

**Climatizing Human Rights:
Economic and Social Rights for the Anthropocene**

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Like all human artifacts, economic and social rights (ESRs) are a product of their time. But precisely what time is that? In the contemporary, specific understanding of ESRs that I am interested in – that is, ESRs as a *global legal project* anchored in an institutional architecture of international treaties and national constitutions and promoted by transnational advocacy networks – they are a product of the second half of the twentieth century. Thus understood, the ESR project arose as a response to the socioeconomic inequities of twentieth-century, Fordist industrial capitalism, and the post-World War II global order. In such a historical context, ESRs gave legal traction to moral claims for the redistribution of the fruits of industrial capitalism in order to achieve levels of material welfare compatible with human dignity for all.¹

¹ As Jensen and Walton have shown, ESRs’ philosophical and legal roots reach back much further in time. Indeed, Jensen and Walton trace the origins of ESRs back to pre-capitalist and pre-Enlightenment times, which debunks the conventional view that ESRs are “second generation” rights that emerged only after civil and political rights had been firmly established.

The twenty-first century has not only upended the dominance of industrial capital and the Euro-American world order but has also jolted humanity into a longer-term perspective. First the climate emergency and then a global pandemic reminded us that human beings exist within a vaster web of life and that societies are contained in and dependent upon a biosphere whose history is measured in millions of years as opposed to centuries. From this much longer time horizon – the “deep time” of geology, ecology, biology, and life sciences in general² – the brief history and the uncertain future of ESRs can be viewed in a new light.

From this perspective, the ESR project’s lifespan overlaps almost perfectly with a new epoch of Earth’s history: the Anthropocene, the period wherein humans operate as the driving planetary force. In May 2019, the Anthropocene Working Group of the International Commission on Stratigraphy – the scientific panel responsible for determining the periods of Earth’s history based on geological evidence – proposed a start date for the Anthropocene in the mid-twentieth century. As the experts of the Working Group explained, starting with the first nuclear tests and the bombing in Hiroshima in 1945, “a rapidly rising human population accelerated the pace of industrial production, the use of agricultural chemicals and other human activities. At the same time, the first atomic-bomb blasts littered the globe with radioactive debris that became embedded in sediments and glacial ice, becoming part of the geologic record.”³

In socioeconomic terms, the Anthropocene has been the period of what Earth scientists call “the Great Acceleration.”⁴ The increase of human activity and its impact on the planet over the last seventy years has been extraordinary. Between 1950 and 2020, the global population grew from

See Steven Jensen and Charles Walton, “Not ‘Second-Generation Rights: Rethinking the History of Social Rights,” in S. Jensen and C. Walton, *Social Rights and the Politics of Obligation in History* (Cambridge: Cambridge University Press, 2022): 1-25. As noted, however, I refer to ESR in more specific, sociolegal terms. I refer to the twentieth-century “ESR project” to denote a global field of thought and practice that includes a wide range of actors and strategies, from governments’ ESR norm-setting and implementation to advocacy organizations’ campaigns and lawsuits to scholars’ conceptual and empirical research on ESR issues. I take this usage from Philip McMichael’s work on the global development project. *See* Philip McMichael, *Development and Social Change* (Los Angeles: Sage, 2017).

² *See* Marcia Bjornerud, *Timefulness: How Thinking Like a Geologist Can Help Save the World* (Princeton: Princeton University Press, 2018).

³ Meera Subramanian, “Anthropocene Now: Influential Panel Votes to Recognize Earth’s New Epoch,” *Nature*, May 21, 21, 2019, <https://www.nature.com/articles/d41586-019-01641-5>.

⁴ *See* “The Great Acceleration,” *Future Earth*, January 16, 2015, <https://futureearth.org/2015/01/16/the-great-acceleration/>.

2.5 to 7.8 billion. It took *Homo Sapiens* 50,000 years to reach a population of one billion; at current growth rates, it will take only ten years to add another billion.⁵ According to the most comprehensive study of the indicators of the Great Acceleration, between 1950 and 2015, the world real GDP increased tenfold. The pronounced intensification of human activity has had severe impacts on the planet's living systems. As humans' energy use increased fourfold, freshwater use tripled, and fertilizer use increased more than tenfold, all dimensions of the biosphere have been profoundly affected. For instance, greenhouse gases (GHG) driving global warming have increased dramatically, the oceans have acidified, and biodiversity losses have been drastic.⁶

In this chapter, I focus on the climate emergency, the Anthropocene's most urgent existential threat to humanity, human rights, and life on Earth. After three decades of inaction and denial, the climate emergency entered the mainstream in the late 2010s. The 2018 UN Intergovernmental Panel on Climate Change (IPCC) report on the urgency of avoiding global warming beyond 1.5 degrees Celsius overlapped with a cascade of extreme weather events that scientists had been warning about for many years.⁷ Signs continue to mount of the uninhabitable planet that future generations will inherit if drastic decarbonization measures are not urgently adopted to change the trajectory that is leading the planet to 1.5 to two degrees Celsius of warming by mid-century and three to four degrees Celsius by the end of the century.⁸

The Anthropocene raises existential challenges to human rights.⁹ It opens the gates to rights violations at an unprecedented scale, including, for example, tens of millions of climate-induced

⁵ See Time Radford, "Adventures in the Anthropocene by Gaia Vance – Review," *The Guardian*, September 23, 2015, <https://www.theguardian.com/science/2015/sep/23/adventures-in-the-anthropocene-by-gaia-vance-review>; see also "Current World Population," *Worldometer*, last accessed March 22, 2021, <https://www.worldometers.info/world-population/#pastfuture>.

⁶ See "The Great Acceleration," n. 3.

⁷ See Intergovernmental Panel on Climate Change [IPCC], *Special Report on Global Warming of 1.5°C* (October 8, 2018); see also Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services [IPBES], *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services* (November 25, 2019).

⁸ See Bill McKibben, *Falter: Has the Human Game Begun to Play Itself Out?* (New York: Henry Holt and Co., 2019).

⁹ See César Rodríguez-Garavito, "Five Existential Challenges to Human Rights," *OpenGlobalRights*, March 12, 2021, <https://www.openglobalrights.org/five-existential-challenges-to-human-rights/>, from which this paragraph is partly taken; see also César Rodríguez-Garavito, "Disrupting Human Rights:

deaths, waves of forced displacement that far surpass those caused by wars, and economic suffering much deeper and more generalized than that associated with the Great Depression and financial crises.¹⁰

The climate emergency raises the most formidable challenge to the enjoyment of the entire range of ESRs. From the collapse of food systems to the forced migration of up to a billion people by 2050 to the dramatic, heat-induced aggravation of the threat to health stemming from pollution (which currently kills more than 10,000 people daily),¹¹ global warming undermines the conditions that are indispensable for the enjoyment of the rights to food, water, housing, health, and many others. Indeed, “climate change threatens to undo the last 50 years of progress in development, global health and poverty reduction,” as the then-UN Special Rapporteur on extreme poverty and human rights, Philip Alston, noted in his 2019 report on the matter.¹²

Therefore, if ESRs are to remain relevant in the Anthropocene, budding theoretical, doctrinal, and advocacy efforts to address the climate emergency need to be deepened and expanded. The task of urgently advancing climate action through ESRs is what I call “climatizing” ESRs. I argue that there are two complementary routes to climatizing ESRs. The first route involves applying the existing ESR conceptual and legal tools to the climate emergency. In the first section of the chapter, I posit that this route entails both addressing the impacts of global warming on ESRs and ensuring that climate action follows ESR norms regarding substantive and procedural equity. Although much has yet to be done, I show that key human rights actors – from advocacy organizations to national and international courts to UN rapporteurs and treaty bodies – have made important initial inroads. These efforts, as we will see, tend to focus on holding states accountable for their ESR obligations regarding *adaptation* to climate change, that is, protecting individuals and communities

Existential Challenges and a New Paradigm for the Field,” in *The Struggle for Human Rights*, ed. Nehal Bhuta et al. (Oxford University Press, 2021).

¹⁰ See David Wallace-Wells, *The Uninhabitable Earth* (New York: Tim Duggan Books, 2019).

¹¹ See Wallace-Wells, *The Uninhabitable Earth*, n. 9.

