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**ASSESSING THE PROSPECTS FOR CLIMATE ACTION IN THE
FORM OF CLIMATE LITIGATION AS A TOOL TO SAFEGUARD
HUMAN RIGHTS**

by

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Declaration of originality

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Chapter One Introduction

1. Background of the study

Experts have warned that climate change is an existential threat to humanity.¹ Changes in global temperatures are fueling environmental degradation, natural disasters and other extreme weather event.² This intensifies food and water insecurities, which amplifies health issue, disrupts economies, and increases conflicts over land and resources.³ Sea level rise has resulted in the loss of properties and homes, which increases the magnitude of social injustices, including xenophobia and racism.⁴ These injustices are particularly undeserved since those who have contributed the least to climate change bear the biggest brunt of the climate crisis.⁵ Normalizing climate change as an abstract term that has no human effect and is strictly limited to scientific boundaries is no longer acceptable. Those that have been, and will be disproportionately affected by climate change have presented stories and life experiences that has personified the climate crisis as the serious human rights challenge.⁶

The Intergovernmental Panel on Climate Change (hereinafter “IPCC”) reveals that there are sufficient indicators proving that global temperatures will continue to rise due to continuous carbon emissions that are driven and accelerated by human activities.⁷

¹ UN News: *Climate change: An 'existential threat' to humanity, UN chief warns global summit* (2018), available at <https://news.un.org/en/story/2018/05/1009782> (accessed 10 May 2020).

² Intergovernmental Panel on Climate Change (hereinafter IPCC): *Climate Change 2014: Impacts, Adaptation, and Vulnerability Part A: Global and Sectorial Aspects* (2014), at 485 available at https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf (accessed 20 May 2020).

³ *Id.*, at 757.

⁴ United Nations Human Rights Council: *Climate change and poverty – Report of the Special Rapporteur on extreme poverty and human rights* (2019) A/HRC/41/39, at para 67.

⁵ *Id.*, at para 14 – 15.

⁶ *Id.*, at para 33.

⁷ NASA scientist compiled studies that proves that the earth’s temperature is continuously rising due to human activities, available at

Thus, the impacts of climate change on ecosystems and people are likely to increase significantly.⁸ Furthermore, a scientist study presented by Science Advances confirmed that as of May 2019, the concentration of carbon dioxide (hereinafter ‘CO2’) in the atmosphere is the highest it has ever been in human history.⁹ The overwhelming scientific evidence has deemed climate change a global crisis which requires urgent, impactful and continuous climate action on a global scale.¹⁰ Climate action is not only a means to tackle the current impacts of climate change, but also to guarantee that future generations will inherit a habitable world.¹¹ States have international obligations to take effective climate action to protect against human rights violations.¹² However, the current trajectory of climate action taken by States’ lacks a sense of urgency.¹³ States’ have prepared international and national climate change pledges that are weak and considered ineffective to significantly reduce carbon emissions.¹⁴ These pledges seem to be limited by States’ subjective estimates of what they believe constitutes effective climate action.¹⁵ This has enabled States to commit to futile climate actions, which renders the global goal on emission reduction insufficient to keep global warming well below 1.5 degrees Celsius.¹⁶

https://climate.nasa.gov/climate_resources/139/video-global-warming-from-1880-to-2019/ (accessed 10 May 2020). The IPCC Fifth Assessment Report (AR5) that concludes that there is enough evidence showing that the damages resulting from climate change are likely to increase over time. It also global temperatures rise will continue for the next decades due to greenhouse gasses produced as a result of human activities, available at https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap22_FINAL.pdf (accessed 10 May 2020).

⁸ *Ibid.*

⁹ M Willeit, A Ganopolski, R Calo & V Brovkin ‘Mid-Pleistocene Transition in Glacial Cycles Explained by Declining CO2 and Regolith Removal’ (2019) *Scientific Advances Vol. 5*, available at <https://doi.org/10.1126/sciadv.aav7337> (accessed 21 July 2020).

¹⁰ United Nations Secretary-General: *Report of the Secretary-General on the 2019 Climate Action Summit and the way forward in 2020* (2019), at 3.

¹¹ See A/HRC/41/39 (n 4 above), at para 26.

¹² *Id.*, at para 22 – 25.

¹³ United Nations Environment Programme: *Emissions Gap Report November 2019* (2019), at 8.

¹⁴ Steven Herz *Paris Is Not Enough: Why the Paris Agreement Isn’t Driving More Climate Action, And How It Could* (2020), at 2.

¹⁵ *Id.*, at 3.

¹⁶ *Id.*, at 4.

To avoid future and catastrophic climate change, States need to take rapid and effective climate action to ensure that their citizens enjoy their rights to live in a safe, clean and healthy environment.¹⁷ Currently, individuals and civil society groups, including youth organizations from all over the world are demanding urgent and effective climate action.¹⁸ Their determination has inspired the growing global movement that seeks to hold States accountable for failing to combat climate change.¹⁹ This movement employs both environmental and human rights perspectives to guarantee climate justice for those who are and will be affected by climate change impacts.²⁰ Recently, individuals and civil society groups have successfully extended their climate action efforts into courts.²¹ Experts say that this ‘new class’ of climate change litigation (hereinafter “climate litigation”) has resulted in an increase in climate change awareness and, it has also encouraged a growth in resilient and ambitious climate action taken by non-states actors.²² Consequently, climate litigation is now increasingly employed as a climate action tool to enhance States efforts to tackle the climate crisis.²³

Currently, court precedents in relation to climate change seems to show a general recognition of the responsibility that States and corporations have in relation to climate mitigation and adaptation efforts to protect and uphold people’s rights.²⁴ Furthermore, climate litigation seems to promote public discussions on the multidisciplinary nature

¹⁷ Tessa Khan *Accounting for the Human Rights Harms of Climate Change: The use of strategic litigation is a key tool in holding governments - Responsible for inaction on climate change* (2017), at 91. See also UN News (n 1 above).

¹⁸ Jessica Corbett *Study Finds Holding Governments and Corporations Legally Accountable for Climate Crisis 'Has Become a Global Phenomenon'* (2019), available at <https://www.commondreams.org/news/2019/07/04/study-finds-holding-governments-and-corporations-legally-accountable-climate-crisis> (accessed at 21 July 2020)

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Joana Setzer and Rebecca Byrnes *Global Trends in Climate Change Litigation: 2019 Snapshot* (2019), at 5. This reports indicates that the number of countries in which people are demanding climate action in courts is likely to continue to increase.

²⁴ United Nations Environment Programme: *The Status of Climate Change Litigation: A Global Review* (2017), at 10 -11.

of climate change and its solutions.²⁵ In fact, Former US Vice President Al Gore recently spoke about how climate change solutions are catalysts for solutions to other social and economic challenges.²⁶ For instance, climate change impacts have severe consequences on the rights to food.²⁷ These impacts warrants climate action through the adoption of stringent policies on climate resilient crops and farming techniques.²⁸ These solutions are parallel to solutions that are specifically presented to tackle sustainable development goal two, which represents zero hunger.²⁹ These solutions and possible directives could potentially originate in courts through strategic climate litigation efforts.

2. Objectives of the Study

This study seeks to examine the value and effectiveness of climate litigation as a substantial form of climate action that protects against human rights violations. This study aims to examine the recent developments in climate litigation procedures to determine the value it may have as a climate justice tool used by individual and communities affected by climate change impacts. The study attempts to achieve these objectives by presenting considerable factors that support and challenge climate litigation, specifically in relation to protecting and defending human rights.

²⁵ Greenpeace Climate Justice: *Holding your Government Accountable for Climate Change – A Peoples’ Guide* (2018), at 37.

²⁶ Al Gore *RS Interview Special Edition* (2020) available on Youtube at, <https://www.youtube.com/watch?v=5OkGHtl6POY> (accessed 21 July 2020)

²⁷ IPCC: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), at 9 -11. This report was created to provide policymakers with regular scientific assessments on climate change, its implications and potential future risk, as well as adaptation and mitigation options, available at <https://www.ipcc.ch> (accessed 23 April 2020).

²⁸ *Ibid.*

²⁹ United Nations: *Transforming our World: The 2030 Agenda for Sustainable Development* (2015) Goal 13, A/RES/70/1, at 17.

3. Research question

To what extent can climate litigation as a form of climate action contribute towards tackling climate change as a human rights challenge?

4. Methodology

This research will take the form of an academic, desk-based investigation premised on litigation practices and case law in related to climate change. This investigation is extended to include findings by the United Nations, and International Agreements on human rights and climate change. This aims to assess the value of climate litigation in order to establish key factors and elements that can potentially influence the human rights perspectives to climate action. This aim will be achieved by adopting a qualitative research methodology approach to reinforce meanings in relation to the multidisciplinary nature of climate change, in order to expose the impacts of climate change in underlying interactions and relationships within social, political and legal systems. This study also widely refers to Internet sources, including recent news reports in relation to this study.

5. Chapter overview

The study will present four chapters. Chapter one will introduce the entire study by providing the background and objectives of the study as well as the research questions and methodology used for the study. Chapter two will elaborate and emphasize the climate emergency to understand why urgent and ambitious climate action should be taken to secure and uphold human rights. The chapter will reveal the role played by civil society groups. States obligations will also be highlighted in this chapter. Chapter three will provide a comprehensive discussion of climate litigation, its value as a substantial form of climate action as well as a number of challenges experienced. Chapter four will provide a conclusion and recommendations.

Chapter Two

Climate Action and Obligations of States

1. Introduction

Climate change poses major threats to human life in the form of food and water shortages, health issues, loss of property and more.¹ Children, the elderly and marginalized communities are most vulnerable to the impacts of climate change.² “Climate change amplifies existing environmental, social, economic and political challenges and has increased the risk of displacements and conflicts over resources.”³ This accelerates social injustices, inequalities, and threatens human rights, including the right to life itself.⁴ Consequently, States can no longer overlook their obligations to effectively address climate change to safeguard human rights. States have agreed to mobilize stronger and more ambitious climate actions.⁵ However, their pledges on carbon emission caps, adaptation practices and climate change funds under the Paris Agreement,⁶ are not as ambitious as they ought to be.⁷ Climate action by way of climate change litigation (hereinafter “climate litigation”) is a possible tool to significantly enhance the effectiveness of States efforts to address climate change. Since the adoption of the Paris Agreement, climate litigation has become a global phenomenon,⁸ providing courts with powers to advance climate governance which

¹ Greenpeace Climate Justice: *Holding your Government Accountable for Climate Change – A Peoples’ Guide* (2018), at 22.

² United Nations Secretary-General: *Report of the Secretary-General on the 2019 Climate Action Summit and the way forward in 2020* (2019), at 3. See also, The Royal Irish Academy *The Geography of Climate Justice – An introductory resource to the geography of Climate Justice* (2011), at 10.

³ Greenpeace (n 1 above), at 25.

⁴ *Ibid.*

⁵ United Nations Environment Programme: *Emissions Gap Report November 2019* (2019), at 3.

⁶ The Paris Agreement, (2015) is a multilateral environmental treaty that seeks to enhance the implementation of the United Nations Framework Convention on Climate Change (hereinafter “UNFCCC”). The Agreement was negotiated at the 21st Conference of Parties (“COP21”) and adopted on December 12, 2015, and marked a historic turning point for global climate change action.

⁷ See UNEP: *Emissions Gap Report* (n 5 above), at 8.

⁸ Joana Setzer and Rebecca Byrnes *Global Trends in Climate Change Litigation: 2019 Snapshot* (2019), at 5.

results in the direct and indirect protection of human rights.⁹ The question then becomes whether increased levels of climate litigation will enhance the climate change discourse as a human rights challenge – in other words, will the act of bringing more cases to national and international courts reinforce climate governance by States to safeguard human rights.

As a starting point, it is imperative that certain overarching concepts are defined and established. Therefore, the aim of this chapter is to contribute to understanding why urgent and ambitious climate action should be taken to secure and uphold human rights. It does so by assessing the connection between climate action and obligations of States. In particular, it seeks to reveal the stakeholders responsible to take climate action and what obligations they have in relation to climate change. The point of departure of this chapter is that climate change and human rights challenges are inseparable.

The chapter begins by illustrating future and past impacts of climate change on human rights, and provides a concise account of the formal recognition that climate change is a human rights challenge. Thereafter the chapter will define climate action and its various role-players involved in it. This section also briefly introduces climate litigating as a persuasive form of climate action and identifies who are the common plaintiffs and defendants in climate litigation procedures. This chapter will also reveal State's obligations in terms of international law to take climate action. And lastly, this chapter will provide concluding remarks.

2. Climate change as a human rights challenge

There have been various alarm bells exposing climate change as a human rights challenge. For instance, Pope Francis, the leader of the biggest Christian denomination declared a global climate emergency and warned that failure to take

⁹ *Id.*, at 6.

urgent action would be an injustice towards the poor and future generations.¹⁰ When actor Leonardo DiCaprio was awarded his first-ever Oscar, this being one of cinema's most historic moments, in his acceptance speech, he emphasized the gravity of the climate crisis and urged the audience to take bold and ambiguous climate action in order to protect those that will be most affected by the crisis.¹¹

The impacts of climate change on human rights have been expressed by various leaders and experts in different social, economic, legal and scientific fields.¹² However, the climate crisis as a human rights challenge has remained largely overlooked due to the general assumption that climate change is only an environmental issue.¹³ Indeed, the environmental effects of climate change are indisputable, from rising sea levels, mass extinction of species, unstable seasons to floods and droughts.¹⁴ However, portraying the climate change narrative as strictly environmental raises grave concerns.

According to a report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, there is certainly sufficient evidence to sustain that climate change is more than just an environmental issue.¹⁵ The report stresses that climate change threatens the full enjoyment of rights including the right to life, health, water, food,

¹⁰ The Guardian *Pope Francis declares 'climate emergency' and urges action*, 14 June 2019, available at <https://www.theguardian.com/environment/2019/jun/14/pope-francis-declares-climate-emergency-and-urges-action> (accessed 23 April 2020).

