissions is an omission, not an act. In addition, the detrimental consequence that could potentially arise from such behaviour is a mere side-effect of an actor's conduct. Both aspects strengthen the conclusion from Chapter 5:

---

[467] Plato, *Gorgias*, v. 469b.
[468] Contrast Caney, 'Cosmopolitan Justice, Responsibility, and Global Climate Change', 767. with Caney, 'Climate Change, Human Rights, and Moral Thresholds', 75. Derek Bell has analysed how Simon Caney's central argument is that climate change violates negative rights; Bell, 'Climate Change and Human Rights', 165.
[469] Broome, 'How Much Harm Does Each of Us Do?', 290. In his previous work, Broome also distinguishes between doing harm and failing to prevent harm; Broome, *Climate Matters*, 55.

behaviour that produces greenhouse gas emissions is not a proximate cause of the detriments brought about by climate change.

In section 6.3, I revisit the structure and force of deontological duties presented in Chapter 2. I argue that avoiding greenhouse gas emissions cannot generally be understood as having the structure and force of a *pro tanto* duty. There is nothing inherently problematic about behaviour that produces greenhouse gas emissions. Such behaviour first becomes a problem because of the scale of behavioural patterns in the modern world with greenhouse gas emissions as their side-effects. Combating climate change is, therefore, a genuine issue of consequentialist states of affairs and not moral theories of individual rights.

6.2 Salient aspects of the narrative of wronging

Most of the lawsuits against governments frame mitigation as a requirement of "protection".[470] If protection is understood as a requirement of fulfilling fundamental interests by creating an optimal state of affairs, both adaptation and mitigation measures are appropriate.[471] However, suppose behaviour that produces greenhouse gas emissions is an independent instance of committing injustice or disrespecting people. In that case, the government faces a second-order duty to guard against these violations, ensuring protection by mitigating such emitting activity within their jurisdiction.[472]

In this section, I argue that this latter position is flawed. In addition to the reasoning already given in Chapter 5, I show that the production of greenhouse gas emissions is a mere side-effect of behaviour (subsection 6.2.1), and that this behaviour currently allows these side-effects (subsection 6.2.2).

6.2.1 Side-effects

Compared to a moral theory of consequences, a moral theory of wronging includes the quality of the behaviour in the assessment. The standard formulations about how moral claim-rights preclude using certain means to realise sundry ends highlight this difference.[473] Not all consequences of behaviour are relevant for the deontological focus; only those closely

[470] See, for instance, *Urgenda*, para 5.2.2; *Neubauer*, para 144.
[471] This was the conclusion in Chapter 4 and Chapter 5.
[472] Courts do not accept this approach but look instead at the broader picture of climate change policy. See, for instance *Neubauer* para 152 and *Arctic Oil*, para 157-8.
[473] See, for instance, Nozick, *Anarchy, State, and Utopia*, 30–31.

related to the questions of "why" and "how" actors behave as they do. The line of reasoning investigated in this chapter seeks to portray behaviour that produces greenhouse gas emissions in this way, namely, that greenhouse gas emissions are tools to realise different ends. Even though actors might have good reasons to pursue their ends, they are contravening duties held towards human beings in most of the world by realising these ends through means which emit greenhouse gases and which thereby frustrate the fundamental interests of people.[474]

A challenge to this line of reasoning is that it needs to make climate change intended by an actor's behaviour: climate change is deliberately applied as a means to the actor's aims. However, climate change is entirely a side-effect of the actors' behaviour. First, greenhouse gas emissions are only a by-product of many processes, such as burning fossil fuels, manufacturing various components, using land, etc. Second, and even more important, the phenomenon of climate change is only a problem when one such process is combined with all the emitting processes of a vast number of actors.

Let us first look at how greenhouse gas emissions are unintended side-effects of different actors' behaviour. An intention can be understood as an actor's purpose that is manifested in their behaviour. Greenhouse gas emissions and climate change are never the goals of the conduct *per se*. For instance, when a company seeks to generate electricity, it might burn fossil fuels to realise this end. The behaviour of burning fossil fuels is conducted to utilise the energy stored in those substances. The fact that greenhouse gases are released into the atmosphere by this behaviour is not the sought objective of burning fossil fuels but rather the unintended side-effect.

Producing electricity by burning fossil fuels with greenhouse gases as a side-effect differs from the prominent examples of contraventions of claim-rights. A paradigmatic example of a horrendous rights contravention is the cultivation of crops through the use of slave labour. Here, the people in charge are intentionally dominating others in pursuit of commercial and agricultural ends. Another relevant example is reckless driving.[475] Here, the misappropriation of the other road users' physical powers-of-disposition over their environs is not a pure side-effect of the driving. Instead, the actor drives with utter unconcern for the safety of other road users because they are pursuing ends such as not being late to a meeting or having fun. As I explored in Chapter 5, no behaviour producing greenhouse gas emissions

[474] In Chapter 5, I refuted this statement by showing that no instance of greenhouse gas emission frustrates the fundamental interests of people, even when these interests are seen as being exposed to risk.
[475] See, for instance, Kramer, 'Of Aristotle and Ice Cream Cones'.

deprives people of any powers-of-disposition over their physical integrity. Hence, no behaviour constitutes the domination of others.[476]

The other side-effect of behaviour producing greenhouse gas emissions is the fact that this behaviour is part of a worldwide behavioural pattern that creates climate change. We encountered this point in Chapter 3, when I investigated whether a global human community brings about climate change as a group agent. In Chapter 3, I dismissed the existence of such a group agent and the view that a global human community had come together to realise its ends by creating climate change. Instead, climate change is the product of a vast and highly diffuse congeries of parties emitting greenhouse gases.

A proposition that an actor who realises an end by a process that emits greenhouse gases thereby dominates other human beings solely as means is factually false. In addition, the moral disposition of the actor emitting greenhouse gases is not inherently problematic. Lack of concern for fundamental features of human beings is not part of the description of conduct that leads to greenhouse gases being emitted. In contrast with slavery and reckless driving, no instance of greenhouse gas-emitting behaviour is per se inimical to fundamental features of other human beings.

The assessment of proximity in Chapter 5 was influenced by the harm from climate change merely being a side-effect of emitting behaviour. As explored above, *emissions* are only a side-effect of an actor's behaviour. In addition, the *detriment* to fundamental interests is again only a side-effect of this actor's emissions: a harm first arises when a vast number of emissions change the global climate. Hence, the detriment to individuals' fundamental interests is only a side-effect of the side-effect of the actor's behaviour, and no disregard for human beings was perforce constitutive of the behaviour. Even if we could pinpoint a greenhouse gas molecule as a factual cause of a detriment, it is not appropriate to attach responsibility to the behaviour that produced this molecule.

That this distinction between sought objectives and side-effects is morally significant does not mean that it is always dispositive. Even the staunchest supporters of the Doctrine of Double Effect would not maintain that there are no claim-rights against being exposed to unintentional side-effects.[477] A compelling moral imperative exists that actors in the aforementioned vast congeries come together to mitigate the dire consequences of cumulative

[476] This conclusion is not primarily concerned with climate change being global in its scope and potentially affecting everyone. This is a characteristic shared by behaviour that is a contravention of individual rights, like the unleashing of an atomic bomb of a certain magnitude that could impact every human being. Rather, the issue is that of causing a harm.
[477] McIntyre, 'Doctrine of Double Effect', para. 1.

greenhouse gas emissions. Nevertheless, with regard to the wrongness investigated in this chapter, this distinction shows that duties to mitigate greenhouse gas emissions are not justified by a deontological line of reasoning. Actors producing greenhouse gases do not thereby dominate other human beings solely as means to the actors' sundry ends.[478]

6.2.2 Doing and allowing

The line of reasoning explored in this chapter portrays greenhouse gas emissions as violative of people's rights.[479] This formulation highlights mitigation as a negative duty to not *do* harm. As John Broome writes: "In living our lives, we act in ways that cause greenhouse gas to be emitted. We cause carbon dioxide to spew from our chimneys and the exhaust pipes of our cars. Our eating causes cattle to be reared and rice to be grown for us, and those agricultural processes emit methane. And so on. These are all the consequences of things we do, rather than things we omit to do."[480] Broome argues that greenhouse gas emissions are the result of things we do rather than the result of things we do not do. He points to a distinction often considered morally salient: the distinction between the detrimental consequences we create and the detrimental consequences we allow to take place. If I use a well-known metaphor, the context of global warming does not resemble a situation where actors have a duty to save a drowning person but rather a situation where actors have a duty not to drown people.[481]

In the following, I strive to determine if this shift in seeing greenhouse gas emissions as something we do, as an active contravention of someone's rights, is more than a rhetorical exercise. To do this, I will rely on a technical definition of the distinction between doing and allowing put forward by Jonathan Bennett.[482]

Bennett's theory describes a behaviour as either an act or an omission, equating the distinction between doing and allowing or negative and positive duties and rights. Bennett recounts how the sundry ways a human body can be positioned or moved are captured within a four-dimensional grid of space and time.[483] To determine whether the conduct we

[478] As John Broome has stressed, the difference between duties and goodness is that "[d]uties of justice are owed by one person to another particular person, or to other particular people; this is their key identifying characteristic." Broome, *Climate Matters*, 52.
[479] Caney, 'Climate Change, Human Rights, and Moral Thresholds', 76–80.
[480] Broome, *Climate Matters*, 55.
[481] This first metaphor applies to the perspective investigated in Chapter 4.
[482] Bennett, *The Act Itself*, chap. 6.
[483] The following description of Bennett's account is paraphrased from Kramer, *Torture and Moral Integrity*, 78–89.

investigate – behaviour that emits greenhouse gases – is an act or an omission, we ask if the behaviour is the narrower or broader set of the options available to the human body in the four-dimensional grid. The conduct to bring about an outcome E is labelled an action if the set of all the movements and positions in the grid resulting in E is *smaller* than those not bringing about E. The conduct to bring about E is an omission if the set of the movements and positions that would bring it about is *bigger* than the alternative set of movements and positions. This analysis illustrates that it is not, for instance, movement as such that matters but the available alternatives of moving and positioning itself.

At first glance, this description of action fits very well with an idea of behaviour that emits greenhouse gases. For instance, driving a car can be classified as an action because the set of positions constituting driving is much *smaller* than all those possible alternative positions a person can place their body in if not driving. However, we should query whether the comparison in a real-world setting is between the emitting conduct of driving a car and all other ways humans can move and position their bodies. The situations we face in our lives are much more circumscribed and specific. For example, in many parts of the world, driving a car is necessary for people to get to work, school, grocery stores, health care facilities, family members etc. Driving a car, then, is a necessary means through which people can realise the many options of modern lives, whereas not using a car involves realising fewer of these options. According to this alternative comparison, driving represents the bigger set of bodily movements and positionings available, and non-driving represents the *smaller* set. Thus, the stationary nature of staying put and not driving is the action, and the driving is the omission.[484]

The above paragraph showed that the distinction between acts and omissions is always drawn with reference to some end or result that might ensue. Thus, a single type or instance of conduct such as driving can be correctly classified as an action with regard to some envisaged consequences and as an omission with regard to other envisaged consequences. Currently, most emissions in most parts of the world are accurately classifiable as omissions: by emitting greenhouse gases, actors are omitting to perform the action of

[484] To illustrate how stationariness can be an action, Matthew Kramer uses the example of a person being completely motionless in a sealed room surrounded by metallic dust that will cause an explosion if the dust settles on the ground. As long as the person moves, the dust hovers in the air. In this example, the immobility is to be characterised as an action (the set of fewer possibilities), and the moving around is the omission (the set has most possibilities of positions the body can be placed). Kramer, 80.

resigning from modern society.[485] It is essential to note that this is a concrete assessment of behaviour. The description of people's situation can change when non-emitting alternatives are widely available.[486]

The relevant comparison might not only be between continuing to emit greenhouse gases and retiring from (nearly) all activities in modern society. Instead, the comparison can be between continuing some emitting behaviour and changing to some non-emitting alternatives. Behaviour that emits greenhouse gases is correctly classifiable as an omission compared to the act of changing. For instance, for a person living in a home with a gas boiler and a gas stove, the greatest set of conduct available is to keep using these devices and otherwise pursue their sundry ends.[487] The comparison is to a set of conduct involved in switching to alternatives, like going to the store, organising installation, etc., instead of all the other sundry ends they otherwise could have undertaken.

When looking at the behaviour involved in changing to a non-emitting option, this change is to be understood as an action compared to the continuous emitting of greenhouse gases: when continuing to emit the actor omits to do something with the situation.[488] When non-emitting options are less available, striving to realise them can be a lifelong commitment to develop or utilise such alternatives.

When the act of changing to non-emitting alternatives is available, they are usually still expensive. In a broader sense, this financial issue also narrows down the total set of conduct available to an actor if the switch is undertaken. For example, assuming people have limited financial resources, using these resources on non-emitting alternatives has implications for the other projects the actors can undertake.[489]

A pressing question is whether there is a difference between the ongoing emissions from an already established source of emissions and the introduction of a new emission source. Hence, there might be a difference between using an already-installed gas boiler and

[485] If we draw the relevant scope of emissions wide and include human breath and the various emissions related to food production, emitting greenhouse gases also is an omission to perform the act of resigning from human existence.
[486] Such as non-emitting cars or other types of public transport. Or, that the society transforms more radically so that activities involving greenhouse gas emissions are not (nearly) all the meaningful alternatives to people.
[487] This has a parallel to Sinnott-Armstrong's stressing of emissions being normal activities and therefore not counting as wrongful conduct; Sinnott-Armstrong, 'It's Not My Fault', 335.
[488] Again, in the future the situation might be very different. If the *status quo* is not emitting devices, changing to an emitting option would be an action.
[489] That other commitments cannot be realised does not have direct relevance for the classification of the actual behaviour as an act or omission. As Matthew Kramer commented on this chapter: "My omitting to φ might infuriate certain people who keenly wanted me to φ or who held claim-rights to my φ-ing, and I might subsequently be deprived by them of many of my freedoms as a result. Still, my omitting to φ is an omission."

installing a gas boiler in a new home. However, if we remain within the same broad perspective, both are omissions. The comparison is still between (1) utilising options that are already widely available but result in the emission of greenhouse gases and (2) finding non-emitting alternatives. These non-emitting alternatives typically represent a narrower set of behaviours available because they must be developed or are costly. Hence, the business-as-usual approach still represents the broader set of options.

We can avoid the problematic notion that actors who already use emission sources only allow these emissions to happen, whereas those starting to use such sources are acting. Such a notion is morally dubious, as those already privileged with a high emitting lifestyle or business would be pulling up the ladder for those not yet in this trajectory.[490] Nevertheless, we must remember that the act/omission distinction is always drawn with reference to some result that might ensue. Thus, we cannot just assume that all emitting conduct will be classified as allowing. The assessment will likely change for some situations as the world has at least partially started the transition to non-emitting alternatives. Opting for emitting alternatives when the default is non-emitting options could then be characterised as actions.

The last point to highlight in this discussion on the act/omission distinction is that that distinction can also be brought to bear on behaviour that does not directly emit greenhouse gas emissions but contributes to or benefits from such emissions. The climate change discourse usually addresses this distinction by a reference to Scope 1, 2 and 3 emissions.[491] Whereas Scope 1 emissions stem from the conduct of an actor A, Scope 2 emissions for A are emissions emitted by B to facilitate something for A, like electricity powered by coal. Scope 3 emissions are more complex because they are only associated with the actor A's behaviour. For example, if A is a manufacturer, A's Scope 3 emissions could be emissions lower down in A's supply chain or emissions resulting from the use of A's products. If A produces gas, the greenhouse gases emitted when this gas is utilised by C in C's gas boiler is a Scope 3 emission for A.

The approach often used to ascribe moral responsibility for Scope 2 and 3 emissions is to examine whether the emissions are within A's control. For instance, states are considered to control all the emissions within its territory. This distinction crosses both doing

[490] This view would be seriously unfair. Here, I am grateful for discussions with Amin Ebrahimi Afrouzi.
[491] The Paris Agreement only covers a country's Scope 1 emissions. In the fossil fuel cases, the issue is mainly that litigants are seeking to make a company or state responsible for Scope 3 emissions; for instance, *Arctic Oil*, *Shell, Total, and Portuguese Children*.

and allowing. For example, some of a state's contributions to emissions might be doing – like subsidising or treating emitting behaviour more favourably than non-emitting behaviour.

Sometimes, allowing other actors' behaviour is morally wrong even though it does not directly contribute to the upshot of the behaviour. Such a conclusion is warranted, for instance, if there is a special relationship between the actor and the duty-bearer, like that between a state and its citizens.[492] Such a conclusion can also be warranted when the unchecked behaviour is iniquitous.[493] However, within the ethical framework investigated in this chapter, the premise for this independent duty to not commit a wrong and a duty not to contribute to the committing of a wrong is that the original conduct is a *doing*. Above I argued that the actor who emits the greenhouse gases is omitting rather than acting. The puzzling conclusion is that no one appears to be doing something wrong when we are caught up in the current dependence on fossil fuels.

6.2.3 Implications

Behaviour that leads to emissions of greenhouse gases does not fit the traditional conception of negative rights. Hence, no wrong in this direct conventional sense occurs by the emission of greenhouse gases. Instead, we face a moral duty to act to avoid the potentially harmful side-effects of one's behaviour when emitted in cumulation with other emissions. This positive duty to mitigate might be of different content than just changing the actors' emitting behaviour, namely, a duty to come together and avoid the side-effects created by the many omissions by different actors.[494] In any case, it describes a duty that is not the classical deontological duty to avoid performing acts that damagingly exploit other people's fundamental features to reach certain ends.

A critic may ask why this distinction between acts and omissions is morally salient. The distinction drawn above between acts and omissions is technical, and it does not directly follow that the distinction also retains moral relevance. Thus, we would have to provide moral arguments if we are to exclude a duty to act to avoid the harmful side-effects of cumulative behaviour from the domain of right-based justifications. For example, if we return to the Trolley Problem, the people towards which the trolley is originally running also might

[492] This is the main constellation of the international human rights regime.
[493] An example is Rawls' idea of international human rights. He argues that different decent societies would only agree to a limited class of rights governing their interrelations, such as freedom from slavery and serfdom, freedom of conscience and security from genocide; Rawls, *The Law of Peoples*, 78–79.
[494] This political duty is the main duty opted for by many moral philosophers: Cripps, *Climate Change and the Moral Agent*, 140; Sinnott-Armstrong, 'It's Not My Fault', 344.

have claim-rights to being saved.[495] If an actor does not change the track of the trolley to save the original victims, the detriment of the trolley running into them is a side-effect factually caused by the actor's omission.[496] Hence, a typical objection to the presentation I have given above is that if an actor knows that climate change is a predictable side-effect of their emitting behaviour, they have a duty to not cause this side-effect.[497] Although the justification of this duty is not deontological, an actor discharging this duty equally commits a wrong. Hence, if we see the usage of toxic substances as an insecticide,[498] to purify gold,[499] or insulate homes[500] as a right's contravention, the same could hold for greenhouse gases.

The main argument against this comparison is that no one would know that any detriment occurs from their behaviour. As we saw in Chapter 5, not every emission would be a factual or proximate cause in the collective creation of climate change and its detrimental consequences. However, even if we assume such a causal role, the line of reasoning investigated in this chapter can still contend that there is a morally salient difference between negative wronging and positively realising a desirable state of affairs. Chapter 4 addressed one reason: positive duties of fulfilment are so demanding that no individual can impose them on all the actors needed for their realisation.[501] As we saw in that chapter, the abstract claim-right to a safe climate requires actors to come together as a more or less worldwide collective and transform their current societies away from the many processes that emit greenhouse gases.

The distinction between acts and omissions drawn above was closely tied to the behaviour available to an actor. In a society where the way of life is based on fossil fuels, an actor's options are limited due to the demanding nature of changing behaviour away from emitting practices. Thus, this analysis explains Simon Caney's suggestion that human beings' duty to mitigate climate change is linked to how their society is transforming.[502] When new, low-emitting activity patterns become available to people, the demanding nature that otherwise precludes a duty to take them up disappears. However, the analysis does not

[495] If these people cannot be saved in a way that does not contravene other people's claim-rights, we are faced with a moral conflict: a wrong will be committed regardless of what the actor does.
[496] The omission is both an INUS-condition and a NESS-element as described in subsection 5.3.2.
[497] Broome, *Climate Matters*, 56.
[498] For instance, the UN Human Rights Committee case *Pereira*.
[499] For instance, the ECtHR case *Tatar.*
[500] For instance, the UK asbestos case *Fairchild.*
[501] Derek Bell is an example of the many authors indirectly arguing for demandingness being the crucial moral distinction between positive and negative rights; Bell, 'Climate Change and Human Rights', 167.
[502] Caney, 'Two Kinds of Climate Justice', 137.

vindicate Caney's broader argument that the interests of any individual human being make this wide-ranging transition obligatory.

Moreover, investigating these technical matters and how they apply to climate change mitigation enables us to see that they are not justificatory bases for duties to mitigate. I have already impugned any such justification. If duties to mitigate are to be asserted in moral theories of rights, these theories must eschew this traditional perspective of wronging.[503]

6.3 The structure and force of the requirement to not emit greenhouse gases

Here, I examine another aspect of deontological duties: their structure and force. According to typical deontological theories of rights, conflicts of duties may occur. If a more stringent moral duty overtops a moral duty with which it conflicts, this latter duty does not cease to exist but remains in force, and the breach should be remedied.[504] In Chapter 4, we saw that a focus on mitigation as the realisation of a desirable state of affairs did not fit this structure of a *pro tanto* duty.[505] However, Chapter 5 and this current chapter have explored whether the emitting of greenhouse gases is a wrong in itself. Hence, the narrative currently under investigation implies that there is a deontological moral duty not to emit greenhouse gases.

This section will examine whether it makes sense to understand a requirement to not emit greenhouse gases as a *pro tanto* duty. I discuss this understanding through two issues often arising in the academic climate change discourse: offsetting (subsection 6.3.1) and over-inclusiveness (subsection 6.3.2).

6.3.1 Offsetting

As examined in the previous chapter, the structure of a duty is that it keeps its force even if a more stringent duty overtops it. A central question here is whether behaviour that leads to

[503] In Chapter 8, I show that the wrong committed when an actor does not comply with a duty to mitigate greenhouse gas emissions is related to the political obligation to comply with laws enacted to mitigate climate change. This political theory of wronging does not require that the conduct is in itself harmful; see, for instance, Duff and Marshall, '"Abstract Endangerment", Two Harm Principles, and Two Routes to Criminalisation'.
[504] See, for instance, Kramer, *Torture and Moral Integrity*, 7. However, as we saw in Chapter 2, enforcement and remedies are not available for all legal duties; still, they are legal duties.
[505] As we remember from Chapter 2, "*pro tanto*" is here referring to the circumscribed duty that remains in force even when overtopped by a more stringent duty. Hence, a *pro tanto* duty is different from a *prima facie* duty, which appears to be a duty at first glance but might not be when all things are considered. See; Kramer, *Where Law and Morality Meet*, 290.

greenhouse gas emissions is a breach of a duty with deontological force. In this subsection, I examine whether the often-invoked idea of offsetting supports this take on emitting behaviour. Offsetting covers practices where reductions in greenhouse gas emissions somewhere serve to counterbalance emissions of greenhouse gases elsewhere. The further details about their connection are an open question.

Two perspectives on offsetting

From some parts of the climate change discourse, one gets the impression that a source of greenhouse gas emissions is in and of itself problematic – for example, that establishing a new fossil fuel project or exporting fossil fuel always breaches the mitigation duty.[506] Statements such as "every source of emissions counts" in the debate about electrifying the Norwegian petroleum sector make a similar impression.[507] The assertion is that, regardless of the behaviour's impact on the overall effort to combat climate change or to bring about another societal goal, it still represents a breach of a duty. Hence, even though it might create a better outcome if energy produced from gas replaces the energy produced from coal, producing energy from gas is still viewed as an independent wrong.

Underlying such views is the notion that there is a duty to avoid emitting greenhouse gases from fossil fuels. This duty stays in force even though a morally more pressing obligation might overtop it, like ensuring a better global climate situation by, for instance, allowing gas to replace coal. If this requirement is a deontological duty, the breach of this duty must be remedied. Offsetting enters the picture as a natural candidate for remedy. By offsetting, I mean that an actor emitting greenhouse gases makes sure that an equal amount of greenhouse gases will not be emitted by another actor or will be stored in a carbon sink. Hence, the idea behind offsetting is to reduce to zero the impact of the possible detrimental emissions resulting from the breach.[508]

---

[506] This appears to be the motivation for many climate change lawsuits; *Arctic Oil* is about new petroleum search concessions in the Barents Sea and *Portuguese Children* is about the export of fossil fuel from many European countries.

[507] The Norwegian Climate and Environment Minister Espen Barthe Eide has praised electrification because it reduces emissions from one of the country's biggest sources of emissions; Sættem, 'Klimaforsker advarer mot å bruke opptil 10 prosent av norsk kraft til å drive oljeplattformene'.

[508] The benefit sought when emitting behaviour is upheld as the fulfilment of a *pro tanto* duty is that instances of such behaviour must be accounted for on their own. This could encourage each actor to take responsibility for their own behaviour and not outsource mitigation efforts. However, if the goal is to encourage the avoiding of all asserted problematic behaviour (and possible the faster transition to a net-zero society/a more just transition), offsetting might not be the appropriate remedy for a breach. This is because offsetting would make the sources of emissions interchangeable in practice. Another option as an appropriate remedy that would deny the interchangeability could be to make the duty-bearer forsake the benefit they gained by taking control over the

However, offsetting can also be understood as avoiding the contravention of a duty occurring in the first place. This appears to be the view of Broome when he argues that people can permissibly continue their emitting behaviour if these emissions are offset.[509] A breach of duty only occurs if someone emits greenhouse gases without offsetting them. The role of offsetting then resembles people paying for their meal in a restaurant or a state paying due compensation when land is expropriated for a legitimate public purpose.[510] Neither eating in a restaurant nor the act of expropriation breaches any duties; but they do so if the actors do not provide due payment. Hence, the payment is not remedying a breach of duty; rather, it prevents a breach of duty from taking place.

From this latter perspective, a new fossil fuel project is not in breach of any duty to mitigate if the emissions arising from this project are offset. Offsetting could follow directly from, for instance, how the energy produced from this newly available gas leads to less energy produced from already existing coal power plants. In sum, emissions are avoided. However, the offsetting might not need to be as closely tied to the activity and could take place in a different sector. What matters is that the duty to mitigate can be upheld either by avoiding the emitting behaviour in the first place or by offsetting the emissions resulting from this emitting behaviour.

Offsetting (and climate change) is about totality

The two conceptions of offsetting are reminiscent of a controversy within tort law. The controversy concerns whether compensation is a remedy for a breach of duty not to act negligently or whether instead an activity can permissibly occur only if the agent is willing to pay compensation for possible losses.[511] However, because climate change mitigation is an

right-holders' powers-of-disposition through the emitting behaviour. For this view on how the exposure to risks could be restored, see Kramer, 'Of Aristotle and Ice Cream Cones'.

However, there are at least three objections to upholding this view in relation to climate change mitigation. The first is that the starting premise is flawed since we cannot establish that the emitting behaviour is depriving someone of any power-of-disposition (Chapter 5). Second, a claim-right correlative to such a duty to remedy would be held distributively by everyone. If the benefit is supposed to be redistributed to those whose rights have been contravened by global warming, a global system needs to be in place. A third objection questions the underlying assumption that motivates this argument, namely, that it would lead to a better climate situation if emitting behaviour were considered a wrong in itself. Empirically, this is uncertain. Analytically, this type of argument resembles the structure of rule consequentialism where a duty is upheld because it typically leads to the best outcome. Hence, the narrative is only using a deontological language but divagates from the structure of deontological duties.

[509] Broome, *Climate Matters*, 59; Broome, 'How Much Harm Does Each of Us Do?', 289.

[510] Kramer, *Where Law and Morality Meet*, 286–87.

[511] Keeton, 'Conditional Fault in the Law of Torts', 430.

issue of the totality of greenhouse gases reaching the atmosphere, neither of these perceptions fits the topic well.[512]

Those upholding the first view, where compensation remedies negligent behaviour, would deny that fault occurs only if compensation is not paid. Rather, the compensation is a remedy for the wrongness of the negligent behaviour as such.[513] Even though both situations lead to the same economic position for the right-holder, the right-holder's right is not solely about this economic position. Instead, there is an independent worth – beyond the economic disadvantage – in not being subject to negligent behaviour. Whereas compensation can eliminate the economic burden it cannot undo the duty contravention.

This rationale about negligent behaviour as a violation beyond what can be compensated cannot be translated into the issue of climate change. The hazardous aspect of climate change is the total greenhouse gases in the atmosphere. There is nothing inherently problematic with behaviour that emits greenhouse gases. The climate first changes when there is no longer an equilibrium between emissions and sinks so that more greenhouse gases stay in the atmosphere. As we have seen in Chapter 5 and the above sections, any particular instance of emitting behaviour is not in itself harming or wronging other human beings. If global coordination leads to a safe equilibrium, the possible hazardous consequences for a right-holder can be eliminated even when an actor emits greenhouse gases.

This conclusion leads to the impression that the second conception of offsetting adequately describes climate change mitigation. A fault only occurs if one is not offsetting the consequences of the emitting behaviour.[514] However, this perspective similarly fails to recognise that the total amount of greenhouse gases in the atmosphere is what matters. The same concern raised above continues to hold true here, namely, that we do not know from the outset if the behaviour will indeed lead to emissions reaching the atmosphere and creating a consequence that must be offset.[515] In addition, suppose we offset emissions beyond the existing carbon cycle by creating new carbon sinks, like planting trees. We do not know if some of the emissions taken up by this sink are indeed the emissions coming from the behaviour in question. To try to sustain this idea of a mitigation duty first being breached by a

[512] See, the previous Chapter 5.
[513] Keeton realises this, because he argues that the two understandings of fault describe different situations: one of negligence and one of risk but no negligence.
[514] In this situation, offsetting might also not be considered the appropriate response. If the rationale for the legitimacy of imposing a risk is that the actor is willing to pay for the eventual manifestation of this risk (ref Keeton's argument), the compensation might need to be higher than offsetting and include means for adaptation. A practical problem is to ensure that the appropriate right-holders are reached. A more pressing problem is, however, that we assume that the emission is creating a risk.
[515] See section 5.5.2.

failure to offset emissions, we need to apply offsetting metaphorically. For example, "I am driving a gas guzzler for fun, but I renders that activity permissible because I planted a tree" is how we should understand the statement "I am driving a gas guzzler for fun, but I offset the effects of that activity by planting a tree."

However, if we see the relationship metaphorically, it is not evident why direct emissions and offsetting are necessarily connected. How much of one's emission one should reduce and how much one should help combat the overall emission situation might well be separate questions within a framework of how the just coordination of the totality should be.[516] It is misguided to use the interchangeability of emissions to uphold a fiction of actors operating in moral isolation when climate change results from the global totality.

In addition, how we understand offsetting is crucial. If we look at Broome's description, offsetting can occur by ensuring emitting behaviour is avoided elsewhere.[517] The idea is that it is utterly indifferent to the climate if emission A or emission B reaches the atmosphere. However, this only holds if an equivalent of either A or B can be added to the atmosphere. If we return to the fictional narrative, it does not matter which particular marble is added to the tube. What matters is whether there is indeed room in the tube for another marble to be added before it spills. What Broome describes is a predefined system with a set totality. Emissions are kept within this totality according to the willingness to pay for such an upshot rather than by avoiding the specific emissions that bring about the upshot.[518] Such a system does exist in some areas, like the EU's Emission Trading System (ETS).[519] However, it is currently not applicable to all emissions.[520] More importantly, because such a system is justified in normative assessments of distribution,[521] we cannot, by just looking at the emission, answer the question of whether it is permissible or not.

Offsetting might be better than not offsetting because it potentially leads to fewer emissions being emitted than what otherwise would be emitted.[522] However, there is no guarantee that offsetting prevents the tube from being filled up, which is what matters for the

[516] From a justice perspective, this could be framed as a criticism of the evolving practice of businesses claiming to be net zero by, for instance, planting trees. Is it just that these sinks are legitimising emissions from Amazon and BrewDog instead of emissions that are harder to avoid e.g., for social or technical reasons?
[517] Broome, *Climate Matters*, 87.
[518] This coordination of which emissions are allowed within a safe totality based on the willingness to pay has been criticised on justice grounds, see; Broome, 89ff.
[519] 'EU Emissions Trading System (EU ETS)'.
[520] The private offsetting scheme that previously existed is no longer operating.
[521] The ETS system is based on a system of distribution based on the willingness to pay for emission.
[522] This is, again, an empirical question as we would have to make sure that the avoided behaviour would not have been avoided anyway. The issue of double accounting is one of the main challenges to establishing a global trading scheme under the Paris Agreement.

narrative of climate change as a wrong. It therefore seems that fitting the issue of climate change into an idea of independent wrongs when it is actually about the totality is as conceptually problematic as working a square into a circle.