¹² UN Special Rapporteur on extreme poverty and human rights, Report, Climate Change and Poverty, A/HRC/41/39, ¶ 13 (July 17, 2019).

from the repercussions of extreme weather events and other effects of global warming that are already inevitable given the dangerously high accumulation of GHGs in the atmosphere.¹³

The second, complementary route entails adapting and updating ESRs to the Anthropocene's realities and challenges. If global warming threatens to undo the material progress brought about by the Great Acceleration, that threat can no longer be addressed with the same economic tools and ideas that led us to the brink of climate catastrophe during the same period. Economic growth propelled by fossil fuels was the driving force that enabled industrial capitalism and its (limited) redistributive policies, as Andreas Malm has shown. Indeed, industrial capitalism (including its social democratic varieties) can be usefully described as “fossil capitalism.”¹⁴

Thus, a progressive socioeconomic agenda for the Anthropocene needs to be concerned as much with economic equity as with decarbonization and a livable Earth system.¹⁵ Its goal is equitable “human prosperity in a flourishing web of life” not only for people alive today but also for future generations and the non-human world, as Kate Raworth and others have argued.¹⁶ In addition to a concern with guaranteeing at least a *minimum* of material welfare and equity compatible with human dignity, this goal requires protecting the planetary boundaries (on climate, biodiversity, air quality, etc.) that make life on Earth possible – and thus a concern with the *limits* to human economic activity. Between the minimum and the maximum there is a vast space for economic activities that are productive, equitable, regenerative, and respectful of future generations and the planet. In Raworth's useful image, the satisfaction of human needs and Earth's boundaries can be seen as the inner and outer edges of an economic “doughnut,” where human and planetary nourishment comes from the space in the middle.

In the second section of this chapter, I flesh out the implications of this view for ESRs. As the climate emergency and a global pandemic have made patently clear, the fate of human societies is

¹³ Philip Alston, UN Special Rapporteur on extreme poverty and human rights, *Climate Change and Poverty*, ¶ 23, n. 12.

¹⁴ See Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming* (London: Verso, 2016).

¹⁵ See Mariana Mazzucato, “Avoiding a Climate Lockdown,” *Project Syndicate*, September 22, 2020, <https://www.project-syndicate.org/commentary/radical-green-overhaul-to-avoid-climate-lockdown-by-mariana-mazzucato-2020-09?barrier=accesspaylog>.

¹⁶ Kate Raworth, “What on Earth is the Doughnut?”, *Kate Raworth*, last accessed March 22, 2021, <https://www.kateraworth.com/doughnut/>.

contingent on the fate of the biosphere in which all of them are contained. Thus, I argue that the traditional separation between ESRs, on the one hand, and environmental rights, on the other, is no longer tenable under the conditions of the Anthropocene. Instead, social and environmental rights need to be seen as two sides of the same coin – or, to keep with the metaphor, as the two edges of the socioeconomic donut. Just as the aforementioned first route to climatizing rights entails infusing climate action with ESR norms and values, the second avenue requires ESR law and advocacy to centrally incorporate issues, demands, and solutions that address the causes of the climate emergency and other existential threats to the Earth’s web of life. In addition to adaptation to climate change, this path is centrally concerned with hashing out ESR obligations and strategies regarding *mitigation* of global warming – that is, the drastic reduction of GHG emissions that, according to science, needs to take place by 2030 for humanity to avoid the most catastrophic scenarios of climate change.

I will also argue that this avenue requires more time – or, more precisely, a sharper awareness of time and the longer-term time horizon of the lives of many generations and Earth systems’ processes. It also requires asking questions that go beyond the core concern of ESRs with economic redistribution: Are the sources of funding for redistributive policies coming from the fossil capital driving the climate crisis? Is a given economic policy compatible with both human dignity and planetary boundaries? How can ESRs help prioritize the protection of and reparations to populations and countries that are being most affected by climate change while contributing the least to causing it? How can we balance the protection of the rights of present and future generations and even the non-human beings that are being recognized as rights holders in various jurisdictions? Although most of this task remains to be done, I will review recent contributions to socioenvironmental rights litigation, doctrine, and concepts that hold out the prospect of providing useful answers to these and other questions.

1. Climatizing ESR Concepts and Norms

Starting in the mid-2000s and gaining momentum in the mid-2010s, human rights actors have acknowledged the link between climate change and human rights, including ESRs. Elsewhere, I review the sociolegal trajectory of the slow convergence between global climate governance and

human rights law and advocacy, and how it picked up in recent years.¹⁷ Here I focus on the ways in which existing ESR norms and doctrines have been brought to bear on the climate emergency. Statements and reports by human rights actors have climatized ESRs by (1) assessing the impacts of global warming on the enjoyment of ESRs and (2) articulating the need for climate policies to be consistent with ESRs. Put differently, the first route for the climatization of ESRs has proceeded along the two directions of the relationship between climate change and ESRs. As Figure 1 shows, one direction goes from climate change to ESRs. It entails assessing how current and future events induced by rising temperatures – for instance, heat waves, floods, fires, hurricanes, and typhoons that are rendered more likely and frequent by global warming – violate or create serious risks for the rights to health, food, water, housing, and other ESRs. The opposite direction runs from ESRs to climate change and hinges on the argument that effective climate action requires the respect, fulfillment, and protection of ESRs. This entails, for instance, examining whether climate taxation is progressive or regressive from an ESR perspective and whether climate policies comply with procedural and substantive rights (e.g., Indigenous peoples’ rights to their territories).

Figure 1 about here

This is not the place to provide a thorough examination of the sources of legal standards and doctrine that have given content to this dual connection. Since the main purpose of this chapter is to outline and make a case for the various routes to the climatization of ESRs, in this section I limit myself to sketching some of the key contributions made by authoritative sources to this first route in the international ESR institutional architecture, namely the UN Office of the High Commissioner for Human Rights, UN treaty bodies, and UN Special Rapporteurs.

¹⁷ See César Rodríguez-Garavito, “Litigating the Climate Emergency: The Global Rise and Human Rights-Based Litigation for Climate Action” in *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, ed. César Rodríguez-Garavito (Cambridge University Press, 2022).

At the request of the UN Human Rights Council, between 2008 and 2009 the *UN Office of the High Commissioner for Human Rights* (OHCHR) conducted the first systematic report on the impact of climate change on human rights.¹⁸ As most other actors in the human rights field at the time, OHCHR was initially tentative about the rights-climate nexus. It concluded that “[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.”¹⁹ However, together with other human rights actors, OHCHR came to favor and actively promote the articulation of climate action and human rights in the mid-2010s. The decisive language of its 2015 report on the matter demonstrates this turn. “Simply put,” concluded OHCHR, “climate change is a human rights problem and the human rights framework must be part of the solution.”²⁰ Specifically, “[c]limate change impacts, directly and indirectly, an array of internationally guaranteed human rights. States (duty-bearers) have an affirmative obligation to take effective measures to prevent and redress these climate impacts, and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis.”²¹ OHCHR’s subsequent study on climate change and the rights of women also took this approach to climatizing ESRs, as it focused on “outlin[ing] some key impacts of climate change on women and describ[ing] gender-responsive, rights-based approaches to address these.”²²

The OHCHR has also alluded to the opposite direction of the ESR-climate nexus. In its 2015 report, for instance, it noted that “[p]articular care should be taken to comply with relevant human rights obligations related to participation of persons, groups and peoples in vulnerable situations

¹⁸ See Human Rights Council, Resolution 7/23, Human Rights and Climate Change, A/HRC/RES/7/23, ¶ 136 (March 28, 2008).

¹⁹ Human Rights Council, Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61, ¶70 (July 15, 2009), <https://undocs.org/en/A/HRC/10/61>.

²⁰ Office of the United Nations High Commissioner for Human Rights (OHCHR), Understanding Human Rights and Climate Change, 6 (2015), <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

²¹ OHCHR, Understanding Human Rights and Climate Change, 2, n. 20.