¹¹ Oscars 2016: Leonardo DiCaprio Wins Best Actor Speech 2016, available at <https://www.youtube.com/watch?v=AOoP56eXtzM> (accessed 23 April 2020) See also <https://variety.com/2016/film/news/leonardo-dicaprio-oscar-speech-climate-change-1201717970/> (accessed 23 April 2020). See also Al Gore: The Case for Optimism on Climate Change, available at <https://www.youtube.com/watch?v=gVfgkFaswn4> (accessed 23 April 2020)

¹² United Nations Human Rights Council: *Climate change and poverty – Report of the Special Rapporteur on extreme poverty and human rights* (2019) A/HRC/41/39, at para 1.

¹³ *Id.*, at para 16.

¹⁴ Anne King *Climate change and human rights – Can the courts fix it?* (2019), available at <https://www.boell.de/en/2019/03/18/climate-change-and-human-rights-can-courts-fix-it> (accessed 25 April 2020).

¹⁵ United Nations 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) A/HRC/31/52, at para 24.

housing, development and self-determination.¹⁶ The greater the increase in average global temperature, the greater the number of deaths, injuries and displacement of persons from climate-related disasters, as well as an increase in mortality and illness from heat waves, droughts, diseases and malnutrition.¹⁷

According to estimates made by the World Bank, without urgent climate action, climate change could drive 120 million more people into poverty by 2030,¹⁸ access to water is expected to decrease significantly and droughts are expected to increase in many already-dry areas.¹⁹ Consequently, climate change will negatively impact agricultural systems especially the production of major crops, such as wheat, rice and maize, leaving millions of people with no food to eat.²⁰ Furthermore, estimates also reveal that between 2030 and 2050, climate change is expected to cause approximately 250 000 additional deaths per year due to malnutrition, malaria, diarrhea and heat stress.²¹

Climate change will force people to migrate, yet the ability to migrate often depends on mobility and resources.²² Therefore, those who are most vulnerable will not be able to migrate, instead remaining in locations that will make them more susceptible to climate-induced harms.²³ Experts suggest that by 2050, climate change could displace approximately 140 million people in sub-Saharan Africa, South Asia and Latin America alone.²⁴ Furthermore, climate change threatens the very existence of some small islands.²⁵ As sea levels rise, these islands lose surface area, forcing people to evacuate which creates restrictions to their rights to self-determination and to development.²⁶

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ World Bank *Shock Waves: Managing the Impacts of Climate Change on Poverty* (2016), at 12.

¹⁹ *Id.*, at 25.

²⁰ *Id.*, at 26.

²¹ World Health Organization: *Quantitative Risk Assessment of the Effects of Climate Change on Selected Causes of Death, 2030s and 2050s* (2014), at 22.

²² See A/HRC/31/52 (n 15 above), at para 26.

²³ *Id.*, at para 27.

²⁴ See A/HRC/41/39 (n 12 above) at para 11.

²⁵ *Id.*, at para 13.

²⁶ See A/HRC/31/52 (n 15 above), at para 29.

Climate change will aggravate existing inequalities. According to the Intergovernmental Panel on Climate Change (hereinafter 'IPCC'), people who are socially, economically, culturally, politically, institutionally or otherwise marginalized are particularly vulnerable to climate change.²⁷ Perversely, the richest people who are liable for and have benefited from the vast majority of carbon emissions, will be able to handle the impacts of climate change better.²⁸ Yet, the poorest people, who have contributed and benefited the least to carbon emissions will not have adequate resources to react to the impacts of climate change.²⁹ This inequality is illustrated in a study compiled by Oxfam International which reveals that the poorest half of the world's population is responsible for 10% of carbon emissions, while the richest 10% of the world's population are responsible for half of the world's carbon emissions.³⁰

The paragraphs above illustrate future impacts of climate change on human rights. However, these impacts have already been experienced by millions of people, and perhaps offering an illustration of past impacts of climate change may reinforce the motives for more urgent and ambitious climate action. Former United States President Barack Obama, said that "climate change is no longer some far-off problem; it is happening here and it is happening now".³¹ In recent years, climate change has caused rapid melting of icecaps, unexpected wildfires, more frequent floods and cyclones and currently, millions face malnutrition due to devastating drought.³²

²⁷ IPCC: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty (2018), at 10 & 13.

²⁸ Anmar Frangoul on *CNBC - Oxfam International, World's richest 10% produce half of carbon emissions while poorest 3.5 billion account for just a tenth* (2015), available at <https://www.cnbc.com/2015/12/03/worlds-richest-10-produce-half-the-pollution-oxfam.html> (accessed 27 April 2020). See also A/HRC/41/39 (n 12 above), at para 14.

²⁹ See Anmar Frangoul (n 28 above).

³⁰ *Ibid.*

³¹ See Obama warns climate change "can no longer be denied", available on Youtube at https://www.youtube.com/watch?v=S9A0w_lemK0 (accessed 1 May 2020).

³² See World Health Organization (n 21 above), at 23.

In 2017, 18.8 million people worldwide were displaced due to climate-related disasters, this is almost twice the number of displaced persons due to conflict.³³ Furthermore, authorities have a history of prioritizing wealthier areas for protection,³⁴ furthering the narrative that poorer people will be and are most vulnerable to climate-related harms.³⁵

In 2019, cyclone Idai struck Mozambique, the second poorest country in the world.³⁶ It was reported that 146 000 people were internally displaced, 100 000 homes were damaged, 1 million acres of crops were destroyed, and the cyclone demolished 1 billion dollars' worth of infrastructure.³⁷ While, 70% of the Mozambique's population lives under poverty,³⁸ the cyclone proved to have heightened the country's preexisting poverty conditions.³⁹ As devastating as that may have been for Mozambique, the world is looking towards a future where such unprecedented floods and storms are commonplace.⁴⁰ Recently, floods in Eastern parts of Africa have intensified the already challenging situation as counties in those regions battle a double crisis of climate change impacts and the coronavirus pandemic.⁴¹

³³ Internal Displacement Monitoring Centre and Norwegian Refugee Council, *Global Report on Internal Displacement* (2018), at 5.

³⁴ *Ibid.*

³⁵ See IPCC Summary for Policy Makers (n 27 above), at 18.

³⁶ See The Poorest Country in the World, available at <https://www.focus-economics.com/blog/the-poorest-countries-in-the-world> (accessed 1 May 2020).

³⁷ Reid Kathryn: *2019 Cyclone Idai - World Vision* (2019) <https://www.worldvision.org/disaster-relief-news-stories/2019-cyclone-idai-fact> (accessed 3 May 2020) Also see United Nations: "UNHCR Factsheet: Cyclone Idai." (2019) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/> (accessed 25 April 2020)).

³⁸ See Reid Kathryn (n 66 above)

³⁹ *Ibid.*

⁴⁰ Deb Blessman: *Top 10 Facts About Poverty in Mozambique* (2017), available at <https://borgenproject.org/about-poverty-in-mozambique/> (Accessed 3 May 2020).

⁴¹ New Aljazeera Reports: *East African countries count losses after devastating floods* (May 2020). Statistics show that 1.3 million people have been affected by flooding in the sub-region, including at least 481,000 displaced, in: Burundi (around 50,000 affected, most of whom are displaced); Djibouti (over 110,000 affected in the capital in the last week of April); Ethiopia (219,000 affected, including nearly 107,000 displaced); Kenya (233,000 affected, including 116,000 displaced); Rwanda (thousands affected); Somalia (546,000 affected, including nearly 217,000 displaced); Tanzania (31,000 affected, including 13,500 displaced); and Uganda (hundreds of thousands affected), see also UN Office for the Coordination of Human Affairs: *Eastern Africa Region: Floods and Locust Outbreak Snapshot* (May 2020)

The destruction caused by the floods killed hundreds of people, while displacing hundreds more,⁴² and also ironically washing away a hospital in Uganda as people move into makeshift camps which make social distancing impossible, and consequently, accelerating the spread of the coronavirus.⁴³ These floods are just a few of the scary, but very real, consequences of the climate crisis.

Climate change has been in the human rights discourse for over a decade, but was formally recognized as a human rights challenge at the 21st session of the Conference of the Parties (hereinafter “COP”),⁴⁴ where the 2015 Paris Agreement was adopted.⁴⁵ During the session, the United Nations High Commissioner for Human Rights (hereinafter “OHCHR”) admitted that “urgent, effective and ambitious climate action is not only a moral imperative, but also necessary in order to satisfy the duties of States under human rights law.”⁴⁶

The Paris Agreement has been criticized for having abandoned the idea of reducing and controlling carbon emissions through binding emission targets,⁴⁷ this being the foundation of the 1997 Kyoto Protocol.⁴⁸ This criticism underlines the Agreement’s tolerance towards developed country’s massive and historic contribution to carbon emissions which is, in fact the principal cause of the climate crisis.⁴⁹ Several experts

⁴² *Id.*

⁴³ The flood also washed away roads and bridges in Kampala, see news report by Duncan Mirriri & Elis Biryabarema, available at <https://www.reuters.com/article/us-health-coronavirus-africa-floods/ugandan-hospital-somali-town-washed-away-by-east-africa-floods-idUSKBN22K1UC> (accessed 1 May 2020)

⁴⁴ See A/HRC/41/39 (n 12 above), at para 32.

⁴⁵ Office of the High Commissioner for Human Rights: *Submission of the OHCHR (hereinafter “OHCHR”) to the 21st Conference of the Parties to the United Nations Framework Convention: Key Messages on Human Rights and Climate Change* (2015) A/HRC/32/24, at 11 www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf. (accessed 3 May 2015).

⁴⁶ *ibid*, at 9 -11.

⁴⁷ Benoit Mayer ‘Human Rights in the Paris Agreement’ (2016) *Climate Law*, at 109 -110

⁴⁸ The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change. The major feature of the Kyoto Protocol is that it sets binding targets for 41 industrialized countries and the European community for reducing greenhouse gas (GHG) emissions, see <https://www.britannica.com/event/Kyoto-Protocol> (accessed 11 June 2020).

⁴⁹ Benoit Mayer (n 47 above), at 113.

go as far as to argue that the Agreement explicitly peruses developing countries in order to control their future carbon emissions, punishing them for the ever-increasing carbon emissions of which they are not responsible for.⁵⁰ Furthermore, the Agreement is criticized for being centered around State's voluntary pledges to address the climate crisis, giving States the freedom to subjectively decide on the level of urgency around the climate crisis, thus reducing the Agreement's efficiency to measure the global impact of climate action.⁵¹

Despite these criticisms, the Paris Agreement is mostly seen as revolutionary.⁵² It is applauded by human rights communities for being the first climate agreement, and one of the first environmental agreements of any kind, to explicitly recognize the significance of human rights.⁵³ The Agreement does not explicitly mention human rights in its operative provisions however, after acknowledging that climate change is a common concern of humankind,⁵⁴ the preamble to the Agreement states the following:

“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.”⁵⁵

⁵⁰ *Id.*, at 114.

⁵¹ “Parties to the Agreement should communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve” These contributions are meant to reflect each country's ambition for carbon emission reduction, taking into account its domestic circumstances and capabilities, available at <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs> (accessed 18 May 2020).

⁵² A/HRC/41/39 (n 12 above), at para 32 -34. UN experts say that the Paris Agreement is a historic turning point in the global effort to address climate change.

⁵³ Article 1 – 29 of the Paris Agreement constitute the operative provisions of the Agreement and does not explicitly use the term ‘human rights’ does not explicitly mention human rights.

⁵⁴ See Preamble of the Paris Agreement (2015).

⁵⁵ *Id.*

The above-mentioned provision has no equivalent in the United Nations Framework Convention on Climate Change (hereinafter “UNFCCC”) and the Kyoto Protocol.⁵⁶ This emphasizes the uniqueness of the Agreement as it “outlines the positive obligation on States to promote and consider human rights when taking climate action.”⁵⁷ Further into this chapter, States obligations in terms of the Agreement will be discussed in detail. For the purposes of this research, this section establishes why urgent and effective climate action is crucial in order to protect and uphold human rights.

3. Climate Action: States and non-state actors

Sustainable Development Goal 13 defines climate action as the urgent act of combatting climate change and its impacts.⁵⁸ In other words, climate action is the stepped-up efforts to reduce greenhouse gas (GHG) emissions,⁵⁹ to strengthen resilience and adaptive capacity to climate-induced impacts,⁶⁰ which includes integrating climate change measures into national policies and strategies,⁶¹ and improving education, awareness-raising with respect to climate change mitigation, adaptation, impact reduction and early warning systems.⁶²

While it may be assumed that taking climate action is a duty imposed on States based on their international commitments,⁶³ given the urgency of the climate crisis as well as the emerging climate trends, it would probably be more accurate to say that there is a moral responsibility for everyone to take climate action.⁶⁴ This means that States as well as Non-State actors such as individuals, non-governmental organisation

⁵⁶ See Benoit Mayer (n 47 above), at 113.

⁵⁷ *Ibid.*

⁵⁸ See A/RES/70/1 (n 29 above), at 25.

⁵⁹ *Id.*, Goal 13.1.

⁶⁰ *Id.*, Goal 13.2.

⁶¹ *Id.*, Goal 13.3.a.

⁶² *Id.*, Goal 13.3.b.

⁶³ Lauri Lahikainen *Individual Responsibility For Climate Change A social structural account*, Academic Dissertation University of Tampere (2018), at 80.

⁶⁴ See Lahikainen (n 63 above), at 32.

(hereinafter “NGOs”), businesses and other social and environmental groups have a responsibility to take climate action.⁶⁵ For most non-State actors, since climate change generates and fuels human right violations, and other systemic injustices, they take climate action based on moral obligations.⁶⁶ Therefore, in most instances, non-State actors do not have formal obligations to take climate action. While on the other hand, States have prescribed procedural obligations rooted in national and international laws to take climate action.⁶⁷

Currently, climate action taken by States have proved to be insufficient and driven by the need to only satisfy administrative outcomes that have minimal direct human-related impacts.⁶⁸ To substantiate this view, the United Nations Environment Programme (hereinafter “UNEP”) published a 2019 emissions gap report which highlights that despite elaborative commitments made by States in their Nationally Determined Contributions (hereinafter “NDCs”) to tackle the climate crisis, global emissions are projected to continue rising.⁶⁹ Additionally, experts have indicated that the next 10 years are crucial for climate action,⁷⁰ with the prevalent recognition that carbon emissions must fall 45% by 2030 to keep global warming well below 1.5C as stipulated in the Paris Agreement.⁷¹ In other words, experts have confirmed that in light of the evident climate crisis, the scale and pace of climate action taken by States have proved to be insufficient.⁷²

The UNEP 2019 emissions gap points out 7 major climate culprits; Australia, Brazil, Canada, Japan, South Korea, South Africa and the US,⁷³ and highlights that these States are noticeably far from meeting their climate change commitments.⁷⁴

⁶⁵ *Id.*, at 34.