This debate might seem outdated if offsetting is understood as carbon capture and storage (CCS) technologies.[523] Here, we would know which molecules are captured from the industry, power plant, waste plant etc. and then brought to permanent storage. On the one hand, it appears appropriate to say that the emissions are avoided as they never reach the natural carbon cycle or atmosphere. On the other hand, the storage capacity may become limited. Hence, the issue of which emitting behaviour has such a great value that we want it to take place and use storage capacity on it still is an issue of limited resources.[524]

Returning to the example of how a mitigation duty would apply to a new fossil fuel project, the conclusion is that neither of the alternatives discussed in this subsection captures the issue of climate change correctly. It is incorrect that a particular behaviour is breaching a duty by something unique to this behaviour. In addition, it is erroneous that an emitting behaviour can be factually cancelled out by offsetting behaviour. Instead, the correct question to ask is how we see the role of this emitting behaviour within the totality of emissions that creates dangerous climate change. So constructed, the two perspectives discussed in this subsection are addressing the question of just distribution. Assertions that people have claim-rights against greenhouse gas emissions with the corresponding duty to not emit greenhouse gases obstruct the fact that the issue at stake is distribution.[525]

6.3.2 Over-inclusiveness

Another normative challenge when asserting that the emission of greenhouse gases breaches a deontological duty is that this is an overinclusive statement. Humans need to breathe and eat to live, which are processes that emit greenhouse gases. As we discovered in section 5.5.2, we cannot establish an emission's role in climate change causation based on its source. Hence, we must apply normative reasoning to distinguish permissible and non-permissible

[523] In the same way as natural sinks such as tree planting are frequently invoked as tools to offset, I anticipate the inclusion of artificial sinks in the discourse on offsetting.
[524] Today, the distribution of CCS is taking place by states subsidising the technology, but the first contracts negotiated in the market have just been signed; 'Equinor og Wintershall Dea vil samarbeide om CO2-lagring på norsk sokkel'.
[525] In Chapter 8, I show that the obligation to comply with the outcome of a just distribution can be given the force of a duty.

anthropogenic emissions. However, it is clear from the outset that the assertion that it is a *pro tanto* duty to not emit greenhouse gases cannot be correct.

I addressed a related concern in sections 2.3.2 and 6.2.2, emphasising our dependence on high-emitting processes to fulfil our basic needs in modern society. Philosophers have, therefore, affirmed the need for a "right to emit". Henry Shue argues that there is a difference in moral relevance between emissions needed for subsistence and emissions used for luxury consumption.[526] Simon Caney applies Shue's theory of *basic rights* and argues that it would be unjust to require people to be pushed beyond basic subsistence levels to combat climate change. [527]

We might be able to carve out a plausible theory to distinguish which emissions are necessary and which are not. However, this is a much more complicated and controversial task than it seems at first glance. A taste of these difficulties is evident from the literature surrounding the intuition that driving a gas guzzler for fun represents unnecessary luxury emission.[528] However, if one considers driving a gas guzzler for fun as a *pro tanto* wrong, this applies not only to Ms. Lavish's frequent extravagant Sunday drive but also to Ms. Green's rare Sunday drive.[529] According to Julia Nefsky, the view of emitting behaviour being an independent wrong would carry the implausible implication that even Ms Green, who lives a very low-emission lifestyle, cannot permissibly sometimes drive or fly for recreational or convenience purposes.[530]

Many philosophers have addressed the challenge of allocating different emissions to the category of permissible and impermissible by invoking moral theories of virtue.[531] Nefsky herself argues for an imperfect view where what matters is not particular instances of emitting behaviour but that one "*keep one's emission low enough"*, taking a cross-temporal view.[532] By invoking the moral theories of virtue and imperfection that apply over time, however, we openly depart from the task of circumscribing particular duties of mitigation.[533]

---

[526] Shue, 'Subsistence Emissions and Luxury Emissions'.
[527] Caney, 'Human Rights, Responsibilities, and Climate Change'.
[528] Walter Sinnott-Armstrong has, however, forcefully shown that there is no independent harm from such activity; Sinnott-Armstrong, 'It's Not My Fault'.
[529] Nefsky, 'Climate Change and Individual Obligation: A Dilemma for the Expected Utility Approach, and the Need for an Imperfect View'.
[530] Nefsky, 211.
[531] Dale Jamieson argues that we should not seek to calculate what is best in each instance but rather rely on green virtues; Jamieson, 'When Utilitarians Should Be Virtue Theorists'.
[532] Nefsky, 'Climate Change and Individual Obligation: A Dilemma for the Expected Utility Approach, and the Need for an Imperfect View', 213.
[533] Kingston and Sinnott-Armstrong, 'What's Wrong with Joyguzzling?', 170–71.

Hence, not only is it mistaken to claim that each emission is in itself creating a harm. It is also the case that there is nothing in the behaviour itself that warrants a particular condemnation – like driving, eating meat, having air-conditioning and heating, etc. It is the consequences arising from a great totality that matter. Therefore, the challenge is for the current human population to collaborate to mitigate climate change and distribute the burdens (justly) among us, a topic explored in the next Part III.

6.4 Conclusion

In Part II, I have explored two types of moral theories of rights and how they apply to the topic of mitigation: (1) that an individual's fundamental interests are sufficient to ground a duty; (2) that an individual's fundamental interests are a constraint on actors realising their sundry ends. The first consequentialist narrative is about the abstract duty to mitigate climate change borne by a global collective of actors: the issue at stake is to bring about a state of affairs that minimally (or optimally) fulfils human interests. As we saw in Chapter 4, because this is a wide-ranging duty on nearly all actors to transform almost all aspects of modern societies, an individual's interests are not a sufficient justification for this abstract duty. Instead, it is the aggregate of interests that will justify climate change mitigation.

By contrast, the deontological line of reasoning is about the specific duties to mitigate greenhouse gas emissions: the issue at stake is whether individuals' claim-rights constrain an actor from emitting greenhouse gases when realising their various ends because such emissions contravene these claim-rights. In this chapter, I have provided four reasons why this line of reasoning is unsuccessful. The first draws on the conclusion from Chapter 5 that greenhouse gas emissions do not cause any independent harm to human beings. The harm to individuals is only a side-effect of emitting activities: greenhouse gases are a by-product of an actor's behaviour that, together with the behaviour of a vast number of other actors, becomes problematic.

I provided two further reasons why there is nothing inherently problematic with greenhouse gas emissions. The discussion about offsetting showed that it is not appropriate to view each instance of greenhouse gas emissions as a breach of a duty that the offsetting measure must remedy. Instead, whether to mitigate the actor's own emissions or the emissions that the actor pays others to mitigate is a normative matter that rests on the assumption that the totality is problematic. In addition, the moral positions arguing that

something is inherently wrong with behaviour that emits greenhouse gases run into the problem of over-inclusiveness. To distinguish between Ms. Lavish's Sunday drive and Ms. Green's Sunday drive, we must draw on normative considerations about the overall burden of mitigation each actor should bear. Hence, climate change mitigation requires coordination of behaviour to bring about an overarching arrangement where each actor is to comply with their fair share.

The subsection about doing and allowing illustrated further the difficulties when we draw a line between acceptable and unacceptable behaviour. Here, I reached the surprising conclusion that not all conduct that produces greenhouse gas emissions is *doing*. More importantly, I showed that the morally salient matter is the demandingness of the non-emitting alternatives. The availability of such non-emitting alternatives influences the burden it is appropriate to assign to an actor. However, because the coordination to reduce greenhouse gas emissions can happen in many ways, and because societies can adopt different schemes of coordination, the assessments needed are societal and global rather than discretely focused on individuals.

The main implication following these four rejoinders is that the specific duties to mitigate greenhouse gas emissions can first be established after complex assessments of burden distribution, drawing on the totality of emissions, categories of actors, comparisons between different categories of actors, and the societal paths chosen. Part II has thereby shown that moral theories of rights do not provide adequate answers to the pressing question of *who ought to do what* to combat climate change. Instead, the issue of establishing specific mitigation duties is a question of just distribution.

A project examining the relationship between ideas of rights and climate change mitigation could have ended here. However, as Joana Setzer and Lisa Vanhala pointed out when reviewing the research on the litigation trend, there is a gap in the literature "between research on climate change litigation and human rights on the one hand, and research on climate justice on the other".[534] In Part II, I filled this gap by looking at moral theories of individual rights as a topic of climate justice. In Part III, I confront the challenge head-on and engage directly with how the strategic litigation trend relates to political theories of climate justice.

[534] Setzer and Vanhala, 'Climate Change Litigation', 2019, 11.

Part III: Political Theories of Justice

Chapter 7: International Justice

7.1 Introduction

In Part II, I showed that the two traditional moral theories of rights do not justify climate change mitigation. This is because (1) an individual's interest is not sufficient to ground the abstract duty to mitigate climate change, and (2) circumscribed instances of greenhouse gas emissions do not wrong other individuals. Instead, I concluded that it is only when many interests are brought together in an overall assessment that we can establish an abstract duty borne by the global collective to mitigate climate change, as well as specific duties borne by particular actors to mitigate greenhouse gas emissions.[535] This conclusion brings the climate change mitigation discourse back to its roots: *justice*, which is the topic of the final Part III of this dissertation.

The academic and political debate on climate change has typically addressed the matter from the angle of political justice, not individual rights.[536] From a political justice perspective, the question is how members of a political community should relate to and take due account of each other's interests. This question has two sides. On the one hand, it addresses the content of the principles which should govern their political institutions. On the other hand, the question of political justice asks how the political community should decide these matters.

Investigating the content of climate justice parallels John Rawls's approach in *A Theory of Justice*, where he established his two principles of justice: (1) "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."; and (2) "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[537] Political theories of climate justice apply

[535] *Who ought to do what* to mitigate greenhouse gas emissions depends on a normative assessment of, for instance, the totality of emissions, aspects of the actor, a comparison between different actors, the path of transition chosen in the society, etc.
[536] Classical publications are inter alia; Vanderheiden, *Atmospheric Justice*; Broome, *Climate Matters*; Jamieson, *Reason in a Dark Time*; Moellendorf, *The Moral Challenge of Dangerous Climate Change*; Shue, *Climate Justice*.
[537] Rawls, *A Theory of Justice*, 266.

different *distributional principles* to climate change mitigation.[538] They ask the following questions: Do principles of distributional justice justify climate change mitigation? What is the just temperature target according to such principles? How do the principles guide the distribution of the burdens of mitigating greenhouse gas emissions required to fulfil this temperature target?

Asking how the political community should decide these matters resembles Rawls's later work on legitimate authority. Political theories of climate justice must ask how climate change mitigation should be argued and settled within a political community.[539]

In the three chapters of Part III, I show how the strategic litigation trend on rights and climate change mitigation concerns political justice. In Chapter 7, I address the general principles of distributive justice and examine how they apply to the international community's current response to climate change. In Chapter 8, I investigate how theories of legitimate political disagreement apply to disagreement over principles of distributive justice within a state. Finally, in Chapter 9, I ask whether some principles of distributive justice have become part of a legal system in the form of moral standards circumscribing the content of duties to mitigate greenhouse gas emissions. That final chapter draws the line back to Part II of the dissertation by striving to establish boundaries on political power in the context of climate change mitigation. The chapter revisits the conclusions from Part II: even if the strategic litigation trend is successful in establishing moral standards on duties to mitigate greenhouse gas emissions, these standards are not about rights in the narrow sense, but are instead principles of distributive justice.

In this chapter, 7, I engage with three questions: why climate change mitigation is an appropriate topic for the international community (section 7.2), what constitutes just levels of climate mitigation (section 7.3), and what constitutes a just distribution of burden among the members of the international community (section 7.4). Central to the discussions of the principles of justice in sections 7.3 and 7.4 is how the recent litigation trend challenges the international community's realisation of these principles in both the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

[538] The conclusion to be drawn from Part II of this dissertation is that mitigation duties are not a matter of Rawls's first principle stating that everyone should have the same rights and freedoms. Instead, mitigation duties are about the second principle of how benefits and burdens of resources should be distributed.
[539] Rawls, *Political Liberalism*, chap. 2.

7.2 Climate change mitigation as a topic of international justice

The discourse on climate justice questions both the just level of mitigation and what a just distribution of the burden of fulfilling this just level should look like. In this chapter, I discuss how the rights and climate change discourse is really a discourse about climate justice: how should a just international community of states address climate change mitigation?[540]

In this subsection, I establish climate change mitigation as a matter of international justice.[541] The perspective in subsection 7.2.1 on extraterritoriality mirrors the discussion in Part II of the dissertation: must a state mitigate greenhouse gas emissions because of how these emissions relate to the interests of individuals in other states? I conclude that an appeal to extraterritoriality is not suited to making mitigation an international topic, because there is no direct relationship between either emissions and harm or between emissions and interest fulfilment.

In subsection 7.2.2, I shift the perspective to how climate change is a common concern for all members of the international community. The global nature of climate change justifies the need to come together to address its causes and solutions. Throughout the subsection, I emphasise how the current international community has come together to address climate change through the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

7.2.1 Extraterritoriality

In international law, responsibility is often addressed by way of the concept of *extraterritoriality*. This concept is essential for the climate-change context in two respects. First, the concept raises the question of whether a country is responsible for acts and omissions within its territory when a resulting *harm* occurs in another country.[542] In addition

[540] This is first because states, as defined by international custom and generally reflected by the Montevideo criteria, are the typical agents in international law. However, for my purposes these criteria are not central, and I recognise that the UNFCCC has allowed both Palestine and the EU as parties. To avoid the contested issue of what national states are and why they are the relevant agents, Rawls himself sees the participants as decent peoples. In the same way as the persons are rational, the requirement of peoples to be decent is a guarantee for the outcome to be just; Rawls, *The Law of Peoples*, 80. However, since it can be contested whether peoples are agents, my second reason for referring to political communities as states is that I am interested in actors who can be bearers of duties to mitigate climate change.

[541] The central question is whether that particular justice issue is "a suitable object of international concern"; Beitz, *The Idea of Human Rights*, 137.

[542] The Inter-American Court of Human Rights has found that a country is responsible for extraterritorial environmental harm: "Regarding transboundary damage, a person is subject to the jurisdiction of the State of origin, if there is a causal connection between the incident that took place on its territory and the violation of the human rights of persons outside its territory. The existence of jurisdiction arises when the State of origin

to such explicit *transboundary* harm, human rights law establishes responsibility for harm occurring outside a state's territory if the state has *effective control* over the cause of harm.[543] However, as I investigated in Chapter 5, the harm from climate change is collectively created and does not originate from any discrete behaviour. Hence, the obligation not to create harm outside a state's territory does not establish specific duties to mitigate greenhouse gas emissions.[544] I will therefore not examine this question further.

Second, the debate on extraterritoriality provokes the question of whether a state has a duty to *fulfil* human rights obligations in other countries.[545] Is the fulfilment of fundamental interests a cosmopolitan requirement borne by all states towards all individuals, or a national requirement borne by a state toward its citizens? Within the discourse on fundamental interest fulfilment in other countries, Rawls is a proponent of the latter view. He thinks that circumscribed political communities would not agree to make the fulfilment of the fundamental interests of the individuals within their community a matter for international powers.

Rawls's argument is as follows. First, he assumes that all places could establish a minimally just (well-ordered) society, based on their own resources and international trade.[546] Then, by applying his political method to the international level, he argues that the members of the international community would decide that such fulfilment should be a matter for their own community to decide for themselves.[547] Two implications follow from his conclusion: (1) the international community must accept the various understandings of justice within the different political communities; and (2) the members of particular communities are responsible for establishing justice for their community. For Rawls, the only acceptable form of international interference is one which avoids extreme unjustness within a community, such as freedom from slavery, serfdom, or genocide.[548]

Parts of Rawls's argument are applicable if the injustice of climate change is associated with its direct impact on various fundamental interests. Drawing on the fictional

---

exercises control of the activities that caused the damage and consequent violation of human rights."; *Advisory Opinion OC-23/17*, summary, 4 (h).

[543] Vinuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment', 184.

[544] *Urgenda*, para 5.7.5 and Voigt, 'State Responsibility for Climate Change Damages'. For a critical examination of the applicability of the no-harm principle to climate change mitigation, see Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics'.

[545] We encountered a version of this argument in Chapter 4.

[546] Rawls, *The Law of Peoples*, 108.

[547] The observance of human rights is, however, also a necessary condition for a society being labelled decent; Rawls, 83.s

[548] Rawls, 78–79.

narrative of Russian Roulette firing over a marketplace introduced in Chapter 5, the concern is whether gunshots injure people at the marketplace.[549] Measures on the ground could secure protection from such threats, such as warning systems, protection gear, etc. In the real-world situation, this perspective emphasises the measure of climate *adaptation*. In *Neubauer*, the German Federal Constitutional Court observed that such protection of people's interests would require powers that the German state does not possess outside the German jurisdiction.[550] In other words, the German government cannot protect the lives of people in Nepal and Bangladesh from the consequences of climate change. The Court in *Neubauer* provides a factual description of real-world power, but we can also understand the argument normatively: the question of which adaptation measures a community finds appropriate is an issue for them to decide and not one of external intervention.[551]

A critic may object to this application of the fictional narrative by arguing that the general risk created by the glockenspiel of games of Russian Roulette is central to why the people at the marketplace fare as they do. Ensuring justice can then be understood as not allowing the risk to manifest in the first place. The problem with this reformulation is that a particular state cannot remove the risk of climate change on its own. As we saw in Chapter 4, fulfilling this interest would be an aggregative accomplishment by all the global community members and not a distributive accomplishment by any member state. Even if we accept a cosmopolitan perspective that interest fulfilment is not an exclusive matter between a state and its citizens, the problem is that a particular state cannot fulfil the interest in a safe climate for its citizens, nor for human beings in other parts of the world.

Following the reasoning in Part II, a rationale focused on extraterritoriality cannot adequately justify climate change mitigation and, hence, cannot make mitigation an issue of international justice.

7.2.2 Political justification

Climate change mitigation is an international issue, but not because of the extraterritorial effects of greenhouse gas emissions or mitigation measures. The lack of direct harm and protection does not preclude members of the international community from reciprocally

[549] The fictional narrative was presented in Chapter 5.
[550] *Neubauer*, para 178.
[551] This does not imply that financial support for the realisation of adaptation measures is excluded as an issue of international climate justice. However, this issue of climate justice in a broader sense falls outside the scope of this dissertation.

agreeing that climate change mitigation is an issue of their common concern.[552] Applying the philosophical method of Rawlsian contractarianism, we can ask whether members of the international community, in a hypothetical contractual situation, would find climate change mitigation an issue that the international community should govern.

Both the creation and solution of climate change are genuinely collective. Climate change is therefore a paradigmatic example of an issue of *common concern* that can only be adequately governed at a supranational level.[553] Every political community depends on other political communities to control the temperature increase. Therefore, it is reasonable for each to agree that climate change mitigation is an issue for the international community.

The view that climate change mitigation is an issue for the international community is no longer controversial. The UN General Assembly has, since 1988, addressed climate change as a common concern of mankind and has urged the international community to negotiate and implement climate change treaties.[554]

Because different states will be affected differently by the changing climate, states may have different views on when the global average temperature increase becomes problematic. For these concerns to be acceptable as *political arguments*, political philosophers typically hold that they must apply generally and not be opportunistic for the individual member. Following Rawls, aspects of states' locations, economic conditions, etc. are under a "veil of ignorance": the members must prescind from such considerations and focus instead on the general justness of arguments for climate change mitigation.[555]

The international community has agreed on what constitutes unjust levels of climate change. Under the UNFCCC enacted in the 1990s, the international community pledged to stabilise the concentration of greenhouse gases in the atmosphere at "a level that would prevent dangerous anthropogenic interference with the climate system".[556] In the Paris Agreement, the parties were able to concretise this threshold. In Article 2 (1)(a), this is specified as "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-

[552] Reciprocity is a central criterion for Rawls, see, for instance; Rawls, *Political Liberalism*, xliv.
[553] This is stressed by many of the UN Human Rights Bodies in inter alia; A/HRC/25/53, A/HRC/31/52, para 42.
[554] A/RES/43/53, para 1.
[555] Applied to individuals, they do not know (1) their place in society; (2) their natural assets; (3) their concept of good and rational plans of life; (4) the particular circumstances of their own society; (5) which generation they belong to; Rawls, *A Theory of Justice*, para. 24. Point 3 makes it a thick theory. In his international theory, Rawls submits that the representatives of the peoples do not know their natural resources, economic development, etc., or conceptions of the good; Rawls, *The Law of Peoples*, 33.
[556] UNFCCC, Objective.

industrial levels, recognising that this would significantly reduce the risk and impacts of climate change".[557]

As considered throughout this dissertation, an abstract duty to mitigate climate change borne by the international community of states would require the ceasing of the worldwide dependence on high greenhouse gas emissions. Mitigation calls for a transition of technology and ways of organising modern societies.[558] Utilising political power within states is necessary for this transition to take place and, hence, for the fulfilment of the abstract duty to mitigate. Understanding mitigation as an international issue implies that states will also agree to restrictions on how they can use their powers, either by relinquishing power to supranational institutions now exercising this power, or else by agreeing to some predefined limits to their powers. The current international climate change system takes the latter approach.

The central philosophical question is what kind of restrictions it is reasonable for states, as participants in a Rawlsian hypothetical contractual situation, to relinquish to the international level. A state would balk at giving up the power to decide *how* the transition shall take place in its community. It is generally legitimate for political communities to choose for themselves which measures to adopt. For instance, Laura Burgers argues that the decision in *Urgenda* was democratically legitimate because the Dutch Supreme Court gave the state discretion on how it would fulfil the new 25% reduction target.[559]

A state might also want to retain the power to decide on the level of greenhouse gas reduction that they consider appropriate for their community. This decision is indirectly a decision on the priority of this political aim over other visions of the community.[560] Let us suppose that each state's contribution to the fulfilment of the abstract duty to mitigate climate change becomes an issue for the international community. In that case, all the reasons a state has for emitting greenhouse gases become an international concern. Giving up this power to decide a national conception of justice involves a more substantial limit on sovereignty than giving up the power to determine how to fulfil such a conception of justice.

---

[557] The difference between the consequences experienced on the Earth's surface in a situation of temperature increase of 2°C compared to 1.5°C is significant; IPCC 1.5C, 'Summary for Policymakers', 7. There is uncertainty as to whether the international community represented by the parties to the Paris Agreement is currently pursuing the lower target. In the *Glasgow Pact*, adopted at COP 26 in 2021 the commitment to 1.5°C was strengthened. However, this was not repeated as strongly in the following COP 27 in 2022.
[558] Voiced by, for instance, the UN Special Rapporteur on extreme poverty in A/HRC/41/39, para 69.
[559] Burgers, 'Should Judges Make Climate Change Law?', 65, 73.
[560] Mitigation does not necessarily lead to a trade-off with other societal aims and it can generally promote wellbeing in a society; A/HRC/41/39, para 56, Railton, 'A Convenient Truth? Climate Change and Quality of Life'.

However, because all states depend on one another to stabilise the increase in the global average temperature, it is nevertheless reasonable for them to accept some mitigation requirements. Otherwise, climate change is a tragedy of the commons where each state has the incentive to free-ride.[561] The German Federal Constitutional Court in *Neubauer* emphasises the close connection between the willingness to contribute to the collective effort to mitigate and the willingness to accept mitigation as an international issue: climate change can only be mitigated by the worldwide implementation of specific measures to mitigate greenhouse gas emissions.[562] According to the Court, the reliance on the international community necessitates implementation of mitigation measures at the national level.[563] If not, one member might incentivise other states to undermine the cooperation.[564] This consequentialist appeal to incentives has a parallel in the Dutch Supreme Court's deontological appeal to fairness in *Urgenda*: the premise for international collaboration is that all the members take action to mitigate in accordance with their specific responsibilities and options.[565]

That it is reasonable for states to accept specific duties to mitigate greenhouse gas emissions to enable the fulfilment of the collective effort to mitigate climate change does not, however, settle the content of these duties. Consequently, the question of which principles of justice a community sees fit to apply to their community remains central.

The tension between how states accept duties to mitigate greenhouse gas emissions and simultaneously want to retain influence over the content of these duties has riddled the international negotiations on climate change. The first international agreement under the UNFCCC, the Kyoto Protocol, allocated specific mitigation burdens to some specific developed states.[566] This "top-down" approach directly settled the issue of distribution.[567] The Paris Agreement from 2015 applies a different so called "bottom-up" approach. In the bottom-up approach, all the parties to the agreement establish the content of their own contributions, called National Determined Contributions (NDCs). With this approach, the

[561] This consideration will be addressed under the heading of political obligation in the following chapter 9.
[562] *Neubauer*, para 199.
[563] This argument was a reply to the government's causality obligation: that the German emissions only make up 2% of global emissions. As part of a collective effort, doing one's share is what matters; *Neubauer*, para 201.
[564] *Neubauer*, para 202.
[565] *Urgenda*, summary of para 5.6.1-5.8.
[566] Dupuy and Viñuales, *International Environmental Law*, 181.
[567] An approach in line with Garrett Hardin's "mutual coercion, mutual agreed upon" solution to the tragedy of the commons; McKinnon, *Climate Change and Political Theory*, 15.

Paris Agreement retains the tension: member states accept duties to mitigate greenhouse gas emissions but retain the political power to decide on the content of these duties.[568]

The Paris Agreement further specifies the process of the "bottom-up" approach. For instance, parties to the agreement shall report NDCs every fifth year, and a global stocktake of the collective effort shall also take place every fifth year.[569] The international agreement on which emissions should be reported entails normative assessments, such as the exclusion of emissions from non-fossil waste.[570] The parties to the Paris Agreement have negotiated distinctions for which sources of emissions a country must report, primarily justified by avoiding double counting.[571] These agreements excluded some emissions that are hard to allocate to a specific country of origin, like international aviation.

The Paris Agreement's guidance on the content of the NDCs is limited. It only proclaims that the NDCs should progress, reflect the country's highest ambition, and take account of the principle of common but different responsibilities and respective capabilities (CBDR-RC).[572] The CBDR-RC is traditionally understood as being a reference to countries' different levels of development and, thereby, their capacity to contribute to the collective effort.[573] The extent to which this principle of burden distribution is upheld by the parties is then assessed by the transparency mechanism, according to which parties shall report emissions and track progress made in implementing their NDCs.[574] In addition, the global effort to avoid an average temperature increase beyond the targets is assessed by a global stocktake. The mechanism of a global stocktake allows the members to adjust their contributions according to how the collective effort plays out. Moreover, the yearly conferences of the parties to the quinquennial global stocktake are political arenas for voicing different views on justice, influencing the discourses in the various political communities of what their just contribution should be.

---

[568] Under the Paris Agreement, all countries shall set NDCs, but developing countries shall be granted assistance in fulfilling their contribution. For further discussions on the details of the Paris Agreement, see, for instance, Dupuy and Viñuales, *International Environmental Law*, 85.
[569] Articles 4.9 and 14.
[570] The reason for this appears to be that non-fossil waste is part of a natural carbon cycle. See the discussion of this type of argument in subsections 5.4.2 and 6.3.2.
[571] The difference between Scope 1, 2 and 3 emissions have been discussed in 6.2.1.
[572] Article 4.3.
[573] In its early resolutions on climate change, the UN General Assembly stressed that responsibility for combating climate change falls on developed countries because the problem originates in their countries; A/RES/44/207/, 131. In 2003, it started to refer to the common but different responsibilities and respective capabilities (CBDR-RC); A/RES/57/257, 1.
[574] Article 13.

A formal dispute settlement mechanism covers the application or interpretation of the duties in the Paris Agreement.[575] The issues that the dispute settlement can address are generally not considered to include the content or implementation of the NDCs.[576] In 2023, the UN General Assembly requested an advisory opinion from the International Court of Justice (ICJ) on whether states have specific duties to mitigate greenhouse gas emissions.[577] The ICJ may reach a different position and include the content of the NDCs within its jurisdiction.[578] The following analysis does not anticipate this shift. It relies on the straightforward distinction between the legal duty to adopt NDCs and the legal liberty to decide the content of this duty.

7.3 Just levels of climate change mitigation

The issue of climate justice encompasses two main topics: (1) the injustice of unabated climate change, in other words, the just levels of abstract climate change mitigation; (2) a just placing of the burdens to mitigate climate change.[579] This section examines the first topic. The second topic will be the focus of section 7.4.

In subsection 7.3.1, I explore how the rights and climate change mitigation discourse draws on the philosophical debate on climate justice when addressing the abstract duty to mitigate climate change.[580] The principles of justice, like equality, ensuring thresholds of the

[575] Article 24, which refers to UNFCCC Article 14.
[576] McKinnon, *Climate Change and Political Theory*, 8.
[577] The General Assembly referred the following questions to the ICJ: "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
(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 States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"; A/RES/77/276.
[578] The Court might not only take a different stance on the content of the duties under the Paris Agreement but also on the human rights issues I addressed in Part II.
[579] Simon Caney describes these questions as (1) identifying the just target, and (2) sharing the burdens; Caney, 'Climate Change', 665.
[580] Classical publications are inter alia; Gardiner et al., *Climate Ethics*; Vanderheiden, *Atmospheric Justice*; Broome, *Climate Matters*; Arnold, *The Ethics of Global Climate Change*; Jamieson, *Reason in a Dark Time*; Moellendorf, *The Moral Challenge of Dangerous Climate Change*.

fulfilment of human needs, and avoiding risk, resemble the narratives discussed in Part II. However, as political arguments about how political communities should justly organise themselves, they are focused not on particular human beings but instead on the political community as an actor: How should the community organise itself to provide justice to its members? Following the conclusions in Part II, these arguments about justice within a political community are more promising as a basis for the abstract duty to mitigate climate change.

In subsection 7.3.2, I address how the rights and climate change mitigation discourse apply these principles of justice to challenge the international community's response to climate change mitigation. On the one hand, the case law voices a moral critique of the international response to climate justice. On the other hand, it could also be understood as arguing for the stronger claim that the states are disabled from enacting this unjust international system. However, from the philosophical perspective of international justice, this is a difficult claim to uphold.

7.3.1 Different principles of justice

This subsection addresses how the arguments invoked in the recent rights and climate change mitigation discourse rely on different principles of justice. I will address four principles: antidiscrimination, equality, basic needs, and risk. The presentation of these principles follows the same trajectory as the analysis of the consequences experienced by the people at the marketplace in the fictional narrative of a glockenspiel of games of Russian Roulette from Chapter 5. Hence, this subsection reiterates that the injustice does not pertain to some people being wronged, but that the risk of harm is too high.

In Part II, I concluded that the abstract duty to mitigate climate change was not justified by any individual's interests. Although the arguments examined in that part were not valid as arguments of rights in the narrow sense, they can be valid as arguments in a discourse about the just climatic *state of affairs*. Hence, when I revisit the arguments explored earlier in this dissertation, I do so in order to place them in the more appropriate context of political theories of justice.[581]

[581] Especially the narratives in section 4.2: (1) furthering of fundamental interests; (2) precondition of the fulfilment fundamental interests; (3) minimal thresholds of fundamental interests.

Antidiscrimination

Antidiscrimination is the first principle of justice associated with the discourse on rights and climate change mitigation. *Antidiscrimination* means the widely recognised requirement that a political community treats its members (or human beings in general) as *equals*.

The principle of antidiscrimination emphasises how climate change affects some people more than others. As I discussed in Chapter 4, people affected by climate change can be vulnerable groups within a local or national community, such as children, women, indigenous people, migrants, and people already living in poverty.[582] Moreover, they can be people living in places where the consequences of a changing climate are or will be severe – as in low-lying island states or parts of Africa, the Middle East and the Arctic.[583] People living in different parts of the world can also have distinct vulnerabilities to the consequences of climate change because of disadvantages pertaining to, for instance, the socioeconomic conditions within former colonies or developing communities.[584] Furthermore, future generations will be much more affected, because it takes time for the increase in the concentration of greenhouse gases in the atmosphere to increase Earth's surface temperature.

The core of the principle of antidiscrimination is that the production of greenhouse gas emissions by those less susceptible to the consequences of climate change is discriminating against the people who will be more severely affected by climate change and who do not benefit as much from the production of the emissions. In other words, the behaviour that benefits the affluent or currently living imposes detrimental side-effects on the less affluent or future generations.