²² Office of the United Nations High Commissioner for Human Rights (OHCHR), Report, Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women, A/HRC/41/26, ¶ 3 (May 1, 2019), <https://undocs.org/A/HRC/41/26>.

in decision-making processes and to ensure that adaptation and mitigation efforts do not have adverse effects on those that they should be protecting.”²³ Similarly, its report on women and climate change noted that the “full and equal participation and leadership of women in decision-making, planning and implementation as regards climate action is essential to protecting women’s rights and ensuring effective climate action.”²⁴

As for treaty bodies, the *Human Rights Committee’s* 2018 General Comment on the right to life acknowledged that “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.”²⁵ Although (incongruously) finding that the Australian government’s dismal climate record had not violated the right to life of the Indigenous inhabitants of islands whose very existence is threatened by climate-induced sea-level rise, the UNHR’s conclusions in the *Torres Islanders v. Australia* case established a key precedent in international human rights law by squarely framing global warming as a human rights issue and finding that Australia had violated the petitioners’ rights to culture as well as their right to private life, family, and home.²⁶

The *UN Committee on Economic, Social and Cultural Rights* (CESCR) has also made important contributions to fleshing out the ESR-climate connection.²⁷ Its 2018 statement on climate change recognized the “impacts of climate change on a range of rights guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR)... in particular, the rights to health, food, water and sanitation.”²⁸ As we will see in the next section, the same statement noted that

²³ OHCHR, *Understanding Human Rights and Climate Change*, 4 – 5, n. 20.

²⁴ OHCHR, *Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women*, ¶ 26, n. 22.

²⁵ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, ¶ 62 (October 30, 2018), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

²⁶ UN Human Rights Committee, *Views on Daniel Billy et al. v. Australia*, CCPR/C/135/D/3624/2019 (July 21, 2022).

²⁷ *See States’ Human Rights Obligations in the Context of Climate Change: CESCR* (CIEL & GI-ESCR, 2020).

²⁸ Committee on Economic, Social and Cultural Rights, *Climate change and the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2018/1, ¶ 4 (October 31, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>.

state duties under the ICESCR translated into obligations not only to adapt to but also to mitigate climate change. It also brought key principles of ESR law to bear on climate action by asserting that “a failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach” of states’ obligations to respect, fulfill, and protect ESRs.²⁹ CESCR has also been addressing climate change in an increasing portion of its concluding observations on states’ reports.³⁰

In terms of the other direction of the ESR-climate connection, CESCR has also highlighted the need for climate policies and programs to comply with ESRs. For instance, in the 2019 joint statement on climate change that it issued with a number of human rights treaty bodies, it noted that in “the design and implementation of climate policies, States must also respect, protect and fulfil the rights of all, including by mandating human rights due diligence and ensuring access to education, awareness raising, environmental information and public participation in decision-making.”³¹ An example of the application of this view can be found in its 2018 concluding observations on New Zealand, in which the Committee recommended that New Zealand “put in place effective mechanisms to ensure meaningful participation of Māori in all decision-making processes affecting their rights” and ensure “its climate change policies are developed and implemented in partnership with Māori, including through their effective participation in the Climate Commission.”³²

The UN Committee on the Rights of the Child has also contributed to clarifying some of the most vexing legal issues at the intersection of climate and human rights. In 2021, it handed down its decisions on complaints brought by 16 children (including Greta Thunberg) from 12 different

²⁹ Committee on Economic, Social and Cultural Rights, Climate change and the International Covenant on Economic, Social and Cultural Rights, ¶ 6, n. 27.

³⁰ In 2018, for instance, forty-two percent of the Committee’s Concluding Observations addressed global warming. *See* UN Special Rapporteur on extreme poverty and human rights, Climate Change and Poverty, ¶ 22, n. 12.

³¹ Joint Statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, Statement on Climate Change and Human Rights, HRI/2019/1, ¶ 7 (September 16, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>.

³² *States’ Human Rights Obligations in the Context of Climate Change: CESCR*, 4, n. 26.

countries against five states (Argentina, Brazil, France, Germany, and Turkey) that are among the largest carbon emitters under the Committee's jurisdiction. Although it declared the complaints inadmissible because their authors had not previously exhausted the remedies available to them in domestic jurisdictions, the Committee importantly asserted that states can be held accountable for climate harms suffered by children both inside and outside their territories, as long as those harms are foreseeable and can be shown to be linked to states' actions or omissions (for instance, in regulating fossil fuel industries).³³ By acknowledging states' extraterritorial responsibility for climate-induced human rights violations, the Committee left the door open for future complaints of this kind.

UN human rights committees have not been alone in beginning to address climate change. Reports by *UN special rapporteurs* (SRs) provide painstaking normative guidance regarding the two directions of the relationship between climate action and the existing battery of ESR norms and implementation mechanisms.³⁴ The work of the SRs on human rights and the environment has offered particularly detailed and influential guidelines. Given the broad scope of their mandate, SRs on human rights and the environment initially examined the environment-human rights connection in general, rather than the climate-ESR nexus in particular.³⁵ In his 2018 report distilling international normative consensus around a set of framework principles on human rights and the environment, SR John Knox pointed to what he called the "greening" of existing human rights (as opposed to the creation of new human rights like the right to a healthy environment) as

³³ See, for instance, UN Committee on the Rights of the Child Decision in *Chiara Sacchi v. Argentina*, CRC/C/88/D/104/2019 (September 22, 2021). The Committee's decisions in the submissions against the other four respondent states can be found at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1351&Lang=en.

³⁴ See, for instance, the reports of the Special Rapporteurs on the right to housing, the right to food, the rights of migrants, the rights of internally displaced people, and the rights of indigenous people. See Raquel Rolnik, 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 nondiscrimination in this context, A/64/355 (August 6, 2009); see also Hilal Elver, Interim report of the Special Rapporteur on the right to food, A/70/287 (August 5, 2015); see also Chaloka Beyani, Special Rapporteur on the human rights of internally displaced persons, Protection of and assistance to internally displaced persons, A/66/285 (August 9, 2011); see also François Crépeau, Report of the Special Rapporteur on the human rights of migrants, A/67/299 (August 13, 2012); see also Special Rapporteur on the rights of indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/36/46 (November 1, 2017).

³⁵ See, e.g., John H. Knox, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Mapping Report, A/HRC/25/53 (December 30, 2013), <https://undocs.org/en/A/HRC/25/53>.

the main point of convergence in international law on the matter. This report offers a particularly clear articulation of the two directions of the ESR-environment connection:

Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights, including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development, as well as the right to a healthy environment itself, which is recognized in regional agreements and most national constitutions. At the same time, the exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment.³⁶

Importantly, in specifying the mutual imbrication of the protection of ESRs and a healthy environment, the SR drew on principles from ESR law and doctrine and applied them to environmental challenges. The principles of progressive realization and non-retrogression were identified as particularly relevant within this context. For instance, in his 2013 report, the SR noted that a “relevant factor in deciding whether an environmental law meets human rights obligations is whether it is retrogressive.”³⁷ Drawing on the work of CESCR, the SR highlighted that “if States do take deliberately retrogressive measures, then they have the burden of proving that they first carefully considered all alternatives, and that the measures ‘are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.’”³⁸

The next Special Rapporteur on human rights and the environment, David Boyd, applied this analysis to climate change specifically. In his 2019 report on the matter, after identifying “the

³⁶ John H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59, Framework Principle 2, ¶ 4 (January 24, 2018), <https://undocs.org/A/HRC/37/59>.

³⁷ John H. Knox, Mapping Report, ¶ 55, n. 33.