⁶⁶ *Id.*, at 44.

⁶⁷ Human Rights Council: *Resolution adopted by the Human Rights Council on 12 July 2019 Human rights and climate change* (2019) A/HRC/RES/41/21, at 1 - 2

⁶⁸ Tessa Khan *Accounting for the Human Rights Harms of Climate Change: The use of strategic litigation is a key tool in holding governments - Responsible for inaction on climate change* (2017), at 91.

⁶⁹ See UNEP: *Emissions Gap Report* (n 5 above), at 24.

⁷⁰ *Id.*, at 25.

⁷¹ *Id.*, at 29.

⁷² *Id.*, at 29

⁷³ *Id.*, at 8.

⁷⁴ *Id.*, at 10.

There are however, some countries that have proved that climate action is possible in practice as well as in theory. Uruguay, for example, already produces approximately 95% of its electricity from renewable energy.⁷⁵ Another example is Iceland which produces almost all of their electricity from geothermal and hydropower sources.⁷⁶

This situation, where States have failed to take ambitious and impactful climate action, has given non-State actors a forefront position in leading climate action to safeguard human rights.⁷⁷ Most of these actors form part of what is known as the civil society,⁷⁸ and play a significant role in national and international climate change negotiations by stimulating climate action ambition.⁷⁹ Civil society groups have contributed towards defining climate-related issues, and shaping climate change rules, principles, and normative standards.⁸⁰ Additionally, they evaluate and monitor State compliance with human rights and climate change regimes,⁸¹ and coordinate numerous climate actions to guarantee the inclusion and recognition of human rights in the climate change discourse.⁸² For instance, it is known that the fundamental human rights features stipulated in the Paris Agreement were arguably established as a result of resilient advocacy by civil society groups.⁸³

⁷⁵ The Guardian: *Uruguay, for example, already produces approximately 95% of its electricity from renewable energy* (2015) available at <https://www.theguardian.com/environment/2015/dec/03/uruguay-makes-dramatic-shift-to-nearly-95-clean-energy> (accessed 4 May 2020).

⁷⁶ *Geography Renewable Energy – Iceland is a Leader in Renewable Energy* (2016), available at <https://www.inspiredbyiceland.com/article/renewable-energy> (accessed 4 May 2020).

⁷⁷ See Tessa Khan (n 68 above) at 92.

⁷⁸ Rachel Cooper *What is Civil Society, Its Role and Value*, unpublished academic article, University of Birmingham (2018) at 2.

⁷⁹ Karin Bäckstrand, Jonathan W. Kuyper, Björn-Ola Linnér & Eva Lövbrand: *Non-state actors in global climate governance: from Copenhagen to Paris and beyond*, *Environmental Politics* (2017), at 561, available at <https://doi.org/10.1080/09644016.2017.1327485> (accessed 26 April).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² See Benoit Mayer (n 47 above) 111-112.

⁸³ *Ibid.*

The Lamu Anti-Coal Plant Campaign illustrates the general architecture of civil society groups.⁸⁴ Communities in Lamu, on the coast of Kenya stood together in solidarity to challenge the Kenyan government and investors who planned to build a coal plant in Lamu.⁸⁵ These communities were of course led by civil society groups who ensured that they were given a platform to raise their human rights and environmental-related concerns about the construction of the coal plant.⁸⁶ As a result, Kenya's National Environment Tribunal (hereinafter "NET") revoked the license granted to build a coal power plant.⁸⁷ This campaign symbolized a win for civil society groups in their efforts to promote public participation of local communities in environmental and human rights governance.⁸⁸

Evidently, the most effective attributes of civil society groups is their ability to mobilize and engage with the public.⁸⁹ In other words, they are well positioned within society to stand in solidarity with affected communities.⁹⁰ On that note, experts have revealed that climate action by civil society groups are particularly successful when there is a human rights focus.⁹¹ It is in this sense that much of climate action to safeguard human rights retains a strong civil society presence.⁹²

⁸⁴ *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd* (2016) Tribunal Appeal No. Net 196 of 2016 at para 3&4.

⁸⁵ *Id.*, at para 10.

⁸⁶ *Id.*, at para 23, 35,

⁸⁷ The Lamu community worked with civil society groups across various sectors. Local and foreign environmental and human rights organisations were actively involved, and included Save Lamu, Katiba Institute, Natural Justice, Heinrich-Böll-Stiftung, 350 Africa, Centre for Human Rights and Civic Education, Sauti Ya Wanjiku, Muhuri – Muslims for Human Rights, Natural Resources Alliance of Kenya, American Jewish World Service and the Centre for Justice Governance and Environmental Action. These connections and networks provided legal, financial and other resources to the local activists whilst facilitating an exchange of information, which provided the Lamu community with the tools and influence to fulfil their goal., see UNEP News: *Lamu coal plant case reveals tips for other community-led campaigns* (2019), available at <https://www.unenvironment.org/news-and-stories/story/lamu-coal-plant-case-reveals-tips-other-community-led-campaigns> (accessed 30 May 2020)

⁸⁸ This case inspired many similar actions where communities in many parts of Africa came together not only to support the Lamu case but to strive to transformation their own local environmental governance.

⁸⁹ See Karin Bäckstrand and others (n 79 above), at 562.

⁹⁰ See A/HRC/41/39 (n 12 above), at para 27.

⁹¹ See Tessa Khan (n 68 above) at 92.

⁹² See Karin Bäckstrand and others (n 79 above), at 561.

This presence has recently stimulated a new and arguably affective approach to climate action, namely climate litigation,⁹³ which refers to the institution of legal actions in which climate change and its impacts are either a contributing or key consideration in legal arguments and adjudications.⁹⁴ Climate litigation seeks to ensure that governments incorporate climate change into their decision-making processes.⁹⁵ While governments have remained the main defendant in these procedures, civil society groups have remained the main and prominent plaintiffs in these procedures.⁹⁶

For the purposes of this research, this section illustrates that climate action is a duty imposed on both States and Non-state actors. This section also introduced climate litigation as a resilient and developing form of climate action and in doing so, this chapter reveals civil society groups as the common plaintiffs in climate litigation, and States are the common defendants in such procedures.

4. State obligation to take climate action to safeguard human rights:

4.1 International human rights instruments

In 2009, the OHCHR concluded for the first time that “States have obligations to address the effects of climate change on human rights.”⁹⁷ From the Universal Declaration of Human Rights onwards, international human rights treaties contain provisions that obligates States to adopt remedies to address human rights

⁹³ *Ibid.*

⁹⁴ Jacqueline Peel & Hari M. Osofsky ‘Climate Change Litigation – Regulatory Pathways to Cleaner Energy’ (2015) *Cambridge University Press*, at 5.

⁹⁵ *Ibid.*, at 6. “While governments have remained the main defendant type (in over 80 per cent of cases) over the period under analysis, 1994–May 2019, the number of corporations as plaintiffs has fallen both in relative and absolute terms, while the number of NGOs has increased (see Figure 3). The prominence of NGOs in high-profile cases suggests that this is an area in which NGOs are increasingly engaged.” See quote from, Joana Setzer and Rebecca Byrnes (above n 8), at 4.

⁹⁶ *Ibid.*

⁹⁷ See A/HRC/31/52 (n 44 above), at para 37.

violations.⁹⁸ Should these violations happen to be a consequence of climate-induced harms, States have obligations to adopt remedies that protect against, and respond to these harms.⁹⁹ While climate change is not explicitly mentioned in any of the key international human rights treaties, the UN Human Rights Treaty Bodies, which monitor States' binding obligations under international human rights law, have highlighted concerns regarding the protection of internationally recognized human rights from climate-induced harms.¹⁰⁰

Several UN Human Rights Treaty Bodies have published concluding observations that mention climate change as a threat to international human rights treaties such as the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR"), the International Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Right of the Child. In order to establish the relationship between international human rights treaties and climate change obligations, this section will do so by considering particular vulnerable group.

4.1.1 Women

According to a recent report of the OHCHR, women are more exposed and vulnerable to climate change because they are often poorer, receive less education, and are not involved in climate related decision processes that affect their lives.¹⁰¹ At its core, the

⁹⁸ 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) A/HRC/25/53, at para 45.

⁹⁹The absence of explicitly mentioning climate change in international human rights treaties may give the assumption that states have no legal obligations to curb their greenhouse gas emissions. Yet, if emissions continue on their present trajectory, the harms they cause will reach catastrophic and will violate the human rights of millions of people, See Oslo Principles in *Global Climate Change Obligations*, available at <https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations> (accessed 13 June 2020).

¹⁰⁰ The Global Initiative for Economic, Social and Cultural Rights States': *Human Rights Obligations in the Context of Climate Change* (2017), at 2.

¹⁰¹ "Climate change affects women, men, boys and girls in different ways. Entrenched and systemic discrimination can lead to gender-differentiated impacts of climate change with respect to health, food security, livelihoods and human mobility, among other things.

International Convention on the Elimination of All Forms of Discrimination Against Women provides for the prohibition of all forms of discrimination against women.¹⁰² Regardless of the Convention's lack of guidance on States obligations relating to the disproportionate burden that women will likely experience as a result of climate change, State still have the obligation under the Convention to take "all appropriate measures, including legislative measures, to ensure the full development and advancement of women in all fields, in particular in the political, social, economic, and cultural fields"¹⁰³

In 2010, the Committee on the Elimination of Discrimination Against Women produced General Recommendations on the rights of older women.¹⁰⁴ The report concluded that climate change impacts women differently, especially older women during and after natural disasters who, due to their "physiological differences, physical ability, age and gender, as well as social norms and roles and an inequitable distribution of aid and resources relating to social hierarchies," are particularly disadvantaged. This recommendation emphasised States obligations to ensure that climate change and disaster risk-reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women.¹⁰⁵ The committee also addressed the impacts of climate change on the rights of rural women.¹⁰⁶ The Committee stressed that State parties should "alleviate climate-related threats and ensure that rural women enjoy a safe, clean and healthy environment,"¹⁰⁷ and to ensure that rural woman fully participate in climate-related decision making processes.¹⁰⁸

Intersectional forms of discrimination can further increase the vulnerability of some women and girls to climate change, while the exclusion of women from climate action inhibits its effectiveness and further exacerbates climate harms," see quote from United Nations High Commissioner for Human Rights: *Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women* (2019) A/HRC/41/26, at para 4-12
¹⁰² Convention on the Elimination of All Forms of Discrimination against Women (1979), at article 2.

¹⁰³ *Id.*, at, article 3.

¹⁰⁴ Committee on the Elimination of Discrimination against Women: *General Recommendation No. 27 on older women and protection of their human rights* (2010), CEDAW/C/GC/27, at para 4

¹⁰⁵ *Id.*, at para 8.

¹⁰⁶ Committee on the Elimination of Discrimination against Women: *General Recommendation No. 34 on the rights of rural women* (2016) CEDAW/C/GC/34, at paras 3-6.

¹⁰⁷ *Ibid.*, at para 8.

¹⁰⁸ See A/HRC/41/26 (101 above), at paras 52-33

4.1.2 Children

The United Nations International Children’s Fund (hereinafter UNICEF) raised concerns that climate change “is a dangerous and disruptive force for many children around the world and is particularly impacting the most vulnerable.”¹⁰⁹The International Convention on the Right of the Child arguably provides provisions that are relative to the protection of children in the context of climate change.¹¹⁰ Article 24 of the Convention stipulates the “right of the child to the enjoyment of the highest attainable standard of health” and proceeds to outline how States should ensure full implementation of the right. For example, states “shall take appropriate measures” to “combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution.”¹¹¹

It is already common knowledge that health issues exacerbate when confronted with climate change. The Committee on the Right to the Child has emphasized in their recommendations the need for the State to prevent the adverse impacts of climate change on children,¹¹² and has stressed the importance of educating children on climate issues.¹¹³ The committee also emphasised that States should ensure youth participation in climate-related decision making processes.¹¹⁴ To date, the latter recommendation has fallen short, however, it has created a persuasive climate

¹⁰⁹ UNICEF: *Environment and climate change Climate change and environmental degradation undermine the rights of every child*, at available at <https://www.unicef.org/environment-and-climate-change> (accessed 12 June 2020) (“Children are the least responsible for climate change, yet they will bear the greatest burden of its impact.”).

¹¹⁰ The Global Initiative for Economic, Social and Cultural Rights States’: *States’ Obligations under the Convention on the Rights of the Child, in the Context of Climate Change* (2017), at 3.

¹¹¹ Convention on the Rights of the Child (1989) Article 24.

¹¹² Global Initiative (n 100 above) at 2.

¹¹³ *Id.*, at 3&4. See also UNICEF (n 138 above).

¹¹⁴ *Ibid.*

movement where youth climate activist all over the world have mobilised to expressed their concerns for a sustainable and climate-crisis free future.¹¹⁵

4.1.3 Indigenous people

Climate change poses threats to the survival of indigenous communities worldwide as climate change affects ecosystems that indigenous people rely on for their livelihoods and cultural identity.¹¹⁶ The experts all over the world have recognised that that climate change poses a serious threat to indigenous peoples, who often live in lands with fragile ecosystems which are particularly sensitive physical alterations.¹¹⁷ These threats undermines the right to self-determination for indigenous peoples, which is recognized in both the ICCPR and the ICESCR,¹¹⁸ This right is also recognised in the UN Declaration on the Rights of Indigenous Peoples, specifying that “Indigenous peoples have the collective right to live in freedom, peace and security” and a corresponding right “not to be subjected to forced assimilation or destruction of their culture.”¹¹⁹

¹¹⁵ The #FridaysForFuture is a movement that began in August 2018, after 15-year-old Greta Thunberg and other young activists sat in front of the Swedish parliament every schooldays for three weeks, to protest against the lack of action on the climate crisis. She posted what she was doing on Instagram and Twitter ant it went viral, available at <https://fridaysforfuture.org> (accessed 9 June 2020) See also Juliana v, United States: ‘Meet The Kids Suing Over Climate Change,’ available at <https://www.youtube.com/watch?v=sd5K1ms1tOc> (accessed 9 June 2020). See also Colombian youth save the amazon, available at https://www.youtube.com/watch?v=OKyN6_Hklv0 (accessed 9 June 2020)

¹¹⁶ International Labour Office: *Indigenous Peoples and Climate Change: From Victims to Change Agents through decent work* (2017), at 1.