If we understand this principle as an argument of direct discrimination, we encounter the same problems explored in Chapter 5 on harm and in Chapter 6 on wronging. This is because an assertion that greenhouse gas emissions discriminate against someone follows the same argumentative framework as the assertion that the production of greenhouse gas emissions wrongs someone.[585] The argument of direct discrimination implies a link between the challenged behaviour and the disadvantageous position of those allegedly being

[582] See, for instance, A/HRC/37/58, para. 23-24 on children; CEDAW/C/GC/37, para. 3 on women; A/HRC/RES/40/11 on indigenous peoples, A/HRC/41/39, para. 12-13 on people living in poverty.
[583] See, for instance, how the IPCC shows changes on a map by different temperatures; fig. SPM.5. Fig. SPM.3 shows how different regions are already affected; IPCC AR6 WGI, 'Summary for Policymakers'. The way in which some areas are affected particularly badly is also highlighted in legal disputes like *RWE*, *Torres Straight Islands*, and *Ioane Teitiota*.
[584] For an overview of arguments about colonialism as part of international justice see, for instance; Blake and Smith, 'International Distributive Justice', sec. 4.3.
[585] See, sections 5.1 and 6.1.

discriminated against, and it also implies that the people are subjected to this position because of some characteristics on their part. Her we find a parallel to the notion that someone is wronged because (1) the challenged behaviour causes a harm, and (2) an actor intentionally inflicted the harm to pursue some end.

However, as we saw in Chapters 5 and 6, this argumentative pattern does not fit the issue of climate change. Behaviour that creates emissions of greenhouse gases is not in itself causing independent harm. In addition, climate change is a side-effect of individual human behaviour. This latter insight is of particular importance to the principle of direct discrimination: human beings are not subjected to climate change because of any particular characteristics inherent to them.

There is no contempt for any human characteristics through driving or continuing a way of life that results in greenhouse gas emissions. If people are affected disproportionately by climate change, it is not because they are seen as less worthy or not equal to other human beings. Instead, climate change is indiscriminate: Earth's atmosphere changes. As a physical phenomenon, climate change and climate change mitigation are indifferent to the status of affected people. The issue of climate change mitigation is thereby sharply different from that of adapting to the changing climate, where the latter can target or exclude particular individuals based on their statuses in societies.[586]

Many of the UN human rights bodies have directly voiced a concern that groups who might already be in a vulnerable situation in a community are not granted appropriate adaptation measures because of this situation.[587] Similarly, they warn against applying mitigation measures that do not pay due respect to particular groups, like indigenous people.[588] Emitting behaviour does not disregard groups of people in a similar way.[589] Nevertheless, the underlying sense of injustice when some people benefit from the production of greenhouse gas emissions while others suffer from the side effects of this behaviour is still a valid concern. In the following, I will address this concern under the heading "equality".

[586] Discrimination was not an explicit issue in *Torres Straight Islands*, but one could imagine that the slow response from Australia was partly due to the fact that these islands are inhabited mainly by indigenous people.
[587] See for instance CEDAW/C/GC/37, para. 31 and A/HRC/37/59, Comment nr. 7 to Framework Principle 3.
[588] See, for instance, A/HRC/36/46, para 35, 50 and 108.
[589] Typically, because it is possible that someone is emitting greenhouse gases just for the sake of creating havoc for those groups that most probably will be most affected by a changing climate. However, the challenge remains that this behaviour might not create any harm at all, and even if it did, we cannot allocate the behaviour to a particular harm.

Equality

A second principle of justice, *equality*, emphasises that all people should do equally well, and that political institutions should attend to any inequality. Justice as equality encompasses two concerns: (1) that some people are harmed more by climate change than they benefit from greenhouse gas emissions; (2) that some other people benefit more from greenhouse gas emissions than they are harmed by climate change. The principle of equality voices the sentiment that it is unjust that the benefits and burdens of modern society befall people unequally.

The first concern focuses on those most affected by climate change. Already vulnerable people have the least resources to tackle the changes, and having few resources also means that they would have the least access to the behavioural patterns producing high levels of greenhouse gases.[590] These concerns voice an egalitarian argument focusing on how most people are not responsible for how they are doing. Being part of such vulnerable groups is mainly beyond these individuals' control and, thus, is something egalitarian theories want to counter.[591] This argument also applies to people not yet born, because they have not contributed to any emissions. It is more controversial whether a theory of justice should account for where and at what time in history someone is born.[592] Still, at least from the outset, these features are generally beyond people's control and should not lead to people faring differently from each other because of a changing climate.

In the discourse on rights and climate change mitigation, this egalitarian sentiment underlies the emphasis on how climate change will disproportionately affect vulnerable groups.[593] Many recent lawsuits indirectly address the issue of inequality by bringing claims from disadvantaged areas already experiencing the consequences of climate change against countries or companies from the more privileged parts of the world. For instance, claimants from the low-lying islands of Kiribati and the Torres Strait Islands, both existentially threatened by sea-level rises, are challenging their treatment by New Zealand and Australia before the UN Human Rights Committee.[594] Similarly, a farmer in Peru threatened by

[590] This is an empirical statement about the current reality. The tables might be turned and the privileged live with non-emitting technology and it is the less privileged who still emit.
[591] See, for instance, Swift, *Political Philosophy*, 185; Lippert-Rasmussen, 'Justice and Bad Luck', para. 4.
[592] For instance, Rawls doesn't include any of them as relevant in his original position.
[593] As stressed multiple times by the UN human rights bodies: "The disproportionate impact of climate change on persons in vulnerable situations raises concerns of climate justice, fairness, equity and access to remedy." A/HRC/32/23, para. 38
[594] Both *Ioane Teitiota* and *Torres Strait Islands* were treated by the Human Rights Committee as cases about adaptation to the consequences of climate change. In the latter case, the Committee decided that Australia had not done enough to protect the indigenous culture (CCPR Article 27) and their right to privacy and family life

landslides from melting glaciers is suing a German energy company.[595] The underlying premise for these cases is that some communities will be affected much more than others, and it is essential to illuminate this inequality.

As a genuinely egalitarian argument, the principle of inequality holds that a just international institution should not allow the production of greenhouse gas emissions, because such behaviour creates or exacerbates inequality between and within communities. A classic criticism of egalitarian justice is that it is not evident why the fact that some human beings are doing differently than others is what morally matters.[596] This concern is often illustrated by the "levelling-down" objection: why should we prefer a situation where everyone is doing equally badly to a situation where some are doing well? Applied to climate change, erasing inequality could imply that no one should be allowed to rely on fossil fuels. However, before such a transition has occurred, this would mean that all the benefits of modern societies cease to exist. At the other end of the scale, the emissions of so many greenhouse gases that the consequences would be unbearable for human life as we know it at all places on the Earth's surface could also erase inequality. Both scenarios highlight the point that the *difference* is not sufficient to make the climate change situation unjust. Considerations pertaining to the detrimental consequences on some people must also be included.

The fact that it is the acceptance of the detrimental consequences that makes climate change unjust is related to the second concern about equality, focusing on those benefitting from the emissions of greenhouse gases. Is it unjust that those benefitting from high greenhouse gas emissions are not considering the adverse side-effects of these behaviours that befall others? Because they are not themselves "paying the price" for their gains, their willingness to accept the detrimental consequences of their behaviour might be higher than if the lot fell on themselves. Unabated climate change is consequently seen as unjust, because it prioritises those fortunate to have high-emitting lifestyles over those who are disproportionately burdened by the consequences of higher temperatures. The morally salient matter is that people's interests should count equally. In the following, I will address this sentiment under the heading of basic needs.

(CCPR Article 17) with a slow and inadequate plan for adaptation; para 8.14 and 8.12. The claims of inadequate mitigation were not addressed by the majority, and this was criticised in individual opinions.

[595] *Lliuya.* Other examples include how the human rights institute in the Philippines, a country threatened by more and severe cyclones investigated a wide range of European and North American companies (*Carbon Majors*). In addition, claimants from Nepal and Bangladesh were part of the German constitutional case *Neubauer*.

[596] See, for instance, Arneson, 'Egalitarianism', para. 6.

Basic human needs

The injustice of climate change is due to its adverse impacts on the interests of human beings: it challenges their ability to fulfil their *basic needs*. This argument for climate justice resembles the human rights literature's *sufficientarian* view on justice. The sufficientarian theories of justice hold that the human needs under consideration should be secured at least by a threshold level.[597] When applied to climate change, the argument is usually that the increase in global average temperature creates new obstacles to ensuring that human beings have access to food and water, adequate health, security of their belongings, and the possibility to practice their culture, etc. This link is emphasised repeatedly by academics, the various UN human rights bodies, and lawsuits.[598]

As we saw in Part II, a political community can fulfil its duty to provide sufficient levels of basic goods in many ways, and reducing the amount of greenhouse gases emitted plays only a partial role in this endeavour.[599] For instance, measures of adaptation to the consequences of climate change can prevent or remedy most of the impact on these fundamental interests, at least up to some temperature levels. Most recent climate change lawsuits recognise this when assessing the right-to-life provisions. For example, in *Urgenda*, the Dutch Supreme Court wrote that measures of either mitigation or adaptation might be appropriate steps to counter an immediate danger to life and privacy.[600] The Court did not pursue the possibility of adaptation further and examined concrete duties of mitigation resting upon the Dutch State. However, similar statements on the connection between mitigation and adaptation by the German Federal Constitutional Court in *Neubauer* led the Court to leave the German State with extensive discretion regarding how it wants to secure the people's right to life within Germany.[601]

---

[597] See, for instance, Shue's theory of basic levels of subsistence (Shue, *Basic Rights*.), Nussbaum's ten capabilities (Nussbaum, *Frontiers of Justice*.), and Griffin's entitlements to personhood (Griffin, *On Human Rights*.). The idea of justice does not need to ground these levels in an individual's interests. This applies with force to the *legal* ideas of justice. Allen Buchanan notes for example that a legal right to health might impose a duty on the state to provide certain healthcare services. Such services are, however, justified in the interest of the public at large and do not necessarily require the existence of an individual moral right to health, Buchanan, 'Human Rights', 504–5.

[598] See, for instance, the overview by Schapper, 'Climate Justice and Human Rights', 279.; A/HR/31/52.; *Neubauer*, para 23.

[599] Simon Caney calls the view that sees adaptation and mitigation governed by a common principle of justice *holistic*, in contrast to an *atomist* view. According to Caney, the holistic view is most appropriate because both mitigation and adaptation are seeking to prevent harm; Caney, 'Climate Change', 675.

[600] *Urgenda*, para 5.3.2.

[601] *Neubauer*, para. 164-5. For the German court, the interwovenness of mitigation and adaptation in protecting people's lives from the consequences of climate change also meant that the German state did not have a responsibility toward the people living in Nepal and Bangladesh – countries in which the German state did not possess powers to introduce adaptation measures; para 178.

When climate justice means ensuring that human beings can continue to meet their basic needs, it is unsurprising that the focus often turns towards adaptation. The sufficientarian view holds that a just political community counterbalances various instances of bad luck, or even bad choices, to ensure a sufficient level of fundamental interests.[602] For example, much of the European Court of Human Rights' case law draws on this view when it determines that states must protect against foreseeable environmental harms, regardless of their causes.[603] In the context of climate change, a duty to ensure adaptation measures is a natural extension of this argument. First, protection from climate change threats often requires the same measures as protection from similar threats produced by forces of nature. Second, adaptation measures can usually adequately protect the fundamental interests in question. Third, the duty-bearer in question, typically a state, can provide this protection.

If the benchmark for climate justice is ensuring a sufficient level of fulfilment of various fundamental interests, mitigation can be subordinate. However, according to the current climate science complied by the IPCC, humans will probably be unable to adapt to all the threats against all people's fundamental interests if the global average temperature increases significantly.[604] Hence, the concentration of greenhouse gases in the atmosphere cannot be at too high a level or sufficientarian justice will be breached. The guidance from the climate justice literature is usually that global mitigation should be targeted towards levels where everyone can secure their basic subsistence and where the efforts to mitigate will not at the same time deprive anyone of their subsistence.[605] In *Neubauer*, the German Federal Constitutional Court gave voice to this view by claiming that realising climate neutrality is the only way to satisfy the right to life.[606] However, the Court did not specify what temperature limit is required.

The sufficientarian understanding of climate justice has an additional implication. Empirically, the wealth produced by the various activities with greenhouse gas emissions as a side-effect might have ensured the realisation of many basic needs by their produced wealth. Or, more fundamentally, the fulfilment of these basic needs might require emission-producing activities.[607] Hence, mitigation implies the effort to mitigate to a level of emissions

[602] Arneson, 'Egalitarianism'; Caney, 'Climate Justice'.
[603] ECtHR, 'Factsheet on Environment and the European Convention on Human Rights'.
[604] IPCC AR6 WGII, 'Summary for Policymakers', para. C.3.3.
[605] Caney, 'Climate Change', 669.
[606] *Neubauer*, para 155. The Court argued for national climate neutrality, which I take to be in line with the state's assertion of 5% of Germany's emissions in 1990; para 32. However, theoretically speaking it is a global net-zero that matter, and it is a separate question of how this collective effort is to be realised.
[607] Simon Caney illustrates the import of an *integrated* idea of justice by considering how the running of hospitals and schools usually requires the use of fossil fuels; Caney, 'Climate Change', 679.

that ensures the fulfilment of basic needs, rather than an absolute duty to refrain from all emissions. Thomas Pogge's theory of how the international trade regime has created world poverty faces similar criticism. Critics argue that the empirical reality of poverty is much more complex and that global trade has pulled many people out of poverty.[608] Within the climate justice discourse, the shift to human rights instead of a pure economic cost-benefit analysis might have been a way of sidelining this type of argument according to which an optimal balance between mitigation and emission should be pursued.[609] Nevertheless, if the just state of affairs is one where people enjoy a certain level of fulfilment of various basic needs, some emissions are required in order to realise this state of affairs.

Although this empirical argument that emissions are needed to ensure basic needs might have been correct until now, it might not be a good prediction of the future. For instance, it is realistic that renewable alternatives will soon be both cheaper and produce more overall wealth than the emitting alternatives.[610] If so, a high level of mitigation efforts would then better ensure the sufficient level of fulfilment of the most basic needs. Regardless of the empirical situation, the philosophical insight still holds: the assessment pinpointing the level of just climate change mitigation is complicated and requires a holistic approach, taking a wide range of fundamental interests into account.

Level of risk

An essential challenge to the emphasis on adaptation is that sufficient adaptation is not happening.[611] In addition, governments with the jurisdiction to implement adaptation measures to protect the most vulnerable might not have the resources available. Another challenge is that climate change appears for many to be unjust, even if adaptation measures fulfil basic needs. A conception of climate change justice that focuses on the threats from climate change might therefore better address these challenges.

As we saw in Chapter 5, an argument with such a focus can take two forms. First, a changing climate requires adaptation to the consequences of global warming in order to protect fundamental interests. The harm in question is then the need to adapt: sufficientarian justice requires political communities to redistribute resources by undertaking adaptation

[608] Blake and Smith, 'International Distributive Justice', sec. 4.2.
[609] Caney, 'Climate Change, Human Rights, and Moral Thresholds'.
[610] See, for instance, Way et al., 'Empirically Grounded Technology Forecasts and the Energy Transition'.
[611] For instance, *Torres Strait Islands*.

measures to ensure an adequate realisation of fundamental interests. Lack of mitigation creates the burdens of adaptation – and the issue becomes one of avoiding these burdens.[612]

The second form of this argument looks in a more isolated way at the *risk* created by climate change. People have a fundamental interest in retaining powers-of-disposition over their bodies and properties, something they are losing through changing weather conditions, regardless of this risk not materialising due to adaptation.[613] However, humans never have full powers-of-disposition over their bodies and properties, due to the natural conditions on Earth. As we saw in Part II, no particular actor deprives individuals of control over their powers-of-disposition. Climate change's collective "anthropogenic" aspects must be the decisive point if mitigation is needed to prevent injustice. The issue at stake is counteracting the burdens on some people that are posed by modern societies.

When establishing what level of risk is unjust, the distinction between an isolated approach and an integrated approach again becomes relevant. All risks might be relevant, requiring an immediate reduction of greenhouse gases beyond net zero. However, a theory of justice with an isolated zero-tolerance of risk created by the cumulative side-effect of human activities may not accord well with other relevant considerations, such as the ability of people to pursue various goals. Because human activity generally will entail some side effects, the question is one of which types and levels of side effects the international community should accept. When arguing for the acceptable level of risk, one might look at the most probably impacted *interests* and the *likelihood* of these impacts on the interests.

7.3.2 Challenging the temperature limit

Some participants in the rights and climate change mitigation discourse give the impression that the targets for the global average temperature increase in the Paris Agreement have some intrinsic qualities.[614] However, it is generally accepted that these temperatures are targets due to political decisions.[615]

---

[612] That adaptation is governed by backward-looking principles of justice. See, Vanderheiden, *Atmospheric Justice*.
[613] See, subsection 5.3.3.
[614] Laura Burgers argues that 2°C is a limit for preventing dangerous tipping points from occurring; Burgers, 'Should Judges Make Climate Change Law?', 56. However, the more precise formulation is that this temperature limit poses a defined risk of a tipping point. The international community has accepted this risk but might be unwilling to accept a higher risk.
[615] McKinnon, *Climate Change and Political Theory*, 62. She refers to Knutti et al., 'A Scientific Critique of the Two-Degree Climate Change Target'; Randalls, 'History of the 2°C Climate Target'.

Subsequent analyses from the IPCC have shown a significant difference between the consequences experienced in a 1.5°C scenario compared to a 2°C scenario, which provides an argument for preferring the former.[616] Reaching the 1.5°C target requires more stringent and urgent mitigation measures, which might be an argument against realising this more ambitious target. A similar dilemma arises for the difference between a world of 2°C and, for instance, 2.4°C. Or indeed, for a scenario in which we stop all emissions immediately, potentially limiting the temperature increase to 1.2-1.3°C. The selection of one over another requires a political argument.

None of the principles in subsection 7.3.1 provides a clear-cut answer to the question of which scenario to prefer. Thom Brooks has forcefully shown that all theories of climate justice come with various consequences, and none guarantees a perfect future.[617] The various policy decisions can come together in disparate ways to bring about many different states of affairs pertaining to the climate.[618] These policy decisions will also impact the preparedness of different societies to tackle these various climatic scenarios and other societal aims. Given that there is no political theory of justice that can viably decide which measures are correct, the real need is for the international community to facilitate a sincere and thorough political debate on the various global warming scenarios. Climate change mitigation is, therefore, a topic at the heart of political debate on how human life on the planet Earth should be.

At the heart of this political debate is the level of risk deemed acceptable. Whether the discussion leading up to the agreed temperature target is legitimate depends on how we look at the matter from a Rawlsian hypothetical contractual situation and a real-world situation. The first assessment concerns what an *ideal* agreement would look like. Here, political communities might be willing to accept different levels of risk.[619] Similarly to how some individuals are willing to accept a high risk for high gains, while others are risk-averse, some members of the international community will prefer high risk, while others will prefer low risk. Hence, there will probably be a genuine and legitimate disagreement on the just level of mitigation.

---

[616] IPCC, 1.5°C report.
[617] Thom Brooks has criticised the current climate change ethics debate for promising simple solutions that will solve all problems related to the climate; Brooks, *Climate Change Ethics for an Endangered World*, 64. Brooks argues that his view neither denies anthropogenic climate change nor provides an apathetic approach, as it should make us more risk-averse; Brooks, 67.
[618] The climate change is unstoppable; all we can do is to not speed up inevitable change unnecessarily fast; Brooks, *Climate Change Ethics for an Endangered World*, 73.
[619] A common criticism of Rawls is that the parties in the Original Position are risk averse; Swift, *Political Philosophy*, 27.

The second, *non-ideal* situation, represents the conditions in which the members of the international community actually reach an agreement. From an impartial perspective, the concern is that the level of risk a member state prefers is affected by its particular situation. Opting for the highest possible benefits and detriments might appear more attractive when knowing that the potential detriments will most probably affect communities at different places and times. In this non-ideal situation, the states might have based their conception of justice on circumstances pertaining to their national communities, rather than on impartial political considerations of risk acceptance. When assessing the level of risk agreed upon by the international community, it is difficult to disentangle the legitimate political disagreements about risk from the non-ideal realpolitik of the current power dynamics in the international community.

The different climate change lawsuits generally invoke the temperature targets in the Paris Agreement as the acceptable levels of risk.[620] The lawsuits thereby acknowledge that the existence and content of a legal duty on the international community to mitigate climate change rests on this international agreement. Typically, the strategic litigation trend is concerned with the enforcement of this duty.[621] An often-voiced concern by the litigants is that stocktakes conducted by various agencies, such as the UN Environment Program (UNEP), show that the current mitigation efforts are not meeting the limits of the average temperature increase agreed in the Paris Agreement.[622] In their 2022 'Emission Gap Report', the UNEP found that the policies in place would probably result in a warming of 2.8°C by the end of this century, and with the implementation of all current NDC pledges, the warming will be 2.4-2.6°C.[623] In the technical report from September 2023 prepared for the first global stocktake, the IPCC conformed that the expected temperature increases are 2.4–2.6 °C, with the possibility of reducing the increase to 1.7–2.1 °C.[624]

At first glance, the litigants' claim is about a breach of an international legal norm. However, there are three challenges to this legal argument. The first is whether the temperature targets in the Paris Agreement are a legal duty borne by the international community.[625] The second challenge is that even if we accept the existence of this abstract

[620] *Arctic Oil* and *Neubauer* address mitigation under constitutional environmental provisions, whereas *Urgenda* applies articles on right to life and privacy enshrined in the ECHR.
[621] E.g., *KlimaSeniorinnen,* para 5.4.
[622] Gardiner, 'Motivating (or Baby-Stepping Toward) a Global Constitutional Convention for Future Generation', 202; McKinnon, *Climate Change and Political Theory*, 8.
[623] UNEP, 'Emissions Gap Report 2022', XVI.
[624] FCCC/SB/2023/9, para 79.
[625] Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change', 595–97.

duty on the international community, the Paris Agreement accountability mechanism is the quinquennial stocktakings and subsequent raisings of mitigation ambitions. Voicing the gap between current mitigation efforts and the temperature targets is part of the implementation strategy of the agreement; it enables subsequent political discussion regarding measures that can narrow the gap. Hence, the existence of a current gap might not establish that the temperature targets will eventually be breached. The strategic litigation trend may be a forceful governing tool in this subsequent political process.[626]

The third challenge has been repeatedly encountered in the course of this dissertation: the duty to uphold the temperature targets is borne by the international community of all the member states aggregatively. Thus, an assertion of a breach of this duty must be directed at the international community as such, an attempt not pursued by any lawsuits. Instead, the lawsuits target the various members of the international community. Whether these actors have breached or upheld their specific duties to mitigate greenhouse gas emissions as part of their collective effort to fulfil the abstract duty is a separate question. In the following, I will address this question through the lens of just burden distribution.

7.4 Just distribution of burdens

The overlap with arguments investigated in Part II is less prominent in this section on the just distribution of burdens between the members of the international community, than in the previous section 7.3. In Part II, I investigated strategies to assign specific duties to mitigate greenhouse gas emissions, based on how such duties relate to the individuals experiencing the detrimental effects of climate change. The strategy investigated in this section is to see the question of burden distribution as an independent question of justice.[627]

The question to explore is: which contribution in the collective quest to end the increased accumulation of greenhouse gases in the atmosphere is appropriate for *this* agent? In the following two subsections, I first present how the climate justice literature has typically addressed the topic of just burden distribution (subsection 7.4.1), before I investigate how these theories apply to the recent strategic litigation trend (subsection 7.4.2). This latter investigation places the litigation trend within the context of current international law.

[626] Rodríguez-Garavito, 'Litigating the Climate Emergency', 33. The gap has narrowed since the start of the litigation trend.
[627] The challenging question is not that climate change should be mitigated to some degrees, but the specification of the mitigation duties; Bell, 'Climate Change and Human Rights', 167.

Because the international community has deliberately adopted an agreement that leaves it to the members to decide their contributions, the question of just distribution mainly arises in a national context. This prepares the ground for the final two chapters of this dissertation, where I engage with the normative question of just contribution in two ways: Chapter 8 addresses political theories of legitimate authority to settle issues of justice, and Chapter 9 addresses whether some principles of just burden-sharing have become normative standards applicable in a particular national legal system.

7.4.1 Different principles of justice

Three main principles guide the scholarly debate about the just distribution of the burdens of mitigating greenhouse gas emissions amongst states in international collaboration: the polluter pay principle, the beneficiary pay principle, and the ability to pay principle.[628] The following presentation applies Henry Shue's engagement with these principles.[629] The first principle Shue considers is the *polluter pay principle*, which looks at developed countries' historical emissions.[630] This principle is as in Peter Singer's description: "if you break it, you fix it", meaning that the developed countries have caused the problem and now should bear the burden of solving it.[631] This principle is backward-looking, arguing that the burden of future mitigation should be more demanding on those actors that have already produced considerable emissions. If the atmosphere is a sink (or a tube of marbles in my fictional narrative from Chapter 5), these actors have already filled up their due share.[632]

The most pressing counterargument to this view is that those individuals who have emitted in the past are no longer alive. Thus, if the polluter pay principle is even vaguely related to remedying past wrongdoing, those currently alive are not the correct duty-bearers.[633]

Shue circumvents this problem by emphasising the *beneficiary pay principle* as a second principle of just distribution. Those who have benefitted from high emissions in the past and thus inherited a privileged lifestyle should bear a burden now. According to Shue, the central injustice is that the people most affected by the consequences of climate change

[628] See, for instance, Schapper, 'Climate Justice and Human Rights'.
[629] Shue, 'Historical Responsibility, Harm Prohibition, and Preservation Requirement'.
[630] Shue, 8.
[631] Singer, *One World Now*, 38.
[632] Vanderheiden, *Atmospheric Justice*.
[633] Caney, 'Climate Change', 682.

are the ones who benefited the least from past emissions.[634] This distribution principle resembles the *equality principle* from subsection 7.3.1. Wealth and gains must be redistributed to ensure that people are doing equally well. Hence, those who inherited benefits from past emissions should give them up.

A caveat is that it is not certain that the beneficiary pay principle results in egalitarianism. It might not suffice to halt global warming or rectify its consequences for people doing equally well overall. Another objection to this principle of justice is that it is not clear that a historic benefit results in a benefit today. Anyone living in the UK will be struck by how many people live in poverty, even though the country's overall lifestyle is due to the UK's industrialisation and high historical emissions. The *ability to pay principle* is a third distributional principle often invoked to respond to these worries.

According to the ability to pay principle, a fair distribution should impose the main burden on those who have the current strength to bear the mitigation burden. The alteration resembles the turn to *sufficientarian justice* encountered in subsection 7.3.3, according to which a sufficient level of fulfilment of basic human needs is what matters for a minimally just state of affairs. Wealth and gains above the minimum necessities are available for redistribution – like specific duties to mitigate greenhouse gas emissions.[635] Simon Caney applies this perspective on climate justice when stating that justice has been done as long as no one is pushed beyond sufficiency levels by efforts to mitigate climate change (or by climate change itself).[636]

In addition to these three principles, Elisabeth Cripps has included another variant of the *beneficiary pays principle*, targeting those who benefit from the mitigation of global warming.[637] This perception of the principle captures the point that climate change mitigation serves someone's interests, and that those benefitting from this effort should themselves contribute to bringing about this outcome. A critic may see this argument as a form of victim blaming. However, the underlying reasoning is the opposite of victim blaming: this contribution is central to behaving as a rational agent. As addressed in subsection 7.2.2, John Rawls's political theory relies on rational agents coming together to realise a fair society that will benefit them.[638] Another example is how David Gautier argues that humans form

[634] Shue, 'Historical Responsibility, Harm Prohibition, and Preservation Requirement', 20.
[635] This resembles Henry Shue's seminal approach; Shue, *Basic Rights*, 115.
[636] Caney, 'Climate Change', 669. This is the same perspective as taken by Henry Shue, who sets the threshold to basic subsistence and argues that we should prioritise subsistence emissions over luxury emissions; Shue, 'Subsistence Emissions and Luxury Emissions'.
[637] She terms the duty-bearer from this principle "the Young"; Cripps, *Climate Change and the Moral Agent*, 28.
[638] Rawls, *A Theory of Justice*.

partnerships because cooperation is for their own benefit.[639] Hence, this conception of the beneficiary pays principle is related to the justifications of why we seek political justice in the first place.

Above, I associated the beneficiary pay principle with the equality principle. However, the equality principle can also imply an equal distribution of the specific duties to mitigate greenhouse gas emissions among states. Steve Vanderheiden is an advocate for this kind of future-looking distribution.[640] In line with Singer, he argues that international justice requires an equal per capita allocation of the allowances to emit greenhouse gases.[641] Similarly to the beneficiary pay principle, it is unclear whether this distributional approach achieves the desired equal state of affairs.

On the one hand, giving every duty-bearer the same burden might lead to a rather unequal/insufficient state of affairs regarding the fundamental interests that the redistribution should fulfil. Imposing the same burdens can lead to very unequal results. On the other hand, it is also arguable that future technology will be able to provide modern standards of living without emissions. Stressing a right to emit greenhouse gases just for the sake of emissions does not seem to be a weighty argument.[642] The argument must address why people need to emit even if non-emitting technology is available, in order to avoid being purely formalistic.[643]

Even if the climate justice discourse establishes the salience of the polluter pay principle, the beneficiary pay principle, and the able to pay principle, it does not straightforwardly follow which actors fall into which category, nor the contents of their specific duties to mitigate greenhouse gas emissions. One challenge that resembles the issues addressed in Chapter 5 is that many constellations of all possible actors may be minimally sufficient to cause and mitigate climate change. Hence, we cannot necessarily pinpoint which actors are part of the *polluter* and which of the *able* group. The same holds for the group of *beneficiaries*: the consequences will manifest differently in different parts of the world and at different times.[644] All actors can be drawn into the assessment by the idea of *equality*. However, this principle still gives little guidance to the concrete contents of the specific

[639] Gauthier, *Morals by Agreement*.
[640] Vanderheiden, *Atmospheric Justice*, 222–23.
[641] Singer, *One World Now*, 54; Vanderheiden, *Atmospheric Justice*, 225.
[642] Henry Shue recognised this criticism; Shue, *Climate Justice*, 7.
[643] In the caselaw, the equal per capita distribution is invoked as a formalistic principle of burden distribution without any reference to the reasons the actors have for emitting; see, for instance, *Neubauer*, para 225.
[644] Hence, this perspective on how children are affected by climate change has nothing to do with any of their characteristics as children. Rather, it is focused on the fact that they will probably be alive in a future in which these increased temperatures occur.

duties to mitigate greenhouse gas emissions. Thus, even though we see these principles of distributive justice in the context of climate change mitigation as expressing different forms of guidance, the guidance turns out to be decidedly limited.[645]

Thom Brooks has recently criticised typical theories of climate change ethics for not being able to provide definite solutions to how to solve the climate change problem.[646] In addition to arguing that there is no absolute climatic end-state to reach – because the Earth's climate is constantly changing – he appears sceptical about the view that these various distributional principles unequivocally ascribe the burdens of mitigation to various actors. I take Brooks' argument to favour a more complex real-world assessment of the just mitigation effort for each actor, pitching the different principles against each other. In practice, this is a complicated exercise with high levels of disagreement.

This complexity is a key reason for why it has been challenging to negotiate a top-down approach to burden distribution under the UNFCCC. The triumph and pitfall of the Paris Agreement is that its bottom-up approach allows the members to apply a patchwork of various distributional principles of justice. The Paris Agreement shifted the responsibility to enact legal commitments to mitigate greenhouse gas emissions to the national level. The international level is left with procedural requirements to ensure transparency and continue negotiation and collaboration to enhance the member states' commitments to mitigate greenhouse gas emissions.

7.4.2 Challenging the current distribution

The strategic litigation trend is motivated by states failing to close the gap between the temperature targets agreed in the Paris Agreement and the global trajectory of greenhouse gas emissions.[647] The litigants in various courts address this gap by suing member states of the Paris Agreement in order to demand that these members perform their specific duties to mitigate greenhouse gas emissions so that the temperature targets can collectively be attained. The litigation trend pursues this endeavour through four different strategies.