³⁸ John H. Knox, Mapping Report, ¶ 55, n. 33, (citing Committee on Economic, Social and Cultural Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, ¶ 32 (August 11, 2000)).

rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and culture” as “[a]mong the human rights being threatened and violated” by the climate emergency, the SR detailed how climate change affects each of these rights.³⁹ Drawing on CESCR’s 2018 statement, he reiterated that:

[F]ailure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilize the maximum available resources in an effort to do so, could constitute a breach of their obligation to respect, protect and fulfil all human rights for all. States must, therefore, dedicate the maximum available financial and material resources to shift to renewable energy, clean transport and agroecological farming; halt and reverse deforestation and soil deterioration; and increase adaptive capacity, especially in vulnerable and marginalized communities.⁴⁰

The SR went beyond previous statements by UN authorities by further specifying states’ duty to comply with ESRs in pursuing climate action. In his 2019 report, he demonstrated how climate action that does not integrate human rights norms and standards can result in violations of ESRs. For instance, past “[p]olicies supporting biofuel production contributed to spikes in food prices, riots, and a major increase in the total number of people suffering from hunger. Forest preservation policies raise similar concerns about the impact on rights, as such policies may limit access to lands used for hunting, fishing, gathering, cultivation and other important cultural activities.”⁴¹

The 2019 report by Philip Alston, then-SR on extreme poverty and human rights, offers a systematic assessment of progress and challenges to the climatization of ESRs. Its in-depth analysis of the work of the most engaged UN treaty bodies shows that the overwhelming majority of the extant statements and decisions address adaptation to global warming, rather than climate mitigation.⁴² For the purposes of this chapter, the key contributions of this report are twofold. First, it foregrounds the profoundly deleterious impact of global warming on already unacceptable levels

³⁹ David R. Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *Safe Climate Report*, A/74/161, ¶ 26 – 44 (July 15, 2019), <https://undocs.org/en/A/74/161>.

⁴⁰ Boyd, *Safe Climate Report*, ¶ 70, n. 37.

⁴¹ Boyd, *Safe Climate Report*, ¶ 69, n. 37.

⁴² Alston, UN Special Rapporteur on extreme poverty and human rights, *Climate Change and Poverty Report*, n. 12.

of socioeconomic inequality within and among countries. Insisting that “extreme inequality is the antithesis of human rights,”⁴³ the SR warned that we risk “a climate apartheid scenario in which the wealthy pay to escape overheating, hunger and conflict while the rest of the world is left to suffer.”⁴⁴ Second, the report provides a meta-analysis of the work on the climate emergency by major international human rights actors. It rightly concludes that “[a]lthough climate change has been on the human rights agenda for well over a decade, it remains a marginal concern for most actors. However, it represents an emergency without precedent and requires bold and creative thinking from the human rights community and a radically more robust, detailed and coordinated approach.”⁴⁵

A key step towards filling this gap was the establishment of the UN Special Rapporteurship on climate change and human rights in 2021. In its initial report to the UN General Assembly in 2022, the first SR, Ian Fry, embraced the framing and the conclusions of the aforementioned 2019 report by the SR on the environment and human rights. It concluded that, “throughout the world, the rights of people are being denied by climate change.” This includes not only the right to life but also key ESRs such as “health . . . food, water and sanitation, work, [and] adequate housing.”⁴⁶ Importantly, it flagged topics that had received limited attention, including the human rights implications of climate-induced forced displacement and obstacles to participation by vulnerable populations (including Indigenous peoples, youth, and women) in global decision-making processes on climate change. Particularly important for the purposes of the future ESR agenda on global warming is the priority given by the SR to the debate on financial compensation for losses and damages incurred by vulnerable countries and communities due to global warming. Given that, by definition, climate justice and reparations are issues of global economic redistribution from the Global North to the Global South, and that Northern countries have long stalled or underfunded

⁴³ Philip Alston, “Extreme Inequality as the Antithesis of Human Rights,” *Open Global Rights*, August 27, 2015, <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/>.

⁴⁴ Alston, *Climate Change and Poverty Report*, ¶ 51, n. 12

⁴⁵ UN Special Rapporteur on extreme poverty and human rights, *Climate Change and Poverty, Summary*, n. 12.

⁴⁶ Ian Fry, *Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change. (Report on the promotion and protection of human rights in the context of climate change, loss and damage, and participation)*, A/77/226, ¶ 88 (July 26, 2022), <https://undocs.org/en/A/77/226>.

negotiations and institutional mechanisms on loss and damage, this should indeed be a core theme of the ESR project.

All SR reports include calls for action that overlap with what I have described as the second route to the climatization of ESRs: the expansion and updating of human rights standards and tools in order to match the uniqueness, scale, and speed of the climate emergency. As Alston's report puts it, among the urgent questions that human rights actors have yet to systematically address are "how human rights obligations can be used to define the legal duties of States to reduce greenhouse gas emissions individually and at a global level, what the minimum actions are that States must take in line with the latest scientific guidance and whether human rights law gives rise to a certain threshold of action below which a State is in violation of its obligations."⁴⁷

I argue that if ESRs are to remain relevant in the Anthropocene, these and related questions need to be addressed with precision and become core preoccupations of the ESRs field. I further argue that this task entails expanding and even going beyond existing ESR concepts and norms. This is the second route to the climatization of ESRs, to which I now turn.

2. Expanding ESR Concepts and Norms

"In a single lifetime humanity has become a planetary-scale geological force," concluded Will Steffen, the Earth scientist who led the aforementioned study on the Great Acceleration. "Major Earth Systems changes became directly linked to changes related to the global economic system. This is a new phenomenon and indicates that humanity has a new responsibility at a global level for the planet."⁴⁸

For the human rights field in general, and the ESRs field in particular, this responsibility includes revising concepts and norms that, while addressing the inequities of the period of industrial capitalism, fail to address the challenges of the Anthropocene – including, crucially, the need to

⁴⁷ UN Special Rapporteur on extreme poverty and human rights, *Climate Change and Poverty*, ¶ 81, n. 12.

⁴⁸ "Planetary Dashboard Shows 'Great Acceleration' in Human Activity Since 1950," *International Geosphere-Biosphere Programme*, January 15, 2015, <http://www.igbp.net/news/pressreleases/pressreleases/planetarydashboardshowsgreataccelerationinhumanactivitysince1950.5.950c2fa1495db7081eb42.html>.

urgently decarbonize the global economy. This entails incorporating a concern with planetary boundaries to economic activities on a par with the fundamental ESR concern with the equitable distribution of the fruits of such activities.

From this dual perspective, states and other ESR duty-bearers should be held accountable not only for failing to meet basic material human needs but also for undermining the biosphere and the conditions that are indispensable for the continuation of life on the planet. For example, countries that may score high on economic redistribution (such as Australia, Canada, and Norway) should not get a free pass from ESR actors to the extent that their redistributive policies are funded by oil, coal, and other carbon-intensive industries that destabilize the climate system on which their nationals and all of humanity depend. In addition to questions about material well-being and equity, ESR actors should raise questions about the compatibility of economic policy with a liveable climate system, biodiversity, air quality, and other conditions necessary for human flourishing and a thriving web of life.

In terms of Karl Polanyi's classical critical analysis of capitalism, ESRs have reminded us that the market needs to be embedded in society if economic activity is to be compatible with human dignity. Updating Polanyi's analysis and ESRs to the conditions of the Anthropocene, it is now equally important to remember that, if it is to be sustainable, society needs to be embedded in the biosphere.⁴⁹

Combining insights from human rights and Earth sciences, Kate Raworth has usefully depicted this double embeddedness as a "doughnut" (Figure 2). The inner edge is comprised of the social foundations of human well-being as determined by civil, political, and socioeconomic rights. The outer edge is made up of the maximum levels of pressure that Earth's life systems can bear, from climate to the oceans to forests to the nitrogen cycle to the air that we breath. Earth scientists have quantified the nine key planetary boundaries condensed in Figure 2.⁵⁰ Remaining within these limits entails a concern not only with the rights of people alive today but also those of future generations and non-humans, as economists like Raworth and moral philosophers like Will

⁴⁹ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd ed. (Boston: Beacon Press, 2001).

⁵⁰ See Johan Rockström, "A Safe Operating Space for Humanity," *Nature* 461 (September 2009): 472–475.

Kymlicka and Martha Nussbaum have argued.⁵¹ To put it in terms of economic policy, the only type of New Deal that is sustainable and compatible with human rights in the twenty-first century is a climate-proof New Deal – one that decarbonizes the global economy while ensuring a “just transition,” jobs and economic opportunities for those impacted by the process, as Mariana Mazzucato and others have argued.⁵²

Figure 2 around here

Human rights researchers and practitioners have yet to develop the battery of legal concepts, norms, and doctrines that are required by this holistic approach to rights. This view entails extending the scope of the classic argument about the indivisibility of rights – which holds that civil, political, and socioeconomic rights are mutually constitutive and have the same status – to include the protection of future generations and nature in the indivisible whole of rights. Insights from life and health sciences, which are increasingly focused on the similarities between and interdependence of the human and the non-human worlds, provide a promising path forward for this approach. Following in the footsteps of Indigenous knowledge, ecology, and other holistic worldviews,⁵³ life and health scientists and practitioners are developing such frameworks as “One Health,” which stresses the indivisibility of human health and ecosystems’ health and has been embraced by the World Health Organization.⁵⁴ As shown by the twin health emergencies (and persistent threat) of climate change and global pandemics stemming from the destruction of ecosystems, the right to health depends on measures to protect the health of nature.