¹¹⁷ OHCHR: Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, (2009), A/HRC/10/61 at 86

¹¹⁸ International Covenant on Civil and Political Rights (1966), at article 1. See also International Covenant on Economic, Social and Cultural Rights (1996), at article 1.

¹¹⁹ “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” see Article 3 of the United Nations Declaration on the Rights of Indigenous People (2007).

The Declaration stipulates that indigenous people shall not be relocated from their lands or territories without “free, prior and informed consent, and after agreement on just and fair compensation and, where possible, with the option of return.”¹²⁰ These provisions are particularly significant when States are implementing or authorizing climate mitigation and adaptation projects that will affect lands or resources owned or used by indigenous people.¹²¹ For example, the Congolese government has authorised projects for the protection of the Congo rainforest,¹²² the world’s second largest rainforest, home to hundreds of indigenous communities,¹²³ and one of the world’s most crucial carbon sinks.¹²⁴ Yet, eco-guards, those who are assigned to physically protect the rainforest as a form of climate have been accused of abusing indigenous people’s rights.¹²⁵ Based on an investigation conducted by the UNDP, these human rights violations and threats by eco-guards has devastated the Baka communities,¹²⁶ preventing the Baka from pursuing their customary livelihoods, which is consequently a violation of their rights to self-determination.¹²⁷ In 2018, The Committee on Economic, Social and Cultural Rights affirmed that the “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” by a State could constitute a breach of its legal obligations.¹²⁸

¹²⁰ *id.*, see article 10.

¹²¹ United Nations Environment Programme: *Climate Change and Human Rights* (2015), at 27.

¹²² *Id.*, 34.

¹²³ *Id.*, at 20. See also <https://www.onegreenplanet.org/animalsandnature/the-worlds-second-largest-rainforest-congo/> (accessed 30 May 2020).

¹²⁴ The Congo Forests play an important role capturing and storing Greenhouse gasses, acting as both a sink and a source of carbon dioxide. Forest ecosystems’ place in the global carbon cycle and has gained more prominence with the world’s concern for climate change, see Carole Megevand: *Deforestation Trends in the Congo Basin Reconciling Economic Growth and Forest Protection* (2013), at 33.

¹²⁵ Richard Schiffman: *Green Violence: ‘Eco-Guards’ Are Abusing Indigenous Groups in Africa* (2020), available at <https://e360.yale.edu/features/green-violence-eco-guards-are-abusing-indigenous-groups-in-africa> (accessed 30 May 2020). See also, The Guardian: *‘Armed ecoguards funded by WWF ‘beat up Congo tribespeople’* available at <https://www.theguardian.com/global-development/2020/feb/07/armed-ecoguards-funded-by-wwf-beat-up-congo-tribespeople> (accessed 30 May 2020).

¹²⁶ United Nations Development Programme: *OAI, Social and Environmental Compliance Unit* (Draft investigation Report) Case No. SECU009 (2020), at 20-22.

¹²⁷ *Id.*, 26.

¹²⁸ Committee on Economic, Social and Cultural Rights: *Climate change and the International Covenant on Economic, Social and Cultural Rights* (2018) E/C.12/2018/1, at para 6.

In relation to climate change, States have obligations not only to protect indigenous people from climate change impacts such as loss of agriculture for food security and for meeting substance needs, but also from threats arising from climate mitigation and adaptation projects.¹²⁹ The rights of indigenous peoples, women and children are particularly vulnerable in this context because they are individuals and communities who lack the resources to adapt to the impacts of climate change.

4.2 Obligations in terms of the Paris Agreement

The Paris Agreement has been described by many as ground-breaking, and a turning point in the United Nation's climate change negotiations.¹³⁰ This Agreement is the most recent international treaty that States have adopted under the umbrella of the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC"),¹³¹ and aims to significantly reduce carbon emissions by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.¹³² Not every provision in the Agreement creates legal obligations for States to take climate action.¹³³ However, it is worth noting that in adopting this Agreement, States acknowledge that the Agreement was crafted to significantly reduce the risks and impacts of climate change. And to that effect, they also acknowledge that they have obligations to address climate change impacts.¹³⁴

¹²⁹ UN 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* A/HRC/31/52, at 20 & 22. See also, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs> (accessed 25 June 2020).

¹³⁰ *Id.*, at para 4.

¹³¹ *Id.*, at para 17 See Tessa Khan (n 68 above), at 91.

¹³² See Paris Agreement, article 2(a).

¹³³ See Benoit Mayer (n 47 above), at 114. See also, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement/nationally-determined-contributions-ndcs> (accessed 25 June 2020).

¹³⁴ See A/HRC/31/52 (n 15 above), at para 67.

The previous section clarifies how States should utilise international human rights treaties to respond to climate change as a human rights challenge. This is also to a large extent clarified in preamble of the Agreement which suggest that whenever States take action to address climate change, they should respect, protect and consider their respective human rights obligations.¹³⁵

The Agreement includes several binding procedural obligations which requires each State party to prepare, communicate and maintain successive national determined contribution (hereinafter “NDCs”) that it intends to achieve,¹³⁶ to provide the information necessary for clarity, transparency and understanding, when communicating their NDCs,¹³⁷ and to communicate a successive NDC every five years, which will represent a progression beyond the Party’s current NDC.¹³⁸ These operative provisions raise strong expectations for States commit to their climate change commitment.¹³⁹ Furthermore, States must adopt domestic legal and institutional framework to give effect to their NDCs. Consequently, this creates an opportunity for citizens to hold their State accountable through national institutions¹⁴⁰

For the purpose of this research, this section establishes that there are legal obligations for States to take climate action and international Human rights norms clarify how States should take these actions. The OHCHR made a powerful statement that urgent, effective and ambitious action to combat climate change is not only a moral imperative, but also necessary in order to satisfy the duties of States under human rights law.¹⁴¹ When States are in breach of these human rights obligations, climate litigation then becomes a possible tool to be used to hold states accountable to their climate action commitments. This concept will be explained in detail in the subsequent chapter.

¹³⁵ *Id.*, at para 86.

¹³⁶ See Paris Agreement, article 4.2.

¹³⁷ *Id.*, at article 4.8.

¹³⁸ *Id.*, at articles 4.3 and 4.9.

¹³⁹ See Benoit Mayer (n 47 above) 116.

¹⁴⁰ See A/HRC/31/52 (n 15 above), at para 68.

¹⁴¹ See OHCHR News: *Burning Down the House*, available at <https://www.ohchr.org/EN/NewsEvents/Pages/BurningDowntheHouse.aspx> (29 June 2020)

5. Conclusion

This chapter provides a starting point to assess the value and effectiveness of climate litigation as a substantial form of climate action to safeguard human rights. It explains how climate change and human rights are inseparable and also shows why urgent and ambitious climate action should take place in order to protect those whose human rights will be affected by the impacts of climate change. This chapter also established that Non-state actors play a paramount role in holding states accountable for their failure to adequately take climate action, these actors are the main influencers to the progressive and successful development of climate litigation.

Chapter Three

Climate Change litigation

1. Introduction

Climate litigation is an umbrella term encompassing judicial disputes and adjudications that relate to climate change.¹ This form of litigation serves as a tool to catalyse legal and social changes in relation to climate change.² Over the past decade, there has been a significant increase in climate litigation procedures and outcomes which reflect multiple ways in which climate litigation has influenced States to enhance and adopt laws to increase climate action on mitigation and adaptation practices.³ There are several factors that have facilitated the development and growth of climate litigation. The first factor that has facilitated the growth in climate litigation has been the advancements of scientific consensus around the causes and impacts of climate change.⁴ Secondly, the lessons learnt from previous litigation efforts have also increased the prospects for climate litigation.⁵ Thirdly, climate litigation is amplified through public and civil society mobilisation as well as collaboration efforts between academics, lawyers, scientists and activists across the world.⁶

¹ United Nations Environment Programme: *The Status of Climate Change Litigation: A Global Review* (2017), at 8. See also opinion piece by Mark Clarke & Tallant Hussain *Climate Change Litigation: A New Class of Action* (2018), at 1, this opinion piece states that the term 'climate change litigation' stands for a range of different proceedings that are connected to climate change related matters.

² *Id.*, at 8. See also opinion piece by Daisy Mallett & Sati Nagra *Climate change litigation - what is it and what to expect?*, available at <https://www.lexology.com/library/detail.aspx?g=03ba4171-3769-4b77-b355-c9cf63cccc24> (accessed 10 June 2020). See also Jacqueline Peel & Hari M. Osofsky 'Climate Change Litigation – Regulatory Pathways to Cleaner Energy' (2015) *Cambridge University Press*, at, at 5.

³ Joana Setzer and Rebecca Byrnes *Global Trends in Climate Change Litigation: 2019 Snapshot* (2019), at 4.

⁴ *Id.*, at 6.

⁵ Tessa Khan *Accounting for the Human Rights Harms of Climate Change: The use of strategic litigation is a key tool in holding governments - Responsible for inaction on climate change* (2017), at 91.

⁶ *Ibid.*

Currently, climate litigation is recognised as a valuable tool for those who seek accountability and justice for current and future climate-related harms.⁷ For the purpose of this chapter, a broad definition of climate litigation will be adopted, which includes plaintiffs and claimants using courts and tribunals to hold States and non-states actors accountable to their climate change commitments.

In efforts to trail the previous chapter's establishment of State's procedural and human rights obligations in relation to climate change, this chapter will attempt to established the value of climate litigation as a tool to ensure that States adhere to those obligations. Therefore, this chapter aims to contribute towards validating the significance of climate litigation as a tool to combat climate change, thus protecting against human rights violations.

The chapter begins by assessing the current value of climate litigation, in doing so, the chapter suggests that climate litigation is a form of climate action that influences the development of other forms of climate action, scenarios will be presented to give effect to this. Thereafter, the chapter will evaluate climate litigation through a human rights perspective. Subsequently, climate litigation's main challenges will be discussed as well as a discussion for the establishment of a specialized international environmental court as a potential tool to enhance the value of climate litigation. Lastly, this chapter will provide concluding remarks.

2. Climate litigation as an influential form of climate action

Climate litigation is a form of climate action that pursues the improvement and establishment of other forms of climate action. For instance, climate litigation alone can prompt State to take climate action by developing climate-related laws and policies that not only prevents current and future carbon emissions but also influences stringent climate-finance practices.⁸

⁷Climate litigation – Centre for International Governance Innovation, available at <https://www.youtube.com/watch?v=yY5UQCHzLnI> (accessed 6 June 2020)

See also Tessa Khan (n 5 above), at 92. See also Joana Setzer & Rebecca Byrnes (n 23 above), at 2.

⁸See Mark Clarke & Tallant Hussain (n 1 above), at 2. Climate litigation can be directed at

According to experts, climate litigation has, over the years contributed towards sophisticating courts abilities to attribute specific events to climate change impacts.⁹ This, together with the public's growing impatience at States' insignificant climate action efforts, has elevated climate litigation as a significant tool to secure effective climate action.¹⁰ Accordingly, as of January 2020, approximately 1441 climate cases have been filed, up from 1302 since March 2019.¹¹ This significant increase suggests that climate litigation is potentially a valuable form of climate action.

Though, in many instances, plaintiffs are not succeeding in imposing State accountability, their actions have nonetheless proved to have increased pressure on States to adhere to their climate action obligations.¹² The more climate-related cases are filed, the better the opinions expressed by judges, and other law makers, thus creating impactful precedents and prestige around climate litigation.¹³ The case of *Urgenda Foundation v. Netherlands*,¹⁴ (hereinafter "*Urgenda*") best illustrates the latter.¹⁵ This ground-breaking case in the Netherlands marked the first time a country was ordered by its courts to take climate action.¹⁶ The Supreme Court upheld the

public and private companies, all spheres of governments, insurance companies. Climate litigation also encompassed a wide range of legal avenues.

⁹ See Tessa Khan (n 5 above), at 91.

¹⁰ *Id.*, at 92.

¹¹ See opinion piece by Elisa de Wit, Sonali Seneviratne, Huw Calford *Climate Change update* (2020), available at <https://www.nortonrosefulbright.com/en-za/knowledge/publications/7d58ae66/climate-change-litigation-update> (accessed 21 April 2020). See also Climate Change Data Base, available at <http://climatecasechart.com/non-us-climate-change-litigation/>

¹² See UNEP: The Status of Climate Change Litigation (n 1 above) at 14. See Also Tessa Khan (n 5 above), at 94.

¹³ Legal experts agree that there have been a number of significant climate change cases or complaints that have recently been lodged, and they expect the number of cases to increase exponentially, see Elisa de Wit and Others (n 11 above).

¹⁴ *Urgenda Foundation v. State of the Netherlands* ECLI:NL:HR:2019:2007 – Report info: [2015] HAZA C/09/00456689, at 2-3

¹⁵ Andre Nolkaemper & Laura Burgers 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (2020) *Blog of the European Journal of International Law*, available at <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/> (accessed 30 May 2020). See also UN Human Rights, Office of the High Commissioner, News, *Bachelet welcomes top court's landmark decision to protect human rights from climate change* (2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> (accessed 30 May 2020).