In the first group of cases, the legal question is whether a state has fulfilled the burden it committed itself to through its NDCs. Currently, the Paris Agreement does not contain legal requirements for such fulfilment, since its implementation mechanism depends on

[645] This reflects how topics such as colonialism, developed/developing countries, the super-rich 1% etc. are included as supplementary concerns in the debate about how duties should be distributed.
[646] Brooks, *Climate Change Ethics for an Endangered World*, 28, 47, 60.
[647] Section 7.3.2.

members reporting progress, then being subjected to political criticism and not legal sanctions.[648] As a legal matter, the question for the courts in the litigation trend is whether and how these international commitments have been transformed into enforceable national laws and whether these national obligations have been fulfilled.[649] Some courts concluded that the government had either fulfilled or will probably fulfil these specific mitigation duties,[650] whereas others found them to be breached.[651]

In the second group of cases, the litigants challenge the content of a member state's NDC. These cases engage upfront with the question of just burden distribution: has the member state taken on their "fair share" of the burdens to mitigate greenhouse gas emissions? *Urgenda* and *Neubauer* are prominent cases where the courts addressed this question squarely. Both courts translated the targets of curbing the average temperature increase to well below 2°C and striving towards 1.5°C into a global budget consisting of the quantity of greenhouse gas emissions left for emission before these temperatures are likely to be reached. In *Neubauer*, the German Federal Constitutional Court argued that a just burden required that Germany at least comply with an *equal distribution* of this budget amongst all states based on their population size.[652] In *Urgenda*, the Dutch Supreme Court argued that the Dutch State, as a developed country, should *take the lead*.[653] The Court made the Netherlands follow one of the mitigation pathways for developed countries suggested by the IPCC.[654] *Held* captures the sentiment in both of these two cases when highlighting that the US state of Montana is a major emitter "in absolute terms, in per capita terms, and historically".[655]

---

[648] Dupuy and Viñuales, *International Environmental Law*, 193; Zaman, 'Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law', 107. The forthcoming advisory opinion from the ICJ on states' obligations in the context of climate change might reach a different conclusion.
[649] In *Arctic Oil*, one of the doctrinal questions was whether the Norwegian Climate Change Act was subject to judicial review.
[650] *Family Farmers* and *Neubauer*, para 238.
[651] *Affaire du siècle* and *Commune de Grande-Synthe*.
[652] *Neubauer*, para 225. The court found that the reduction target of 55% by 2030 was valid because it did not exhaust the acceptable quantity of emissions making up the just burden on Germany. Indirectly, the Court challenged the overall German climate change policy, since it found that the budget would likely be exceeded within a year; para 246. Because this finding was based on considerable uncertainty, the state was required to specify the reduction targets within considerable legislative discretion; para 247-9.
[653] They followed a suggested distribution by the IPCC in their 4th assessment report still following the distinction in the Kyoto protocol between developed Annex I countries and developing non-Annex I countries. However, this judgment could be understood as really being about backsliding, since the political backdrop of the case was that the Dutch government had lowered their reduction target for 2020.
[654] The Netherlands was required to do what was considered the just contribution from a developed state in the international distribution of burdens, unless the state could show that this would jeopardise its fulfilment of other duties towards its inhabitants; para 7.5.3.
[655] *Held*, 68. This sentiment influenced the court's decision to declare the state's explicit prohibition on including climate change in its oil concession assessments unconstitutional. However, in line with my findings in the previous chapters, the pronouncement of Montana's status as a major emitter in absolute terms is incorrect.

Again, the current international community has not reached an agreement that provides the content of the specific duties to mitigate greenhouse gas emissions: The Paris Agreement is a "bottom-up" agreement relying on each member setting their own contribution. Setting the content of this duty following principles of just burden distribution is a moral duty that Elizabeth Crips calls a duty to perform some "mimicking actions".[656] In the absence of an agreement settling how the collaboration shall take place, an actor has a moral duty to mimic the content of the duty that *should* have been agreed upon. For the litigation trend, the question is whether there are features in the national legal system that make this mimicking of how the just international community should have distributed the burdens part of national law. If not, invoking the different principles of justice is only an external criticism of a member's climate policy.

The third group of cases questions the justness of the few details of burden distribution established in international climate change law. To be able to set NDCs and report progress on their fulfilment, one must know which emissions are or are not included. The Paris Agreement includes the emissions that occur directly from a state's territory. To avoid counting the same emissions (and reductions) multiple times, the emissions to which a country contributes by commission (Scope 2), or facilitates (Scope 3), are not part of the distribution in question. The litigants in *Arctic Oil* and *Portuguese Children* argue that the responding states must also take responsibility for the Scope 3 emissions that are produced when the petroleum products extracted in these states are burned.[657]

This third group of cases thereby addresses who should be allowed to produce and gain wealth from fossil fuels that can still be combusted within the limits of the abstract mitigation duty. Especially if the abstract duty to mitigate is justified in securing *equality* or *sufficiency*, the distribution of the mitigation burden should also uphold these principles. Even though the Paris Agreement does not address this issue, courts have been willing to include Scope 3 emissions, and thereby also the justice of contributing to those emissions, in other legal requirements. For instance, the Norwegian Supreme Court in *Arctic Oil* found that Scope 3 emissions were relevant under the Norwegian constitutional duty to protect the environment in Norway.[658] However, the Court only directed the government to take Scope 3

[656] Cripps, *Climate Change and the Moral Agent*, 155. Cripps is interested in individuals as the moral agents, but her theory applies to other agents as well, such as states.
[657] These emissions were also included in *Held*.
[658] *Arctic Oil*, para 155.

emissions into account in their decision-making.[659] Thus, it did not engage with or settle the question of the *justness* of further petroleum extraction in Norway.

The fourth group of cases challenges the claim that states have fulfilled alleged duties to negotiate a just international agreement. Political philosophers have criticised the different member states' strategies in the international climate change negotiations.[660] For instance, Henry Shue has upbraided the US. Given the historical emissions, current high per-capita emissions, and economic and international position of the US, it should have been offering to bear appropriate burdens. The failure of the Americans to offer to bear their just burdens implied that they were not striving earnestly to reach an agreement.[661] However, other scholars have taken a much more pragmatic approach, arguing that the US should be given benefits to encourage cooperation.[662]

Moral philosophers can arrive at similar conclusions. For instance, in Elizabeth Cripps' many thought experiments on what a moral agent must do when faced with climate change, the primary duty is to cooperate so that the collectively created harm does not arise.[663] Sinnott-Armstrong argues that since no individual agent is causing harm when they emit greenhouse gases, the relevant obligation is to campaign for a political solution to the problem.[664] Since mitigation must be achieved collectively, the relevant actor should work for such cooperation to occur. Although Cripps and Sinnott-Armstrong's analyses do not target states as the relevant actors, their reasoning for a political duty on states to negotiate a fair agreement still applies to the international context.

The challenge for the litigation trend is that it must not only mount a criticism against the unjustness of the current international agreement, but must also argue that this unjustness is related to a legal duty on each member state to negotiate a just agreement. *Sacchi* argued

---

[659] Note that the court did not specify when in the process this had to be done. This was the reason for the dissent in the judgment. The dissenting judges found that the EU Environmental Impact Assessment legislation covered the emission from combustion of fossil fuel. This is a contested issue that will be addressed in an upcoming UK case. However, the majority position in *Arctic Oil* is in line with the UK Supreme Court in *Heathrow*. The UK Supreme Court did also not find the EU EIA legislation to include an assessment of emissions from a third runway, as other strategy plans would ensure that the issue of greenhouse gas emissions was addressed; *Heathrow*, para 149.

[660] Stephen Gardiner is an example of a scholar arguing that the current international fora are not able to take account of justice across generations; Gardiner, 'Motivating (or Baby-Stepping Toward) a Global Constitutional Convention for Future Generation'.

[661] Shue, *Climate Justice*, 4.

[662] Posner and Sunstein, 'Climate Change Justice'. For a recent discussion on realistic approaches to international climate justice see Budolfson, 'Political Realism, Feasibility Wedges, and Opportunities for Collective Action on Climate Change'.

[663] Cripps, *Climate Change and the Moral Agent*.

[664] "It is better to enjoy your Sunday driving while working to change the law so as to make it illegal for you to enjoy your Sunday driving."; Sinnott-Armstrong, 'It's Not My Fault', 344.

that the responding states had breached their duty of international cooperation under Article 4 of the UN Child Convention.[665] The Child Committee did not address this claim in its decision, because the case was dismissed on standing.[666] But even if the Committee had assessed the case on its merits, there are two reasons for a cautious approach.

First, the duty could not be a duty to achieve a result. Enacting an agreement is a collective enterprise, and it would be empirically challenging to establish that any responding states were responsible for the inadequacy of a collective negotiation. Similarly, showing that different behaviour by any one state would have led to a different agreement would be highly challenging. Yet, establishing the content of the duty to cooperate is equally difficult if the duty is one of effort. There are disagreements about the content of a just agreement and the negotiating strategy to reach an agreement.[667] *Plan B* illustrates this tactical aspect when the UK government won acceptance from the High Court that the national mitigation target for 2050 could be wielded shrewdly in the international negotiations.[668] Thus, strengthening the national ambition could be used to further similar commitments by other states, or the reluctance to voice a higher ambition could push other agents to step up their commitments. Contrast this with how the German Federal Constitutional Court in *Neubauer* argued that it was important that Germany fulfilled specific domestic reductions for its international advocacy to be credible.[669]

Second, and most important, is that a legal duty requiring that states must argue for a particular international solution appears chillingly authoritarian. As we have seen, arguments about justice may justify a wide range of temperature limits and burden distributions.[670] Some of these positions may be voiced from a non-ideal stance of realpolitik, in which each state is

[665] Petition, para 188.
[666] Due to the subsidiarity principle, according to which the states must have the opportunity to address the complaint in their national system before it is brought to the international level.
[667] This is evident in the fact that countries were not able and found it not appropriate to agree to an authoritative distribution. Rather, this was an ongoing issue both in a national and international context allowing the ambitions to be gradually strengthened over time.
[668] *Plan B*, para 48.
[669] *Neubauer*, para 202. As we recall from Chapter 5, the German Federal Constitutional Court held that the duty in the German Basic Law to safeguard the environment for future generations entailed the specific duty on the German government to seek an international agreement that could safeguard the environment; para 200.
[670] In the political justice literature, there is largely a consensus that global warming should be limited to 1.5-2°C global warming and that developed countries should take special responsibility; McKinnon, *Climate Change and Political Theory*, 105–6. However, there are many possible complications. For instance, our current scientific knowledge also shows that developing countries such as China, India and Brazil must contribute significantly to mitigation for the abstract mitigation target to be met. This was one of the most contested issues in the discussions leading up to the Paris Agreement.

concerned with furthering its interests and not just political co-existence between states.[671] However, even from an ideal political position, the range of legitimate positions is broad. The fact that we may not agree with a state's position about the just distribution is not enough to discredit it as a position about justice.

Thus, I take it that this fourth group of cases is best understood as a political criticism of the justness of the current fulfilment of the Paris Agreement in an ongoing political discussion on how the international community should tackle climate change. Arguing that there is, or should be, a legal obligation on states only to support a particular position of justice is an argument on a very different level. Not only are such arguments claiming superior wisdom over other agents, but they are also circumscribing the legitimate method of settling normative disagreement through political processes. In the international arena, the political process consist in reaching international agreements between the states as members of the international community. Chapter 8 substantiates these philosophical ideas in a national context, by looking at the concepts of political obligation and legitimate political authority.

7.4.3 Implications

Bringing climate change mitigation back to the political ideal of justice has implications for our assessment of the litigation trend and our analysis of mitigation duties. I will discuss two aspects in this subsection: (1) how the litigation trend relates to the international legal system of climate change mitigation; and (2) the task of identifying the holders of claim-rights correlative to the specific duties in the international legal framework.

International legal frameworks

In Part II of this dissertation, I argued against the sentiment in the litigation trend that moral theories of individual rights pinpoint what various actors must or must not do to combat climate change. I concluded that an individual's interests do not provide straightforward answers to what an actor, such as a state, ought to do. Instead, the normative issue at stake is that the members of the collective should come together to coordinate and *distribute the*

[671] We encountered a similar criticism in Chapter 4: that the fulfilment of fundamental interests in a country like Norway which has experienced more moderate detriments and has more resources for adapting to avoid these detriments could justify a higher acceptable temperature increase.

burdens in order to realise the just *state of affairs*. Various principles of justice guide the just state of affairs and the question of what a just burden distribution looks like.

The litigation trend primarily challenges the justness of the burden sharing amongst the actors making up the international collective of states. The litigation's strategic aim is to highlight where an actor has not contributed their *fair share* to the collective effort: the Netherlands should mitigate emissions by 25% by 2020,[672] Germany should not use more of its equal share of greenhouse gas emissions before reaching net-zero in 2050,[673] Norway should not offer new petroleum products to the international market,[674] and so forth.

From a political point of view, bringing these cases to court may be a successful strategy to change public sentiment and highlight the need to enact new just obligations. From a legal point of view, these lawsuits are more questionable. Climate change has become an international issue because the members of the international community have made it so in the UNFCCC and subsequent Conferences of the Parties (COPs). In these contractual situations, such as COP 21 in Paris in 2015, they have agreed to give up some of their powers by committing to announce NDCs and report progress and retain the power to decide on the contents of their specific duties to mitigate greenhouse gas emissions further. The litigation trend has highlighted the injustice of many of these subsequent national decisions, and has maintained in effect that states should have given up more power to avoid these outcomes. The tragic consequence of all states enacting unfair duties to mitigate greenhouse gas emissions is that the abstract duty to mitigate climate change may not be fulfilled. Although this is genuinely devastating, it does not change the content of each state's international commitments.[675]

Analytical theories of rights

Justifying duties to mitigate climate change in ideas of a just international community does not change the conclusions reached in Part II about the holders of claim-rights correlative to these duties. Indeed, the international justice perspective elaborates some of these conclusions: the parties to the international agreement are right-holders correlative to the specific duties in the international agreement, not the individual third-party beneficiaries.

---

[672] *Urgenda*.
[673] *Neubauer*.
[674] *Arctic Oil*.
[675] In the context of human rights, political scholars hold that their existence depends on their legal recognition as limits to the sovereignty of states; Raz, 'Human Rights Without Foundations', 336–37; Beitz, *The Idea of Human Rights*, 137. Thus, human rights *law* is at the heart of the human rights enterprise; Buchanan, *The Heart of Human Rights*, 501.

Other parties to the Paris Agreement hold claim-rights correlative to the specific duties in this international agreement as a result of the general interest of a promisee in having a promise kept. For the analytical interest theory of right-holding, this conclusion follows directly. The other parties to the Paris Agreement hold a claim-rights correlative to, for instance, party A's duty to report an NDC because the duty to report an NDC made by A under an international agreement inherently protects the interest of these other members in having promises kept. In addition, the detriment experienced when this promise is breached is an element in a set of facts minimally sufficient to establish that the duty to report an NDC has been contravened. The analytical will theory of right-holding also reaches this conclusion with ease. Each party to the international agreement can seek enforcement of the duties in the Paris Agreement at the ICJ or else waive the duties by withdrawing from the agreement.[676]

The Paris Agreement aims to mitigate climate change to a level that the international community considers on balance to be typically beneficial for human beings. As I showed in Chapter 5, individuals are third-party beneficiaries of this abstract duty to mitigate and hold claim-rights correlative to this abstract duty. However, as we have previously encountered, the specific duties in the Paris Agreement do not have individuals as the holders of correlative claim-rights. These specific duties neither fulfil nor cause a detriment to an individual's interests.

7.5. Conclusion

In this chapter, I have demonstrated two main points. First, I have shown that the real issue at stake in the current rights and climate change discourse is the justness of the current international political institution. The rights and climate change mitigation discourse, with the strategic litigation trend at its frontier, addresses the justness of the international climate change system in two ways: (1) current international agreements may not be able to prevent an unjust climatic state of affairs occurring on planet Earth; and (2) the current agreements have failed to allocate the burdens justly between the states.

Second, I have shown that it is not appropriate to voice these criticisms in a legal form. The coming together of the international community under the auspices of the UN to address climate change as an issue of justice also highlights the political nature of mitigation duties. An international agreement establishes these duties whereby each state cedes some

[676] Paris Agreement, Article 24.

elements of sovereignty to the collective effort to combat climate change. The assertion that the parties *should* have agreed to something else does not create other duties than those agreed to in the Paris Agreement.

In the following Chapter 8, I engage with this question from the perspective of national politics: are there principles of political morality that can aptly be invoked in support of the proposition that a particular country's chosen NDC is an illegitimate act of political authority? In Chapter 9, I go on to ask whether principles of distributive justice are embedded in national legal systems as moral standards applicable to specific duties to mitigate greenhouse gas emissions.

Chapter 8: National Justice

8.1 Introduction

Chapter 7 focussed on climate change mitigation as an issue of international justice, exploring the questions of what is a just distribution of the benefits and burdens of the production of greenhouse gas emissions, and what is a just sharing of the burden to mitigate greenhouse gas emissions among the international community. The chapter concluded that the international community has settled these two issues in the Paris Agreement, by agreeing on (1) a curbing of the maximum global average temperature increase to well below 2°C, while striving for 1.5°C, and (2) leaving it to each party to the agreement to determine their specific contribution to this collective effort.

The strategic litigation trend challenges the justness of a party's contribution.[677] From the international law perspective investigated in Chapter 7, such challenges are futile, because international law deliberately fails to provide the answers. In this chapter, I shift the perspective to focus instead on national legal systems: are the challenges to a state's specification of its just contribution more expedient within a national context? Instead of providing a doctrinal answer to this question, I provide a philosophical explanation for why these challenges are generally inappropriate: duties to mitigate greenhouse gas emissions concern issues of just distribution, and questions about just distribution are at the heart of legitimate political disagreement within a political community.[678]

This chapter reaches the above conclusion by exploring two topics within political philosophy: political obligation (section 8.2.) and legitimate authority (section 8.3.). Theories

[677] The parties to the Paris Agreement are typically nation-states. As we encountered in Chapter 7, other entities beyond internationally recognised nation-states were parties to climate change agreements, such as the EU and the Palestinian territories. In this chapter, I will similarly consider cases relating to the EU's mitigation response without engaging with the question of what type of authority the EU has, strictly speaking. Other potential duty-bearers are cities or regions, but I am not aware of any cases addressing this level. This is probably because human rights frameworks expressly state that they only apply to states. The reference to "national" justice in the title of this chapter signals a distinction from the international level and draws our attention to a circumscribed political community.

[678] Thus, the chapter addresses a question that often arises concerning the litigation trend: Are duties to mitigate greenhouse gas emissions a *legal* or *political* matter? The discourse on rights and climate change mitigation argues that this is a legal matter, because theories of individual rights incorporated into national and international law provide a straightforward answer to the question of *who ought to do what* to mitigate climate change. As I showed in Part II of this dissertation, theories of individual rights do not provide such answers. Even if legal provisions associated with rights, such as human rights and tort law, are based on these moral and analytical theories of rights, they do not prescribe the contents of specific duties to mitigate greenhouse gas emissions. Instead, those contents are matters of justice and political morality, taking into account the various interests at stake: a set of questions at the heart of legitimate political disagreement.

of political obligation are fundamentally concerned with the question of why citizens must obey laws even when they disagree with their content. Theories of legitimate authority ask whether there are any limits on how an authority can use its powers and still retain legitimacy.[679] In this chapter, I argue that the boundaries to legitimate political disagreement are wide. Hence, the current discourse on climate change mitigation is within the bounds of a philosophically legitimate disagreement.

8.2 Political obligation

This section addresses the first topic of this chapter: the political obligation to follow mitigation measures. We can begin here by accepting that a state cannot fulfil its mitigation burden solely by eliminating direct emissions from its direct operations, such as its prisons, ambulances, administrative buildings, etc. For national mitigation of greenhouse gas emissions to be successful, a state must also use its powers to regulate the behaviour of those within its jurisdiction.[680]

The task for the political community is to make certain that it distributes the burden justly among its members. The many measures available will have different consequences beyond emission reduction and, hence, will affect the members differently. One member of the political community might find that they bear a burden heavier than is fair or that others bear burdens lighter than is fair. Such disagreements are at stake in, for instance, *Arctic Oil* and *Sharma.* Both cases dispute the role the challenged fossil fuel projects should have in the national pathway to net zero.[681] Another example from the litigation trend is the appropriateness of using biofuel to reach the EU's mitigation target.[682] Suppose that a national political community has settled upon such an approach. In that case, the question then arises as to whether the members, including the litigants, have a moral obligation to respect this burden-sharing.[683]

---

[679] John Simmons holds that the question of legitimacy, understood as being the duty to obey the laws of a state, is a separate question from that of the justification of the state. His concern is primarily that it does not follow from the justification of a state that one also has an obligation to obey it. Rather, this question requires a separate argument; Simmons, *Justification and Legitimacy*, 129.

[680] See, for instance, *Urgenda*, para 5.2.2.

[681] The other understanding is whether it is just that Norway and Australia should be the actors extracting the remaining fossil fuels within the limits of global mitigation. In both understandings, the courts were reluctant to review the governmental decision.

[682] *Biofuel*, plaintiff.

[683] The question of whether a member of a political community has a moral duty to do more than the legally allocated burden is a different question from the question of moral obligation. Elizabeth Cripps argues for a moral duty to perform actions that would be required under the legal duties that should have been introduced by

In subsection 8.2.1, I argue that in a liberal-democratic system, the typical theories of political obligation support a moral duty to follow the distribution established by a political process. In subsection 8.2.2, I highlight how the limits on the political obligation highlighted by these theories do not apply to mitigation as an issue of straightforward burden sharing. In the last subsection, 8.2.3, I discuss how these insights help us to assess the recent litigation trend.

8.2.1 Obligation to follow mitigation laws

Within political philosophy, the topic of political obligation covers the reasons that members of a political community have for following that community's laws. A disputed question within this topic is whether the obligation exists independently of the contents of the legal requirements.[684] The sceptic denies that there is an obligation to follow laws beyond their moral merits and, hence, implies that political obligations are content-dependent.[685]

In an insightful article, Laura Valentini analyses whether the claim of a content-independent political obligation holds for the main types of theories of political obligation.[686] She argues that apart from procedural theories that lay emphasis on how the obligations come into existence, none of the main theories, like instrumental theories of law or theories focused on fair play or membership, establish a duty to obey, independently of the content. On a closer examination of prominent procedural theories of consent and democracy, we see that even those maintain moral limits on the legitimacy of correctly established authority.[687] Hence, the existence of an obligation to adhere to political decisions on climate change mitigation will, to some degree, be subject to a moral examination of the merits of the content of these decisions.[688]

---

a political community; Cripps, *Climate Change and the Moral Agent*, 155. However, within political philosophy, it is disputed whether a member of a political community is morally allowed to benefit from injustices in the legal system while working politically to change the laws; Swift, *Political Philosophy*, 222. In any case, a legal system would establish a contradiction if it granted each member a legal liberty to undertake the emitting behaviour and also established a legal duty each member to avoid it. Only one of these duties would be in effect at any given time in any given legal system.

[684] This is linked to an additional question of whether laws have any normativity on their own, which is an issue that will not be addressed in this dissertation.

[685] Wolff, *In Defense of Anarchism*, 18.

[686] Valentini, 'The Content-Independence of Political Obligation'.

[687] For instance, John Locke's theory of consent in the *Second Treaties of Government* or Thomas Christiano's theory of democracy in the *Constitution of Equality*.

[688] Contrary to Valentini's own conclusion, I take her argument to imply that the philosophical sceptic view on political obligations holds.

My examination of the status of laws that address the mitigation of greenhouse gas emissions follows the sceptic's approach. I argue that the main philosophical theories on political obligation encompass most legal duties to mitigate greenhouse gas emissions.

Reasons to follow laws

Here, I examine how the main theories of political obligation apply to mitigation laws. I argue that these theories support a moral duty to respect legal measures enacted to mitigate greenhouse gas emissions.

According to the so-called *instrumental theories of authority*, or what Joseph Raz labels a "service conception of authority", laws can give us second-order reasons to comply with the first-order reasons that we already have. Raz illustrated this with an example of a father telling his son to follow his mother's instructions. The son already has an obligation to follow his mother's instructions, and the father is giving him a second-order reason to comply with the first-order reason that the son already has.[689] In situations where it is challenging to interpret the content of the first-order reasons, or their existence depends on extensive coordination and cooperation, Raz argues that individuals are usually best served by following the second-order reasons provided by the relevant laws.[690]

The idea that individuals are best served by following society's coordination of behaviour applies with force in the climate change context. As we have encountered in this dissertation, there are strong first-order reasons to mitigate climate change – unabated climate change will adversely affect a wide range of fundamental interests and deprive people of their powers-of-disposition over such interests. This first-order reason applies to us collectively and not individually. In addition, we have first-order reasons to contribute to mitigation based on fairness in how this collective effort should be brought about. When we ask what each actor's burden in this aggregated effort should be, and hence the content of their individual first-order reason to contribute to mitigation, this is a highly complicated assessment that depends on the political coordination of the collective effort. Following the regulations in our society would therefore typically best enable us to comply with our individual first-order reasons to contribute to the mitigation of climate change, and hence also our collective first-order reasons to mitigate climate change.

[689] Raz, *The Authority of Law*, 17.
[690] Raz, 25. A typical criticism of Raz's theory of authority is that although individuals have good reasons to follow the relevant laws, this does not establish that the reasons impose moral obligations to follow these laws.

I reach similar conclusions from theories that emphasise *fair play* or the special obligations following *membership* in a valuable association. Both types of theories highlight the benefits of being part of a (reasonably just) political community. For the fair play theory articulated by John Rawls, the benefits are the concrete gains from the constitutional arrangements.[691] For the membership theory articulated by Ronald Dworkin, the benefits are more abstract and are linked to the value of the association and having an identity as part of the association.[692] In the climate change context, we can argue that successful collective mitigation of climate change will directly benefit the members of various societies. Following membership theories, the benefit arising from successful collective mitigation efforts provide moral reasons to follow specific mitigation requirements. However, these benefits are not the same for all people. For instance, young people will benefit more than older people, and those living in vulnerable areas will benefit more than people living in less affected areas.[693]

There are at least three ways to address this challenge. In Chapter 5, we saw that people can have an interest in not being exposed to risk. In the context of an issue of not exceeding the level of acceptable global risk, the protection against this risk can benefit a human being.[694] Even though neither the duty in question nor all the duties to mitigate greenhouse gas emissions within the legal system can mitigate climate change, they are part of the broader arrangements that collectively can bring about this benefit.

In addition, there are two further ways to extend the types of benefits relevant to the mitigation context. The first way is to include the benefit of being able to fulfil the abstract duty borne by us "all" to mitigate climate change. As participants in this collective endeavour, we can only fulfil this duty in collaboration with others. Hence, the contents of our specific duties to mitigate greenhouse gas emissions depend on how the collective coordinates this endeavour. According to this way of extending the relevant benefit, the benefit of fulfilling one's fair share in the collaboration provides moral reasons to follow

[691] Rawls, 'Legal Obligation and the Duty of Fair Play', 122.
[692] Dworkin emphasises that the members of the group must have certain attitudes about the responsibility they owe to one another: (1) the obligation is special to the group, (2) it is personal between the members, (3) each has a concern for the well-being of the others, and (4) the concern is an equal concern for all the members; Dworkin, *Law's Empire*, 199–201.
[693] Rawls recognises that the argument of fair play does not bind all members of a society. For instance, it is only the privileged in the society who can fully benefit from the opportunities available; Rawls, *A Theory of Justice*, 302–3. This also applies in the climate change context, where the benefit of combating climate change will be fully felt in the future and will vary for different parts of the world.
[694] As I argued in Chapter 5, individuals can hold claim-rights correlative to the abstract duty to mitigate climate change, even though they do not hold claim-rights correlative to specific duties to mitigate greenhouse gas emissions.

mitigation laws.[695] This duty to do one's fair share borne by any particular individual can be fulfilled without the fulfilment of the collective duty and vice versa.

The other way to extend the concept of a benefit is more general with a focus on the benefits of being part of a benign political community. Rawls takes this approach when introducing a separate *natural duty* to uphold just institutions.[696] Respecting laws enables a just legal system to function. Whether there are any moral merits in the existence of law as such is a contested jurisprudential question.[697] Hence, the benefit rests on the presupposition that the laws are themselves just, for there to be a moral duty to uphold the institution enacting them. Accordingly, obligations enacted in the context of mitigating greenhouse gas emissions are to be obeyed in the same way as all other laws given by a reasonably just government, given that they are within the government's legitimate power.[698]

Legitimate disagreement

The above accounts suggest a moral obligation to follow duties issued to combat global warming. A critic may argue that we strongly disagree about the contents of these specific duties and ask why the political obligation extends to these situations. Within a political community there might be disagreement on, for instance, whether the community should focus on reducing emissions from traffic or from the heating of buildings. If the community chooses the first, the disagreement will then extend to whether it should reduce the use of private vehicles by increasing taxes on petrol, banning cars in certain areas, or requiring a switch to renewable alternatives. If choosing the latter regulatory tool, should the community opt for biofuel, electricity, or hydrogen? In addition, the members might even disagree about the temperature limits to strive for and the community's fair share of the collective burden to mitigate.

These disagreements are not superficial but go to the heart of the inherent and legitimate disagreement within political communities.[699] Mike Hulme argues that climate change is a complicated political issue because it taps into a wide range of matters that humans fundamentally disagree about. He emphasises how we ascribe different values to

[695] Even if the authority issuing specific mitigation duties is in other respects unreasonable and unjust, we might still have reasons to follow the laws that make us comply with our moral imperatives; Simmons, *Justification and Legitimacy*, 156.
[696] Rawls, *A Theory of Justice*, 294.
[697] See, for instance, Kramer, *Objectivity and the Rule of Law*, para. 2.2.
[698] This implies that there is only a political obligation from which the members do not have immunity where such obligation, for instance, contravenes their rights. A fuller discussion follows in subsection 8.2.2.
[699] Rawls, *Political Liberalism*, 56–58.

different activities, assets, and resources, and how we evaluate risk and human development differently.[700] Moreover, he holds that we strongly disagree about climate change mitigation because we seek to govern in different ways.[701]

In the context of debates over political obligation, the question is whether members of the political community have a content-independent reason to follow a mitigation pathway which they oppose. The theories of political obligation can, in most cases, account for a moral obligation to follow the laws with which those bound by them strongly disagree. Only for highly immoral measures is disobedience authorised; disobedience does not extend to disagreement over a just distribution.

Let me start by exploring the *instrumental theory of authority* through Raz's scenario concerning whether there is a political obligation to stop at a red light when there is no traffic. Raz sees benign laws not only as second-order reasons to comply with the first-order reasons we already have, but also as exclusionary reasons for other first-order reasons. Raz illustrates the role of exclusionary reasons with an example of a father telling his son that he should *not* abide by instructions given by his mother. Thus, the father's directive excludes the first-order reasons the son has to follow the instructions from his mother.[702] In the legal traffic light situation, Raz argues that laws require us to disregard the other first-order reasons we might have for not stopping at the red light, such as the street being empty, and surrender to the law, because we would generally be better off following traffic regulations.[703]

This example parallels the climate change context when members of a political community disagree about the appropriateness of particular mitigation measures. For instance, dissenters might argue that a policy of mixing biofuel into petrol is ineffective in reducing global greenhouse gas emissions and has additional negative consequences for the environment.[704] Following Raz, mitigation laws give us a second-order reason to accept the authority's coordination of our behaviour that excludes a wide range of first-order reasons for how this coordination otherwise could occur. First, because we might have got the first-order reasons wrong.[705] Second, because our efforts to act in accordance with the first-order reasons by mitigating our emissions are dependent on collaboration. Thus, even though we

[700] Hulme, *Why We Disagree about Climate Change*, 112, 181, 251.
[701] Hulme, 288.
[702] Raz, *The Authority of Law*, 17.
[703] Raz, 25.
[704] For instance, the EU *Biomass* case.
[705] The government may also have misjudged those reasons. If the misjudgement is so severe that the resultant coordination will be worse than no coordination, then there are not genuinely any second-order reasons operative.

disagree about the coordination, mitigation can be an area where we are generally better off by having our behaviour coordinated.[706]

However, the second-order reasons provided by laws do not exclude all kinds of first-order reasons.[707] If highly immoral mitigation measures are imposed, such as violently reducing the size of the population, there is no moral obligation to comply with them.[708]

Rawls's theory of justice also offers an argument for why the political obligation covers most climate change mitigation measures with which the members strongly disagree. Rawls's *natural duty* to obey the laws of just institutions is part of his general theory of justice, where people come together in a hypothetical original position to decide upon the basic institutions of their society. Rawls argues that it is rational for people in this situation to agree to follow the various laws of society even when they do not accord with their preferred sense of justice.[709] Following even such laws is the only way to realise a stable society governed by just institutions. The limits of this obedience become evident from its foundation: disobedience is allowed when the obligation threatens the basic institutions agreed upon in the original position.