⁵¹ Will Kymlicka, “Human Rights Without Human Supremacism” (2017) 48 *Canadian Journal of Philosophy* 763; Martha Nussbaum, *Justice for Animals: Our Collective Responsibility* (Simon & Schuster, 2022).

⁵² See Mazzucato, “Avoiding a Climate Lockdown,” n. 15.

⁵³ See Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants* (Milkweed Editions, 2013)

⁵⁴ See, e.g., “One Health,” *World Health Organization*, September 27, 2017, <https://www.who.int/news-room/q-a-detail/one-health>.

In the twenty-first century, therefore, defending the right to health requires going beyond a concern with present generations of humans. It also entails defending the health of the “more-than-human world” constituted by nature and future generations, to borrow the apt terminology proposed by philosopher and ecologist David Abram.⁵⁵ In addition to present-day humans’ rights, it requires advancing what I have called “more-than-human rights,” that is, the rights of future generations and non-humans.⁵⁶

The articulation of this holistic approach – the second route to the climatization of ESRs – remains largely a pending task. However, emerging developments in the ESR field, especially in domestic and international rights-based climate litigation, are planting promising seeds. In the remainder of this section, I briefly highlight advances made and outstanding challenges that remain on two sides of this route: (1) new ESR standards and doctrines to promote climate mitigation (and thus to address the root causes of the climate emergency); and (2) recent efforts to extend ESRs to the more-than-human world.

2.1 ESRs and Climate Mitigation Litigation

A particularly dynamic site of new ESR concepts and doctrines on climate mitigation has been rights-based climate lawsuits and court rulings. Although the first cases of this kind were filed as early as the mid-2000s, the large majority of them (eighty-eight percent) have been filed since 2015. As I document elsewhere,⁵⁷ of the 148 rights-based climate cases that had been brought before national and international judicial and quasi-judicial bodies by the end of 2021, ninety-four percent concerned climate *mitigation*. Among them are lawsuits invoking states’ human rights obligations to pressure governments to increase the ambition of their mitigation programs, as well as legal actions challenging major sources of GHG emissions, from new oil and coal projects to airport construction and deforestation.

⁵⁵ David Abrams, *The Spell of the Sensuous: Perception and Language in a More-Than-Human World* (New York: Vintage, 1997)

⁵⁶ See César Rodríguez-Garavito, “The Doughnut Approach: How to Climatize Human Rights,” *Open Global Rights* (September 30, 2021), from which this chapter is partially taken. <https://www.openglobalrights.org/the-doughnut-approach-how-to-climatize-human-rights/>

⁵⁷ See César Rodríguez-Garavito, “Litigating the Climate Emergency” (supra n. 18).

In 2019, the Dutch Supreme Court ruled in favor of the plaintiffs in the landmark *Urgenda* case and ordered the Dutch government to increase the country's GHG emissions reduction target, in line with the recommendations of the IPCC and the goals of the 2015 Paris Climate Agreement.⁵⁸ Crucially, one of the pillars of the court's decision was the recognition that the government's insufficient ambition with regard to mitigation violated regional and global human rights duties. *Urgenda*-like suits have been pursued in Belgium, France, Germany, Ireland, South Korea, Switzerland, and the United Kingdom, as well as before the European Court of Human Rights.⁵⁹ A particularly relevant precedent for the purposes of this chapter is the German Constitutional Court's ruling in the *Neubauer v. Germany* case. In ruling for a group of youth plaintiffs – who had claimed that the German government's failure to adopt a sufficiently detailed, ambitious, and long-term climate plan violated their rights – the Court squarely framed climate change as a human rights (including ESR) issue, recognized the rights of future generations, and used the Court's ESR doctrines to hold that the government has a positive obligation to act with urgency and ambition against global warming.⁶⁰

⁵⁸ See HR 20 december 2019, 41 NJ 2020, m.nt. J.S. (*Urgenda/Netherlands*) (Neth.) (hereinafter "*Urgenda*").

⁵⁹ For information on the Belgium climate case *VZW/ASBL Klimaatzaak*, see "Overview of the Progress of Our Legal Action," *L'Affair Climat*, last accessed March 22, 2021, <https://affaire-climat.be/fr/the-case>. For an unofficial translation of the complaint submitted by the petitioners in *Notre Affaire à Tous v. France*, see "«Affaire du Siècle» (Case of the Century): Brief on the Legal Request Submitted to the Administrative Court of Paris on 14 March 2019," *Notre Affaire à Tous*, last accessed March 22, 2021, <https://notreaffaireatous.org/wp-content/uploads/2019/05/Brief-juridique-ADS-EN-1.pdf>. For an overview of the case filed by the Commune de Grande-Synthe against the French government, see "French Mayor Goes to Court Over Government's 'Climate Inaction,'" RFI, January 23, 2019, <http://www.rfi.fr/en/environment/20190123-french-mayor-goes-court-over-government-s-climate-inaction>. For the Supreme Court judgment in *Friends of the Irish Environment v. Ireland*, see "Friends of the Irish Environment v. Ireland," *Sabin Center for Climate Change Law*, last accessed March 22, 2021, <http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/>. For an unofficial English translation of the judgment in the Swiss case, see "Verein KlimaSeniorinnen Schweiz v. DE: Judgment of 27 November 2018," *KlimaSeniorinnen*, last accessed March 22, 2021, <https://klimaseniorinnen.ch/wp-content/uploads/2019/02/Judgment-FAC-2018-11-28-KlimaSeniorinnen-English.pdf>. For the initial decision in the U.K. case *Plan B Earth v. Secretary of State for Business, Energy and Industrial Strategy*, see *Plan B Earth v. Sec'y of State for Bus., Energy & Indus. Strategy* [2018] EWHC 1892 CO/16/2018 (appeal taken from Eng.) (UK).

⁶⁰ 'Constitutional Complaints against the Federal Climate Change Act partially successful', Bundesverfassungsgericht, 29 April 2021, <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>>.

Beyond Europe, in 2015, Pakistan’s Lahore High Court found that the government’s delay in enacting the country’s climate laws violated citizens’ fundamental rights, including ESRs.⁶¹ Courts and human rights bodies in the Global South – from South Africa to India to Colombia⁶² – have formally recognized climate harms as ESR violations. With regard to corporate accountability, the pioneer case originated in a complaint filed before the Philippines’ Commission on Human Rights against the largest fossil fuel corporations known as “Carbon Majors.”⁶³ Greenpeace and Filipino citizens impacted by typhoon Haiyan and other global warming-related extreme weather events brought the case, invoking massive ESR and other human rights violations. In its 2022 report, the Commission largely agreed with the petitioners.

The connection between ESRs and climate mitigation is clear in this growing litigation trend. Litigants in 26 percent of them frame climate harms as violations of the right to health, as they did in a successful challenge to Mexico’s lax legislation on ethanol before the Mexican Supreme Court.⁶⁴ Courts that have been traditionally receptive and proactive with regard to ESR cases – such as Brazil, Colombia, India, Indonesia, Pakistan, the Philippines, and South Africa – have tended to extend to climate cases the doctrines and remedies that they developed to protect ESRs like the rights to health, food, and housing that are heavily affected by climate harms.⁶⁵ For instance, in 2018, the Colombian Supreme Court held that by not delivering on its international pledges to reduce deforestation in the Amazon as a means to contribute to climate mitigation, the Colombian government had violated the rights of 25 young plaintiffs who were already suffering

⁶¹ See *Leghari v. Pakistan*, (W.P. No. 25501/2015), Lahore High Court Green Bench, Order of 4 Sept. 2015, <https://affaire-climat.be/fr/the-case>.