¹⁶ *Ibid.* Academics like Jacqueline Peel and Tessa Khan advise that this case was ground-breaking for being the first climate change case to successfully highlight the climate change

Appeal Court's decision which included Article 2 and 8 of the European Convention on Human Rights (hereinafter "ECHR") which influenced the ruling that the Dutch government had a positive obligation to take measures to prevent climate change and that such measures should ensure a 25% greenhouse gas (hereinafter "GHG") emissions reduction of by the end of 2020.¹⁷ This case confirmed that the Dutch government and, by implication, other governments have legal obligations, based on international human rights laws to take impactful and quantifiable climate action.¹⁸ This case also highlights that, when well-reasoned, climate litigation is an influential form of climate action.¹⁹ The *Urgenda* case became popular for the influence it had on the existing climate litigation trends that seek to significantly increase State's commitments to urgently and effectively tackle climate change impacts.²⁰

Climate change may not always be central to a dispute,²¹ on this account, plaintiffs have found novel and creative legal avenues to strengthen their cases.²² Plaintiffs have integrated climate change issues into private law disputes, which include claims in relation to negligence, nuisance, public trust and unjustified enrichment.²³ Administrative law disputes are also common claims that generally involve judicial review of administrative decision-making by governments, often in relation to licensing approvals granted to high-emissions projects.²⁴

issue as a human rights challenge and that States are obligated to ensure that their citizens are protected against climate change impacts.

¹⁷ See *Urgenda* in the Supreme Court (n 14 above), at para 7.5.1.

¹⁸ *Id.*, at para 7.5.3

¹⁹ Andre Nolkaemper & Laura Burgers (n 15 above) See also Tessa Khan (n 5 above), at 92.

²⁰ *Id.*, at 93.

²¹ See Mark Clarke & Tallant Hussain (n 1 above), at 2.

²² The enormous gap between the climate change commitments made by States and the actions they take to implement those commitments has resulted in plaintiffs finding creative ways to institute nation-wide claims against their governments, see Tessa Khan *Spotlights on the SDGs – SDG 13: Climate Justice – How Climate Change Battles are Increasingly being Fought, and Won, in Courts*, at 147 – 149.

²³ Plaintiffs have also brought private nuisance claims alleging an act or omission by an individual or a corporation that interferes with an individual's enjoyment of his property, see Business & Human Rights Resource Centre: *Climate Litigation against Companies: An Overview of Legal Arguments* (2019), at 1-3.

²⁴ Daisy Mallett & Sati Nagra (n 172 above). See also *EarthLife Africa Johannesburg v Minister for Environmental Affairs & Others* 2017 Case: 65662/16 Judgment of the High Court of South Africa. Gauteng Division, Pretoria, para 2- 18

Furthermore, constitutional and human rights disputes connects climate change impacts to human rights violations and protections.²⁵ These methods of integration has increased courts aptitude in addressing climate change disputes,²⁶ and has also created the view that climate litigation is largely based on a strategic litigation hypothesis.²⁷ This encompasses advocacy features that are designed to raise awareness on specific issues or to promote the rights of marginalised and vulnerable groups of people.²⁸ Currently, plaintiffs in climate litigation procedures utilize strategic litigation to instigate ambitious and impactful climate action.²⁹

Climate change negotiations conducted by the international community has, in many ways proved to be inadequate to effectively confront climate change and its impacts.³⁰ Therefore, it is correct to assume that climate litigation presents itself as a tool to act on, and to enhance the outcomes of these negotiations. At present, climate litigation would come in handy to address climate change inactions as a result of inadequate climate change negotiations. For instance, a country like the Republic of the Congo has negotiated contracts for oil explorations in the Congo Basin's Cuvette Central peatland.³¹

²⁵ *Ibid.*,

²⁶ Maria L Banda & Scott Fulton 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) *Environmental Law Institute*, at 10124.

²⁷ See Joana Setzer & Rebecca Byrnes (n 3 above), at 1 ("Strategic cases are designed to press national governments to be more ambitious on climate or to enforce existing legislation").

²⁸ *Id.*, at 1.

²⁹ Greenpeace Climate Justice: *Holding your Government Accountable for Climate Change – A Peoples' Guide* (2018), at 29 ("Strategic litigation involves selecting and bringing a case to the court with the goal of creating broader changes in society").

³⁰ Due to domestic social, political and legal contexts, most countries, to date have not fully implemented their climate change commitments, see *Paris Climate Agreement: a good but insufficient step forward* available at <https://actalliance.eu/news-post/paris-climate-agreement-a-good-but-insufficient-step-forward/> (accessed 11 June 2020).

³¹ The Republic of the Congo's First Nationally Determined Contribution: Submission date 21/04/2017, at 5, 7-8. See also The Guardian: *Plan to drain Congo peat bog for oil could release vast amount of carbon* (2020) available at, <https://www.theguardian.com/environment/2020/feb/28/ridiculous-plan-to-drain-congo-peat-bog-could-release-vast-amount-of-carbon-aoe> (accessed 12 June 2020) See also, *Republic of Congo oil drilling threatens environment: Activists*, available at, <https://www.youtube.com/watch?v=GHzwrrphYWU> (accessed 12 June 2020).

This questions their commitments to mitigate climate change as stipulated in their NDC. This oil drilling intention fairly suggests that the Congolese State is unlikely to engage in further and critical climate change negotiations as it would contradict their intentions. It is important to note that, this particular peatland area is believed to be the world's largest tropical peatland and one of the world's biggest carbon sinks, storing an estimated amount of 30 billion tonnes of carbon.³² Experts believe that if this area is drained for oil drilling, the process could release up to 1.3 billion tonnes of carbon into the atmosphere which happens to be more than Japan's annual carbon emissions.³³

Taking climate action to preserve these peatlands is essential to protecting both social and environmental benefits, with the latter playing a crucial role in efforts to combat climate change.³⁴ Climate litigation in this context could serve as a tool to firstly highlight that the Congolese government has undermined their obligations to take preventative and precautionary measures to reduce GHG emissions.³⁵ Secondly, courts could order the government to cease all climate-sensitive activities and to implement stringent national policies and commissions to oversee the government's progress in taking climate action.³⁶

³² A carbon sink is anything that absorbs and stores more carbon from the atmosphere than it releases as carbon dioxide. Natural carbon sinks include oceans, forests, grasslands and soil, and are crucial in the fight against climate change due to their abilities to absorb and store carbon, See African Climate Reality Project: *Carbon Sink Management In Africa*, available at <http://climatereality.co.za/carbon-sinks-management/> (accessed 12 June 2020).

³³The Guardian (n 31 above). See also Oil Exploration at odds with Peatland protection in the Congo Basin, available at <https://news.mongabay.com/2020/03/oil-exploration-at-odds-with-peatland-protection-in-the-congo-basin/> (accessed 24 May 2020).

³⁴ See African Climate Reality Project: *Carbon Sink Management In Africa*, available at <http://climatereality.co.za/carbon-sinks-management/> (accessed 12 June 2020)

³⁵ *Ibid.*

³⁶ This was the outcome in the case of *Ashgar Leghari v Republic of Pakistan* (2015) W.P. No. 25501/2015, para 8.

Climate litigation moulded the so-called climate justice movement that seeks to ensure that people and the environment are treated fairly when climate action is taken either to reduce further climate change or to adapt to climate change impacts.³⁷ In essence, climate justice pursues the protection of human rights particularly for those who are most vulnerable to climate-induced harms.³⁸

One way to illustrate climate justice is to refer to Africa's energy poverty crisis. Millions of Africans lack access to affordable and sustainable sources of energy,³⁹ and burning charcoal and wood remains their sole source of energy.⁴⁰ Consequently, as these fires burn across the continent, climate change accelerates and people develop serious health issues.⁴¹ Fortunately, experts have revealed that solar, wind and other renewable and sustainable energies have become leading solutions to this particular crisis.⁴² However, there is so little buy-in from African States to invest in renewable energy,⁴³ and many are still venturing into new funding opportunities for fossil fuels based projects that have proved to cause irreversible harms to both people and the environment.⁴⁴

³⁷The Royal Irish Academy: *The Geography of Climate Justice – An introductory resource to the geography of Climate Justice* (2011), at 2 & 3.

³⁸*Id.*, at 6 & 7. See also Why Climate Change Is a Threat to Human Rights |Mary Robinson |TED Talks, available at <https://www.youtube.com/watch?v=7JVTirBEfho> (accessed 10 June 2020).

³⁹Terje Osmundsen *What does it take to eliminate energy poverty in Africa?* (2019), available at <https://www.powerforall.org/insights/africa/what-does-it-take-eliminate-energy-poverty-africa> (accessed 17 June 2020). ("The lack of choice in accessing adequate, reliable and safe energy services to sustain economic and human development is the way in which energy poverty manifests"), available at <https://www.sustainable.org.za/theme.php?id=16> (accessed 17 June 2020).

⁴⁰The issue arises due to the fact that many people use this wood for their livelihoods. Many households require energy for the essential services of cooking food, heating water, space heating and illumination in order to satisfy their very basic human needs, available at <https://www.sustainable.org.za/theme.php?id=16> (accessed 17 June 2020).

⁴¹*Ibid.*

⁴²Phil U. Chineyemba 'Energy Access in Rural Areas' (2008) *The OPEC Fund for International Development*, at 105.

⁴³In November 2019, the African development bank approved loan of \$400 million to support the building of a Natural Gas plant, in Mozambique, and at that time, Mozambique was still recovering financially from the cycle the fanatical implications of cycle Idia, See Africa Development Bank Group, at <https://www.afdb.org/en/countries/southern-africa/mozambique> (accessed 17 June 2020).

⁴⁴*Ibid.*

In this instance, climate justice seeks to guarantee accessible, safe and affordable energy or all and, climate litigation, could possibly serve as a tool to fortify the advocacy efforts to ensure this accessibility is made possible for all.

For the purposes of this research, this section elevates climate litigation as an influential form of climate action based on the evidence that suggest the expansion of climate litigation. This section also highlights a rather significant value of climate litigation as it encompasses domino effects by creating one climate action that results in many other actions.

3. Climate litigation through a human rights perspective

The evident and ongoing effects of climate change impacts on human rights has significantly strengthened and justified the argument for States to urgently address climate change.⁴⁵ The lead-up to, and aftermath of the Paris Agreement saw the emergence of strategic climate litigation with claims that encompass a rights-based dominance.⁴⁶ These cases illustrates a greater willingness of plaintiff's efforts to highlight that climate change is a human rights challenge.⁴⁷ Essentially, these cases propose strategies to develop and enhance climate action through a human rights perspective. Though these cases are moderately new, they nonetheless serve as a model or inspiration for an increase in strategic climate litigation in order to safeguard human rights from climate change impacts.⁴⁸

⁴⁵Preamble of the Oslo Principles on Global Climate Change Obligations 'Fulfilling climate change obligations is necessary and urgent if we are to avoid an unprecedented catastrophe' available at <https://globaljustice.yale.edu/sites/default/files/files/OsloPrinciples.pdf> (accessed 12 June 2020). These principles are based on findings made by a group of legal experts from around the world regarding State's obligations to take climate change in order to safeguard human rights. These principles aim to assist courts in determining whether States are in compliance with their legal obligations to address climate change.

⁴⁶Jacqueline Peel & Hari Osofsky 'A Rights Turn in Climate Change Litigation?' (2017) *Transnational Environmental Law* at 45. See also Joana Setzer & Rebecca Byrnes (n 3 above), at 5.

⁴⁷ See Tessa Khan (n 5 above), at 91.

⁴⁸ See Maria L Banda & Scott Fulton (n 25 above), at 10133-34.

The Inter-American Commission on Human Rights adjudicated the first climate change case to have a human rights foundation.⁴⁹ This complaint was filed by Inuit plaintiffs seeking relief for human rights violations resulting from climate change impacts that were allegedly caused by the United States' failure to address climate change.⁵⁰ The plaintiffs claim emphasised that the United States should adopt obligatory measures to limit its GHG emissions and their environmental policies should be modified to establish and implement adaptation plans to protect Inuit cultures and resources.⁵¹

The Inter-American Commission on Human Rights declined to proceed with the case, stating that the plaintiffs had provided insufficient information for the commission to determine whether the allegations illustrate a violation of rights protected by the American Declaration.⁵² Although this case was unsuccessful, it nonetheless, for the first time, highlighted the possibility of a human rights line of argument to address climate change in court.⁵³ Over the years, climate litigation demonstrated and defended the notion that climate change is a human rights challenge, and recently, it has gained traction and has increasingly become a successful line of argument. This research will highlight 4 landmark cases to demonstrate that, when properly constructed, human rights arguments validate the necessity for more climate litigation procedures. The *Urgenda* case has arguably been the most successful of the recent climate change cases to rely on human rights standards to emphasise the climate change urgency.⁵⁴

⁴⁹ *Petition to The Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused By Acts and Omissions Of The United States* (12/08/2005), at 118.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Id.*, see (15/01/2007), at 1-2.

⁵³ *Ibid.*, at 1-2.

⁵⁴ See Tessa (n 5 above) 92. This view seems to be the leading view made by many academics and lawyers. See also Joana Setzer & Rebecca Byrnes (n 3 above), at 8.

After hearing arguments that the Dutch government was not doing enough to prevent dangerous and foreseeable climate change impacts, the court ordered the government to significantly reduce its level of GHG emissions.⁵⁵ This revolutionary decision marked the first time that a court has ordered a government to observe an emissions reduction target.⁵⁶ The human rights provisions as enshrined in the ECHR played a fundamental role in the court's construction of the government's duty to address climate change.⁵⁷ Article 2 of the ECHR provides for the right to life and Article 8 of the ECHR provides for the right to a private and family life. These provisions were used to impose a positive obligation to take suitable measures to prevent climate change as a means to protect human rights.⁵⁸ This case was ground-breaking for many reasons, but for the purposes of this research, the human rights line of argument that was recognised and accepted by both the Court of Appeal and the Supreme Court is what stood out. This decision, that climate change impacts are connected to the right to life and that State's obligations to safeguard these rights can be connected to the targets negotiated in relation to GHG emissions is remarkable, and has become an important point of reference for current and future climate litigation arguments.⁵⁹ Experts are confident that this decision is likely to continue to have an influence on future climate litigations.⁶⁰

⁵⁵ See *Urgenda* (n 14 above), para 5.5.1.

⁵⁶ *Ibid.*

⁵⁷ *Id.*, paras 5.5.2 -5.5.3.

⁵⁸ *Ibid.*, See also The European Convention on Human Rights, 1950, at article 2(1) ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law)." See also Article 8(1)(2) ("Everyone has the right to respect for his private and family and there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

⁵⁹ The 2020 judgment of the Supreme Court is likely to have influence on future climate change litigation as it demonstrates how a court can determine responsibilities of an individual state, notwithstanding the fact that climate change is caused State and non-state actors who share responsibility for its harmful effects, see Andre Nolkaemper & Laura Burgers (n 15 above).