Rawls only includes violations of the first principle of justice – equal rights and freedoms – and the first part of the second principle – equal access to opportunities – as justifying disobedience. Hence, he excludes the second part of his second principle of justice – the difference principle of wealth distribution, according to which wealth can be unequally distributed if it benefits those least well off in society. Rawls excludes the difference principle of distribution of wealth from the right to disobedience, because it is a highly complex task to determine how the principle should be realised, and the role that particular measures play in its realisation. Therefore, the members should follow the authority's interpretation.[710] Another reason for excluding the different principles of wealth distribution seems to be that people vehemently disagree about what a just distribution and redistribution

[706] Valentini argues that we should not look at domains of law, like traffic regulations, but only at the particular situation. Thus, there might be no moral obligation to stop at a red light on an empty street; Valentini, 'The Content-Independence of Political Obligation', 144–46. Similarly, in the climate change context, there might not be a moral obligation to follow measures that do not mitigate climate change. However, contrary to the traffic light situation, this is a much more complicated issue to establish and therefore we might often be better off by deferring to the authority.
[707] Raz, *The Authority of Law*, 22.
[708] I will return to this issue in subsection 8.2.2.
[709] Rawls, *A Theory of Justice*, 306, 311–12.
[710] Rawls, 327.

of wealth should be.[711] Indirectly, Rawls acknowledges that one can legitimately disagree about these issues of justice. He thereby accommodates the fact that his particular theory of wealth distribution is in itself highly contested.[712]

The main message of this dissertation is that specific duties to mitigate greenhouse gas emissions have to be justified by arguments of fair burden distribution. The question of a just distribution of the mitigation burden might be resembles the topic of wealth distribution in Rawls's theory: multiple issues of just resource distributions within a society, between societies, and between generations are here at play.[713] We should acknowledge that people will disagree about the overall principles governing this distribution. In addition, even when there is widespread agreement about some central principles, such as the polluter pay principle, the beneficiary pay principle, or the able pay principle from Chapter 7, the question of how these principles should be turned into actual legal requirements is in itself highly contested.[714] Hence, climate justice generally falls within a type of legal requirements by which the members of a political community are obliged to abide, even when they prefer a different distribution of the burdens.

Both Raz's instrumental theory of authority and Rawls's theory of a natural duty to abide by just institutions affirm that members of decent political communities are under moral obligations to obey most mitigation duties. Because the members of a community legitimately disagree about how the burdens to mitigate should be shared, a legal authority can legitimately settle the disagreement with binding force upon the members. However, in most liberal democracies, an equally important aspect is the democratic process that settled this disagreement. I engage with this issue in the following subsection.

Democracy

Democracy scholars such as Thomas Christiano can account for a moral duty to obey even highly contested mitigation laws.[715] Christiano bases his democratic theory on the premise that we disagree about justice. When we participate in political processes, such as voting for a representative assembly, we indicate our preferences for the aims that society should pursue.

---

[711] Rawls's theory can then be seen as establishing an obligation to abide by laws that secure a high degree of redistribution. By contrast, Robert Nozick's theory of political obligation supports only a duty of compliance for a minimal state; Nozick, *Anarchy, State, and Utopia*.
[712] Swift, *Political Philosophy*, 27.
[713] Rawls includes the just saving principle under the second principle of justice; Rawls, *A Theory of Justice*, 318.
[714] This is especially so because one principle does not provide the solution; principles have to be combined. See Brooks, *Climate Change Ethics for an Endangered World*, 28, 47, 60.
[715] Christiano, *The Constitution of Equality: Democratic Authority and Its Limits*.

When a majority decides against our preferences, we consider them to have a mistaken concept of justice, and hence the strong disagreement remains.[716] However, the idea of *political equality* justifying democracy as the preferred method of solving such disagreement also calls for the members to obey democratic decisions. By abiding by the democratic outcome, we recognise the other members of society as being equally worthy of a say in how society should look.[717] Even though we disagree on the outcome, we agree about respecting the process. By respecting the process, we honour the value of political equality.

Obedience to the outcome of a democratic process is limited when a majority decision threatens to undermine the foundational value of political equality itself.[718] For Christiano, political equality encompasses liberties to contribute to the political processes and claim-rights against gross interference with one's exercise of such liberties. Emission-mitigating measures that jeopardise these entitlements, or measures which have been brought about under unequal conditions, do not command obedience. In addition, Christiano includes the ability to contribute to the political process as part of political equality and emphasises the necessity of a minimum economic level. What is at stake here is that people should have enough support to be able to voice their preferences for various patterns of distribution, instead of a particular pattern being deemed the only acceptable one from the outset.[719] There are various ways to establish the minimal sufficiency levels that enable political participation. Therefore, the range of mitigation measures excluded because of these boundaries is extremely limited.

Summarising the issue of political participation encountered throughout this dissertation, two types of moral obligations are at play: (1) a duty to pursue justice through democratic institutions, and (2) a duty to respect the legitimate outcomes reached by these institutions.

The first type of moral obligation is emphasised by moral philosophers engaging with climate change. For instance, both Elizabeth Cripps and Walter Sinnott-Armstrong argue that individuals should use their democratic voting powers to ensure that their political community takes action to mitigate greenhouse gas emissions.[720] However, many questions follow if the main moral duty in the context of climate change is to deliberate on the content

[716] Christiano, 234.This is different from the political theory of Jürgen Habermas, who maintains that public discourse leads to a consensus on what justice requires; Habermas, *Between Facts and Norms*.
[717] Christiano, *The Constitution of Equality: Democratic Authority and Its Limits*, 250.
[718] Christiano, 245.This is the same requirement as is put forward by other democracy theories, such as Beitz, *The Idea of Human Rights*.
[719] Christiano, *The Constitution of Equality: Democratic Authority and Its Limits*, 273–74.
[720] Cripps, *Climate Change and the Moral Agent*, 140; Sinnott-Armstrong, 'It's Not My Fault', 344.

of climate justice and advocate for the realisation of climate justice. Such duties involve investigating which political programs represent a legitimate view on how the burden to mitigate should be distributed, so that individuals can fulfil their moral duty to use their political power to promote mitigation by voting on such programs. In addition, it involves a question of how much of one's life an individual must devote to this political engagement, if the duty goes beyond voting. These are controversial questions.

It is even more controversial if this moral duty to pursue justice through political institutions is turned into a legal requirement. Political behaviour is a double liberty for the individual to exercise through their discretion. In the example of voting, individuals typically have the liberty to vote and the liberty not to vote. A legal duty to strive for action on global warming will directly contradict a legal liberty not to strive for such action. Some global-warming activists might call for their objectives to be enshrined in the content of political rights. Thus, a concrete liberty to vote could, for instance, not cover parties that deny that climate change is a problem or deny that the political community must reach net zero.

Germany has a constitutional provision banning illiberal parties, depriving people of their political liberty to vote for such parties. Perhaps this deeply illiberal means of countering illiberality could be extended to debates over global warming. However, the answer to the question of who must do what to fulfil the global mitigation duty does not follow with any necessity, let alone an answer to what the global mitigation duty should be. Because such answers require normative deliberations of distributive justice, authoritarian and undemocratic approaches should be eschewed. Instead, we should be alert to the difference between moral and legal duties. There might be a correct moral position on redistribution and simultaneously a legal liberty to discuss, explore, and contest this view.

These insights also bear upon the second type of moral obligation: the political obligation to obey the prevailing arrangements of justice enacted by the political authority. Since most mitigation arrangements fall within the scope of legitimate disagreement among members of the political community, an authority can settle for a wide range of legitimate options. Hence, the members have a political obligation to obey mitigation laws and regulations within the scope of this legitimate disagreement.

8.2.2 Illegitimate laws

When the political obligation to obey laws is content-dependent, immoral laws do not demand this respect.[721] The exclusion of illegitimate laws from the concept of political obligation resembles standard moral theories of claim-rights. In Chapters 2 and 6, I argued that claim-rights are typically bulwarks against otherwise optimal states of affairs. An extreme example of mitigation measures not requiring moral obedience could be the forceful shrinking of the population to reduce emissions. The prohibition of such immoral measures is generally recognised in the climate change context. For instance, the Paris Agreement emphasises that the mitigation response must respect human rights,[722] a position also stressed by various UN human rights bodies.[723] Moral boundaries also apply to the litigation trend. In *Fosen*, the Norwegian Supreme Court found that a wind farm concession breached the entitlement of the Sami population to herd reindeer in that specific area.[724]

When assessing the legitimacy of legal duties to mitigate greenhouse gas emissions, the distinction between private and public often comes up. This distinction is important for liberal theories when they address two questions: (1) the domain suitable for regulation, and (2) the type of reasoning legitimately justifying regulation. Both questions are relevant in the context of duties to mitigate greenhouse gas emissions.

The distinction between a public domain and a private domain is at the heart of liberal theories: individuals should be free from governmental interference with their privacy, personal life, and the exercise of their individual inclinations.[725] However, as Dale Jamieson and Marcello Di Paola point out, this is a difficult distinction to uphold in the context of climate change mitigation, where even mundane everyday behaviour "such as using a computer and flipping a light switch have global ripples".[726] Regulating greenhouse gas emissions in a national context will most probably need to include various issues at the core

[721] The question of whether there is a moral obligation to follow the laws is a different question from that of whether immoral laws are law.
[722] Paris Agreement, preamble.
[723] See for instance, A/HRC/10/61, para 72.
[724] A more open question is whether people's general freedom sets a boundary on how the community can fulfil its mitigation duty. For example, in *Neubauer*, the German Federal Constitutional Court held that the Basic Law requires the mitigation response to be proportional. But the court acknowledged that increased limits on people's freedoms will be seen as proportional as the need to tackle climate change becomes more pressing; *Neubauer*, para 246. We will return to this issue in subsection 8.2.3. Other immunities against governmental powers could pertain to the types of regulation that can legitimately be expected. An example is the ongoing *RWE* litigation about international investment protection. *RWE* is interesting, since this investment dispute arose because of *Urgenda*, where the Dutch state decided to close coal plants to fulfil its mitigation duty.
[725] See, for instance, Nagel, 'Libertarianism without Foundations', 136.
[726] Jamieson and Di Paola, 'Liberalism and the Public/Private Distinction', 379.

of how people currently live their private lives: their food, housing, purchases, transportation, etc.

The question, therefore, becomes whether such extensive regulations can be legitimate. The burden of mitigation measures on people's private freedom was central to the German Federal Constitutional Court's judgment in *Neubauer*. The German Basic Law protects against the government's intrusions on people's freedoms. The Court emphasised that the government must speed up the transition to a net-zero society, in order to avoid the need to adopt unacceptably intrusive measures. However, the German Federal Constitutional Court did not think that this protection of private freedom implied an inability to introduce mitigation measures. The question at stake was to ensure that people were not deprived of *too much* freedom by the government when it fulfils this duty; not that such freedoms can never be given up.

Similarly, Jamieson and Di Paola emphasise that the liberal protection of the private is more circumscribed than a general reference to personal freedom. They suggest that the liberal position on protecting the private is not concerned with protecting certain kinds of consumption, but instead with "those actions and behaviours related to 'experiments in living' and our capacity to autonomously form and pursue conceptions of the good life".[727] From this perspective, mitigation measures can impose quite onerous burdens on the members of a political community, provided they honour the important values of self-expression, diversity, and innovation.[728]

A corresponding distinction to the distinction between private and public reasoning has been addressed in this dissertation as a distinction between the domestic and the international. In Chapter 7, I emphasised the moral requirement on each member of the international community to argue for climate justice, independent of their community's specific interests.[729] A similar requirement is applicable in a national context. For individuals to be bound by legal duties enacted by a political authority, these duties must be justified through public reasoning, based on a shared justificatory framework and not on private moral positions.[730] The debate about climate justice is generally framed according to normative concepts widely accepted in liberal democracies. In Chapter 7, I discussed a broad range of principles, such as antidiscrimination, equality, subsistence, risk, responsibility, ability, etc.

[727] Jamieson and Di Paola, 390.
[728] Jamieson and Di Paola, 390.
[729] Section 7.2.2.
[730] Quong, *Liberalism without Perfection*, 207.

These principles also apply to most debates about measures to mitigate greenhouse gas emissions in a national context. Hence, even where a member disagrees with the imposed measure, they can still find the measure legitimate because its justification is intelligible. However, some discussions on mitigation measures might run the risk of being based on moral positions beyond climate justice. For instance, some members might argue for an absolute prohibition on meat consumption from the standpoint of their moral convictions on animal welfare. For such measures to legitimately bind those members not sharing these moral convictions, the authority must be able to provide public reasons of justice more generally shared.

8.2.3 The litigation trend

The issue of political obligation to follow mitigation laws can help us understand the recent litigation trend. So far, we have seen that legal duties to mitigate greenhouse gas emissions are the outcomes of political deliberation on what climate justice requires, settled by a political authority. Recalling the international climate change system addressed in Chapter 7, political communities are to determine their own contribution to the international effort to combat climate change. Often, national parliaments have included these national mitigation targets in climate change legislation. One set of cases in the strategic mitigation trend concerns whether governments deliver the emission reduction targets set by political communities through representative assemblies.[731] These cases pertain to duties incumbent on the executive branch: even though a government disagrees with a legislature, the authority to settle this disagreement is typically considered to lie with the legislature; the government is obliged to respect this decision. [732]

Many of the cases concern technical aspects of implementing targets enacted in climate change legislation. For instance, has the executive branch fulfilled its duty to make plans as to how the mitigation targets should be met? In *FIE*, the Irish Supreme Court found that the government acted *ultra vires* when it had not decided how it would reach the national mitigation targets.[733]

[731] *Affaire du siècle*, *Commune de Grande-Synthe,* and *Family Farmers*.
[732] Whether the checking of the executive's compliance with the legislator's decision is an issue for the courts or other institutions – for instance, an impeachment procedure or controls by an ombudsman – is a separate question. This appears to be a doctrinal matter outside the scope of this project.
[733] *FIE* para 6.45, and *UK*. The courts are typically not concerned with the contents of particular measures in the plan but instead whether the plan can fulfil the legal requirement.

Another perspective on implementation is found in *Neubauer* when the German Federal Constitutional Court emphasised the procedural requirements in the Basic Law on how broad aims are turned into concrete legal duties in order to mitigate greenhouse gases.[734] I understand *Neubauer's* primary concern is to align with the ideas of political obligation presented above. The fulfilment of the mitigation target will require the imposition of heavy mitigation burdens on actors within the German jurisdiction. The members of the political community will disagree on how these burdens should be distributed. Hence, the government must follow the democratic procedures laid down in the Basic Law to ensure that obligations to follow the presumably comprehensive mitigation requirements are made binding.[735]

Both *FIE* and *Neubauer* show that the idea of political obligation is closely related to the idea of the Rule of Law: governments and individuals must follow legitimate mitigation laws.[736] However, many of the cases in the recent strategic litigation trend do not seek to enforce mitigation measures, but rather challenge the content or non-existence of such measures. For instance, *Arctic Oil* and *Sharma* questioned the role that fossil fuel production should play in the countries' climate change policies. The most controversial parts of *Neubauer* followed *Urgenda* in challenging the countries' mitigation targets. As far as political obligation is concerned, these challenges are futile if the dispute concerns climate justice as such. The legitimate disagreement about distributional justice covers both the measures that the political authority enacts and also those that it refuses to enact. Because this dispute over the lack of mitigation ambition is the crux of the litigation trend, I will investigate these assertions further in the following section.

8.3 Legitimate authority

A critic may challenge my emphasis on political obligation in section 8.2 for not taking seriously the underlying issue in the strategic litigation trend: Does a political community operate outside its legitimate authority if it does not mitigate greenhouse gas emissions to

[734] *Neubauer*, para 260, 262.
[735] In addition, the court emphasised a substantial requirement of distributional justice, namely, that the reduction of freedom required to fulfil the mitigation target must be "proportional". Hence, the court raised a substantial concern that mitigation targets would become more challenging to fulfil as the government delays the adoption of mitigation measures. *Neubauer*, para 248.
[736] As the Norwegian Supreme Court stated in *Arctic Oil*: "If the Storting was able to disregard its duties without the courts being able to intervene in any instance, it would violate the general rule of law principles"; para 123.

certain levels? This section explores two ways of understanding this question.[737] On the one hand, the question can be construed as an element of the topic of political obligation discussed in section 8.2. The criticism voiced against the authority is part of the disagreement over issues of justice central to political debates. As I maintained in section 8.2, such disagreement does not challenge the legitimacy of the presiding authority, and the issue is rather how the political system should accommodate and settle the disagreement.

On the other hand, the question can be construed as asking about a breakdown of the legitimacy of the political authority in a much more fundamental way: the political authority has failed to fulfil an aim that is mandatory for all political communities to address. Climate justice is then seen as being a moral boundary to any political authority at all.

In the following, we will see there is some truth to each claim. In subsection 8.3.1, I argue that unabated climate change hinders political communities from fulfilling their essential functions or being minimally just. The requirements of legitimate authority then furnish an alternative justification for the abstract duty to mitigate climate change. Nevertheless, beyond this perhaps uncontroversial point of departure, it is uncertain as to what exact level of climate change mitigation should be aimed for or how to distribute the burdens between and among political communities. Hence, in subsection 8.3.2, I confirm the conclusion from section 8.2: the disagreement about specific duties to mitigate greenhouse gas emissions is best settled within a political system that allows for disagreement. In subsection 8.3.3, I address the remaining legitimacy challenge arising from a political community making decisions with consequences beyond the political community itself. Finally, in 8.3.4, I revisit the strategic litigation trend to summarise my findings.

8.3.1 The abstract duty to mitigate climate change

Do political philosophy theories of legitimate authority imply a need to mitigate climate change? Political theories of authority typically assert that humans form political communities to ensure protection from dangers and to fulfil their needs more effectively.[738] If

[737] Chapter 9 explores a third way of understanding the criticism, namely as an evolving moral standards for burden distribution that is already part of some legal systems.
[738] This question was already asked by Plato in *The Republic*; Dagger and Lefkowitz, 'Political Obligation', para. 1.3.

this is the purpose of political authority, its legitimacy as well as its existence is measured by how it ensures security and coordinates human interactions more generally.[739]

The above question alludes to how unabated climate change threatens to undermine the purpose of establishing political authority in the first place.[740] Unabated climate change makes political communities struggle to protect their members from the threats posed by more frequent and severe extreme weather events. Moreover, a warmer world will make it more difficult for a political community to coordinate the cooperation required to fulfil various human needs. For a political authority to be able to deliver on its purpose of providing security and the fulfilment of needs, the most extreme scenarios of climate change must be avoided.

Extinction Rebellion is a social moment that explicitly puts forward this latter line of argument. Extinction Rebellion invites its supporters to sign a template social contract between people and the government, in which the government is asked to provide security and, in turn, receives obedience.[741] Since climate change will threaten people's fundamental interests through heatwaves, food and water shortages, diseases, etc., a political authority that does not protect against these new threats is not taking its central purpose seriously − or so these devotees insist.

Extinction Rebellion's call for the declaration of a climate emergency also fits well with a concern about legitimate authority. A state of emergency and the introduction of martial laws are typical tools taken to protect the state's existence as such. Providing stability and just institutions in the long term overrides the sustainment of liberal democracy in the here and now. Similarly, Extinction Rebellion argues that climate change is a catastrophe that could undermine the future peaceful coexistence of nations, and that an emergency should be declared to tackle this threat.

The theories of political obligation from section 8.2. provide a further point of departure for this line of reasoning. A first example is Raz's service conception of authority. Raz argues for a political obligation to obey laws when the members of a community are better off following the state's coordination of their behaviour. This argument may imply that a state which is not coordinating crucial behaviour, such as the mitigation of greenhouse gas

[739] This line of argument could also be focused on the existence of legal systems which must provide basic levels of security in order to function. Hart labels this the minimum content of law; Hart, *The Concept of Law*, 193–200.
[740] O'Brien, Hayward, and Berkes, 'Rethinking Social Contracts'.
[741] Farrell et al., *This Is Not a Drill*. However, beyond this social contract device the movement is totalitarian, promoting rebellion because they do not tolerate political disagreement on mitigation measures.

emissions, is failing to perform its central purpose. Another example follows from Rawls's political method. Although Rawls did not include climatic conditions in his theory of justice, it appears not overly controversial to think that people in a hypothetical original position would agree not to jeopardise Earth's climatic conditions that enable basic human flourishing. In the same way as Rawls argues that we have a duty to preserve just institutions for future generations,[742] a duty not to create Dante's inferno on Earth by allowing unabated emissions of greenhouse gases appears to be an equally fundamental condition for a just human society.[743] Thus, the placing of the ceiling on the maximal temperature increase legitimate for a political authority to pursue rather seems to be, in a time horizon of 100 years, wherever needed to ensure that an inferno does not occur.

However, the overarching challenge is to translate such broad arguments into actual legal duties for a political community. The worst-case scenarios of a Dante's inferno are beyond the current public and academic debate.[744] The idea of climate justice that is currently at stake appears to be about consequences that are highly serious, but not world-ending.[745] Most human societies must already change due to the currently experienced temperature increase. Nevertheless, most of them are not destined to disintegrate by way of the predicted temperature increases.[746] Thus, the total collapse of human societies is not the subject of the current climate change debate.

Hence, far short of Dante's inferno, we ask if a just climatic state of affairs implies 1.2°C or 2.8°C.[747] Science shows that every 0.1°C increase counts, in terms of risks and consequences from climate change.[748] Nevertheless, determining how much risk we should be willing to take is a separate normative question. Here, we also consider the current benefits of emitting greenhouse gases, the ability to adapt to some of the consequences, and what type of transition away from our high-emitting ways of life is both possible and available.

---

[742] "Of course, the parties must throughout keep in mind the objective of the accumulation process, namely, a state of society with the material base sufficient to establish effective just institutions within which the basic liberties can be realised." Rawls, *A Theory of Justice*, 256. "The just saving principle can be regarded as an understanding between generations to carry their fair share of the burden of realizing and preserving a just society." Rawls, 257.

[743] Even a minimal state favoured by Nozick is legitimate if it protects against this hellish threat.

[744] A recent debate in Norwegian media highlights this: Hessen, 'Vil naturen rydde opp etter festen?'; Stensrud, 'Klimaforskernes dom'.

[745] As we will see in the following subsection, I do recognise that this is a controversial statement.

[746] However, if the Greenland ice sheet has reached its melting tipping point, some low-lying island states will probably disappear under the increased sea level.

[747] Existing global policies in 2022 point to a temperature increase of 2.8°C; UNEP, 'Emissions Gap Report 2022', XVI.

[748] IPCC AR6 WGII, 'Summary for Policymakers', fig. SPM.3.

Throughout this dissertation, I have shown that these are complex assessments in which many interests and considerations are at play.[749] How fast can technology be developed, how much will the transition cost for different areas, and which areas have high cultural resistance to change? Science can provide many answers to these questions. Still, it is ultimately a normative assessment to bring them together and decide on what implications it should have for human behaviour.

Translating our abstract moral commitment to justice into concrete limits on the global average temperature increase is challenging and it represents issues on which humans tend to disagree.[750] Research from political science points to the fact that democratic debate about these types of issues is necessary for producing the innovation and solutions necessary for mitigation to take place.[751] In addition, such debates are essential in order to reach the support and cooperation required for the comprehensive transition that is needed. Hence, although the disagreement might appear frustrating, no other working and legitimate alternative exists.

8.3.2 Specific duties to mitigate greenhouse gas emissions

Throughout this dissertation, I have emphasised that the relevant practical question is how the burden of mitigating climate change should be distributed between different actors. Nevertheless, it is often artificial to strictly separate the questions of abstract mitigation and burden distribution. The areas in need of transformation, the technology available, the cost of transformation, the cultural appropriateness of specific measures, etc., all influence the content of the abstract duty to mitigate. Similarly, the contents of the specific duties that together fulfil the abstract duty must take account of the overall temperature target. Both questions depend on complicated normative assessments that the Paris Agreement requires all political communities to engage with individually.

[749] That the transition can have synergy effects with other development goals as explored in fig. SPM.8 is a highly political argument about which level of redistribution a political community should strive towards; IPCC AR6 WGII, 'Summary for Policymakers'.
[750] We can have strong personal opinions on what climate justice actually is. For instance, to me, it appears utterly insensitive that the current political communities are willing to risk a sea level rise that is known to jeopardise the existence of many low-lying island states and could probably imply the relocation of many cities. Thus, I am pleased that the international political debate has settled for a maximum average temperature rise of between 1.5°C and 2°C degree. Nevertheless, I acknowledge that this the question of what redistributive justice means in concrete terms is the subject of legitimate disagreements.
[751] See, for instance, Machin, 'Democracy, Disagreement, Disruption'.

It is a complex normative issue because it requires the political communities to think about the severe consequences of emitting greenhouse gases and the potentially serious consequences of halting them too abruptly. In addition, they must find an appropriate balance between mitigation and adaptation and ask whether the efforts to mitigate emissions constitute the community's "fair share" of the burden.

When mitigation is categorised under the heading of justice, it parallels other political aims of human society: How should we redistribute resources and wealth between people so that we can alleviate bad health or the negative consequences of a market economy? That a political community can decide these issues in many ways and yet still retain its legitimacy was addressed in section 8.2. There, I invoked Rawls's argument on the lack of a right to disobedience concerning his difference principle: "There is usually a wide range of conflicting yet rational opinion as to whether this principle is satisfied. […] A choice among these depends upon theoretical and speculative beliefs as well as upon a wealth of statistical and other information, all of this seasoned with shrewd judgment and plain hunch. […] The resolution of these issues is best left to the political process provided that the requisite equal liberties are secure.".[752]

The issues of the distribution of resources in general and greenhouse gas emissions in particular are inevitably contested matters. In the same way as a political community will disagree about whether it should be a welfare state or a libertarian state, or how its healthcare should be organised, and whether healthcare should be prioritised over issues of military defence, the community will disagree about climate change mitigation. This point does not exclude the community's understanding of their just mitigation burden from moral criticism; on the contrary, such criticism is an essential task of a functioning public debate. However, it should make us alert to the fact that reasonable people disagree about the topic, and that a community's answer to these disagreements does not threaten the basic legitimacy of the political authority.

8.3.3 Two challenges

The above conclusion might appear too simple. The concern here is that this acceptance of the very wide legitimacy of decisions made by singular political authorities overlooks the fact that climate change justice does not pertain solely to a particular community of

[752] Rawls, *A Theory of Justice*, 327.

contemporaries. Instead, the issue is *intergenerational* and *global*.[753] Going back to Christiano's theory of democracy, the primary limit to majority decisions' legitimacy is that they shall not compromise the political equality of all community members. But what happens if not all of those who will be affected by the decisions are part of those making the decisions? Suppose a decision on a contested justice issue is legitimate because people have had an equal voice in the decision. In that case, we might infer that this argument does not hold for climate change mitigation, because neither future generations nor people from other communities have had an equal voice in that decision.

Future generations

The first concern addresses the fact that the consequences of climate change will mainly materialise in the future.[754] Neither children nor future generations have a direct voice in the current making of politics impinging on this future. Hence, present living human beings who will not be equally affected decide the future generations' destiny. As discussed above, there might be some absolute limits of justice on what the current generations can permissibly do towards the future generations – such as not creating a climatic situation that resembles Dante's inferno. However, the current mitigation debate is not principally concerned with these extremes. We are dealing with severe issues, but more nuanced matters of justice are at play.

If we avoid climate catastrophe, it might be in the interests of future generations that we uphold some of the benefits of currently having greenhouse gas emissions. Thus, there is a contested moral issue regarding which state of affairs those living in the future would prefer. Due to the nature of this problem, we cannot ask future generations directly, nor can we expect the currently living children to provide maturely considered answers to these questions. Hence, we cannot solve the problem in any other way than by the current adult human population acting as guardians for the future generations' interests. In doing so, the present adults will legitimately disagree about what they think will be the best way of ensuring these interests.

[753] It is also to a high degree irreversible.
[754] The many problems of ensuring the interests of future generations have been discussed by Karnein, 'Can We Represent Future Generations?'

What appears to be at stake in this objection is that members of a political community are acting short-sightedly.[755] We cannot trust their abilities to make decisions of justice between generations, and we should, therefore, disregard their disagreement. However, this is a bleak and supercilious attitude regarding the fundamentally equal capacities of people to make rational and moral decisions about justice. It is somewhat surprising that so much of the human rights literature is willing to dismiss the idea of political equality outright, while asking courts to decide on these matters of justice.[756]

A more legitimate objection pertain to the complexity of climate justice, which makes it difficult for a political community to approach the issue with appropriate information and knowledge.[757] However, this need for some kind of a technocratic approach should not obscure the fact that the issue is ultimately one of justice where legitimate disagreement between political equals is present.[758] A more pragmatic approach is to look at when people are most likely to prioritise environmental justice issues. Peter Railton has shown that people's attitudes to environmental issues are highly connected to how much they struggle in their ordinary lives.[759] People prefer economic development over environmental protection in communities facing high unemployment and poverty. This point is at the heart of the complex nature of justice: the just state of affairs brings together considerations about the present and the future. According to Railton, these empirical facts show that the climate crisis is one of multiple political crises intertwined with one other. Hence, one can only solve the climate crisis if one also solves other societal deficiencies. Nevertheless, the question of how to solve these various crises will elicit many political disagreements within societies.[760]

Other communities

The second concern is more pressing: namely, that the decisions of one political community have implications for other communities. Climate change is, by its very nature, global. Throughout this dissertation, I have shown that the detrimental consequences of climate

[755] This is the frustration felt by many political scientists looking at historical trends on how challenging it has been to get climate change high on the political agenda. See, for instance, Gardiner, 'A Call for a Global Constitutional Convention Focused on Future Generations'.
[756] For instance, Burgers, 'Should Judges Make Climate Change Law?'
[757] Scholars have proposed various institutions to remedy this. Examples are Caney's call for a parliamentary committee on future generations, or Beckman and Uggla's emphasis on an ombudsperson for future generations; González-Ricoy and Gosseries, *Institutions For Future Generations*, para. 1.2.
[758] For instance, in the UK a special role is given to a climate committee that provides information and suggests and assesses political measures in the climate change context. However, the power to enact mitigation measures remains within the political domain.
[759] In the Quain 2022 lecture hosted by University College London.
[760] Railton himself mentions unionisation as a possible solution; 'Quain Lecture 3'.

change facing a political community cannot be fully addressed or prevented by decisions taken by that political community. Even though no political decisions regarding greenhouse gas emissions directly harm other specific communities, all such decisions are part of the broader issue of climate justice. Hence, the second concern questions whether it is legitimate that a political community settles a contested question on its own without including all the affected voices.

Some political communities, like the US and China, will be much more critical in determining the global mitigation trajectory than communities that produce fewer emissions.[761] Nevertheless, these latter communities might be even more affected than the former by the consequences of climate change. The final mitigation target and the just distribution of the burdens to realise this target might be assessed differently by American and Kiribatian citizens. Why should the latter's views be excluded from the political arenas settling justice issues that will impact them?

If there were a global political authority, we might envisage ways of extending the theories of political obligation to the global level.[762] For instance, by adjusting Christiano's democratic theory to the global arena, all human beings could come together to voice their preferred understandings of justice. Still, once a decision is reached, the members of this global community are obligated to follow that decision. The different political communities' preferred understandings of justice would, at least in theory, be equally valid perspectives.[763] Hence, the respect for the political equality of all human beings would establish a duty to respect the agreed-upon distribution. The other theories of political obligation previously investigated could argue for an equal moral duty of obedience by invoking the need for coordination to solve the climate crisis, fair play, or upholding climate change institutions.

In a real-world setting, the closest we have to this global concept is the international system under the auspices of the UN. However, as discussed in Chapter 7, the international climate change response through the UNFCCC with its Paris Agreement leaves it to the parties to determine their individual mitigation contributions, the NDCs.[764] The annual conference of the parties and the quinquennial stocktaking mechanism are safety valves to

[761] A problem with a reference to China in this context is that it is not a liberal democracy but governed by a totalitarian dictatorship. Hence, when hardly anyone's voice is heard in the Chinese decision process, their Nationally Determined Contribution (NDC) does not in any case achieve legitimacy from this type of justification.
[762] I discussed the lack of such a global group agent in Chapter 3.
[763] However, it is a further contested question as to whether each individual's view on justice or each political community's view is what matters.
[764] Hence, the current system is not dependent upon a global Leviathan but on the moral judgments of each state.

enable discussion of whether the parties' various views on justice add up, and they allow the political communities to adjust their positions. As political fora for voicing different views on climate justice, they can influence the discourses in the political communities.