⁶² See *Earthlife Africa Johannesburg v. Minister of Env'tl. Affairs* 2017 (2) All SA 519 (GP) (S. Afr.). For information on an Indian case involving consideration of climate impacts in environmental impact assessments, see “Pandey v. India,” *Sabin Center for Climate Change Law*, last accessed March 22, 2021, <http://climatecasechart.com/non-us-case/pandey-v-india/>.

⁶³ See “In re Greenpeace Southeast Asia and Others,” <http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>.

⁶⁴ See “Ruling on Modification to Ethanol Fuel Rule” (2019) <http://climatecasechart.com/non-us-case/ruling-on-modification-to-ethanol-fuel-rule/>.

⁶⁵ See César Rodríguez-Garavito, “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America,” *Texas Law Review* 89 (2011) 1669; see also César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial* (New York: Cambridge University Press, 2015).

the impacts of global warming.⁶⁶ Similarly, in 2022, the Brazilian Supreme Court held that the Paris Agreement should be enforced as a human rights agreement and held the government accountable for the human rights violations stemming from omissions driving deforestation in the Amazon.⁶⁷

Although this litigation trend is a recent development and most lawsuits are either pending or on appeal, my study of the universe of rights-based climate lawsuits and rulings shows that litigants and adjudicators are gradually recognizing new rights and doctrines. For instance, some of them are going beyond the “greening” of existing rights by advancing a new right to a livable climate system.⁶⁸ They are also hashing out new legal concepts and doctrines that cogently address a classic objection from government defendants, who argue that no single government can be held accountable for climate inaction, as all of humanity is involved in producing carbon emissions and thus global warming cannot be fully tackled unless governments act in unison. By holding that governments have a legal duty to contribute their “fair share” of climate emission reductions regardless of what other governments do, litigants and adjudicators are gradually updating conventional conceptions about responsibility for human rights violations to reflect the nature of global warming and the realities of the Anthropocene.⁶⁹

⁶⁶ *Future Generations v. Ministry of Environment & Others*, <<http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>>

⁶⁷ *See PSB v. Brazil*, <<http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/>>

⁶⁸ See, among others, “Request for Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights,” *Sabin Center for Climate Change Law*, last accessed March 22, 2021, <http://climatecasechart.com/non-us-case/request-advisory-opinion-inter-american-court-human-rights-concerning-interpretation-article-11-41-51-american-convention-human-rights/>.

⁶⁹ “Under certain circumstances, there may also be such clear views, agreements and/or consensus in an international context about the distribution of measures among countries that the courts can establish what – in accordance with the widely supported view of states and international organisations, which view is also based on the insights of climate science – can in any case be regarded as the State’s minimum fair share. On the basis of the standards referred to above in 5.4.2 and 5.4.3 (including the common ground method), which the Dutch courts are obliged to apply when interpreting the ECHR (see above in 5.6.1), the courts are then obliged to proceed to establishing such and to attach consequences to it in their judgment on the extent of the State’s positive obligations. It follows from the ECtHR case law referred to above in 5.4.2 that, under certain circumstances, agreements and rules that are not binding in and of themselves may also be meaningful in relation to such establishment. This may be the case if those rules and agreements are the expression of a very widely supported view or insight and are therefore important for the interpretation and application of the State’s positive obligations under Articles 2 and 8 ECHR.” *Urgenda*, ¶ 6.3, n. 54, <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>. “The question of what constitutes a state’s

Interestingly, some of the jurisprudential innovations in right-based climate cases result from cross-fertilization with ESR norms and concepts. This convergence has been facilitated by some similarities between ESR and climate issues. ESR cases tend to exhibit several of the same traits as climate litigation in that they oftentimes affect a large, geographically dispersed population, implicate numerous government agencies alleged to be responsible for pervasive policy failures that contribute to ESR violations, and tend to involve structural injunctive remedies and supervisory jurisdiction mechanisms to monitor compliance with court orders.⁷⁰ This explains why plaintiffs in some prominent climate cases, like those on environmental destruction in the Brazilian Amazon, have requested courts to grant structural injunctive remedies and establish institutional mechanisms to periodically monitor the government's progress in ceasing actions and omissions that contribute to the worsening of global warming.

The nature of ESRs also raises climate-relevant conceptual and legal issues that ESR actors have been dealing with for several decades, such as the question of progressive realization. Since progressive realization and open-ended duties regarding emission reductions are also hallmarks of the system of climate governance established by the Paris Agreement, litigants, courts, and human rights intergovernmental bodies have been actively applying doctrines from ESR law, like the principle of maximum available resources enshrined in the ICESCR, to climate cases.⁷¹ Indeed, petitioners in the aforementioned 2019 *Torres Strait Islanders v. Australia* submission before the UN Human Rights Committee explicitly drew the connection between the principle of maximum available resources in ESR law and the Paris Agreement's principle that states' mitigation measures must represent their "highest possible ambition" (Art. 4.3). Interpreting the Paris

'fair share' of the global burden of mitigating climate change is central to the determination of whether that state's mitigation measures are adequate for the purpose of the Convention. In light of the above, ambiguity on this issue (or likewise as to the meaning, per Article 4(3) of the Paris Agreement, of the term "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances") must be resolved in favour of the Applicants." Complaint, "Youth for Climate Justice v. Austria et al.," *Sabin Center for Climate Change Law*, last accessed March 22, 2021, <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>.

⁷⁰ See César Rodríguez-Garavito, "Human Rights: The Global South's Route to Climate Litigation," *AJIL Unbound* 114 (2020): 40-44.

⁷¹ See Ashfaq Khan, "Litmus Tests as Tools for Tribunals to Assess State Human Rights Obligations to Reduce Carbon Emissions," in *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, ed. César Rodríguez-Garavito (Cambridge University Press, 2022).

Agreement in light of international human rights law, the petitioners argued that states must assess their capacity to cut emissions in light of the obligation to reduce emissions “to the maximum extent possible” – which, in the case of Australia, would mean increasing its mitigation commitments as a means of addressing the existential threat that climate-induced sea level rise poses to inhabitants of the country’s Torres Strait Islands.⁷²

2.2 More-Than-Human Rights: ESRs, Future Generations, and Nature

The climatization of rights is actively shaping the narratives, norms, and strategies of climate action advocates and institutions. Human rights now feature prominently in the toolkit of environmental organizations like Greenpeace, Indigenous movements, and climate action mobilizations such as Extinction Rebellion and 350.org. In the process, human rights have also been shaped and challenged by the worldviews, moral frameworks, and tactics of climate action advocates, which at times differ markedly from those of the human rights movement. While the traditional emphasis of human rights law lies in backward-looking responsibility for past violations, the driving concern of climate action is forward-looking, preventative action to avert the most catastrophic scenarios of global warming.⁷³ While the legal tradition and mainstream interpretations of human rights were developed to deal mostly with individualized violations that occur within a given country’s borders, climate change is a multi-causal, non-linear, transboundary phenomenon that defies the conventional rules for attributing legal responsibility.

Here I focus on two challenges that global warming and the climate movement raise for human rights in general and ESRs in particular. The first one, the rights of future generations, challenges the conventional *time frame* of human rights. The second one, the legal status of non-humans, raises questions about the conventional understanding of *rights holders* in the face of growing awareness of the interdependence of the human and non-human worlds.

⁷² See Sophie Marjanac and Sam Hunter Jones, “*Staying Within Atmospheric and Judicial Limits: Core Principles for Assessing Whether State Action on Climate Change Complies with Human Rights*,” in *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*, ed. César Rodríguez-Garavito (Cambridge University Press, 2022).

⁷³ See Kathryn Sikkink, *The Hidden Face of Rights: Toward a Politics of Responsibility* (New Haven: Yale University Press, 2020).

Facing up to fact that the worst impacts of global warming will be borne by young people and subsequent generations demands putting the issue of time at the center of human rights work. If the late twentieth and early twenty-first centuries were a period of concern about space, I suggest that time will be the most dominant variable in the remainder of this century, in human rights as well as in other fields of practice and thought.⁷⁴

Late-twentieth-century globalization was a spatial phenomenon by definition: the expansion of markets across the world, the connection of the last corners of the globe to telecommunication networks, and the transnational rise of neoliberalism. Although the ESR movement was one of the key sources of criticism and resistance to the inequities of globalization, it remained more focused on space than time. Attuned to the context, it concentrated on the global dissemination of ESR standards embodied in treaties and agreements, which became part of the language of human rights law and politics.