⁶⁰ *Ibid.*

In the case of *Ashgar Leghari v Republic of Pakistan*, human rights were also reinforced. This case was successfully brought by a Pakistani farmer, alleging that the Pakistan government was not taking sufficient climate action to address climate change impacts.⁶¹ The plaintiff argued that the government's insufficient actions to tackle the climate crisis has threatened the country's food, water and energy security which is a violation of the constitutionally-protected rights to life and dignity.⁶² After citing a number of fundamental constitutional rights, as well as the right to intergenerational equity,⁶³ the courts ordered the government to implement a national climate change policy and to create a climate change commission to oversee the government's progress in taking climate action.⁶⁴

This particular case was part of a study compiled by Peel and Lin where they evaluated the trajectory of climate litigation in the global South.⁶⁵ Their findings indicate that there are recent developments and opportunities for climate litigation in the Global South.⁶⁶ While countries in the global south tend to experience a lack of capacity within government agencies, civil society, climate-policies, and financial resources,⁶⁷ there have been recent and noticeable successes in climate litigation that have a rights-based approach due to progressive constitutional frameworks established in countries in the global Global South.⁶⁸ For instance, in the 2017 case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs* relied on national environmental legislation as well as the South African Constitution to require climate change considerations in providing environmental permits.⁶⁹

⁶¹ *Ashgar Leghari v Republic of Pakistan* (2015) W.P. No. 25501/2015, paras 3 & 10.

⁶² *Id.*, at paras 10 -12.

⁶³ *Id.*, at para 7.

⁶⁴ *Id.*, at paras, 23 & 25. In order to facilitate the Government's climate action efforts, the court constituted a Standing Committee on Climate Change, which acts as a link between the court and the executives of the commission. The commission will render assistance to the Governments in order to ensure that the climate change policies continue to be implemented.

⁶⁵ Jacqueline Peel & Joelene Lin 'Transitional Climate Litigation: The Contribution of the Global South' (2019) *American Journal of International Law* Vol 113 (4), at 3

⁶⁶ *Id.*, at 73-74.

⁶⁷ *Id.*, at 71.

⁶⁸ *Id.*, at 25.

⁶⁹ *EarthLife Africa Johannesburg* (n 25 above), at para 2- 18

This case initiated the climate change discourse in south African courts as the first successful case to have a climate change argument.⁷⁰ Since this decision, the South African government released a draft Climate Change Bill in 2018,⁷¹ and finalised a Carbon Tax Act, which came into effect in June 2019.⁷²

Another case that successfully relied on constitutionally-protected rights is the case of *Future Generations v. Ministry of the Environment and Others*,⁷³ where 25 youth plaintiffs in Colombia successfully challenged the Colombian government's failure to tackle deforestation in the Amazon,⁷⁴ thereby violating several human rights that are enshrined in the Colombian Constitution.⁷⁵ The Supreme Court delivered a groundbreaking decision, recognising the link between deforestation, climate change, and the violation of the human rights of present and future generations.⁷⁶ The court specifically recognised the Colombian Amazon as a "subject of rights" that is entitled to protection, conservation, maintenance and restoration.⁷⁷ The court also ordered the Government to formulate and implement action plans to address deforestation.⁷⁸

⁷⁰ According to Climate Case Chart Database, the two other South Africa Cases that have a Climate Change Argument were filed in 2017, right after the 2016 Earthlife case available at <http://climatecasechart.com/non-us-case/trustees-time-groundwork-trust-v-minister-environmental-affairs-others/> (accessed 30 July 2020).

⁷¹ Department of Environmental Affairs: The Climate Change Bill of 2018, available at https://www.environment.gov.za/sites/default/files/legislations/climatechangebill2018_gn41689.pdf (accessed 30 July 2020).

⁷² The Carbon Tax Act of 2019 was signed into law to compel businesses and individuals to reduce their greenhouse emissions. This tax was implemented to penalise and limit the activities of large greenhouse gas emitters. This was in efforts to meet the global climate change targets set in the Paris Agreement.

⁷³ *Future Generations v. Ministry of the Environment and Others* (Demanda Generaciones Futuras v. Minambiente) Report Info: 11001 22 03 000 2018 00319 002018 (2018) Translation of Excerpts from the Supreme Court Decision, at para 2-3.

⁷⁴ *Id.*, para 2.

⁷⁵ *Id.*, para 4 & 11.

⁷⁶ *Id.*, para 45 (from the main judgment).

⁷⁷ *Id.*, para 46 (from the main judgment).

⁷⁸ *Ibid.*

These ground-breaking decisions have set the scene for a continued increase in climate litigation as they have proved to have inspired the filing of several new litigation procedures as well as other climate actions.⁷⁹ This reiterates the assertion made earlier in the chapter that climate litigation is a form of climate action that prompts the establishment and progressions of other forms of climate action.

State's international human rights obligations requires that they protect individuals and groups against abuse by third parties,⁸⁰ including corporations, by preventing, investigating and redressing such abuses through effective laws and regulations.⁸¹ With that in mind, while traditionally, GHG emissions are attributed to States, it is in fact non-state actors such as the so-called Carbon Majors, the world's largest fossil fuels producers, and other corporations that are largely responsible for causing GHG emissions. The list of the so-called Carbon Majors includes, but is not limited to corporations such as Saudi Aramco from Saudi Arabia, Chevron and ExxonMobil from the US, Gazprom from Russia and BP from the United Kingdom.⁸² These actors are increasingly challenged in courts for their contributions towards the climate crisis.⁸³ In the past, these cases were mainly constructed as public nuisance claims and were largely unsuccessful.⁸⁴ Following the Paris Agreement, the *Urgenda* case as well as the consolidation of climate science, there has been an increased possibility of holding corporations liable for their contributions towards the climate change crisis.⁸⁵

⁷⁹ Annalisa Savaresi & Juan Auz: *Climate Change Litigation and Human Rights: Pushing the Boundaries* (2019), available at

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374730 (accessed 17 June 2020).

⁸⁰ See Joana Setzer & Rebecca Byrnes (n 3 above), at 8.

⁸¹ Annalisa Savaresi & Juan Auz (n 79 above)

⁸² Carbon Majors are the world's leading fossil fuel extraction and producing companies.

⁸³ Previously, several of the climate change cases were brought against companies allege a public nuisance (private law bases). In other words, the case was brought based on the act or omission that interferes with the property rights of an individual or a community, see Business & Human Rights Resource Centre (n 23 above), at 2.

⁸⁴ *ibid.*, at 3.

⁸⁵ Andre Nolkaemper & Laura Burgers (n 15 above).

The Philippines Human Rights Commission undertook a landmark investigation into the Carbon Majors,⁸⁶ to establish the connection between the Carbon Majors and climate change impacts on the enjoyment of human rights in the Philippines.⁸⁷ This investigation was framed in a form of a dialogue to highlight the opinions and experiences of those who are most vulnerable to climate-induced harms.⁸⁸ The Commission held that climate change demands urgent action and that Carbon Major who have played a role in anthropogenic climate change and its associated impacts can be found legally and morally liable for human rights violations caused by climate change impacts.⁸⁹ The Commission also held that climate litigation is potentially more successful when brought in domestic courts under national laws,⁹⁰ and where existing laws are inadequate, the Commission recommended that governments have obligations to adopt and implement laws to guarantee that their citizens have rights to access justice.⁹¹

Experts anticipate that these landmark cases will continue to inspire plaintiffs to use human rights arguments to put pressure on States and corporations to strengthen and increase climate action.⁹² This section illustrated that climate litigation have produced outcomes that may further encourage plaintiffs or suggest new avenues to test the value of climate litigation with a human rights substance. Furthermore, this section highlights that climate litigation that incorporates human rights protections have become more prevalent and progressive in advancing climate action.

⁸⁶ In re Greenpeace Southeast Asia and Others: Case No. CCHR-NI-2016-0001 (2015), at para 22-30.

⁸⁷ *Id.*, para 72 -74.

⁸⁸ *Id.*, para 143-148.

⁸⁹ *Id.*, para 12.

⁹⁰ *Id.*, para 130.

⁹¹ See Press Room: *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability*, (2019) available at <https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/> (accessed 13 June 2020)

⁹² Jacqueline Peel & Hari Osofsky (n 2 above), at 14.

4. Climate litigation: Challenges and limitations

The expansion of climate litigation is also confronted with a recurrence of common challenges in various jurisdictions.⁹³ Courts and lawyers often encounter questions of justiciability, which refers to courts authority to make decisions and judgements, and questions of standing which refers to a person's ability to claim a remedy before a court for a violation that has occurred or will occur.⁹⁴ Then, once jurisdiction and standing are established, there is a wide range of potential sources of laws and obligations that also need to be established.⁹⁵ These include rules of international law, constitutional laws, common laws, statutory laws, and national policies. And finally, courts that find a valid legal basis for a claim must still address the question of a suitable remedy.⁹⁶

For the purpose of this research, it essential to highlight that climate litigation that incorporates human rights arguments are not necessarily restricted by difficulties in convincing courts of the relationship between human right and climate change impacts. Rather, the difficulty is found within the different social, political and legal structures of States.⁹⁷ In other words, although by nature, climate change is a global challenge that is supposedly monitored by international responses, different countries adopt and implement these responses to suit their social, political and legal structures.⁹⁸ It is outside of the scope of this research to review all the different challenges based on these structures, however, this section will give a concise depiction of standing as a common procedural challenge experienced in climate litigation procedures.

⁹³ *Id.*, at 15. See also Mark Clarke & Tallant Hussain (n 1 above), at 6.

⁹⁴ See UNEP: The Status of Climate Change Litigation (n 1 above), at 25.

⁹⁵ *Id.*, at 25.

⁹⁶ *Id.*, at 25.

⁹⁷ Climate change case from the global South (Asia, Africa, and Latin America) have characteristics that distinguish them from climate cases in the global north. Experts indicate that climate litigation in the global south suggest new legal avenues to consider with regards to transnational global climate governance, see Jacqueline Peel & Jolene Lin: *Transitional Climate Litigation: The Contribution of the Global South* (2019) the American Society of International Law at 725.

⁹⁸ *Id.*, at 726.

Standing, or *locus standi*, refers to the criteria a plaintiff must fulfil in order to be a party to legal proceedings.⁹⁹ In many instances, rules on standing are restrictive and limit access to justice. This is the case where a legal norm has been violated but rules on standing limit the possibility to review the impacts of that violation.¹⁰⁰ Matters are further complicated when the question of causation is connected to standing, requiring plaintiffs, in order to illustrate a legal interest, to prove that they have suffered or will suffer harm as a result of the defendant's unlawful conduct.¹⁰¹ This creates major limitations for plaintiffs in climate litigation procedures since it may be difficult for an individual plaintiff to establish an adequate causal connection, with required degree of certainty, between a defendant's action and a harm that is linked to climate change impacts.¹⁰² For instance, in the case of *Comer v. Murphy Oil USA*,¹⁰³ regardless of the harm and damaged caused by Hurricane Katrina, the court found that the plaintiffs that were harmed lacked standing to sue the fossil fuel company because their injuries were not traceable to the company's conduct.¹⁰⁴ Specifically, the court found that the causal connection between the GHG emissions generated by that company's activities and the damages caused by Hurricane Katrina were too distinct.¹⁰⁵ Given the complex nature of the climate change, where the harm caused is a result of disaggregate causes, it is near impossible to show that a causal link between a specific conduct and a particular harm.

⁹⁹ See UNEP: The Status of Climate Change Litigation (n 1 above), at 28.

¹⁰⁰ Marisa Martin & James Landman Standing: *Who Can Sue to Protect the Environment?* (2019) ("While the majority of mainstream scientists agree that carbon dioxide and other greenhouse gases cause increased global temperatures, there is less agreement about the effects of global warming. Without certainty about the effects of global warming, plaintiffs have a harder time proving that they will suffer an injury as a result of increased greenhouse gas emissions") available at https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment/ (accessed 12 June 2020).

¹⁰¹ *ibid.*

¹⁰² *ibid.*

²⁷³ *ibid.*

¹⁰⁴ *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (2009), para 13.

¹⁰⁵ See similar case of *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 at 11657 (9th Cir 2012) para 4 – 61 (facts of the case) Native Alaskan communities brought a claim for public nuisance against several oil companies for contributing to climate change, which forced the community to relocate due to sea ice erosion.

It is also worth noting that litigation is inherently timeous and costly.¹⁰⁶ This is mainly due to foreseeable and unforeseeable challenges encountered along the way. Therefore, when considering the urgent need to tackle climate change, climate litigation may not be a suitable tool for urgent use. For instance, although extremely successful, the *Urganda* case took 7 years before reaching completion. However, this also shows resilience and determination on the part of plaintiffs to withstand several challenges, including unfavourable appeal procedures which, for the purposes of this research suggests the value of climate litigation as an effective form of climate action. This section highlights that while climate litigation is not a seamless solution, it is however, still a useful tool to influence and achieve climate justice.

5. Climate litigation in support of an International Environmental Court

Courts are assigned to adjudicate legal disputes between parties in a fair and equitable manner.¹⁰⁷ Court decisions are directed by the rule of law as well as evidence proved.¹⁰⁸ Essentially, courts exist to guarantee liberty, to uphold justice, and to enhance social order.¹⁰⁹ Considering the upsurge of climate litigation, courts are assessing climate change and its interdisciplinary features to increase more impactful and ambitious climate action. In some countries, courts, tribunals and other human rights forums have taken an active role in ensuring that States comply with their obligations under existing human rights instruments to address climate change.¹¹⁰

¹⁰⁶ See opinion piece by Thomas Wilson & Jennifer William: *Why is Litigation So Expensive?* (2018), available at <https://www.velaw.com/insights/why-is-litigation-so-expensive/> (accessed 13 June 2020).

¹⁰⁷ (“Courts’ function is to adjudicate legal disputes between parties and carry out the administration of justice in accordance with the rule of law. The courts’ role is to determine disputes in the form of cases which are brought before them”) see quote at <https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=68089§ion=2> (accessed 20 June 2020).