The chosen solution at the international level can be criticised for not providing the unified coordination that would have benefited the collective action of climate change mitigation. Moreover, it can be criticised for not establishing a top-down solution to follow on from a procedure in which the political communities unite under the auspices of the UNFCCC to settle the matter.

Nevertheless, this procedural objection does not negate the existence of disagreement about the topic. [765] Without any publicly conceived standard of assessment enforced by a global authority, the political communities must follow their own assessments of what justice demands of them within the current climate change regime. This bottom-up arrangement places much responsibility on the public debates within political communities concerning what climate change mitigation is required under various principles of justice. But even a rigorous debate on climate justice is no guarantee of the emergence of a univocal answer: as an issue of distributive justice human beings will inevitably disagree about it.

8.3.4 The litigation trend

The strategic litigation trend challenges whether a political community has (1) engaged with the relevant questions of distributive justice, and (2) reached a just result.

The first focus is evident in the lawsuits on environmental impact assessments. For instance, in *Arctic Oil*, the claimants called for the government to assess the role of new Norwegian petroleum production in the global distribution of petroleum products that can be burnt within the global mitigation target, before granting concessions to companies to search for this petroleum. Suppose a fixed number of greenhouse gases from fossil fuels can be emitted before different global average temperature limits are passed. Then, the distributional justice issue arises concerning which greenhouse gases should be countenanced – the ones originating from the Norwegian petroleum sector or the ones extracted in, for instance, developing countries. *Arctic Oil* targets a failure by the Norwegian government to recognise that granting new petroleum search concessions requires a debate on global burden sharing.

[765] As I discussed in section 7.2.2, there are also legitimate reasons for why a political community would not give up their powers to an international institution enacting a "top-down" solution.

When the Norwegian Supreme Court dismissed the claim, the Court presumably thought it to be for the political community to define and tackle the questions of justice at stake.[766]

By arguing that Norway should not contribute further petroleum products to the global market, the litigants in *Arctic Oil* also suggested an answer to what global justice demands.[767] Hence, the case also addressed the second question of whether Norway had reached a just result. However, the Court was unwilling to engage with this issue.[768] In line with the conclusion to this chapter, the invoked claim was seen as being a disagreement over an issue of distributional justice and the appropriate response was to reject the second-guessing of the decisions reached by a legitimate political process.[769]

Considering the discussion in this chapter, it is interesting to notice that some courts are willing to be directly involved in the climate justice disagreement, like *Urgenda* and *Neubauer*. In *Urgenda*, the Dutch Supreme Court was ready to take a stand on central political topics, such as the level of acceptable risk and whether it is preferable to start mitigation early or pick up the pace later.[770] Note that the 4th IPCC assessment report, upon which *Urgenda* relies, explicitly presents various global mitigation pathways. Picking the preferable pathway is a normative exercise that does not follow directly from the scientific description.[771] A consensus on the science does not imply a consensus on the normative implications of the science. Moreover, choosing the correct mitigation target for the Netherlands requires a normative assessment of how the mitigation burden should be distributed amongst the different countries. Here the Court was also willing to disregard the distribution established in other political fora, such as the EU, for its preferred understanding of justice.

The Court in *Neubauer* was equally willing to investigate whether the German mitigation policy aligned with the contribution deemed just for Germany. To undertake this assessment, the Court had to rely on many normative assumptions presented to it in a advisory report. First, the Court had to choose which limit to the global average temperature

[766] A similar conclusion was reached in *Heathrow*.
[767] As discussed in Chapter 7, these Scope 3 emissions are not directly covered in the Paris Agreement.
[768] "A central point for the Environmental Organisations is that Norway must accept a proportionately larger share of the climate cuts, both because we have produced oil and gas that has resulted in large amounts of emissions, and because we have the economic capacity for this. Norway must therefore, it is claimed, cut greenhouse gas emissions by at least 60 per cent by 2030. The Environmental Organisations also argue that until there is a detailed legal framework and climate account, the authorities cannot initiate production in new areas. […] It is difficult to imagine that the courts would impose such specific requirements on the basis of Article 112 of the Constitution when reviewing individual decisions."; *Arctic Oil*, para 161-162.
[769] See, for instance, *FIE*, High Court, para 90.
[770] *Urgenda*, para 7.4.3.
[771] The argument is that the IPCC reports are endorsed by all the members of the UNFCC.

increase is morally appropriate: this was determined as being 1.75°C.[772] Then, it had to translate this into a maximum level of concentrations of greenhouse gases in the atmosphere, which again had to be translated into an estimate of the quantity of greenhouse gas emissions left available for humans to emit, before their emitting activity crossed these boundaries. Lastly, the Court had to pick the appropriate principle of global distribution, which it found to be an equal per capita distribution.

Both *Urgenda* and *Neubauer* are in tension with the political philosophy positions investigated in this chapter. They disregard the view that climate justice is a topic of legitimate political disagreement. In a liberal democracy, this implies that people's political rights are at the forefront: as equal members of a political community they are to deliberate and decide on the specific duties to mitigate greenhouse gas emissions.

8.4 Conclusion

In this chapter, I have engaged with duties to mitigate greenhouse gas emissions from the perspective of a political community. Three conclusions have emerged. First, since climate change mitigation is an issue of distributional justice, duties to mitigate greenhouse gases fall within the heart of legitimate disagreement amongst political community members. To be sure, there are some outer moral boundaries to these decisions. In this chapter, I argued for two limitations: (1) that mitigation measures must not contravene fundamental rights, and (2) that the maximum global average temperature increase must not result in Dante's inferno. Second, because most specific duties to mitigate greenhouse gas emissions are far from these outer limits, the decisive question is how the legitimate disagreement about them should be resolved. In liberal democracies, equal political rights and general political justifications are important guiding principles for resolving such disagreements. Third, when a political community has settled the disagreement through its institutions, the members of the political community have a duty to respect the outcome.

These three political philosophy conclusions have implications for the strategic litigation trend: it is inappropriate for a court to overturn a political decision regarding specific duties to mitigate greenhouse gas emissions based on a disagreement of justice. In

[772] *Neubauer*, para 235. The debate is still prevalent in the Conference of the Parties (COPs) to the UNFCCC, as to whether the striving towards a temperature increase of only 1.5°C is still politically "alive".

Chapter 9, I ask whether another conclusion is possible: that the principles of climate justice have now become part of the legal system as moral standards.

Chapter 9: Standards of justice

9.1 Introduction

In this last substantial chapter, I circle back to the issue of why the discourse on rights and climate change mitigation invokes rights arguments: claim rights are boundaries on the political will. In this chapter, I argue that the crux of this discourse is a claim that a legal system incorporates some principles of distributive justice as *moral thresholds* and moral *ceilings* for specific duties to mitigate greenhouse gas emissions.

In subsection 9.2, I recount how the discourse on rights and climate change mitigation applies standards of distributive justice to specific duties to mitigate greenhouse gas emissions. Whether such moral standards of climate justice apply to mitigation duties within a legal system is a doctrinal question; a question from which this dissertation has generally prescinded. However, the previous chapters of this dissertation provide some preliminary insights into this approach. In section 9.3, I therefore examine what we can learn about such standards from my examination of philosophical ideas of rights addressed in this dissertation: moral theories of rights (subsection 9.3.1), political theories of legitimate disagreement (subsection 9.3.2), and analytical theories of rights (subsection 9.3.3). In section 9.4, I conclude that the application of moral principles of distributional justice departs significantly from the original claim of the rights and climate change discourse; namely, that climate change mitigation is an issue of individual rights.

9.2 Moral standards

In Chapter 8, I questioned the willingness of some of the courts in the strategic litigation trend to participate in the disagreements about nuances of climate justice and legal scholars' endorsement of this judicial engagement. In this chapter, I reason that this willingness depends on whether the courts and scholars recognise some principles of just distributions as moral standards pertaining to duties to mitigate greenhouse gas emissions recognised in the legal system within which they work. In the following, I first recount how jurisprudential scholars acknowledge that moral standards may be applicable in a legal system. Then I substantiate my reason for thinking that the operativeness of such standards is central to the successful cases in the recent strategic litigation trend.

9.2.1 The jurisprudential idea of moral standards

The notion of moral standards is situated in the jurisprudential debate on how moral assessments are or are not part of law, which I briefly presented in Chapter 1. For Ronald Dworkin, there is a necessary connection between law and morality. He argues that legal reasoning requires an assessment of the integrity of the legal system, which draws on moral principles embedded in the legal system.[773] Legal positivists deny that such moral considerations are *necessarily* operative in every legal system.[774] Nevertheless, some legal positivists recognise that moral principles can enter into law of particular jurisdictions.[775] Within some legal systems, legal officials might have to engage in moral reasoning when ascertaining the law in that system.

For example, Matthew Kramer illustrates how adjudicators in the US may draw on moral standards when establishing the legal validity of a law that determines the level of minimum wages. Kramer asserts that – at his time of writing – a minimum wage of one dollar would be below the morally acceptable threshold, and a minimum wage of fifteen dollars would be above the morally acceptable ceiling as excessive burdensome for employers.[776] Within that range, the US government has political discretion to settle the level of minimum wages they deem appropriate. However, the government fails to establish a valid legal norm if it decides on a minimum wage beyond these boundaries.

The moral range just mentioned does not pick out a level that the legal officials deem morally optimal. Rather, it is an objective assessment of the moral boundaries applicable to various legal matters, within which sundry levels are legitimate even though they might be far from optimal. The distinction is simple in theory, but complicated and contested in practice.[777]

9.2.2 Standards of just distribution in the discourse

In Chapter 4, I highlighted how many legal scholars argue that "systemic integration" makes it relevant to incorporate standards from one legal system or area of law into another, when

[773] Dworkin, *Law's Empire*, chap. 6.
[774] Green and Adams, 'Legal Positivism'.
[775] See, for instance Hart, *The Concept of Law*, chap. 6; Kramer, *Where Law and Morality Meet*, chaps 1–4. Some positivists, like Raz and Marmor, deny that such assessments are internal to the legal system itself.
[776] Kramer, *Where Law and Morality Meet*, 21.
[777] See, for instance, Simmonds, 'Constitutional Rights, Civility and Artifice'. In subsection 9.3.3 we will see that this difficulty can make the position collapse into a state where there is only one principle of justice applicable to the issue, stifling otherwise legitimate disagreement.

interpreting a legal duty. Let us assume that a moral standard applies to a legal duty to φ in the legal area X. A reference to how this moral standard applies in the legal area of Y can help to spell out how a similar standard applies to the duty to φ in the legal area X.[778] I mounted substantial criticisms of this approach in the context of fundamental rights. One aspect of this criticism targets the confusion between the idea of a *bounded range* within which legitimate disagreement occurs and the *correct* moral position. In the context of climate change mitigation, we will see that this is a crucial distinction.

The boundaries usually invoked in the discourse on rights and climate change mitigation are related to the international climate change system. The scholars typically adhere to Catriona McKinnon's sentiment that "all roads appear to lead to Rome", implying a limit of around 1.5-2°C global warming and that developed countries should take special responsibility.[779] Legal scholars typically ground this view on moral standards in the Paris Agreement and argue that the Paris Agreement spells out obligations of justice around both the global average temperature increase and the principles of burden distribution to uphold essential limits on that increase.[780] For instance, Christina Voigt argues that provisions in the Paris Agreement are elements in a due diligence assessment of states' mitigation efforts, suggesting the existence of some range of legitimacy for the respective contents of their mitigation burdens.[781] Voigt affirms that every nation is obliged to take "all appropriate and adequate climate measures according to its best capabilities and its responsibility in order to progressively achieve the long-term temperature goal of the Paris Agreement".[782] This statement articulates the highest possible ambition, the distributional principle of common but different responsibility and respective capability (CBDR-RC), and non-retrogression in Article 4.3 of the Paris Agreement.

The recent litigation trend also draws moral thresholds and ceilings for climate justice from the Paris Agreement when assessing the validity of specific duties to mitigate greenhouse gas emissions. All cases invoke the Paris Agreement when exploring the upper

[778] This might be an appropriate reading of, for instance, Theil, *Towards the Environmental Minimum*.
[779] McKinnon, *Climate Change and Political Theory*, 105–6.
[780] For instance, Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law*. Benoit Mayer's suggestion of a decentralised interpretation of temperature targets only requires an interpretation to be "plausible" by "taking account of science and build[ing] on at least some of the differentiation criteria that numerous States consider as relevant"; Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change', 608.
[781] Voigt, 'The Paris Agreement', 19. A similar argument for due diligence made in relation to the conduct required under the no-harm principle; Voigt, 'State Responsibility for Climate Change Damages', 9.
[782] Voigt, 'The Paris Agreement', 28.

global average temperature increase that is morally acceptable.[783] Although the previous chapters have questioned the moral imperative of these particular levels, especially if justified by an individual's interests, it cannot be denied that the levels spelt out in the Paris Agreement represent the current international view on the matter. These domestic cases show how this view is recognised in other legal systems.[784]

In the context of states' duties to mitigate greenhouse gas emissions within their territory, many cases adopt a strategy of converting the limits on temperature increase to a concentration of greenhouse gases in the atmosphere predicted to result in this temperature increase. From these concentrations, the litigation argues for a "budget" of greenhouse gases that can be emitted before this concentration of greenhouse gases in the atmosphere, and hence, the temperature limit, is reached. In addition to the scientific uncertainties of this strategy, the main normative question concerns which temperature to apply when calculating the remaining emission budget.

Before 2015 and the Paris Agreement, the discourse typically considered the limit on any temperature increase to be 2°C, and this is the limit referred to in *Urgenda*.[785] However, the formulation in the Paris Agreement is "holding" the increase "well below 2°C", which appears to be a more stringent standard.[786] In *Neubauer*, the German Federal Constitutional Court relied on the German Advisory Council's report, using a limit of 1.75°C.[787] It is unclear whether the Court saw this as an absolute limit or more as a point of reference for their assessment.[788] The Paris Agreement also states the aim of "striving" for a limit of 1.5°C. This more demanding limit is still debated within the international climate regime, affecting the soundness of a legal claim that this limit is part of international consensus or custom.[789] However, in other legal systems, the moral attitude might be different – although none of the court cases investigated in this dissertation explicitly finds the 1.5°C increase to be the definite maximal threshold.[790]

---

[783] See, for instance, *Neubauer*, para 162, 163; *Urgenda*, para 4.5, 4.8; *KlimaSeniorinnen*, para 5.1.
[784] These boundaries are also confirmed in cases that are otherwise unsuccessful, such as *Arctic Oil*.
[785] *Urgenda*, para 4.3. The development of the temperature target under the UNFCCC is presented in, for instance, *Klimaatzaak*, 63-64.
[786] The Swiss Supreme Court refers to this standard but does not pin down its precise meaning; *KlimaSeniorinnen* para 5.1, 5.3.
[787] The court stated that this temperature limit was within the legally permissible level but far from the 1.5°C goal; *Neubauer*, para 235.
[788] We can understand the court's position as exploring whether the government's target would be within the morally legitimate range. If a current policy is not plausibly classifiable as such a "morally safe" position, it may be legally unsafe – even though the court declined to define the limits precisely.
[789] The viability of the 1.5°C ceiling was a topic of the recent COPs in Glasgow and Egypt.
[790] *Neubauer* is here ambiguous; para 242.

The most controversial point pertains to the principles of just distribution of this "greenhouse gas emission budget" between the members of the collective.[791] The Paris Agreement contains many references to principles guiding the burden sharing. The strategy in the litigation trend is to argue that these principles voice the moral standards that prescribe the contents of the duties to mitigate greenhouse gas emissions established in a national legal system.[792] An early example is *Plan B*, in which the claimants argued that the UK had to update its mitigation target for the year 2050 from 80% to net zero. The claimants deemed the update necessary because of how the Paris Agreement Article 4 (1) prescribes the aim of "reaching global peaking of greenhouse gas emissions as soon as possible" and to "achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century." The High Court's rejection of the case can be understood as denying that this provision is a relevant moral standard for the UK's national mitigation duty, or as affirming that the UK's enacted duty satisfied the standard. [793]

By contrast, some courts are comfortable with both affirming the existence of moral standards of just distribution in line with the principles in the Paris Agreement and concluding that a duty to mitigate greenhouse gas emissions breaches such thresholds. Central to these assessments is the distributional principle of common but different responsibilities and respective capabilities (CBDR-RC).[794] This principle's concrete meaning has changed from requiring mitigation solely from developed countries, to including all countries but emphasising the developed countries "taking the lead" and providing financial and technical support to ease the developing countries' mitigation burden. For instance, if we return to the principles from the Paris Agreement addressed in *Plan B*, the principle recognises that the peaking of emissions "will take longer for developing country Parties"

[791] This question has been central throughout this project. In Chapter 4, we analysed specific mitigation duties as contributing to the fulfilment of interests and encountered the inherent difficulty of drawing the line between praiseworthy contribution and required contribution to this fulfilment. Chapter 5 confirmed the challenge of establishing mitigation as an individually borne duty, because no anthropogenic emissions are in themselves causing harm. Taken together with the analysis of Chapter 6, we therefore concluded that there is nothing inherently wrong in the emission of greenhouse gases. Rather, the determining of specific duties requires an assessment of the just sharing of burdens. In Chapter 7, we encountered typical theories of climate justice, but we also saw that they do not give unequivocal answers to the particular content of what each duty-bearer must or must not do to combat climate change. Thus, the conclusion from Chapter 8 was that there is legitimate disagreement about what different actors should contribute.

[792] As we saw in Chapter 7, these principles are generally not considered enforceable as international law because the relevant substantive duty in the Paris Agreement is to *report* a contribution whose content is *determined by the party*.

[793] The reluctance to engage with the idea of thresholds of burden distribution when assessing national duties to mitigate greenhouse gas emissions is shared by other courts, for instance, *Arctic Oil*.

[794] Paris Agreement Article 2(2): "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

and that the net-zero situation after that must be achieved "on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty".[795]

Where the litigation trend applies the CBDR-RC principle as the moral standard to assess the validity of duties to mitigate greenhouse gas emissions borne by developed countries, its application reflects this development. All the courts assessing *Urgenda* drew the principle from the IPCC WGIII 4th Assessment Report, which relied on the normative distinction between developed Annex I countries and developing non-Annex I countries.[796] Hence, the scientific scenarios presented focused on emission reduction from developed countries. By contrast, in *Neubauer*, the German Federal Constitutional Court did not take its point of departure in scientific scenarios that mainly distributed the mitigation burden on developed countries.[797] Instead, it used the scenario of a global pathway put forward by the IPCC and found that Germany's minimal share is established based on an equal per capita distribution.[798] The application of equal per capita distribution can also be brought under the CBDR-RC principle. Because Germany is a developed country, its just contribution might be higher than this equal distribution indicates. The Court seems to argue that Germany, as a developed country, cannot fulfil the *minimal* level required as a developed country if they do not even comply with the levels required by equal burden sharing.

Thus, we can construe both *Urgenda* and *Neubauer* as concerning the lowest level of mitigation/highest level of emission morally acceptable for countries' duties to mitigate greenhouse gas emissions in their respective legal systems. However, the courts differed in their willingness to state the precise locations of the thresholds and ceilings. The Court in *Neubauer* recognised that the technical uncertainty in the calculations of these minimal mitigation/maximal emissions could result in a too-large or too-small prediction, which held the Court back from directly annulling the 2030 mitigation target.[799] However, because the Court was certain that Germany would breach the maximal levels of emissions from its territory early in the 2030s, this influenced the Court's final decision to ask the government to ensure that their plan under the Climate Action Law enabled a transition to net zero within this ceiling.[800] The courts in *Urgenda* applied one of the mitigation pathways that the IPCC

[795] Paris Agreement Article 4(1).
[796] Annexes to the UNFCCC. The IPCC 4th assessment reports are from 2007.
[797] The IPCC 5th report from 2014 did not uphold this distinction. In addition, it no longer focused on reduction targets for 2020. The Dutch Supreme Court did not consider that these changes superseded the previous 2020 target; *Urgenda*, para 7.2.5.
[798] This was the method used by the Advisory Council; *Neubauer*, para 225.
[799] *Neubauer*, para 236.
[800] As I discussed in Chapter 4, the plan also must respect peoples' freedom from too onerous measures; *Neubauer*, para 239, 242, 247.

spelled out for developed countries, because they found this pathway to be part of a prevailing international consensus.[801] Less explicitly, they also found the pathway to apply to *every* developed country. The Court declared the Dutch target invalid since it was below this threshold.[802]

The moral assessments of climate justice must be part of the Rule of Recognition within that legal system, in order to be legally relevant. The High Court in *FIE* addressed this doctrinal uncertainty. The Court was open to the possibility that some of the Articles in the European Convention on Human Rights might imply a duty to mitigate and that some moral thresholds for the level of such mitigation might also be legal thresholds.[803] Nevertheless, it held that it was for the ECtHR to establish that the thresholds of climate justice were part of a clear moral consensus of the member states.[804] Therefore, the Court was uncomfortable with challenging the politically enacted Irish emission reduction target or mitigation plan.[805]

Standards of just burden-sharing have also been applied to duties to mitigate greenhouse gas emissions borne by parties other than nation-states. For example, in *Shell,* the Dutch district court applied the same principles of distributional justice as those it deployed in *Urgenda*.[806] In doing so, the District Court placed multinational energy companies on a par with developed nation-states. A similar line of argument seems to underlie the litigants' position in *Arctic Oil* when they challenge the Norwegian government's granting of new petroleum search concessions in the Barents Sea. Let us suppose that the petroleum sector must follow the global minimal reduction path. Suppose also that all actors within the petroleum sector must follow the same reduction path. In that case, no further oil search concessions should be granted, since the global pathway requires emissions to gradually decrease.[807]

---

[801] *Urgenda*, para 7.2.11, 7.3.6. As we discussed in Chapter 5, there are many ways in which the overall reduction target for these actors can be fulfilled. The main argument for equal distribution seems to be that the Dutch government has not provided any adequate arguments for why this should not be the minimal required contribution from a country like the Netherlands; para 7.5.3.
[802] *Urgenda*, para 7.5.1. I think that the reason the Dutch courts' decision was not deemed *too* controversial in the Netherlands was that the country had had a more ambitious mitigation target and that the political debate leading up to the retrogression had not established why the lowering of ambitions was a more just result.
[803] The Supreme Court did not find that the NGO had standing to bring a claim under the European Convention on Human Rights; *FIE*, para 7.24.
[804] *FIE*, High Court, para 139. Contrast with *Urgenda*, in which the Dutch Court itself applied this "common-ground method", para 5.4.3.
[805] In the absence of such thresholds, they would be challenging the domestic climate policy based on their own preferred understanding of climate justice.
[806] Private companies are not direct parties to international climate law. However, they have a presence at the conference of parties and the importance of their contributions is generally recognised.
[807] *Arctic Oil*, para 26.

All these arguments suggest that mitigation pathways explored by the IPCC in their reports are in line with the principles of the legal international climate change system.[808] However, as we have seen in Chapter 5, a global path can be realised in many ways. Hence, the argument only makes sense if an *equal* contribution to this global path is required from the actor in question.

Accordingly, the central question for the courts is to set a standard initially addressed to "all" actors of a global collective, or "all" developed countries, or else applicable to the particular duty-bearer at hand. The litigation trend typically contends that the duties imposed by the relevant standard are borne by every party separately: every developed country, every multinational corporation, or every sector must follow the same minimal reduction path. Alternatively, the standard can be understood as applying to all parties collectively. Then, we are faced with a further question about the just distribution of this aggregative duty.

In the following, I will not provide a doctrinal challenge to application of moral standards of climate justice to legal duties to mitigate greenhouse gas emissions. Instead, I will focus on what we can learn about such an approach from the previous chapters of this dissertation.

9.3 Implications from the philosophical ideas of rights

We can draw insights from my previous investigations of philosophical ideas of rights to assess the idea that legal policies for mitigating greenhouse gas emissions are valid only if they comply with moral thresholds of climate justice. In this section, I demonstrate how the dissertation's main findings about moral theories of rights (subsection 9.3.1), political theories of legitimate disagreement (subsection 9.3.2), and analytical theories of right-holding (subsection 9.3.3), apply to the argument of moral thresholds of climate justice.

9.3.1 Moral theories of rights

From my analysis of moral theories of rights, we can learn two things about thresholds of climate justice: (1) since moral theories of individual rights do not establish duties to

[808] Another way of understanding the court's view is that the threshold applies to the burden sharing within the state. The moral minimum pathway for the country is also the moral pathway that equally applies to various emitting sectors and companies within the country.

mitigate, thresholds of climate justice do not apply in the context of individual rights; and (2) the levels of the thresholds are themselves not found by looking at ideas of individual rights.

The existence of duties to mitigate greenhouse gas emissions

Current climate change litigation represents various attempts to extend widely recognised legal remedies to the new and pressing issue of climate change. In Part II of this dissertation, I showed that the typical moral theories of individual rights do not settle the existence and contents of mitigation duties. At first glance, the threshold approach appears to finesse this problem. Suppose thresholds of justice can fix the contested issue of what a particular duty-bearer should at minimum do in the collective effort of combating climate change. In that case, these thresholds also appear to have established the existence of this duty.

However, there is a crucial difference between questioning whether an existing duty to mitigate greenhouse gas emissions must comply with some moral thresholds of just distribution to be valid within a legal system, and establishing a duty to mitigate as such. As we have observed in subsection 9.2.2 the jurisprudential idea of moral thresholds does not establish the initial existence of a legal duty to which the threshold applies.[809] Hence, resorting to an argument of thresholds does not escape the challenges associated with establishing the initial existence of legal mitigation duties.

Nevertheless, within the discourse on rights and climate change mitigation, I often get the impression that the argument of thresholds of climate justice – such as the "fair share" of the burden for a particular actor – is the preliminary assessment, when establishing legal duties to mitigate greenhouse gas emissions. Let me use tort law as an example. Christina Voigt, for instance, often argues that the existence of duties to mitigate one's fair share of greenhouse gas emissions is primarily associated with the moral threshold of *due diligence* under the no-harm principle.[810] In the litigation trend, a similar assessment draws on the *standards of care* under tort law negligence provisions.[811] However, these arguments conflate

[809] In the following subsections, I will also argue for a stronger position: the moral standards which have entered into the law in some jurisdictions and which typically are invoked in the rights and climate change mitigation discourse do not prescribe threshold levels of mitigation.
[810] She sometimes takes for granted and sometimes doubts that the no-harm principle establishes a legal duty to mitigate greenhouse gas emissions; Voigt, 'State Responsibility for Climate Change Damages', 9, 15. When doubting the success of causation under the no-harm principle, she calls for lawyers to be creative; Voigt, 15. In line with my conclusion in Part II of this dissertation, I think a more honest plea would be to call for the adoption of mitigation duties through the appropriate political channels.
[811] This route was used by the Dutch District Court in *Urgenda* and *Shell*.

the content of a tort law duty and issues about the circumstances that can exclude responsibility, even when the duty is contravened.[812]

To establish the content of the tort law duty, we first ask whether the conduct in question is a cause of *harm* (where a risk of harm may count as a harm).[813] The second step involves due diligence or standards of care: we ask if the harmful conduct was within the actor's control or was unforeseeable.[814] Applying a standard of due diligence to mitigation duties means assessing whether a duty-bearer who has contravened a *prima facie* duty, such as not causing harm or failing to provide certain services, can avoid responsibility because they were sufficiently diligent.[815] It does not mean, as Benoit Mayer suggests, that the duty-bearer can be held liable even without a breach of the initial duty.[816] Thus, the first crucial issue is whether a duty-bearer has caused harm. If not, the second question does not arise.

In the context of greenhouse gas mitigation, the "fair share" threshold applies, since the actor's due diligence or standard of care would relate to the fulfilment of a duty not to harm someone by emitting greenhouse gas emissions. However, as I concluded in Chapter 5, a no-harm tort law duty is not transgressed by any instance of greenhouse gas emissions. First, not all legal systems include risk as a relevant harm, and the harm in question is primarily about risk. Second, and most importantly, the harm created by climate change is caused by the global collective emissions of greenhouse gases and not by any single actor. No instance of greenhouse gas emission is either the cause of an independent harm or else the proximate cause of harm resulting from climate change as a collective phenomenon.

The discourse on rights and climate change often similarly conflates the matter of an initial duty to respect, protect, or fulfil fundamental interests and the matter of the thresholds that fix upon the minimum content of this duty. For instance, I showed in Chapter 4 that the discourse does not engage seriously with whether an individual's interest can be a sufficient ground for the abstract duty to mitigate climate change, but rather moves straight into a discussion of the thresholds of justice framing this assumed duty. Because an individual's

[812] This conflation is evident in, for instance, Voigt, 'State Responsibility for Climate Change Damages', 10.
[813] This question came to be associated with thresholds. Other examples would be how thresholds are applicable to establish the required fulfilment of human rights or the valid levels of minimal wages.
[814] These questions are also associated with thresholds.
[815] Voigt, 'State Responsibility for Climate Change Damages', 9–10.
[816] Mayer uses the example of a doctor who has made a medical mistake but because of luck, such as the treatment given by other doctors, the mistake doesn't lead to detrimental consequences for the patient; Mayer, 'Obligations of Conduct in the International Law on Climate Change', 137. However, as we saw in Chapter 5, a legal system holding the doctor responsible for her mistake would achieve this, because it would consider the risk imposed by her blundering as an independent harm to the patient.

interests do not constitute such a justification, discussion of the need to comply with specific thresholds for this duty is premature.

In other legal contexts than tort law and human rights law, those legal scholars emphasising the threshold approach accept that thresholds apply to duties to mitigate greenhouse gas emissions with an independent legal authority. Voigt, for example, admits that the moral thresholds of just distribution found in the Paris Agreement are not judiciable in themselves.[817] I take her argument to hold that, because there are no justiciable duties to mitigate greenhouse gas emissions in the Paris Agreement, the moral thresholds guiding the minimal content of such duties would also not be justiciable.[818]

The conclusion is that thresholds of climate justice only apply when a duty to mitigate greenhouse gas emissions borne by the actor in question is established.[819] The problem with the strategic litigation trend is that it is typically the existence of this initial duty that is contested.[820]

The thresholds

In the present context, the other implication from my previous investigation of moral theories of rights is that the interest of an individual human being does not serve to establish the parameters of climate justice. Neither a just global average temperature increase, nor a just burden distribution, is fixed upon by ideas of rights in a narrow sense.

We can contrast this conclusion from Part II with the example from section 9.2.1 on moral thresholds and ceiling for the duty to pay a minimum wage under the US legal system.[821] The lowest wage an employee can be legitimately paid is connected to the individual employee's interests, such as their ability to lead an autonomous life or cover basic necessities. Minimum wages are not required for these fundamental interests to be fulfilled, as there are many ways in which a legal system can enable individuals to lead autonomous

[817] Voigt, 'The Paris Agreement', 22.
[818] Another interpretation of the argument is that the moral thresholds themselves are not assessments to be recognised by legal systems.
[819] According to my conclusion in Part II, the notion of moral thresholds is more appropriately applied in *Neubauer* than *Urgenda*. In *Neubauer*, the German Federal Constitutional Court applied thresholds of justice to a duty to mitigate greenhouse gas emissions within a national climate change act, whereas the Dutch Supreme Court in *Urgenda* deduced such a duty from individual human rights.
[820] Kim Bouwer has argued that climate change mitigation is increasingly becoming well a regulated field within a legal system, making litigation less strategic in nature; Bouwer, 'The Unsexy Future of Climate Change Litigation'.
[821] Kramer, *Where Law and Morality Meet*, 21. I am interested here in the threshold because it is most appropriately associated with individuals. The ceiling has the interest of the employer, usually associated with a business, as its main concern.

lives and cover their basic necessities. However, once the political community decides to deploy the means of minimum wages to this end, the employees' fundamental interests become relevant for assessing the lowest morally acceptable level.

In regard to wages, moral thresholds or ceilings are breached when the balance clearly disregards *one* of the interests at stake. In the context of mitigation, the thresholds of global mitigation, like the temperature limits in the Paris Agreement, are not connected with equally clear negligence of one of the interests at stake. In Chapter 4, I showed that no individual's interest can account for the temperature limits currently considered moral thresholds on the abstract legal duty to mitigate climate change. In addition, any individual's interest may have been outweighed in the overall assessment establishing the limits. In Chapter 5, I emphasised how the interest at stake is about the general level of *risk* acceptable for the societal benefits gained. Still, that level is established by a wide range of interests.

In addition, the burdens to be borne by particular actors to ensure that the collective of human actors does not surpass the limit of this risk is part of an intricate assessment of a wide range of principles of distributional justice. In Chapter 5, I indicated that no particular burden distribution is necessary to fulfil an individual's interests in a safe climate.