The time to cope with the climate emergency with conventional measures has passed. My generation (Generation X) was a product of globalization, and we largely wasted the thirty crucial years we had to take gradual steps against global warming, ever since scientists sounded the first audible alarm bells in the late 1980s.⁷⁵ Today, Generation Z teenagers go on school strikes to remind us of what the IPCC has concluded: to avoid the most catastrophic climate change scenarios and the subsequent human rights crisis, urgent measures that cut carbon emissions in half by 2030 at the latest are the only way out.

Recovering time also means changing the way that human rights actors think about it. When globalization was booming, the prevailing disciplines, from geography to political economy and international law, focused on space. Today, it is necessary to learn from other fields that hold a fuller understanding of time, such as biology and geology, considering that they are more connected to temporal phenomena such as the evolution of species and the formation of climate

⁷⁴ See César Rodríguez-Garavito, “For Human Rights to Have a Future, We Must Consider Time,” *Open Global Rights*, June 10, 2019, <https://www.openglobalrights.org/for-human-rights-to-have-a-future-we-must-consider-time/>, from which this section is partly taken.

⁷⁵ See Gaia Vince, “The Heat Is On Over the Climate Crisis. Only Radical Measures Will Work,” *The Guardian*, May 18, 2019, <https://www.theguardian.com/environment/2019/may/18/climate-crisis-heat-is-on-global-heating-four-degrees-2100-change-way-we-live>.

systems. As geologist Marcia Bjornerud wrote, “an acute consciousness of how the world is made by – indeed, made of – time” is what is required.⁷⁶ Advancing this vision implies pursuing changes based on “timeful” ideas and proposals, as suggested by Bjornerud.

In the realm of human rights, a particularly “timeful” idea is the recognition of the rights of future generations. The Universal Declaration of Human Rights falls short when it states that “all human beings are born free and equal in dignity and rights.”⁷⁷ The Declaration considers only present generations because its provisions do not prevent them from leaving an uninhabitable planet to future generations. The same can be said of subsequent treaties and standards, including those on ESRs, focused as they are on socioeconomic justice as opposed to intergenerational justice.

As noted, a holistic approach to ESRs requires considering the impact of a given action on future generations. For them, the fundamental threats to their ESRs are the unlivable temperatures, massive forced migrations, armed conflicts, new pandemics, crippling physical and mental health illnesses, and other predictable impacts of a planet warmer than 1.5 degrees above pre-industrial temperatures.⁷⁸ From this viewpoint, for instance, economic initiatives that governments justify by invoking redistributive goals – such as the opening of a new oil field or coal mine – need to be assessed in light of the evidence that, in order to avoid the most extreme scenarios of climate change, humanity needs to keep existing fossil fuel reserves underground.⁷⁹

Although not as decisively as the climate emergency would warrant, the human rights community is gradually coming to terms with the full recognition of the rights of future generations. An especially dynamic approach has been litigation on behalf of children and young people. Instead of defining the rights of future generations as those of people who have not yet been born, these lawsuits extend the time frame of human rights by advocating for the rights of those who are likely to be alive around the end of the century, when the most serious consequences of global warming are predicted to happen. An early instance was the *Juliana* case, in which a group of youth sued

⁷⁶ See Gaia Vince, “The Heat Is On Over the Climate Crisis. Only Radical Measures Will Work,” n. 70.

⁷⁷ Universal Declaration of Human Rights, Art. 1 (The United Nations, 1948).

⁷⁸ See Wallace-Wells, *The Uninhabitable Earth*, n. 9.

⁷⁹ See, e.g., Christophe McGlade and Paul Ekins, “The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C,” *Nature* 517 (2015): 187 – 190.

the U.S. government in 2015 for its lack of ambition regarding climate action and its role in actively promoting fossil fuel extraction. In 2018, the Colombian Supreme Court ruled in favor of young plaintiffs who sued the government to hold it accountable to its own international climate-related pledge to reduce deforestation in the Amazon region.⁸⁰ In 2020, four children and two young adults from Portugal filed a complaint against thirty-three European governments before the European Court of Human Rights, alleging that the governments' inaction violated their rights to life, private life, and non-discrimination under the European Convention on Human Rights. Other rights-based lawsuits involving young plaintiffs have been filed in Australia, Canada, Germany, India, Peru, and South Korea.⁸¹ At the time of writing, a total of twenty-five rights-based climate cases have been filed on behalf of children and young people before national and international judicial and quasi-judicial bodies. Not all of these cases revolve around ESRs, and most of them are still pending or on appeal. However, together with increased recognition of future generations as rights holders by UN treaty bodies and SRs, this wave of litigation holds out the prospect of extending the time frame of ESRs and contributing to a more holistic approach to rights.

Climate activism raises a second challenge for human rights, one that has to do with the very conception of who counts as a rights holder. From Raworth's "doughnut economics" to Kymlicka's and Nussbaum's cases for animal rights to climate and Indigenous activists' claims about the intrinsic value of nature, moral and legal approaches that question modernity's categorical separation of the human and non-human worlds have gained momentum. It is not a

⁸⁰ See Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, abril 5, 2018, M.P.: L.A. Tolosa Villabona, Expediente 11001-22-03-000-2018-00319-01 (Colom.), <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>.

⁸¹ See *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020); see also "Youth Verdict v. Waratah Coal," *Grantham Research Institute for Climate Change and the Environment*, last accessed March 22, 2021, https://climate-laws.org/cclow/geographies/australia/litigation_cases/youth-verdict-v-waratah-coal; see also "La Rose v. Her Majesty the Queen," *Sabin Center for Climate Change Law*, last accessed March 22, 2021, <http://climatecasechart.com/non-us-case/la-rose-v-her-majesty-the-queen/>; see also Jeff Tollefson, "Canadian Kids Sue Government Over Climate Change," *Nature*, October 25, 2019, <https://www.nature.com/articles/d41586-019-03253-5>; see also "Pandey v. India," *Sabin Center for Climate Change Law*, last accessed March 22, 2021, <http://climatecasechart.com/non-us-case/pandey-v-india/>; see also Chloe Farand, "Nine-Year-Old Girl Files Lawsuit Against Indian Government Over Failure to Take Ambitious Climate Action," *Independent*, April 1, 2017, <https://www.independent.co.uk/environment/nine-ridhima-pandey-court-case-indian-government-climate-change-uttarakhand-a7661971.html>.

coincidence that they are proliferating at a time when global warming, biodiversity loss, air pollution, and other transgressions of the Earth's boundaries are reminding us that *Homo Sapiens* are embedded in the biosphere. Some approaches to the protection of the more-than-human world are anthropocentric – for instance, the vindication of the human right to a healthy environment. Others are ecocentric – for instance, the recognition of the rights of nature. However, as scientific evidence of the pervasive interdependence of and affinities between the human and more-than-human worlds proliferates, the gap between anthropocentric and ecocentric approaches has been shrinking.

As Knox has noted, one way to further shrink the gap is “to interpret the right of humans to live in a healthy environment to include the right of the environment itself to be healthy.”⁸² The clearest authoritative articulation of this view can be found in the Inter-American Court of Human Rights' 2017 advisory opinion on the environment and human rights. According to the Court, the right to a healthy environment “protects the components of the environment, such as forests, rivers, seas and others, as legal interests in themselves, even in the absence of certainty or evidence about the risk to individual persons.”⁸³

Another way to bridge anthropocentric and ecocentric approaches is to relax the legal frontier between human and more-than-human subjectivities. This is what life, health, and Earth sciences have been doing during the last few decades – let alone Indigenous peoples, who have advanced holistic views of justice for centuries. The human rights field is starting to take systematic note of these developments. Court rulings in countries such as India, Ecuador, and Colombia have recognized rivers, animals, and ecosystems as subjects of rights.⁸⁴ The Bolivian and Ecuadorean

⁸² John H. Knox, “Constructing the Right to a Healthy Environment,” *Annual Review of Law and Social Science* 16 (2020): 95.