¹⁰⁸ (“Courts are an impartial forum, and judges are free to apply the law without regard to the states wishes or the weight of public opinion but in line with human rights”) see quote at <https://www.open.edu/openlearn/ocw/mod/oucontent/view.php?id=68089§ion=2>

¹⁰⁹ *ibid.*

¹¹⁰ The vast majority of these cases continue to rise in the United States (US), followed by Australia, United Kingdom, European Union, New Zealand, Canada, Spain, India, Brazil, Pakistan and South Africa, see Elisa de Wit & others (n 11 above)

Experts have warned that climate change impacts have become more frequent and alarming. However, despite these warnings, there remains a lack of international consensus on effective legal responses to the climate crisis.¹¹¹ Accordingly, climate change laws are built upon 27 years of international negotiations and have already proved to be insufficient to drastically decrease carbon emissions.¹¹² Ironically, the number of international climate change laws is part of the problem as they are often unclear and do not provide remedies for breach of obligations.¹¹³ In attempts to tackle this issue, there has been a growing demand for the establishment an International Environmental Court to specifically clarify States legal obligations, to harmonise existing environmental and climate regulatory regimes. This court could provide access to justice to a wide range of actors, and to create practical solutions for the enforcement of environmental and climate change laws.¹¹⁴ The increase of climate litigation has contributed towards strengthening the demand for the formation of an International Environmental Court.

It has already been established that individuals and civil society groups are the main drivers of the new, and rather successful climate litigation trends. Although international courts such as the International Court of Justice (hereinafter “ICJ”), and the International Tribunal for the Law of the Sea (hereinafter “ITLOS”) provide opportunities to address climate change disputes, they are limited to state-to-state disputes due jurisdictional restrictions.¹¹⁵ Therefore, non-state actors, including civil society groups generally cannot bring claims or be sued under international law.¹¹⁶

¹¹¹ Sharaban Tahura Zaman: *International Green Court: A solution to achieving climate justice?* (2019), available at <http://www.ipsnews.net/2019/07/international-green-court-solution-achieving-climate-justice/> (accessed 20 June 2020).

¹¹² *Ibid.*

¹¹³ *ibid.*, See also, Anne McMillan: *Time for an International Court for the Environment* (2019), available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=71b817c7-8026-48de-8744-50d227954e04> (accessed 19 June 2020)

¹¹⁴ *Ibid.*

¹¹⁵ The main challenge with regards to the ICJ and ITLOS is that by nature, these courts deal only with disputes between States. See article 36 & 37 of the Charter of the United Nations and Statute of the International Court of Justice. See also article 3 & 4 of the Statute of the International tribunal for the Law of the Sea.

¹¹⁶ William Thomas Worster ‘Relative International Legal Personality of Non-State Actors’ (2016) *Brooklyn Journal of International Law* Vol 42 (1), at 209 -211

Furthermore, as a general rule, international courts and tribunals aim to contribute towards the development of international laws and create consciousness on particular socio-legal matters.¹¹⁷ However, climate change matters are complex. These complexities vary from attributing GHG emissions to climate change impacts,¹¹⁸ to adopting climate change perspectives regarding territories over which no State has sole sovereignty, for instance, the High Seas and Antarctica.¹¹⁹ According to Philippe Sands, these complexities are what separates climate issues from the classical structure of the international legal norms that divides the world into State territories.¹²⁰ This suggests the unique, yet broad challenges presented when addressing climate change. This also suggests the potential necessity to consider a court that would specifically welcome these challenges.

Based on the current climate litigation trajectory, experts agree that legal standing and jurisdiction in relation to international courts and tribunals need to be expanded beyond States, which an International Environmental Court could potentially provide.¹²¹ This chapter does not rule out the effectiveness of the ICJ and ITLOS, according to Philippe Sands, these international courts are specifically vital for their potential role in settling overarching scientific issues within a specific case, which could come in handy when interpreting and establishing climate change impacts that are specifically tied to the scientific aspects of climate change.¹²² Furthermore, a court like the ICJ is highly prestigious and influential.¹²³ Decisions made by the ICJ could constitute powerful authoritative precedent that can be used as a model in other courts and tribunals¹²⁴

¹¹⁷ Philippe Sands 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' in Tiyanjana Maluwa, Max Du Plessis & Dire Tladi (eds) *The Pursuit of a Brave New World in International Law* (2017), at 199.

¹¹⁸ *Id.*, at 118.

¹¹⁹ *Id.*, at 115 -117. See also The High Sea Alliance, available at <https://www.asoc.org/advocacy/antarctic-governance/high-sea-alliance> (accessed 30 July 2020).

¹²⁰ Philippe Sands (n 117 above), at 119.

¹²¹ Steinar Andersen 'The Role of International Courts and Tribunals in Global Environmental Governance' (2016) *ASPJ Africa & Francophonie*, at 78

¹²² Philippe Sands (n 117 above), at 120

¹²³ *Id.*, 126 -127.

¹²⁴ *Id.*, 128.

To date, the ICJ has decided a number of high profile environmental disputes, including the Whaling in the Antarctic Case, in which Australia successfully challenged the legality of Japan's whaling program in the Southern Ocean.¹²⁵ For the purpose of this research, what needs to be emphasised is that ICJ has two types of jurisdictions that could be used in climate change cases. First, the Court has jurisdiction over 'contentious' disputes between states that have accepted the competence of the Court.¹²⁶ This would then require States to commence proceedings against other States for not meeting their international obligations to address climate change.¹²⁷ For such a case to be successful, States would need to establish a clear obligation in either the UNFCCC or the Paris Agreement that has been breached.¹²⁸

The second type of jurisdiction is the ICJ's power to give advisory opinions.¹²⁹ The UN General Assembly or the Security Council may request the ICJ to give an advisory opinion on any international legal question.¹³⁰ These opinions are not legally binding, however, they offer significant legal weight that can influence international laws and clarify States' international obligations.¹³¹ These types of jurisdictions do not cater for the civil society dominance that has influenced and directed the recent course of climate litigation. One way around this is to follow the tactics used in a recent campaign lead by an NGO group of Pacific law students.¹³²

¹²⁵ *Id.*, 123.

¹²⁶ *Id.*, 125.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Id.*, 126.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, ("An advisory opinion is a judicial opinion, most frequently given by a standing international tribunal (International Court of Justice)" available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e4> (accessed 30 July 2020).

¹³² See Evan Wasuka on Pacific Beats with the title *Students want International Court of Justice to rule on climate change* (2019), available at <https://www.abc.net.au/radio-australia/programs/pacificbeat/students-want-international-court-of-justice-to-rule-on-climate/11355176> (accessed 29 July 2020) See also <https://www.pacificclimateresistance.org/news/harvard-cambridge-yale-melbourne-auckland-law-academics-support-usp-students-call-to-take-climate-change-to-the-icj-7k2ag> (accessed 29 July 2020).

The aim of this campaign is to lobby governments worldwide to request that the ICJ provide advisory opinions on climate change as a human rights challenge. This will likely adjust and influence human rights obligations that arise due to climate change issue.¹³³ The benefits of forming an International Environment Court is that it could potentially address the fundamental procedural challenges faced in climate litigation procedures, standing and jurisdiction.¹³⁴ In other words, having such as court could provide a centralised system of dispute settlement that is accessible to a variety of actors, including individuals, corporations and civil society groups.¹³⁵ This court could therefore strive to clarify States legal obligations to take climate action, and to synchronise the climate change regime, thereby increasing the value of climate litigation.¹³⁶ This court could become the standard compliance and dispute settlement mechanism for environmental treaties such as the UNFCCC, Kyoto Protocol, Paris Agreement, the Convention on Biological Diversity, and more.¹³⁷ This could also possibly reduce the financial burden associated with the increase of overlapping treaties.¹³⁸ Furthermore, if this court is built on a treaty that relies on clear, precise, and binding treaty language, the new era of climate action will be led by a climate regime that contain treaty language that is more than just aspirational.¹³⁹

However, championing for this court may take time and it will demand an almost impossible level of consensus from States world-wide.¹⁴⁰ A new international court would ultimately mean the negotiations of a new international treaty to confer justification of the international court, and when ratified, State parties it enters into

¹³³ *Ibid.*

¹³⁴ Stuart Bruce *An international court for the environment?* (2016) available at <https://www.climate2020.org.uk/international-court-environment/> (accessed 22 June 2020)

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Sharaban Tahura Zaman *International Green Court: A Solution to Achieving Climate Justice?* (2019), available at <http://www.ipsnews.net/2019/07/international-green-court-solution-achieving-climate-justice/> (accessed 28 June 2020).

¹³⁹ Anne McMillan (n 113 above).

¹⁴⁰ Steinar Andersen (n 291 above) at 78 (“Many good arguments urge the establishment of a new IEC, but no single state in the world has supported the idea. Therefore, it will not be established in the foreseeable future”).

force and becomes binding on the member states. This process is extremely timeous, and requires massive financial and human resources.¹⁴¹ Overall, the establishment of an International Environment court will not be the sole solution to the climate change crisis. It is, however, an idea worth considering as a potential long-term attempt at enhancing the value of climate litigation, specifically with regards to individuals and communities' access to justice.

6. Conclusion

This chapter assess the value and effectiveness of climate litigation as a substantial form of climate action to protect against human rights violations. It explains how climate litigation has created opportunities to advance the climate change discourse as a human rights challenge and highlights key challenges regarding climate litigation procedures. However, this chapter illustrates that, these same challenges seem to establish opportunities for an increase in climate litigation procedures as well as the prospects of a significant response to the climate change crisis. This chapter demonstrates that climate litigation can effectively hold States accountable to their climate change commitments as well as their human rights obligations.

¹⁴¹ Example: The Negotiations for the Paris Agreement began in 2010 and was only finalized in 2015, available at <https://www.c2es.org/content/paris-climate-agreement-ga/> (accessed 20 July 2020).

Chapter Four

Conclusions and Recommendations

1. Conclusion

This chapter provides concluding remarks for the study in response to the research question that is presented in chapter one. This study primarily concludes that the climate change crisis is a human rights challenge that demands urgent and effective climate action from both States and non-state actors, and those who seek relief from climate change impacts can rightfully seek climate justice through climate litigation procedures. Climate litigation is demonstrated in this study as a form of climate action that is predominantly driven by effective civil society mobilisation. Furthermore, this study commends the efforts taken by civil society groups as the main plaintiffs in previous climate change cases that have set the scene for a continuous increase in climate litigation procedures. These cases have revealed the prospects of climate litigation as a significant response to the climate crisis. The more climate-related cases are filed, the better the opinions expressed by judges, and other law makers, thus creating impactful precedents and prestige around climate litigation. Furthermore, climate litigation procedures that have a rights-based dominance have noticeably served as a model or inspiration for the increase in strategic climate litigation.

This study finds that International courts such as the International Court of Justice, and the International Tribunal for the Law of the Sea provide opportunities to address climate change disputes, but are limited to state-to-state disputes due jurisdictional restrictions. Therefore, non-state actors, including civil society groups cannot bring claims or be sued under international law. Although these international courts play vital roles in clarifying overarching scientific issues within specific cases, including climate change impacts that are specifically tied to the scientific aspects of climate change, those who are directly affected by climate change impacts do not have standing or jurisdiction in such courts. Therefore, establishing an international court that could potentially provide a centralised system of dispute settlement

that is accessible to a variety of actors, including individuals, corporations and civil society groups is one of the main conclusions and considerations made in this study. Ultimately, this study concludes that climate litigation is a valuable and effective form of climate action that seeks to protect against the adverse impacts of climate change on basic human rights. This is due to the evidence presented in this study that suggests that plaintiffs have showed to have increased pressure on States to adhere to their climate action obligations through climate litigation procedures.

2. Recommendations

Based on the conclusions presented above, this section provides recommendations specifically focused on civil society groups, environmental lawyers and the establishment of an International Environmental Court as a potential solution to standing and jurisdiction challenges encountered in climate litigation procedures. This study recommends civil society groups to approach courts with human rights arguments that are well established in their campaigns. Climate litigation that have a human rights dominance creates authentic public awareness which leverages public interest and support. This increases chances of a successful climate litigation outcome due to the legal arguments that represents the public's interest. Civil society groups to establish significant campaigns that are driven by the public's interests and demands. This will be valuable in the event of unsuccessful climate litigation procedure because such campaigns can still assist in ensuring that States are held accountable. Civil society groups are recommended to leverage this digital era by using media and social media platforms publicise key messages as well as the aims and objectives their case. Media tends increase public support and elevates the importance of having to address issues.

This study encourages the idea of lawyers and legal professionals using their expertise to aid in the fight against climate change. In fact, it is recommended that their legal services should be rendered freely, especially for those who are in need of legal service but cannot afford legal fees. Furthermore, when considering the climate change urgency, lawyers and legal professions should consider their services as a form of climate action that will alleviate harms caused by climate change impacts.

This study reiterates the value of establishing an International Environmental Court. This court could potentially address the fundamental procedural challenges encountered in climate litigation procedures by permitting dispute settlements that is accessible individuals, corporations and civil society groups. This court could potentially clarify States legal obligations to take climate action, and to synchronise the climate change regime, thereby increasing the value of climate litigation. Although the establishment of this court will be extremely timeous, and requires massive financial and human resources, its benefits could potentially enhance the value of climate litigation, specifically with regards to individuals and communities' access to justice. Furthermore, international courts are generally prestigious, influential and create impactful and authoritative precedent that can be used to achieve effective global responses which can also be adopted nationally. Overall, this study concludes that while climate litigation is not a seamless solution, it is however, still a useful tool to influence and achieve climate justice.

Bibliography

1. Academic Articles

Andre Nolkaemper & Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (2020) *Blog of the European Journal of International Law*

Annalisa Savaresi & Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) *Climate Law Vol. 9(3)* 244

Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) *Climate Law Vol.6* 109

Jacqueline Peel & Hari Osofsky, 'A Rights Turn in Climate Change Litigation?' (2017) *Transnational Environmental Law Vol. 3(1)* 37

Jacqueline Peel & Joeline Lin, 'Transitional Climate Litigation: The Contribution of the Global South' (2019) *American Journal of International Law Vol. 113 (4)* 679

Karin Bäckstrand, Jonathan W. Kuyper, Björn-Ola Linnér & Eva Lövbrand, 'Non-state actors in global climate governance: from Copenhagen to Paris and beyond, Environmental Politics' (2017) *Vol. 26 (4)* 561

Lauri Lahikainen , 'Individual Responsibility For Climate Change A social structural account' (2018) *Academic Dissertation University of Tampere*

Maria L Banda & Scott Fulton, 'Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law' (2017) *Environmental Law Institute Vol. 47(2)* 286

M Willeit, A Ganopolski, R Calo & V Brovkin, 'Mid-Pleistocene Transition in Glacial Cycles Explained by Declining CO₂ and Regolith Removal' (2019) *Scientific Advances Vol. 5(4)* 7337.