The conclusion is that any individual's interests in avoiding detriment do not settle the thresholds of justice potentially applicable to the mitigation of greenhouse gas emissions. These thresholds must draw on principles of a just distribution of burdens and benefits within a society.

9.3.2 Political theories of legitimate disagreement

Many participants in the rights and climate change discourse call for *strict scrutiny* by adjudicators when assessing whether mitigation duties comply with thresholds of justice, because they consider climate change mitigation an issue of fundamental rights. Laura Burgers presents a typical argument in the climate change and rights discourse: because she finds climate change an issue of human rights, the thresholds of justice pertaining to mitigation duties are then seen by her as being beyond what a democracy can legitimately disagree about.[822] I argued in Part II that climate change mitigation is not about fundamental rights. Instead, in Part III, I argued that it is an issue of distributive justice. Contrary to

[822] Burgers, 'Should Judges Make Climate Change Law?', 63. Burgers bases her analysis on Habermas' idea of public discourse, which makes it even more surprising that she is so heavy-handedly willing to disregard the outcome of the public debate in the Netherlands about what climate justice requires.

Burger's conclusion, I therefore find the thresholds of justice to be at the heart of what a democracy can legitimately disagree about. My conclusion is in line with the Brussels District Court's refusal to prescribe overall mitigation targets for Belgium in *Klimaatzaak*: the judiciary cannot "deprive [the public authority] of its political freedom nor substitute itself for it".[823]

A successful theory of thresholds of justice for the mitigation of greenhouse gas emissions must take account of the two insights from Part III: (1) distributive justice is at the heart of legitimate disagreement; (2) concretising the principles of distributive justice to specific duties attracts even more disagreement.

In Chapters 7 and 8, I emphasised how the distribution of benefits and detriments is central to the issue of climate justice. Questions about the distribution and redistribution of resources are, in effect, questions about what humans find to be good lives and good societies. Both individuals within a political community and also political communities within the international community disagree about these questions, because they are *essentially contested*.[824] A liberal theory would, therefore, stress how the *process* to settle this disagreement must be legitimate, instead of prescribing which positions of justice are acceptable or unacceptable.[825]

The disagreement does not only pertain to which principles of justice apply to climate change mitigation, but also how these principles prescribe the circumscribed duties. Even if an adjudicator establishes that the distributive principle of burden sharing in the Paris Agreement reflects the normative boundaries of distributive justice in a society, this does not settle the disagreement about what this principle means for any particular duty to mitigate greenhouse gas emissions. The Paris Agreement's principle of common but different responsibility and respective capabilities (CBDR-RC) reflects the main distributive principles in the climate justice literature: because the responsibility is common, both the *polluter* and *beneficiary* should contribute, and the reference to the respective capabilities implies that those who are *able* to contribute most must contribute most.[826]

According to the rights and climate change mitigation discourse, the CBDR-RC principle means that developed countries should at *least* contribute in accordance with the burden being equally distributed among states based on the number of their inhabitants.

---

[823] *Klimaatzaak*, 80. Contrast with *Urgenda*, para 8.3.4.
[824] Gallie, 'Essentially Contested Concepts'.
[825] In Chapter 8, I granted that the leeway for legitimate political disputation comes to an end if Dante's Inferno is in prospect, but neither the current discourse nor political reality concerns this outer limit.
[826] Section 7.4.1.

However, since *equality per capita* is not the only way to spell out the CBDR-RC, the imputation of moral and legal unsoundness to all doctrines of distributive justice that do not comply with this minimal requirement is a cavalierly totalitarian position.

Such a totalitarian position is not grounded in the morality of a society itself since it cannot draw on, for instance, the benchmarks of rights.[827] Burgers argues that when the Court in *Urgenda* raised the national mitigation target beyond what the government had decided, they were following an emerging *consensus* on what justice requires from various agents.[828] At this point in history, this putative moral consensus on absolute thresholds of distributive justice is visible only to those who endorse the principles of justice applied by the court.

In addition, the position is totalitarian in the light of the liberal ideas of legitimate disagreements and political rights within a political community discussed in Part III. At this point, it is appropriate to recall how Rawls excluded the concretisation of his maximin principle of resource distribution from scope for legitimate disobedience towards a political authority, precisely because people will disagree about its implementation.[829] He reinforced this view in his political liberalism by emphasising how reasonable and rational people will disagree about a wide range of justice issues.[830]

The invocation of moral and legal thresholds of the just burden distribution for the mitigation of greenhouse gas emissions therefore serves more as participation in a legitimate political discussion than as a legal argument pointing to genuine legal limits within which legitimate disagreement takes place. *Arctic Oil* illustrates this reluctance to muddle with the political will in the context of distributive justice. Here, the Norwegian Supreme Court was only willing to set aside the public understanding of environmental justice if the political community was "grossly disregarding" the environmental aims to which it has committed itself in the Constitution.[831] However, the Court did not find this to be the case, since Norway had an active political debate and laws on climate change mitigation.[832]

The conclusion is that the moral and legal thresholds for the mitigation of greenhouse gas emissions remain matters of legitimate disagreement in all but the direst circumstances.

[827] In this dissertation, I have argued for this statement in two ways: (1) an individual's interest is not such a benchmark; (2) climate science does not provide clear benchmarks for our moral assessment.
[828] Burgers, 'Should Judges Make Climate Change Law?', 73.
[829] Rawls, *A Theory of Justice*, 327.
[830] Rawls, *Political Liberalism*, 56–58.
[831] *Arctic Oil*, para 157. The court was not willing to make an assessment of the Norwegian mitigation target; para 162.
[832] *Arctic Oil*, para 163.

9.3.3 Analytical theories of right-holding

The dissertation's Part I on analytical theories of rights has two implications for a threshold approach: the individuals experiencing the detriments of global warming can hold claim-rights correlative to an obligation to uphold minimal temperature limits, but not to an obligation to respect a minimal just burden sharing.

Temperature limit

Throughout this dissertation, I have been interested in whether the individuals experiencing detriments from global warming are the holders of claim-rights correlative to various mitigation duties. Suppose there is an obligation to respect a ceiling for the average temperature increase, if any laws providing for the mitigation of climate change are to be valid within a legal system. Then, the question is whether those individuals experiencing detriments from global warming hold claim-rights correlative to this obligation.

When we ask whether the individuals experiencing the detrimental effects of climate change hold claim-rights correlative to the obligation to respect the aforementioned ceiling, we are asking whether those individuals hold claim-rights correlative to the abstract duty to mitigate climate change. In Chapter 4 of this dissertation, I answered affirmatively only insofar as a very large temperature increase is in prospect. My doubts were due to the interest theory's contention that the holding of a claim-right always involves *inherent* deontic protection for some aspect of the holder's situation that is typically advantageous on balance for anyone like the holder. Focusing my analysis on the direct impacts on individuals' physical integrity and, hence, their interests in life, health, and subsistence, I found that the interest theory's criteria was not satisfied. Multiple interests are at stake when deciding the just level of mitigation. Some individuals might directly benefit from the mitigation of climate change at specified temperatures, and others might bear the burdens. Therefore, the on-balance advantageousness or disadvantageousness of a given level of mitigation will vary across individuals – unless we address extreme temperature increases that would bring about Dante's inferno on Earth. More importantly, my doubts were associated with how the measures of mitigation do not inherently protect these interests. Some of the detriments have been accepted as occurring within this average temperature increase and hence, the interest in avoiding them overridden. In addition, we may challenge whether the ceiling alone should avert various detriments or whether instead such an approach should be combined with other approaches such as measures of adaptation.

As I explored in Chapter 5, we can overcome these initial worries if the temperature increase is directly associated with the interest in not being exposed to *risk*. I established how the exposure to risk could be a detriment in itself, by arguing that people can have an interest in not being deprived of powers-of-disposition over their physical integrity. Retaining control over one's physical integrity is, on balance, typically beneficial even if the lack of control does not result in direct harm to one's body or property. An abstract duty to mitigate climate change inherently protects this retaining of control. Hence, we can apply the analytical interest theory of right-holding to an obligation to comply with maximal targets of average temperature increase: not being deprived of powers-of-disposition beyond the permissible levels intrinsically protects an aspect of an individual that, on balance, is typically beneficial for individuals.

Fair share

In the litigation trend, the crucial thresholds of justice pertain to specific duties to mitigate greenhouse gas emissions. The litigants maintain that a duty to mitigate greenhouse gas emissions is legally invalid unless it upholds a *minimally fair distribution of the burdens of mitigation*. For the analytical interest theory of right-holding, the question is whether the individuals experiencing the detrimental effects of climate change hold claim-rights correlative to this obligation to comply with a minimally fair share. The assessments throughout this dissertation have denied this. Because no duty to distribute fairly the burdens of mitigating greenhouse gas emissions can *inherently* protect an individual's interests, it follows that no individual holds a claim-right correlative to such a duty.

This conclusion is also supported when applying *Bentham's test*, under which we have to ask whether the occurrence of some detriment to any particular individual is included in at least one set of facts minimally sufficient to establish a breach of some duty. The test can be illustrated by the example of moral thresholds discussed in subsection 9.2.1. In that example, the individual employees hold claim-rights correlative to an employer's duty to pay wages at or above the minimum level.[833] The detriment the employees suffer when the threshold is not complied with is included in a set of facts minimally sufficient to establish a breach of the employer's obligation. Contrast this with the obligation to uphold a fair

[833] This follows straightforwardly from the analytical interest theory of rights-holding: this obligation inherently protects an aspect that is typically on balance beneficial for the employees: with this minimal salary, they can cover their basic needs.

distribution, where a breach does not directly affect any individual disadvantageously (either in their physical integrity, or in their powers-of-disposition over their physical integrity).

Of course, an obligation to uphold thresholds of just burden sharing is correlated with claim-rights.[834] As discussed in Chapters 3 and 7, the entities that inherently benefit from a nation's contribution to the collective effort to mitigate climate change are the other members of the ad hoc collective of nations responsible for halting global warming. For instance, other parties to the international community's commitments to climate change mitigation in the UNFCCC and the Paris Agreement hold claim-rights correlative to a nation's doing its minimal share to fulfil this collective effort. In addition, each duty-bearer would itself hold a claim-right correlative to a legal duty incumbent on every other nation to take on a minimally fair share. That latter duty inherently protects the interest of each nation in compliance by its promisors with their normative commitments.

9.4 Conclusion

This chapter has shown that a perspective of how legal duties to mitigate emissions must comply with moral thresholds of climate justice in order to be valid can draw insights from my analyses of ideas of individual rights found in the previous chapters of this dissertation. These analyses are significant, considering that the threshold approach is currently so salient in the rights and climate change mitigation discourse.

This chapter has proposed four conclusions. The first is that the challenge of establishing duties to mitigate greenhouse gas emissions is not overcome by invoking thresholds of justice. Because moral thresholds only apply when a legal official assesses the duty's validity, they cannot be invoked where no such legal duty exists.

The second conclusion is that the thresholds are about principles of just distribution of burdens and benefits within and between political communities, instead of relating to moral ideas of individuals' rights. This conclusion is closely related to the third conclusion: the question of moral thresholds of justice is at the heart of legitimate disagreement among the members of political communities. Therefore, asserting outer boundaries on this legitimate disagreement very easily runs the risk of becoming an authoritarian position, suggesting that only one's preferred understanding of justice is legitimate.

[834] As we saw in Chapter 2, every duty *must* have a correlative claim-right as they are two sides of the same coin.

The last conclusion is about right-holding. Individuals experiencing the detriments of global warming can hold claim-rights correlative to duties to stay within certain temperature thresholds, but not to duties incumbent on a nation to bear its fair share of the burdens of mitigating greenhouse gas emissions.

Chapter 10: Conclusion

How do philosophical ideas of individual rights relate to climate change mitigation duties? The main conclusion of this dissertation is that ideas of individual rights do not account for climate change mitigation duties. Instead, both the abstract duty to mitigate climate change, and also the specific duties to mitigate greenhouse gas emissions, are based on, and their contents defined by, theories of distributive justice within and between political communities.

This conclusion is based on the review of three common philosophical understandings of rights: analytical theories of rights (Part I), moral theories of rights (Part II), and political theories of justice (Part III). The answers to how these three ideas of rights relate to mitigation duties can be viewed from two different angles. The first angle takes, as its point of departure, the recent litigation trend on rights and climate change mitigation, asking whether the invocation of rights there corresponds to how rights are typically understood by these three philosophical understandings. By showing how the lawsuits illustrate the various philosophical ideas of rights, scholars, lawyers, or activists who seek recourse to rights as a basis for duties to mitigate greenhouse gas emissions are provided a tool for assessing the philosophical appropriateness of such strategies. The second angle takes as its point of departure the philosophical understandings of rights and explores whether those understandings might apply to mitigation duties. This second angle especially matters to readers interested in philosophical analyses of rights, who are curious to discern how such ideas apply to the global climate crisis.

The philosophical conclusions of particular relevance to scholars, lawyers, or activists seeking to invoke arguments of rights in order to ground mitigation duties, can be summarised in three points. First, analytical theories of rights do not support the notion that individuals experiencing the detrimental effects of global warming are endowed with claim-rights that are the correlates of specific duties to mitigate greenhouse gas emissions. Since no specific duty to mitigate greenhouse gas emissions *inherently* protects an individual from the detriments of global warming, no individual holds a claim-right correlative to a specific duty to mitigate greenhouse gas emissions. A lawsuit challenging the justness of mitigation duties is thus in essence an *actio popularis*, rather than being based on individuals' claim-rights.

Second, a moral focus on protecting the physical integrity of individuals does not ground duties to mitigate greenhouse gas emissions. Climate change mitigation is an issue of protecting against the general *risk* from global warming, rather than addressing the protection

of people's direct physical integrity. Even if we consider human rights and tort law provisions to protect against general risk, the justifications traditionally underlying these areas of law do not extend to climate change mitigation. No individual's interest in avoiding this risk provides a sufficient ground for the abstract duty to mitigate climate change borne by a global collective of a vast number of actors. An abstract duty to mitigate climate change can only be established by reference to the aggregated interests of current and future human beings. In addition, no single actor can fulfil this interest, since it requires the aggregated effort of a vast range of actors. Hence, no specific duty to mitigate greenhouse gas emissions can be justified by how it inherently protects an individual's interest in avoiding the risk of global warming. Similarly, duties to mitigate greenhouse gas emissions cannot be justified by how such emissions cause risks to an individual or by how a specific duty to refrain from producing emissions protects against such risks. Consequently, no individual's fundamental interests justify mitigation duties. Instead, both the abstract duty to mitigate climate change and the specific duties to mitigate greenhouse gas emissions concern the distribution of benefits and burdens of modernity within and between political communities.

Third, arguments that a particular representation of climate justice is the only position that a political community may legitimately take are misguided at best and authoritarian at worst. The question of how benefits and burdens within a society should be distributed is a matter about which individuals legitimately disagree. Principles of distributive justice essentially address both the question of what an ideal human society looks like, relating to how burdens and benefits ought to be distributed, and also how such an ideal society should be brought about. Since members of a political community legitimately disagree on both types of questions, we should be cautious in claiming that there can only be one "right" approach to these issues.

Those who are interested in the philosophical analysis of rights, and who are curious as to how such ideas may apply to the global climate crisis, can take away three similar yet distinct conclusions. First, since climate change's causes and effects are global in nature, the detriment of global warming is created and experienced by all. This point raises the analytical question of how to understand the universal quantifier "all", applicable to both the duty-bearer and right-holder, of the abstract duty to mitigate climate change. As demonstrated through the dissertation, the abstract duty to mitigate climate change is borne *aggregatively* by *all* the members of the global collective of actors and not *distributively* by *every* individual member of this collective. Specific duties to mitigate greenhouse gas emissions borne by

particular duty-bearers do not follow conceptually from the abstract duty to mitigate. Such specific duties are instead established by a normative argument of burden-allocation.

Analytical theories of rights enable us to identify the holders of claim-rights. If the abstract duty to mitigate climate change protects against the risk of global warming, *every* individual can hold a claim-right correlative to this duty. If the abstract duty protects against direct physical injury, the universal quantifier is *disjunctive*: some individuals may hold claim-rights correlative to this duty, while others do not. When turning to the specific duties to mitigate greenhouse gas emissions, this dissertation has found that *no* individuals experiencing the detriment of global warming hold claim-rights correlative to these specific duties: instances of greenhouse gas emission mitigation do not protect an individual against direct injury or risk.

Second, the traditional moral theories of individual rights do not establish the existence and content of mitigation duties. Establishing the existence and content of mitigation duties requires normative assessments of distributive justice. If one were to force the instruments of individual rights to provide for climate change mitigation duties, it would imply severing such instruments from the individual rights' original purpose: rights inherently protect some fundamental aspects of individuals and thereby set limits on what can permissibly be done in pursuit of political policies. To counsel in favour of such a deviation from the moral import of claim-rights is in effect to abandon any genuine reliance on the notion of rights while retaining the language of "rights" as a façade.

The third conclusion reached is that, because individuals legitimately disagree about climate justice, those concerned with the role of rights in the climate crisis should turn their attention to political rights. Since the assessments needed to fix upon duties to mitigate climate change are societal and global, a central question is how we can ensure the legitimacy of policy decisions about climate change mitigation when members within and between political communities strongly and legitimately disagree.

From both angles, these three conclusions substantiate the key lesson of this dissertation: individual rights approaches to climate change mitigation are not a "right" approach – an apposite approach – to the mitigation of climate change. Instead, climate change mitigation is about the just distribution of burdens and benefits of modernity within and between societies.

Sources

Cases

My reference:	Official reference:[835]
Advisory Opinion *OC-23/17*	*Advisory Opinion* [2017] Inter-American Court of Human Rights OC-23/17.
Affaire du siècle	*Notre Affaire à Tous and Others v. France* [2021] Administrative Court of Paris No 1904967.
Arctic Oil	Greenpeace Nordic association v. Ministry of Petroleum and Energy [2020] Norwegian Supreme Court HR-2020-846-J.
Arctic Oil Court of Appeal	Greenpeace Nordic association v. Ministry of Petroleum and Energy [2020] Court of Appeal 18-060499ASD-BORG/03.
Atanasov	*Atanasov v. Bulgaria* [2008] European Court of Human Rights No 54172/00.
Athabaskan people Petition	Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada [2013].
Budayeva	Budayeva and Others v. Russia [2008] No 15339/02.
Careme	*Careme v. France* [2021] Application to European Court of Human Rights No. 7189/21.
Carvalho	Armando Ferrão Carvalho and Others v. The European Parliament and the Council [2019] EU General Court T-330/18.
Climate Majors	*National Inquiry on Climate Change Report* [2022] Commission on Human Rights of the Philippines CHR-NI-2016-0001.
Colombian Amazon	*Future generations v. Ministry of Environment* [2018] Supreme Court of Colombia 11001-22-03-000-2018-00319-01.

[835] For the rights and climate change litigation cases, I follow the reference given to the case by the Sabin Center for Climate Change Law's *Climate Change Litigation Database*: https://climatecasechart.com/.

Commune de Grande-Synthe	*Commune de Grande-Synthe v. France* [2021] Council of State No 427301.
Cordella	*Cordella and others v. Italy* [2019] European Court of Human Rights No 55414/13 and 5426/15.
De Conto	*De Conto v. Italy and 32 other States* [2021] Application the European Court of Human Rights No 14620/21.
Dimmock	Dimmock v. Secretary of State of Education & Skills [2007] England and Wales High Court 2288.
Engels	*Engels and Others v. Germany* [2022] Application to the European Court of Human Rights No 46906/22.
EU Biomass	*EU Biomass Plaintiffs v. European Union* [2021] EU Court of Justice C-297/20 P.
Fairchild	Fairchild v. Glenhaven Funeral Services Ltd and Others [2002] UK House of Lords 2002/22.
Family Farmers	*Family Farmers and Greenpeace Germany v. Germany* [2018] Administrative Court of Berlin 00271/17/R/SP.
FIE	*Friends of the Irish Environment v. Ireland* [2020] Irish Supreme Court 2017 No 793 JR.
FIE High Court	Friends of the Irish Environment v. Ireland [2019] High Court 2017 No 793 JR.
Fosen	*Statnett SF v. Sør-Fosen sijte* Norwegian Supreme Court [2021] HR-2021-1975-S.
Greenpeace Nordic	*Greenpeace Nordic and Others v. Norway* [2021] Application to the European Court of Human Rights No 34068/21.
Hatton	*Hatton and Others v. the United Kingdom* [2003] European Court of Human Rights No 36022/97.
Heathrow	Friends of the Earth and Others v. Secretary of State for Transport [2020] UK Supreme Court EWA Civ 214.
Held	*Held v. State* Montana Trial Court [2023] CDV-2020-307.
Ioane Teitiota	*Teitiota v. New Zealand* [2020] UN Human Rights Committee No 2728/2016.

Leghari	*Leghari v. Federation of Pakistan* [2015] Lahore High Court W.P. No 25501/2015.
Lliuya	Luciano Lliuya v. RWE AG [2015] Complaint.
Klimaatzaak	*VZW Klimaatzaak v. Kingdom of Belgium & Others* [2021] Brussels Court of First Instance 2015/4585/A.
KlimaSeniorinnen	Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others [2020] Swiss Supreme Court 1C_37/2019.
KlimaSeniorinnen Administrative Court	Association of Swiss Senior Women for Climate Protection v. Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others Swiss [2018] Federal Administrative Court A-2992/2017.
KlimaSeniorinnen Schweiz	*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [2020] Application to the European Court of Human Rights No 53600/20.
Müllner	*Müllner v. Austria* [2021] Application to the European Court of Human Rights No 18859/21.
Neubauer	*Neubauer, et al. v. Germany* [2021] German Federal Constitutional Court 1 BvR 2656/18, 78/20, 96/20, 288/20.
The Norwegian Grandparents	*The Norwegian Grandparents' Climate Campaign and Others v. Norway* [2021] Application to the European Court of Human Rights No 19026/21.
Pereira	*Benito Oliveira Pereira et al. v. Paraguay* [2014] UN Human Rights Committee No 2552/2015.
Plan B	Plan B. Earth and Others v. The Secretary of State for Business and Energy and Industry Strategy [2018] High Court CO/16/2018.
Portuguese Children	*Duarte Agostinho and Others v. Portugal and 32 Other States* [2020] Application to the European Court of Human Rights No 39371/29.
PSB	*PSB et al. v. Brazil (on Climate Fund)* [2022] Brazil Supreme Court ADPF-708.

RWE	*RWE v. the Netherlands* [2021] Investment dispute issued under ICSID ARB/21/4.
Sacchi	*Sacchi, et al. v. Germany* [2021] Committee on the Rights of the Child No 107/2019.
Sharma	*Sharma and others v. Minister for the Environment* [2022] Full Federal Court of Australia (No 2) FCAFC 65.
Shell	*Milieudefensie et al. v. Royal Dutch Shell plc*. [2021] Hague District Court C/09/571932 / HA ZA 19-379.
Soubeste	*Soubeste and 4 other applications v. Austria and 11 other States* [2022] Application to the European Court of Human Rights No 31925/22.
Taşkin	*Taşkin and others v. Turkey* [2005] European Court of Human Rights No 46117/99.
Tatar	*Tatar v Romania* [2009] European Court of Human Rights No 67021/01.
Torres Straight Islands	*Daniel Billy and others v Australia* [2022] Human Rights Committee No 3624/2019.
Uricchio	*Uricchio v. Italy and 31 other States* [2021] Application to the European Court of Human Rights No 14615/21.
Urgenda	Urgenda Foundation v. State of the Netherlands [2019] Dutch Supreme Court 19/00135.
Urgenda Court of Appeal	Urgenda Foundation v. State of the Netherlands [2018] Hague Court of Appeal 200.178.245/01.
Urgenda District Court	*Urgenda Foundation v. State of the Netherlands* [2015] Hague District Court C/09/456689 / HA ZA 13-1396.
Urgenda Procurator General	*Urgenda Foundation v. State of the Netherlands* [2019] Opinion of Advocate and Procurator General 19/00135.
Our Children's Trust	*Juliana v. United States* [2021] Ninth Circuit Court No. 18-36082.

Öneryildiz	*Öneryildiz v. Turkey* [2004] European Court of Human Rights No 48939/99.

UN Bodies

My reference:	Official reference:
A/64/255	General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' (2009) UN Doc A/64/255.
A/70/287	General Assembly 'Interim report of the Special Rapporteur on the right to food' (2015) UN Doc A/70/287.
A/73/188	General Assembly 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) UN Doc A/73/188.
A/74/161	General Assembly 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2019) UN Doc A/74/161.
A/HRC/10/61	UN Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (2009) UN Doc A/HRC/10/61.
A/HRC/25/53	Human Rights Council 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (2013) UN Doc A/HRC/25/53.
A/HRC/31/52	Human Rights Council 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2016) UN Doc A/HRC/31/52.

A/HRC/31/56 Human Rights Council ‘Report of the Special Rapporteur on minority issues’ (2016) UN Doc A/HRC/31/56.

A/HRC/32/23 Human Rights Council ‘Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health Report of the Office of the United Nations High Commissioner for Human Rights’ (2016) UN Doc A/HRC/32/23.

A/HRC/36/46 Human Rights Council ‘Report of the Special Rapporteur on the rights of indigenous peoples’ (2017) UN Doc A/HRC/36/46.

A/HRC/37/58 Human Rights Council ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2018) UN Doc A/HRC/37/58.

A/HRC/37/59 Human Rights Council ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2018) UN Doc A/HRC/37/59.

A/HRC/41/39 Human Rights Council ‘Climate change and poverty. Report of the Special Rapporteur on extreme poverty and human rights’ (2019) UN Doc A/HRC/41/39.

A/HRC/RES/7/23 Human Rights Council ‘Human rights and climate change’ (2008) UN Doc A/HRC/RES/7/23.

A/HRC/RES/10/4 Human Rights Council ‘Human rights and climate change’ (2009) UN Doc A/HRC/RES/10/4.

A/HRC/RES/26/27 Human Rights Council ‘Human rights and climate change’ (2014) UN Doc A/HRC/RES/26/27.

A/HRC/RES/32/33 Human Rights Council ‘Human rights and climate change’ (2016) UN Doc A/HRC/RES/32/33.

A/HRC/RES/40/11 Human Rights Council ‘Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development’ (2019) UN Doc A/HRC/RES/40/11.

A/HRC/RES/41/15 Human Rights Council ‘Mandate of the Special Rapporteur on the human rights of internally displaced persons’ (2019) UN Doc A/HRC/RES/41/15.

A/HRC/41/50 Human Rights Council ‘Contribution of development to the enjoyment of human rights Study of the Human Rights Council Advisory Committee’ (2019) UN Doc A/HRC/41/50.

A/HRC/RES/48/14 Human Rights Council ‘Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change’ (2021) UN Doc A/HRC/RES/48/14.

A/RES/43/53 General Assembly ‘Protection of global climate for present and future generations of mankind’ (1988) [1989] UN Doc A/RES/43/53.

A/RES/44/207 General Assembly ‘Protection of global climate for present and future generations of mankind’ (1989) [1990] UN Doc A/RES/44/207.

A/RES/57/257 General Assembly ‘Protection of global climate for present and future generations of mankind’ [2003] UN Doc A/RES/57/257.

A/RES/68/180 General Assembly ‘Protection of and assistance to internally displaced persons’ (2013) [2014] UN Doc A/RES/68/180.

A/RES/70/165 General Assembly ‘Protection of and assistance to internally displaced persons’ (2015) [2016] UN Doc A/RES/70/165.

A/RES/76/300 General Assembly ‘The human right to a clean, healthy and sustainable environment’ (2022) UN Doc A/RES/76/300.

A/RES/77/276 General Assembly ‘Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change’ (2023) UN Doc A/RES/77/276.

CEDAW/C/GC/37 Committee for the Elimination of All Forms of Discrimination against Women ‘General recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change’ (2018) UN Doc CEDAW/C/GC/37.

CCPR/C/GC/36 Human Rights Committee General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) UN Doc CCPR/C/GC/36.

Joint statement	Joint statement 'Five UN human rights treaty bodies issue a joint statement on human rights and climate change' (*United Nations Human Rights. Office of the High Commissioner*, 16 September 2019) <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and> Accessed [7.03.2020].
Open Letter	Special mandate-holders of the Human Rights Council 'A new climate change agreement must include human rights protections for all' (*United Nations Human Rights. Office of the High Commissioner*, 17 October 2014) <https://www.ohchr.org/sites/default/files/Documents/HRBodies/SP/SP_To_UNFCCC.pdf> Accessed [10.08.2023].

International Climate Change System

Cancun Agreements	COP 16 to the UNFCCC [2011] FCCC/CP/2010/7/Add.1.
Copenhagen Accord	COP 15 to the UNFCCC [2010] FCCC/CP/2009/Add.1.
Doha Amendment	COP 18 to the UNFCCC [2013] FCCC/KP/CMP/2012/13/Add.1.
Glasgow Pact	COP 26 to the UNFCCC [2022] FCCC/PA/CMA/2021/10/Add.1.
Kyoto Protocol	COP 3 to the UNFCCC [1998] FCCC/CP/1997/7/Add.1 Decision 1/CP.3.
Paris Agreement	COP 21 to the UNFCCC [2016] FCCC/CP/2015/10/Add.1 Decision 1/CP.21
UNFCCC	UN Framework Convention on Climate Change, drafted 1992, effective 1994.

Bibliography

Alexy, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford: Oxford University Press, 2010.

Arneson, Richard. 'Egalitarianism'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2013. Metaphysics Research Lab, Stanford University, 2013. https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/.

Arnold, Denis Gordon, ed. *The Ethics of Global Climate Change*. Cambridge: Cambridge University Press, 2014.

Atapattu, Sumudu. *Human Rights Approaches to Climate Change: Challenges and Opportunities*. Routledge Research in International Environmental Law. London: Routledge, 2015. https://cam.ldls.org.uk/vdc_100026597122.0x000001.

Batros, Ben, and Tessa Khan. 'Thinking Strategically about Climate Litigation'. In *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, edited by César Rodríguez-Garavito, 97–116. Globalization and Human Rights. Cambridge: Cambridge University Press, 2022. https://doi.org/10.1017/9781009106214.006.

Beitz, Charles R. *The Idea of Human Rights*. Oxford University Press, 2009. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199572458.001.0001/acprof-9780199572458.

Bell, Derek. 'Climate Change and Human Rights'. *Wiley Interdisciplinary Reviews: Climate Change* 4, no. 3 (2013): 159–70. https://doi.org/10.1002/wcc.218.

Bennett, Jonathan. *The Act Itself*. Oxford: Oxford University Press, 1995.

Blake, Michael, and Patrick Taylor Smith. 'International Distributive Justice'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2022. Metaphysics Research Lab, Stanford University, 2022. https://plato.stanford.edu/archives/sum2022/entries/international-justice/.

Bodansky, Daniel, Jutta Brunnée, and Lavanya Rajamani. *International Climate Change Law*. First edition. Oxford: Oxford University Press, 2017.

Bohman, James, and William Rehg. 'Jürgen Habermas'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Fall 2017. Metaphysics Research Lab, Stanford University, 2017. https://plato.stanford.edu/archives/fall2017/entries/habermas/.

Bouwer, Kim. 'The Unsexy Future of Climate Change Litigation'. *Journal of Environmental Law* 30, no. 3 (1 November 2018): 483–506. https://doi.org/10.1093/jel/eqy017.

Boyd, David R. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Law and Society Series. Vancouver, BC: UBC Press, 2012.

———. *The Rights of Nature: A Legal Revolution That Could Save the World*. Toronto: ECW Press, 2017.

Boyle, Alan. 'Climate Change, the Paris Agreement and Human Rights'. *International and Comparative Law Quarterly* 67, no. 04 (October 2018): 759–77. https://doi.org/10.1017/S0020589318000222.

Brooks, Thom. *Climate Change Ethics for an Endangered World*. New York: Routledge, 2022.

Broome, John. *Climate Matters: Ethics in a Warming World*. New York: W.W. Norton, 2012.

———. 'How Much Harm Does Each of Us Do?' In *Philosophy and Climate Change*, edited by Mark Budolfson, Tristram McPherson, and David Plunkett, 281–91. Oxford: Oxford University Press, 2021.

Buchanan, Allen. ‘Human Rights: A Plea for Taking the Law and Institutions Seriously’. *Ethics & International Affairs; New York* 30, no. 4 (Winter 2016): 501–10. http://dx.doi.org/10.1017/S0892679416000472.

———. *The Heart of Human Rights*. Oxford University Press, 2013. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199325382.001.0001/acprof-9780199325382.