⁸³ “A Request for Advisory Opinion from the Inter-American Court of Human Rights Concerning the Interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights,” Opinion, ¶ 62, n. 63.

⁸⁴ See, e.g. Corte Suprema de Justicia [C.C.] [Constitutional Court], Sala de Sexta de Revisión, noviembre 10, 2016, M.P.: Jorge Iván Palacio Palacio, Expediente T-5.016.242 (Colom.) (unofficial translation) at 98 (translation by Thomas Swan, Erin Daly, & James R. May), <http://files.harmonywithnatureun.org/uploads/upload838.pdf>; see also *Sentencia N. °012-18-SIS-CC*, Corte Constitucional, Caso N. °0032-12-IS, 28 marzo 2018 (Ecuador), <https://www.derechosdelanaturaleza.org.ec/wp-content/uploads/2018/04/CUMPLIMIENTO-R%C3%8DO-VILCABAMBA.pdf>; see also *Narayan Dutt Bhatt v. Union of India*, Writ Petition (PIL) No. 43 of 2014, High Court of Uttarkhand at Nainital (June 13, 2018) (India).

constitutions formally recognize nature as a subject of rights.⁸⁵ In New Zealand, an act of parliament granted legal personhood to the Whanganui river as an indivisible and living non-human being.⁸⁶

This is not the place to examine in detail these cases and the traditions of legal theory that support them.⁸⁷ For the purposes of this chapter, it is safe to conclude that through a combination of anthropocentric and ecocentric approaches, the salience of more-than-human rights is likely to continue to grow. As signs of the climate emergency continue to multiply, such approaches are bound to become frequent tools in the effort to climatize ESRs.

3. Conclusions

The climate emergency poses an existential challenge to the ESR project. The hard-won normative and practical progress that ESR movements, organizations, and institutions have made for over seventy years is being fundamentally disrupted by the pervasive and massive impact of global warming on societies and the planet. During the same period, humanity embarked on the Great Acceleration, a period of unprecedented economic activity, population growth, and effects on the conditions for life on Earth. The impact has been so deep that it will be inscribed in the geological record. This has led Earth scientists to suggest that we are indeed living in a new epoch of planetary history: the Anthropocene, the period when a single species (us) gained the power to alter the fate of all other species and the planet at large.

In this chapter, I have argued that, if it is to remain relevant under the conditions of the Anthropocene, the ESR project needs to systematically and urgently address the climate emergency. This is the task that I have called “climatizing ESRs.” It includes insisting on ESRs’ core concern with levels of economic and social well-being and equity that are indispensable for a

⁸⁵ See Liliana Estupiñán Achury et al. (eds.), *La Naturaleza Como Sujeto de Derechos en el Constitucionalismo Democrático* (Bogotá: Universidad Libre, 2019), <https://www.uasb.edu.ec/documents/10181/301042/Libro+derechos+de+la+naturaleza/e8a378bd-477f-4a05-b1e1-51ec1215fbf9?version=1.0>.

⁸⁶ See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, p. 14, ¶12 (N.Z.).

⁸⁷ For a global survey of cases, see Craig Kauffman and Pamela Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (Cambridge: MIT Press, 2021); for a seminal work on the rights of nature in Western jurisprudence, see Christopher Stone, *Do Trees Have Standing?*, 3rd ed. (Oxford: Oxford University Press, 2010).

dignified human existence. This agenda, which constituted a key source of criticism and resistance to the inequities of capitalism in the past century, is particularly important at a time when socioeconomic inequality is on the rise.

However, climatizing ESRs also entails adding new concerns, norms, and strategies in order to match the nature, speed, and scale of the climate emergency. I have suggested that ESR actors may find inspiration in other fields of research and practice that have come to terms with the singular reality of the Anthropocene, from biology, ecology, and geology to health sciences and Earth system sciences to holistic economics and philosophy. Just as Indigenous knowledge has done for centuries, these fields of Western knowledge have been actively exploring the interdependence of human societies and the biosphere and that of the human and the more-than-human worlds. If further evidence was needed, a global pandemic and a flurry of extreme weather events in the early 2020s have reminded us that distributive justice is possible only if economic activity remains within planetary boundaries.

In the same way that ESR actors have powerfully advocated for embedding the market in society, they now need to advocate for embedding society in the biosphere. Just as they contested the inequities of post-World War II industrial capitalism, they should now urgently contest fossil capitalism, that is, the very sources of carbon-intensive energy that have fueled capitalism up until now.

The climatization of rights implies bringing together civil, political, socioeconomic, and environmental rights. In the holistic understanding of rights that this chapter has advanced, they are indivisible. While civil, political, and socioeconomic rights embody the baseline freedoms and material well-being that are compatible with human dignity, environmental rights represent the limits to human activity that are compatible with planetary boundaries and life on Earth. The result is an expanded goal for ESRs and human rights writ large: human flourishing in a thriving web of life.

I posited that there are two main routes to the climatization of ESRs and offered evidence on how ESR actors are taking steps in those directions. The first route entails working with the existing battery of ESR concepts, norms, and strategies to address the climate emergency. This route largely focuses on the important work of adapting to the already inevitable impacts of global warming. As

the work of UN treaty bodies, SRs, and other authorities show, the argument underlying this avenue runs in two complementary directions. On the one hand, ESR actors seek to hold states and other duty bearers accountable for the violations of the rights to health, housing, food, education, etc. of individuals and communities impacted by extreme weather events and other consequences of global warming. On the other hand, they infuse climate action with ESR standards by reminding states and other duty bearers that policies intended to deal with the impacts of global warming need to be substantively and procedurally consistent with ESRs.

The second route to the climatization of rights requires articulating new concepts, interpretations, and norms. I illustrated this avenue through a survey of innovations taking place in ESR-based climate litigation before national and international judicial and quasi-judicial bodies around the globe. I highlighted two types of contributions that this growing body of lawsuits and rulings make to the climatization of ESRs. First, they are actively dealing with the complex issue of climate mitigation. Since time is running out to cut GHG emissions in order to avert the most extreme scenarios of global warming, litigants and adjudicators are hashing out rights-based standards to pressure governments (and, to a lesser extent, corporations) to increase the speed and scale of mitigation efforts. Second, some ESR actors are developing new norms and concepts to protect the rights of future generations and non-humans. Through anthropocentric and ecocentric approaches, they are effectively expanding the concept of rights holder in ways that hold out the promise to update the human rights toolkit to the needs of urgent climate action.

I have also argued that the climatization of rights requires a greater sensitivity to the importance of time in the ESR field. The COVID-19 pandemic and the fires, floods, hurricanes, and other profoundly disruptive events of the early twenty-first century have reminded us how quickly life can be upended and how human rights actors need to anticipate and urgently react to the effects of the Great Acceleration. At the same time, these events have reminded us of the “deep time” of the Earth’s life systems that we are disrupting, which is measured in millions of years. By adding a concern with planetary limits, climatizing rights may help decelerate human activity to a level that is compatible with the flourishing of human life in a thriving web of life – before it is too late.

Recommended Readings

César Rodríguez-Garavito (ed.) *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press, 2022).

Figure 1. The Climate-ESR Circuit

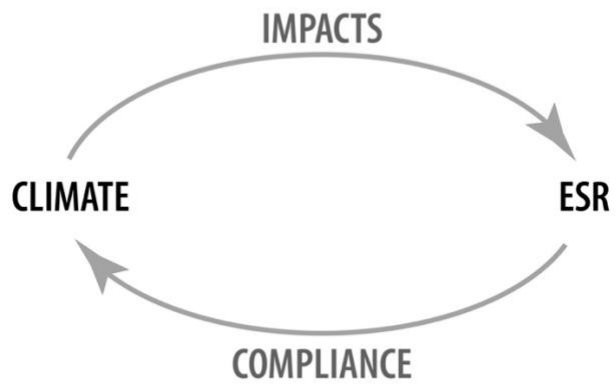


Figure 2. Human Rights and the Doughnut of Social and Planetary Boundaries

Adapted from K. Raworth, <https://www.kateraworth.com/doughnut/>