Phil U. Chineyemba, 'Energy Access in Rural Areas' (2008) *The OPEC Fund for International Development*

Rachel Cooper, 'What is Civil Society, Its Role and Value (2018) *Unpublished Academic article, University of Birmingham*

William Thomas Worster, 'Relative International Legal Personality of Non-State Actors' (2016) *Brooklyn Journal of International Law Vol 42 (1)* 207

2. Books

Jacqueline Peel & Hari M. Osofsky, 'Climate Change Litigation – Regulatory Pathways to Cleaner Energy' (2015) *Cambridge University Press*

Steinar Andersen, 'The Role of International Courts and Tribunals in Global Environmental Governance' (2016) *ASPJ Africa & Francophonie*

3. Book chapter

Philippe Sands 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' in Tiyanjana Maluwa, Max Du Plessis & Dire Tladi (eds) (2017) *The Pursuit of a Brave New World in International Law*

4. Cases

Ashgar Leghari v Republic of Pakistan (2015) W.P. No. 25501/2015

Comer v. Murphy Oil USA, 585 F.3d 855, 860 (2009)

EarthLife Africa Johannesburg v Minister for Environmental Affairs & Others (2017) Case: 65662/16 Judgment of the High Court of South Africa. Gauteng Division, Pretoria

Future Generations v. Ministry of the Environment and Others (Demanda Generaciones Futuras v. Minambiente) Report Info: 11001 22 03 000 2018 00319 002018 (2018) Translation of Excerpts from the Supreme Court Decision

In re Greenpeace Southeast Asia and Others: Case No. CCHR-NI-2016-0001 (2015)

Native Village of Kivalina v ExxonMobil Corp 696 F 3d 849 at 11657 (9th Cir 2012)

Petition to The Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused By Acts and Omissions Of The United States (12/08/2005)

Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd (2016) Tribunal Appeal No. Net 196 of 2016

Urgenda Foundation v. State of the Netherlands ECLI:NL:HR:2019:2007 – Report info: [2015] HAZA C/09/00456689

5. International Treaties

European Convention on Human Rights (1950)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1996)

International Convention on the Elimination of All Forms of Discrimination against Women (1979),

International Convention on the Rights of the Child (1989)

Paris Agreement (2015)

United Nations Declarations on the Rights of Indigenous Peoples (2007)

6. Reports

Global Initiative for Economic, Social and Cultural Rights States': *Human Rights Obligations in the Context of Climate Change* (2017)

Greenpeace Climate Justice: *Holding your Government Accountable for Climate Change – A Peoples' Guide* (2018)

Internal Displacement Monitoring Centre and Norwegian Refugee Council, *Global Report on Internal Displacement* (2018)

Intergovernmental Panel on Climate Change (hereinafter IPCC): *Climate Change 2014: Impacts, Adaptation, and Vulnerability Part A: Global and Sectorial Aspects* (2014)

Joana Setzer and Rebecca Byrnes *Global Trends in Climate Change Litigation: 2019 Snapshot* (2019)

Mark Clarke & Tallant Hussain *Climate Change Litigation: A New Class of Action* (2018)

New Aljazeera Reports: *East African countries count losses after devastating floods* (May 2020).

Royal Irish Academy *The Geography of Climate Justice – An introductory resource to the geography of Climate Justice* (2011)

South Africa: Department of Environmental Affairs: *The Climate Change Bill of* (2018)

Steven Herz *Paris Is Not Enough: Why the Paris Agreement Isn't Driving More Climate Action, And How It Could* (2020)

Tessa Khan *Accounting for the Human Rights Harms of Climate Change: The use of strategic litigation is a key tool in holding governments - Responsible for inaction on climate change* (2017)

Tessa Khan *Spotlights on the SDGs – SDG 13: Climate Justice – How Climate Change Battles are Increasingly being Fought, and Won, in Courts*, at 147 – 149

World Bank *Shock Waves: Managing the Impacts of Climate Change on Poverty* (2016)

World Health Organization: *Quantitative Risk Assessment of the Effects of Climate Change on Selected Causes of Death, 2030s and 2050s* (2014)

7. United Nations Reports

Committee on Economic, Social and Cultural Rights: *Climate change and the International Covenant on Economic, Social and Cultural Rights* (2018) E/C.12/2018/1

Committee on the Elimination of Discrimination against Women: *General Recommendation No. 27 on older women and protection of their human rights* (2010), CEDAW/C/GC/27

Human Rights Council: *Resolution adopted by the Human Rights Council on 12 July 2019 Human rights and climate change* (2019) A/HRC/RES/41/21

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) A/HRC/25/53

Office of the High Commissioner for Human Rights: *Submission of the OHCHR (hereinafter "OHCHR") to the 21st Conference of the Parties to the United Nations Framework Convention: Key Messages on Human Rights and Climate Change* (2015) A/HRC/32/24,

OHCHR: *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, (2009), A/HRC/10/61

United Nations News: *Climate change: An 'existential threat' to humanity, UN chief warns global summit* (2018)

United Nations Development Programme: *OAI, Social and Environmental Compliance Unit* (Draft investigation Report) Case No. SECU009 (2020)

United Nations Environment Programme: *Climate Change and Human Rights* (2015)

United Nations Environment Programme: *Emissions Gap Report November 2019* (2019)

United Nations Environment Programme: *The Status of Climate Change Litigation: A Global Review* (2017)

United Nations 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 A/HRC/31/52*,

United Nations High Commissioner for Human Rights: *Analytical study on gender-responsive climate action for the full and effective enjoyment of the rights of women* (2019) A/HRC/41/26

UNICEF: *Environment and climate change Climate change and environmental degradation undermine the rights of every child*, at available at <https://www.unicef.org/environment-and-climate-change> (accessed 12 June 2020)

United Nations Human Rights Council: *Climate change and poverty – Report of the Special Rapporteur on extreme poverty and human rights* (2019) A/HRC/41/39

United Nations 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) A/HRC/31/52

United Nations Human Rights Council: *Climate change and poverty – Report of the Special Rapporteur on extreme poverty and human rights* (2019) A/HRC/41/39

United Nations Secretary-General: *Report of the Secretary-General on the 2019 Climate Action Summit and the way forward in 2020* (2019)

United Nations: *Transforming our World: The 2030 Agenda for Sustainable Development* (2015) Goal 13, A/RES/70/1

8. Websites

African Climate Reality Project: *Carbon Sink Management In Africa*, available at <http://climatereality.co.za/carbon-sinks-management/> (accessed 12 June 2020)

African Climate Reality Project: *Carbon Sink Management In Africa*, available at <http://climatereality.co.za/carbon-sinks-management/> (accessed 12 June 2020)

Africa Development Bank Group, at <https://www.afdb.org/en/countries/southern-africa/mozambique> \ (accessed 17 June 2020)

Anne King *Climate change and human rights – Can the courts fix it?* (2019), available at <https://www.boell.de/en/2019/03/18/climate-change-and-human-rights-can-courts-fix-it> (accessed 5 May 2020)

Anmar Frangoul on *CNBC - Oxfam International, World's richest 10% produce half of carbon emissions while poorest 3.5 billion account for just a tenth* (2015), available at <https://www.cnbc.com/2015/12/03/worlds-richest-10-produce-half-the-pollution-oxfam.html> (accessed 27 April 2020)

Al Gore: The Case for Optimism on Climate Chang, available at <https://www.youtube.com/watch?v=gVfgkFaswn4> (accessed 23 April 2020)

Al Gore *RS Interview Special Edition* (2020) available on Youtube at, <https://www.youtube.com/watch?v=5OkGHtl6POY> (accessed 21 July 2020)

Climate litigation – Centre for International Governance Innovation, available at <https://www.youtube.com/watch?v=yY5UQCHzLnI> (accessed 6 June 2020)

Daisy Mallett & Sati Nagra *Climate change litigation - what is it and what to expect?*, available at <https://www.lexology.com/library/detail.aspx?g=03ba4171-3769-4b77-b355-c9cf63cccc24> (accessed 10 June 2020).

Deb Blessman: *Top 10 Facts About Poverty in Mozambique* (2017), available at <https://borgenproject.org/about-poverty-in-mozambique/> (accessed 3 May 2020)

Evan Wasuka on Pacific Beats with the title *Students want International Court of Justice to rule on climate change* (2019), available at <https://www.abc.net.au/radio-australia/programs/pacificbeat/students-want-international-court-of-justice-to-rule-on-climate/11355176> (accessed 29 July 2020)

Geography Renewable Energy – Iceland is a Leader in Renewable Energy (2016), available at <https://www.inspiredbyiceland.com/article/renewable-energy> (accessed 4 May 2020)

Jessica Corbett *Study Finds Holding Governments and Corporations Legally Accountable for Climate Crisis 'Has Become a Global Phenomenon'* (2019), available at <https://www.commondreams.org/news/2019/07/04/study-finds-holding-governments-and-corporations-legally-accountable-climate-crisis> (accessed at 21 July 2020)

Marisa Martin & James Landman Standing: *Who Can Sue to Protect the Environment?* (2019)

https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/

(accessed 12 June 2020)

NASA scientist compiled studies that proves that the earth's temperature is continuously rising due to human activities, available at

https://climate.nasa.gov/climate_resources/139/video-global-warming-from-1880-to-2019/ (accessed 10 May 2020)

Obama warns climate change "can no longer be denied", available on Youtube at

https://www.youtube.com/watch?v=S9A0w_lemK0

(accessed 1 May 2020)

Oscars 2016: Leonardo DiCaprio Wins Best Actor Speech 2016, available at

<https://www.youtube.com/watch?v=AOoP56eXtzM>

(accessed 23 April 2020)

Press Room: *Groundbreaking Inquiry in Philippines Links Carbon Majors to Human Rights Impacts of Climate Change, Calls for Greater Accountability*, (2019) available at

<https://www.ciel.org/news/groundbreaking-inquiry-in-philippines-links-carbon-majors-to-human-rights-impacts-of-climate-change-calls-for-greater-accountability/>

(accessed 13 June 2020)

Principles in Global Climate Change Obligations, available at

<https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations>

(accessed 13 June 2020)

Republic of Congo oil drilling threatens environment: Activists, available at,

<https://www.youtube.com/watch?v=GHzwwrphYWU>

(accessed 12 June 2020)

Richard Schiffman: *Green Violence: 'Eco-Guards' Are Abusing Indigenous Groups in Africa* (2020), available at

<https://e360.yale.edu/features/green-violence-eco-guards-are-abusing-indigenous-groups-in-africa> (accessed 30 May 2020)

Sharaban Tahura Zaman International Green Court: A Solution to Achieving Climate

Justice? (2019), available at <http://www.ipsnews.net/2019/07/international-green-court-solution-achieving-climate-justice/>

(accessed 28 June 2020)

Stuart Bruce *An international court for the environment?* (2016) available at

<https://www.climate2020.org.uk/international-court-environment/>

(accessed 22 June 2020)

The Guardian: *'Armed ecoguards funded by WWF 'beat up Congo tribespeople'* available at <https://www.theguardian.com/global-development/2020/feb/07/armed-ecoguards-funded-by-wwf-beat-up-congo-tribespeople> (accessed 30 May 2020)

The Guardian: *Plan to drain Congo peat bog for oil could release vast amount of carbon* (2020) available at, <https://www.theguardian.com/environment/2020/feb/28/ridiculous-plan-to-drain-congo-peat-bog-could-release-vast-amount-of-carbon-aoe> (accessed 12 June 2020)

The Guardian *Pope Francis declares 'climate emergency' and urges action*, 14 June 2019, available at <https://www.theguardian.com/environment/2019/jun/14/pope-francis-declares-climate-emergency-and-urges-action> (accessed 23 April 2020)

The Guardian: *Uruguay, for example, already produces approximately 95% of its electricity from renewable energy* (2015) available at <https://www.theguardian.com/environment/2015/dec/03/uruguay-makes-dramatic-shift-to-nearly-95-clean-energy> (accessed 4 May 2020)

The High Sea Alliance, available at <https://www.asoc.org/advocacy/antarctic-governance/high-sea-alliance> (accessed 30 July 2020)

The Poorest Country in the World, available at <https://www.focus-economics.com/blog/the-poorest-countries-in-the-world> (accessed 1 May 2020)

The flood also washed away roads and bridges in Kampala, see news report by Duncan Mirriri & Elis Biryabarema , available at <https://www.reuters.com/article/us-health-coronavirus-africa-floods/ugandan-hospital-somali-town-washed-away-by-east-africa-floods-idUSKBN22K1UC> (accessed 1 May 2020)

Thomas Wilson & Jennifer William: *Why is Litigation So Expensive?* (2018), available at <https://www.velaw.com/insights/why-is-litigation-so-expensive/> (accessed 13 June 2020)

The Negotiations for the Paris Agreement began in 2010 and was only finalized in 2015, available at <https://www.c2es.org/content/paris-climate-agreement-qa/> (accessed 20 July 2020)

UNEP News: *Lamu coal plant case reveals tips for other community-led campaigns* (2019), available at <https://www.unenvironment.org/news-and-stories/story/lamu-coal-plant-case-reveals-tips-other-community-led-campaigns> (accessed 30 May 2020)

UNHCR Factsheet: Cyclone Idai. (2019) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/> (accessed 25 April 2020)

UN Human Rights, Office of the High Commissioner, News, *Bachelet welcomes top court's landmark decision to protect human rights from climate change* (2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> (accessed 30 May 2020)

Why Climate Change Is a Threat to Human Rights |Mary Robison |TED Talks, available at <https://www.youtube.com/watch?v=7JVTirBEfho> (accessed 10 June 2020)