Budolfson, Mark. ‘Political Realism, Feasibility Wedges, and Opportunities for Collective Action on Climate Change’. In *Philosophy and Climate Change*, edited by Mark Budolfson, Tristram McPherson, and David Plunkett, 323–45. Engaging Philosophy. Oxford: Oxford University Press, 2021.

Burger, Michael, Jessica Wentz, and Daniel J. Metzger. ‘Climate Science and Human Rights: Using Attribution Science to Frame Government Mitigation and Adaptation Obligations’. In *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, edited by César Rodríguez-Garavito, 223–38. Globalization and Human Rights. Cambridge: Cambridge University Press, 2022. https://doi.org/10.1017/9781009106214.015.

Burgers, Laura. ‘Should Judges Make Climate Change Law?’ *Transnational Environmental Law* 9, no. 1 (March 2020): 55–75. https://doi.org/10.1017/S2047102519000360.

Caney, Simon. ‘Climate Change’. In *The Oxford Handbook of Distributive Justice*, edited by Serena Olsaretti. Oxford: Oxford University Press, 2018. https://doi.org/10.1093/oxfordhb/9780199645121.013.23.

———. ‘Climate Change, Energy Rights, and Equality’. In *The Ethics of Global Climate Change*, edited by Denis G. Arnold, 77–103. New York: Cambridge University Press, 2011.

———. ‘Climate Change, Human Rights, and Moral Thresholds’. In *Climate Ethics: Essential Readings*, edited by Stephen Mark Gardiner, Simon Caney, Henry Shue, and Dale Jamieson, 163–77. New York: Oxford University Press, 2010.

———. ‘Climate Justice’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2021. Metaphysics Research Lab, Stanford University, 2021. https://plato.stanford.edu/archives/win2021/entries/justice-climate/.

———. ‘Cosmopolitan Justice, Responsibility, and Global Climate Change’. In *Climate Ethics: Essential Readings*, edited by Simon Caney, Henry Shue, Stephen Mark Gardiner, and Dale Jamieson, 122–45. New York: Oxford University Press, 2010.

———. ‘Cosmopolitan Justice, Rights and Global Climate Change’. *The Canadian Journal of Law and Jurisprudence* 19, no. 02 (July 2006): 255–78. https://doi.org/10.1017/S0841820900004100.

———. ‘Human Rights, Climate Change, and Discounting’. In *Climate Change, Ethics and Human Security*, edited by Asunción Lera St. Clair, Berit Kristoffersen, and Karen O’Brien, 113–30. Cambridge: Cambridge University Press, 2010. https://doi.org/10.1017/CBO9780511762475.009.

———. ‘Human Rights, Responsibilities, and Climate Change’. In *Global Basic Rights*, edited by C.R. Beitz and R.E Goodin, 227–47. Oxford: Oxford University Press, 2007.

———. ‘Just Emissions’. *Philosophy & Public Affairs* 40, no. 4 (2012): 255–300. https://doi.org/10.1111/papa.12005.

———. ‘Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens’. *Journal of Political Philosophy* 22, no. 2 (2014): 125–49. https://doi.org/10.1111/jopp.12030.

Christiano, Thomas. *The Constitution of Equality: Democratic Authority and Its Limits*. Oxford: Oxford University Press, 2008.

Cornell Law School / Legal Information Institute. ‘First Amendment’, 5 February 2010. https://www.law.cornell.edu/constitution/first_amendment.
Council of Europe. ‘Manual on Human Rights and the Environment’, 2012. https://www.echr.coe.int/librarydocs/dh_dev_manual_environment_eng.pdf.
Cripps, Elizabeth. *Climate Change and the Moral Agent: Individual Duties in an Interdependent World*. First edition. Oxford: Oxford University Press, 2013.
Cruft, Rowan, S. Matthew Liao, and Massimo Renzo. ‘The Philosophical Foundations of Human Rights: An Overview’. In *Philosophical Foundations of Human Rights*, edited by Rowan Cruft, S. Matthew Liao, and Massimo Renzo, 1–42. Oxford University Press, 2015. https://doi.org/10.1093/acprof:oso/9780199688623.003.0001.
Dagger, Richard, and David Lefkowitz. ‘Political Obligation’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2021. Metaphysics Research Lab, Stanford University, 2021. https://plato.stanford.edu/archives/sum2021/entries/political-obligation/.
Drupp, Moritz A., Mark C. Freeman, Ben Groom, and Frikk Nesje. ‘Discounting Disentangled’. *American Economic Journal: Economic Policy* 10, no. 4 (1 November 2018): 109–34. https://doi.org/10.1257/pol.20160240.
Duff, R. A., and S. E. Marshall. ‘“Abstract Endangerment”, Two Harm Principles, and Two Routes to Criminalisation’. *Bergen Journal of Criminal Law & Criminal Justice* 3, no. 2 (26 December 2015): 132–61. https://doi.org/10.15845/bjclcj.v3i2.905.
Dupuy, Pierre-Marie, and Jorge E. Viñuales. *International Environmental Law*. Second edition. Cambridge: Cambridge University Press, 2018.
Dworkin, Ronald. *Law’s Empire*. Oxford: Hart, 2010.
———. ‘Rights as Trumps’. In *Theories of Rights*, edited by Jeremy Waldron, 153–67. New York: Oxford University Press, 1984.
———. *Taking Rights Seriously*. Bloomsbury Revelations. London: Bloomsbury Academic, 2013.
ECtHR. ‘Factsheet on Environment and the European Convention on Human Rights’, 2022. https://www.echr.coe.int/documents/fs_environment_eng.pdf.
ENNHRI. ‘Third Party Intervention Klimaseniorinnen’, 2021. https://ennhri.org/wp-content/uploads/2021/09/Third-Party-Intervention-Klimaseniorinnen-_-website.pdf.
‘Equinor og Wintershall Dea vil samarbeide om CO2-lagring på norsk sokkel’. Accessed 31 August 2022. https://e24.no/i/0Gw67A.
‘EU Emissions Trading System (EU ETS)’. Accessed 28 August 2022. https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en.
Farrell, Clare, Alison Green, Sam Knights, and William Skeaping, eds. *This Is Not a Drill: An Extinction Rebellion Handbook*. London: Penguin Random House UK, 2019.
Feinberg, Joel. *Harm to Others*. The Moral Limits of the Criminal Law. New York: Oxford University Press, 1984.
———. ‘The Nature and Value of Rights’. *The Journal of Value Inquiry* 4, no. 4 (1 December 1970): 243–60. https://doi.org/10.1007/BF00137935.
———. ‘The Rights of Animals and Unborn Generations’. In *Rights, Justice, and the Bounds of Liberty*, 159–84. Princeton: Princeton University Press, 1980.
Fuller, Lon L. ‘Positivism and Fidelity to Law: A Reply to Professor Hart’. *Harvard Law Review* 71, no. 4 (1958): 630–72. https://doi.org/10.2307/1338226.
———. *The Morality of Law*. Rev. A Yale Paperbound 152. New Haven: Yale University Press, 1978.
Gallie, W. B. ‘Essentially Contested Concepts’. *Proceedings of the Aristotelian Society* 56 (1955): 167–98.

Gardiner, Stephen M. ‘A Call for a Global Constitutional Convention Focused on Future Generations’. *Ethics & International Affairs* 28, no. 03 (2014): 299–315. https://doi.org/10.1017/S0892679414000379.
———. ‘Motivating (or Baby-Stepping Toward) a Global Constitutional Convention for Future Generation’. *Environmental Ethics* 41, no. 3 (1 May 2019): 199–220. https://doi.org/10.5840/enviroethics201941322.
Gardiner, Stephen Mark, Simon Caney, Dale Jamieson, and Henry Shue, eds. *Climate Ethics: Essential Readings*. Oxford: Oxford University Press, 2010.
Gauthier, David P. *Morals by Agreement*. Oxford: Clarendon, 1987.
Gloppen, Siri, and Asuncion Lera St. Clair. ‘Climate Change Lawfare’. In *Climate Change: International Law and Global Governance*, edited by Oliver C. Ruppel, Christian Roschmann, and Katharina Ruppel-Schlichting, 171–200. Volume II: Policy, Diplomacy and Governance in a Changing Environment. Nomos, 2013. https://www.jstor.org/stable/j.ctv941vsk.10.
González-Ricoy, Iñigo, and Axel Gosseries. *Institutions For Future Generations*. Oxford: University Press, 2016. https://doi.org/10.1093/acprof:oso/9780198746959.001.0001.
GOV.UK. ‘The Highway Code: 8 Changes You Need to Know from 29 January 2022’, 29 January 2022. https://www.gov.uk/government/news/the-highway-code-8-changes-you-need-to-know-from-29-january-2022.
Green, Leslie, and Thomas Adams. ‘Legal Positivism’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2019. Metaphysics Research Lab, Stanford University, 2019. https://plato.stanford.edu/archives/win2019/entries/legal-positivism/.
Griffin, James. *On Human Rights*. Oxford: Oxford University Press, 2009.
Habermas, Jurgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Oxford: Polity, 1996. https://www.dawsonera.com/abstract/9780745692432.
Hart, H. L. A. *The Concept of Law*. Third edition. Clarendon Law Series. Oxford: Oxford University Press, 2012.
Heath, Joseph. *Philosophical Foundations of Climate Change Policy*. New York: Oxford University Press, 2021.
Hessen, Dag O. ‘Vil naturen rydde opp etter festen?’ NRK, 6 December 2022. https://www.nrk.no/ytring/vil-naturen-rydde-opp-etter-festen_-1.16207480.
Hohfeld, Wesley Newcomb. ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’. *The Yale Law Journal* 23, no. 1 (1913): 16–59. https://doi.org/10.2307/785533.
Hulme, Mike. *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity*. 6th. printing. Cambridge: Cambridge Univ. Press, 2012.
Humphreys, Stephen, ed. *Human Rights and Climate Change*. Cambridge: Cambridge University Press, 2010.
Hurd, Heidi M., and Michael S. Moore. ‘The Hohfeldian Analysis of Rights’. *The American Journal of Jurisprudence* 63, no. 2 (1 December 2018): 295–354. https://doi.org/10.1093/ajj/auy015.
International Human Rights Clinic, Harvard Law School. ‘Violations of the Right to Effective Remedy: The UN’s Responsibility for Cholera in Haiti’, 2020. http://hrp.law.harvard.edu/wp-content/uploads/2020/02/HLS-IHRC-IJDH-BAI-Submission-to-Special-Procedures_Cholera.pdf.
IPCC 1.5C. ‘Summary for Policymakers’, 2018. https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf.

IPCC AR6 WGI. ‘Summary for Policymakers’, 2021. https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf.
IPCC AR6 WGII. ‘Summary for Policymakers’, 2022. https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf.
IPCC AR6 WGIII. ‘Summary for Policymakers’, 2022. https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SummaryForPolicymakers.pdf.
Jamieson, Dale. *Reason in a Dark Time: Why the Struggle against Climate Change Failed--and What It Means for Our Future*. Oxford: Oxford University Press, 2014.
———. ‘When Utilitarians Should Be Virtue Theorists’. In *Climate Ethics: Essential Readings*, edited by Stephen Mark Gardiner, Simon Caney, Dale Jamieson, and Henry Shue, 315–31. New York: Oxford University Press, 2010.
Jamieson, Dale, and Marcello Di Paola. ‘Climate Change, Liberalism, and the Public/Private Distinction’. In *Philosophy and Climate Change*, edited by Mark Budolfson, Tristram McPherson, and David Plunkett, 370–95. Oxford: Oxford University Press, 2021.
Kagan, Shelly. ‘Do I Make a Difference?’ *Philosophy & Public Affairs* 39, no. 2 (2011): 105–41. https://doi.org/10.1111/j.1088-4963.2011.01203.x.
Karnein, Anja. ‘Can We Represent Future Generations?’ In *Institutions For Future Generations*, edited by Iñigo González-Ricoy and Axel Gosseries, 0. Oxford University Press, 2016. https://doi.org/10.1093/acprof:oso/9780198746959.003.0005.
Keeton, Robert E. ‘Conditional Fault in the Law of Torts’. *Harvard Law Review* 72, no. 3 (1959): 401–44. https://doi.org/10.2307/1337892.
Kingston, Ewan, and Walter Sinnott-Armstrong. ‘What’s Wrong with Joyguzzling?’ *Ethical Theory and Moral Practice* 21, no. 1 (1 February 2018): 169–87. https://doi.org/10.1007/s10677-017-9859-1.
Klatt, Matthias, and Moritz Meister. *The Constitutional Structure of Proportionality*. Oxford University Press, 2012. http://www.oxfordscholarship.com.ezp.lib.cam.ac.uk/view/10.1093/acprof:oso/9780199662463.001.0001/acprof-9780199662463.
Knox, John H. ‘Climate Change and Human Rights Law’. *Virginia Journal of International Law* 50 (2009): 163–218.
———. ‘Human Rights Principles and Climate Change’. In *The Oxford Handbook of International Climate Change*, 213–35. Oxford: Oxford University Press, 2016.
Knutti, Reto, Joeri Rogelj, Jan Sedláček, and Erich M. Fischer. ‘A Scientific Critique of the Two-Degree Climate Change Target’. *Nature Geoscience* 9, no. 1 (January 2016): 13–18. https://doi.org/10.1038/ngeo2595.
Kramer, Matthew H. ‘Getting Rights Right’. In *Rights, Wrongs and Responsibilities*, edited by Matthew H. Kramer, 28–95. Hampshire: Palgrave, 2001. https://doi.org/10.1057/9780230523630_2.
———. *Objectivity and the Rule of Law*. 1st ed. Cambridge University Press, 2007. https://doi.org/10.1017/CBO9780511619014.
———. ‘Of Aristotle and Ice Cream Cones: Reflections on Jules Coleman’s Theory of Corrective Justice’. *QLR* 16, no. 3 (1997 1996): 279–98.
———. *Rights and Right-Holding*. Oxford University Press, Forthcoming.
———. ‘Rights Without Trimmings’. In *A Debate over Rights*, 7–111. Oxford: Clarendon Press, 1998. https://doi.org/10.1093/acprof:oso/9780198298991.003.0002.
———. ‘Some Doubts about Alternatives to the Interest Theory of Rights’. *Ethics* 123, no. 2 (2013): 245–63. https://doi.org/10.1086/668705.

———. ‘The Demandingness of Deontological Duties: Is the Absolute Impermissibility of Placatory Torture Irrational?’ *Moral Philosophy and Politics* 6, no. 1 (2019): 9–40. https://doi.org/10.1515/mopp-2018-0045.
———. *The Quality of Freedom*. Oxford University Press, 2003.
———. *Torture and Moral Integrity: A Philosophical Enquiry*. Oxford: Oxford University Press, 2014. https://doi.org/10.1093/acprof:oso/9780198714200.001.0001.
———. *Where Law and Morality Meet*. Oxford: Oxford University Press, 2004.
Lippert-Rasmussen, Kasper. ‘Justice and Bad Luck’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2018. Metaphysics Research Lab, Stanford University, 2018. https://plato.stanford.edu/archives/sum2018/entries/justice-bad-luck/.
Lloyd, Elisabeth A., and Theodore G. Shepherd. ‘Climate Change Attribution and Legal Contexts: Evidence and the Role of Storylines’. *Climatic Change* 167, no. 3–4 (August 2021): 28. https://doi.org/10.1007/s10584-021-03177-y.
Machin, Amanda. ‘Democracy, Disagreement, Disruption: Agonism and the Environmental State’. *Environmental Politics* 29, no. 1 (2 January 2020): 155–72. https://doi.org/10.1080/09644016.2019.1684739.
Mackie, John L. ‘Causes and Conditions’. In *Causation*, edited by Ernest Sosa and Michael Tooley, 33–55. Oxford Readings in Philosophy. Oxford: Oxford University Press, 1993.
Marjanac, Sophie, and Lindene Patton. ‘Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?’ *Journal of Energy & Natural Resources Law* 36, no. 3 (3 July 2018): 265–98. https://doi.org/10.1080/02646811.2018.1451020.
Martin, Susan Lorde. ‘Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation’. *Fordham Environmental Law Review* 20, no. 3 (2010 2009): 427–68.
Marx, Karl. ‘On the Jewish Question’. In *Nonsens upon Stilts*, edited by Jeremy Waldron, Methuen., 137–50. London, 1987.
Mayer, Benoit. ‘Attribution Science and the Fate of Climate Litigation’. *Global Policy* 13, no. 5 (2022): 831–32. https://doi.org/10.1111/1758-5899.13153.
———. ‘Climate Change Mitigation as an Obligation Under Human Rights Treaties?’ *American Journal of International Law* 115, no. 3 (July 2021): 409–51. https://doi.org/10.1017/ajil.2021.9.
———. ‘Obligations of Conduct in the International Law on Climate Change: A Defence’. *Review of European, Comparative & International Environmental Law* 27, no. 2 (2018): 130–40.
———. ‘Temperature Targets and State Obligations on the Mitigation of Climate Change’. *Journal of Environmental Law* 33, no. 3 (1 November 2021): 585–610. https://doi.org/10.1093/jel/eqab003.
———. ‘The Relevance of the No-Harm Principle to Climate Change Law and Politics’. *Asia Pacific Journal of Environmental Law* 19 (2016): 79–104.
McIntyre, Alison. ‘Doctrine of Double Effect’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Spring 2019. Metaphysics Research Lab, Stanford University, 2019. https://plato.stanford.edu/archives/spr2019/entries/double-effect/.
McKinnon, Catriona. *Climate Change and Political Theory*. Cambridge, UK: Polity Press, 2022.
Moellendorf, Darrel. ‘Common Atmospheric Ownership and Equal Emissons Entitlements’. In *The Ethics of Global Climate Change*, edited by Denis G. Arnold, 104–23. New York: Cambridge University Press, 2011.

———. *The Moral Challenge of Dangerous Climate Change: Values, Poverty, and Policy*. New York: Cambridge University Press, 2014.
Moore, Michael. 'Causation in the Law'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2019. Metaphysics Research Lab, Stanford University, 2019. https://plato.stanford.edu/archives/win2019/entries/causation-law/.
Nagel, Thomas. 'Libertarianism without Foundations'. Edited by Robert Nozick. *The Yale Law Journal* 85, no. 1 (1975): 136–49. https://doi.org/10.2307/795521.
Nefsky, Julia. 'Climate Change and Individual Obligation: A Dilemma for the Expected Utility Approach, and the Need for an Imperfect View'. In *Philosophy and Climate Change*, edited by Mark Budolfson, Tristram McPherson, and David Plunkett, 201–21. Oxford: Oxford University Press, 2021.
———. 'How You Can Help, without Making a Difference'. *Philosophical Studies* 174, no. 11 (1 November 2017): 2743–67. https://doi.org/10.1007/s11098-016-0808-y.
Newman, D. G. 'Collective Interests and Collective Rights'. *The American Journal of Jurisprudence* 49, no. 1 (1 January 2004): 127–63. https://doi.org/10.1093/ajj/49.1.127.
Nickel, James, and David A. Reidy. 'Philosophical Foundations of Human Rights'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 11 July 2009. https://papers.ssrn.com/abstract=1432868.
NNHRI. 'Written Submission from the Norwegian National Human Rights Institution to Shed Light on Public Interests in Case No. 20-051052SIV-HRET'. NNHRI, 25 September 2020. https://www.nhri.no/wp-content/uploads/2020/10/Amicus-Curiae-from-the-Norwegian-National-Human-Rights-Institution.pdf.
Nordhaus, William D. *A Question of Balance: Weighing the Options on Global Warming Policies*. New Haven: Yale University Press, 2008.
Nozick, Robert. *Anarchy, State, and Utopia*. Malden, MA: Blackwell, 2012.
Nussbaum, Martha Craven. *Frontiers of Justice: Disability, Nationality, Species Membership*. The Tanner Lectures on Human Values. Cambridge, MA: The Belknap Press of Harvard University Press, 2007.
O'Brien, Karen, Bronwyn Hayward, and Fikret Berkes. 'Rethinking Social Contracts: Building Resilience in a Changing Climate'. *Ecology and Society* 14, no. 2 (2009). https://www.jstor.org/stable/26268331.
O'Neill, Onora. 'Justice without Ethics: A Twenty-Century Innovation?' In *The Cambridge Companion to the Philosophy of Law*, edited by John Tasioulas, 135–51. Cambridge: Cambridge University Press, 2020.
———. 'The Dark Side of Human Rights'. *International Affairs* 81, no. 2 (March 2005): 427–39. https://doi.org/10.1111/j.1468-2346.2005.00459.x.
Otto, Friederike E. L., Ragnhild B. Skeie, Jan S. Fuglestvedt, Terje Berntsen, and Myles R. Allen. 'Assigning Historic Responsibility for Extreme Weather Events'. *Nature Climate Change* 7, no. 11 (November 2017): 757–59. https://doi.org/10.1038/nclimate3419.
Parfit, Derek. *Reasons and Persons*. Oxford University Press, 1986. http://www.oxfordscholarship.com/view/10.1093/019824908X.001.0001/acprof-9780198249085.
Pedersen, Ole W. 'The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation'. *Nordic Journal of International Law* 80, no. 4 (2011): 403–23. https://doi.org/10.1163/157181011X598427.
Peel, Jacqueline, and Jolene Lin. 'Transnational Climate Litigation: The Contribution of the Global South'. *The American Journal of International Law* 113, no. 4 (2019): 679–726. https://doi.org/10.1017/ajil.2019.48.

Peel, Jacqueline, and Hari M. Osofsky. ‘A Rights Turn in Climate Change Litigation?’ *Transnational Environmental Law* 7, no. 01 (March 2018): 37–67. https://doi.org/10.1017/S2047102517000292.
Plato. *Gorgias*. Translated by Terence Irwin. Clarendon Plato Series. Oxford: Clarendon Press, 1979.
Pogge, Thomas. *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*. 2nd ed. Cambridge: Polity Press, 2008.
Posner, Eric A., and Cass R. Sunstein. ‘Climate Change Justice’. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 1 August 2007. https://papers.ssrn.com/abstract=1008958.
Powers, Madison. ‘Ethical Challenges Posed by Climate Change: An Overview’. In *Moral Theory and Climate Change: Ethical Perspectives on a Warming Planet*, edited by Dale E. Miller and Ben Eggleston, 35–57. New York: Routledge, 2020.
‘Quain Lecture 3: Climate Change and Quality of Life’. UCL, 17 November 2022. https://www.youtube.com/watch?v=KXkBvuY04wI.
Quong, Jonathan. *Liberalism without Perfection*. Oxford: University Press, 2010. https://doi.org/10.1093/acprof:oso/9780199594870.001.0001.
Radbruch, Gustav. ‘Statutory Lawlessness and Supra-Statutory Law (1946)’. *Oxford Journal of Legal Studies* 26, no. 1 (1 March 2006): 1–11. https://doi.org/10.1093/ojls/gqi041.
Railton, Peter. ‘A Convenient Truth? Climate Change and Quality of Life’. In *Philosophy and Climate Change*, edited by Mark Budolfson, Tristram McPherson, and David Plunkett, 9–41. Engaging Philosophy. Oxford: Oxford University Press, 2021.
Randalls, Samuel. ‘History of the 2°C Climate Target’. *WIREs Climate Change* 1, no. 4 (July 2010): 598–605. https://doi.org/10.1002/wcc.62.
Rawls, John. *A Theory of Justice*. Revised. Cambridge, Mass: Belknap Press of Harvard University Press, 1999.
———. ‘Legal Obligation and the Duty of Fair Play’. In *John Rawls Collected Papers*, edited by Samuel Freeman. Cambridge, MA: Harvard University Press, 1999.
———. *Political Liberalism*. Expanded ed. Columbia Classics in Philosophy. New York: Columbia University Press, 2005.
———. *The Law of Peoples: With ‘The Idea of Public Reason Revisited’*. Cambridge, MA: Harvard University Press, 1999.
Raz, Joseph. ‘Human Rights Without Foundations’. In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 321–37. Oxford: Oxford University Press, 2010.
———. *The Authority of Law*. 2nd ed. Oxford: Oxford University Press, 2009.
———. *The Morality of Freedom*. Oxford: Clarendon Press, 1986.
Rodríguez-Garavito, César, ed. ‘Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action’. In *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, 7–94. Globalization and Human Rights. Cambridge: Cambridge University Press, 2022. https://doi.org/10.1017/9781009106214.002.
Roth, Abraham Sesshu. ‘Shared Agency’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2017. Metaphysics Research Lab, Stanford University, 2017. https://plato.stanford.edu/archives/sum2017/entries/shared-agency/.
Sættem, Johan B. ‘Klimaforsker advarer mot å bruke opptil 10 prosent av norsk kraft til å drive oljeplattformene’. NRK, 25 August 2022. https://www.nrk.no/norge/klimaforsker-advarer-mot-a-bruke-opptil-10-prosent-av-norsk-kraft-til-a-drive-oljeplattformene-1.16079051.

Savaresi, Annalisa, and Joana Setzer. ‘Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers’. *Journal of Human Rights and the Environment* 13, no. 1 (1 March 2022): 7–34. https://doi.org/10.4337/jhre.2022.01.01.

Schapper, Andrea. ‘Climate Justice and Human Rights’. *International Relations* 32, no. 3 (1 September 2018): 275–95. https://doi.org/10.1177/0047117818782595.

Setzer, Joana, and Catherine Higham. ‘Global Trends in Climate Change Litigation: 2022 Snapshot’. The Grantham Research Institute on Climate Change and the Environment, 2022. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.

———. ‘Global Trends in Climate Litigation: 2021 Snapshot’. Grantham Research Institute on Climate Change and the Environment, 2021. https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/.

Setzer, Joana, and Lisa C. Vanhala. ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’. *WIREs Climate Change* 10, no. 3 (2019): e580. https://doi.org/10.1002/wcc.580.

———. ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’. *WIREs Climate Change* 10, no. 3 (2019): 580. https://doi.org/10.1002/wcc.580.

Shue, Henry. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. 2nd ed. Princeton, NJ: Princeton University Press, 1996.

———. *Climate Justice: Vulnerability and Protection*. Oxford: Oxford University Press, 2016.

———. ‘Historical Responsibility, Harm Prohibition, and Preservation Requirement: Core Practical Convergence on Climate Change’. *Moral Philosophy and Politics* 2, no. 1 (2014): 7–31. https://doi.org/10.1515/mopp-2013-0009.

———. ‘Human Rights, Climate Change, and the Trillionth Ton’. In *The Ethics of Gobal Climate Change*, edited by Denis G. Arnold, 292–314. New York: Cambridge University Press, 2011.

———. ‘Subsistence Emissions and Luxury Emissions’. In *Climate Ethics: Essential Readings*, edited by Stephen Mark Gardiner, Henry Shue, Simon Caney, and Dale Jamieson, 200–214. New York: Oxford University Press, 2010.

Simmonds, N. E. ‘Constitutional Rights, Civility and Artifice’. *The Cambridge Law Journal* 78, no. 1 (March 2019): 175–99. https://doi.org/10.1017/S000819731800096X.

Simmons, A. John. *Justification and Legitimacy: Essays on Rights and Obligations*. 1st ed. Cambridge University Press, 2000. https://doi.org/10.1017/CBO9780511625152.

Singer, Peter. *One World Now: The Ethics of Globalization*. New Haven: Yale University Press, 2016.

Sinnott-Armstrong, Walter. ‘It’s Not My Fault: Global Warming and Individual Moral Obligations’. In *Climate Ethics: Essential Readings*, edited by Stephen Mark Gardiner, Simon Caney, Dale Jamieson, and Henry Shue, 332–46. New York: Oxford University Press, 2010.

Smiley, Marion. ‘Collective Responsibility’. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2017. Metaphysics Research Lab, Stanford University, 2017. https://plato.stanford.edu/archives/sum2017/entries/collective-responsibility/.

Spano, Robert. ‘Keynote Speech’. Palais de l’Europe, 2023. https://rm.coe.int/coe-speech-environment-spano-final-2787-8240-6407-v-1/1680aae80b.

Steiner, Hillel. ‘Working Rights’. In *A Debate over Rights*, 233–301. Oxford: Clarendon Press, 1998.
Stensrud, Anna. ‘Klimaforskernes dom: – Verden blir ikke ubeboelig’. NRK, 2 December 2022. https://www.nrk.no/norge/klimaforskernes-dom_-_-verden-blir-ikke-ubeboelig-1.16203813.
Stern, Nicholas Herbert. *The Economics of Climate Change: The Stern Review*. Cambridge: Cambridge University Press, 2007. https://doi.org/10.1017/CBO9780511817434.
Stuart-Smith, Rupert F., Friederike E. L. Otto, Aisha I. Saad, Gaia Lisi, Petra Minnerop, Kristian Cedervall Lauta, Kristin van Zwieten, and Thom Wetzer. ‘Filling the Evidentiary Gap in Climate Litigation’. *Nature Climate Change* 11, no. 8 (August 2021): 651–55. https://doi.org/10.1038/s41558-021-01086-7.
Swift, Adam. *Political Philosophy: A Beginners’ Guide for Students and Politicians*. Fourth edition. Cambridge, UK: Polity Press, 2019.
Theil, Stefan. *Towards the Environmental Minimum: Environmental Protection through Human Rights*. Cambridge: Cambridge University Press, 2021. https://doi.org/10.1017/9781108891769.
Thomson, Judith Jarvis. *The Realm of Rights*. Cambridge, Mass: Harvard Univ. Press, 2013.
UNEP. ‘Emissions Gap Report 2022’. UNEP - UN Environment Programme, 21 October 2022. http://www.unep.org/resources/emissions-gap-report-2022.
Valentini, Laura. ‘The Content-Independence of Political Obligation: What It Is and How to Test It’. *Legal Theory* 24, no. 2 (2018): 135–57. https://doi.org/10.1017/S1352325218000095.
Vanderheiden, Steve. *Atmospheric Justice: A Political Theory of Climate Change*. Oxford University Press, 2008. http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195334609.001.0001/acprof-9780195334609.
Varner, Gary E. *In Nature’s Interests? Interests, Animal Rights, and Environmental Ethics*. Environmental Ethics and Science Policy Series. New York: Oxford University Press, 1998.
Vinuales, Jorge E. ‘A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment’. In *The Frontiers of Human Rights: Extraterritriality and Its Challenges*, edited by Nehal Bhuta, 177–221. Oxford: Oxford University Press, 2016.
Voigt, Christina. ‘State Responsibility for Climate Change Damages’. *Nordic Journal of International Law* 77, no. 1 and 2 (2008): 1–22.
———. ‘The Paris Agreement: What Is the Standard of Conduct for Parties?’ *QIL, Zoom-In* (blog), 24 March 2016. http://www.qil-qdi.org/paris-agreement-standard-conduct-parties/.
Waldron, Jeremy. ‘Can Communal Goods Be Human Rights?’ *European Journal of Sociology* 28 (1987): 296–322.
———. ‘Fake Incommensurability: A Response to Professor Schauer’. *Hastings Law Journal* 45 (1994 1993): 813–24.
———. *Liberal Rights: Collected Papers, 1981-1991*. Cambridge Studies in Philosophy and Public Policy. Cambridge: Cambridge University Press, 1993.
———. ‘Nonsense upon Stilts? - A Reply’. In *Nonsense upon Stilts. Bentham, Burke and Marx on the Rights of Men*, 151–209. London: Methuen, 1987.
Way, Rupert, Matthew C. Ives, Penny Mealy, and J. Doyne Farmer. ‘Empirically Grounded Technology Forecasts and the Energy Transition’. *Joule* 6, no. 9 (September 2022): 2057–82. https://doi.org/10.1016/j.joule.2022.08.009.
Wenar, Leif. ‘The Nature of Rights’. *Philosophy and Public Affairs; Hoboken* 33, no. 3 (Summer 2005): 223-0_6. http://dx.doi.org/10.1111/j.1088-4963.2005.00032.x.

Wewerinke-Singh, Margaretha. *State Responsibility, Climate Change and Human Rights Under International Law*. Hart Publishing, 2018. https://doi.org/10.5040/9781509918478.

'What's the hottest Earth's ever been? | NOAA Climate.gov'. Accessed 13 August 2023. http://www.climate.gov/news-features/climate-qa/whats-hottest-earths-ever-been.

Wolff, Robert Paul. *In Defense of Anarchism*. Berkeley: University of California Press, 1998.

Wright, Georg Henrik von. *Norm and Action: A Logical Enquiry*. Reprinted. London: Routledge & Kegan Paul, 1977.

Wright, Richard W. 'Causation in Tort Law'. *California Law Review* 73, no. 6 (1985): 1735–1828. https://doi.org/10.2307/3480373.

Zaman, Sharaban Tahura. 'Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law'. *Yearbook of International Environmental Law* 26 (1 October 2015): 98–126. https://doi.org/10.1093/yiel/yvx006.