EMERGING TRENDS IN RECENT HUMAN RIGHTS-BASED CLIMATE CHANGE LITIGATION TARGETING GOVERNMENT ACCOUNTABILITY

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Abstract

Increasing global attention on climate change has resulted in the growth of climate change litigation worldwide. 2019 and 2020 saw a global rise in human rights-based climate change litigation and certain new trends seem apparent in this litigation, specifically relating to holding governments accountable for their actions. Due to climate change cases being canvassed comprehensively in other publications up until 2019, this dissertation focuses on those cases filed in 2019 and 2020 and cases in which major developments occurred in the last two years. Prior to 2019, the trends that emerged from climate change litigation were, *inter alia*, governments being held accountable for not adhering to stated national commitments, the linking of the impacts of extracting resources to climate change, establishing that certain emissions are causing particular adverse climate effects, the liability of governments that failed to adapt to the climate crisis and the use of the public trust doctrine. In the context of human rights-based climate change litigation targeting government accountability (relevant litigation) there appears to have been a shift in the trends that have emerged since 2019. These trends are claimants relying on regional instruments in the relevant litigation, the use of judicial review, the increasing use of children's rights in the relevant litigation and the linking of climate change and the displacement of indigenous people. The content of this dissertation critically evaluates these contemporary trends and highlights ongoing challenges and opportunities for development in the field of human rights-based climate change litigation targeting government accountability.

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Chapter 1: Introduction

1.1 Background to the issue

Over time, the issue of climate change has evolved from being one of a controversial nature, to becoming a commonly accepted and indisputable threat to our planet.[1] Increased human activity and the associated increase in greenhouse gas emissions have caused average earth temperatures to rise by 0.2ºC per decade over the last 30 years.[2] Most climate models project great differences in the climate characteristics of regions between present-day temperature and global warming of 1.5ºC and between global warming of 1.5ºC and 2ºC.[3] These differences are immense. It includes, *inter alia*, an increase in mean temperature in most ocean and land regions and an increase in precipitation in others. It is projected that the global mean temperature of 'well below 2ºC', as envisaged in the Paris Agreement,[4] will in fact be closer to a rise of 3ºC by 2100.[5] Even if we could contain global temperature increase within 2ºC,[6] climate change has the 'ability to undermine all the advancements that humankind has achieved over the centuries and destroy life as we know it today'.[7]

The international community is in agreement over the severity of the above issues.[8] Arguably, this is evident through the inclusion of climate action as one of the 17 United Nations (UN) Sustainable Development Goals,[9] as well as through the conclusion of the Paris Agreement.

Climate action has accelerated not only on the international front, but

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[1] Mitkidis & Valkanou 2020 (9) 1 *Transnational Environmental Law* 11.
[2] IPBES (2019): Summary for Policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services.
[3] IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5ºC. An IPCC Special Report on the impacts of global warming of 1.5ºC 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* 5.
[4] Adoption of the Paris Agreement, Decision 1/CP.21 *in* COP Report No. 21, Addendum, at 2, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) (hereinafter Paris Agreement).
[5] Eskander et al 2021 (2) *Environmental and Energy Policy and the Economy* 45.
[6] Quirico 2018 (65) *Netherlands International Law Review* 186.
[7] Atapattu 2019 (50) 1 *Arizona State Law Journal* 38.
[8] Mitkidis & Valkanou 2020 (9) 1 *Transnational Environmental Law* 11.
[9] UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 Sept. 2015), UN Doc. A/RES/70/1.

also on a domestic level. Between 1990 and 1999, 110 national policies and laws addressing climate change were passed.[10] As of May 2021, this number has increased to 2161 climate laws and policies in 197 countries and the European Union as a block – thereby ensuring that every country in the world has at least one of these policies or laws.[11]

Due to this vast new swathe of new domestic climate laws and policies, the role of the judiciary has become vital in the interpretation and application thereof. According to the United Nations Environment Program (UNEP), '[l]itigation has arguably never been a more important tool to push policymakers and market participants to develop and implement effective means of climate change mitigation and adaption than it is today'.[12] Some commentators correctly argue that 'the judiciary is thought of as a critical forum in which the future of climate change regulation and responsibility is debated, and the need for further legislative action is flagged'.[13]

The years 2019 and 2020 saw a global rise in climate change litigation. As of May 2021, the total number of climate change-related cases filed worldwide was approximately 1787.[14] This indicates a major increase from the 1302 cases filed up until March 2019[15] and the 1587 cases filed up until May 2020.[16]

Arguably, advancements in the scientific understanding of climate change have influenced litigation dramatically.[17] Development in the field of climate attribution science is allowing claimants to better quantify the environmental impact of certain actions, policies and laws.[18] The amount of

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[10] Eskander et al 2021 (2) *Environmental and Energy Policy and the Economy* 45.
[11] To access the most recent numbers on climate laws and policies, see the Grantham Research Institute on Climate Change and the Environment, available at https:/climate-laws.org/.
[12] United Nations Environment Program 2017 *The Status of Climate Change Litigation: A Global Review* 8.
[13] Bogojevic 2013 (35) *Law & Policy* 184.
[14] See note 11 above for updated numbers on climate change-related cases filed worldwide.
[15] De Wit et al (February 2020) *Norton Rose Fulbright Publications* 1.
[16] Setzer & Byrnes 2020 *London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science* 4.
[17] De Wit et al (February 2020) *Norton Rose Fulbright Publications* 1.
[18] Ibid.

climate change-related actions is increasing together with our growing understanding of the crisis.

An increasing number of these cases are relying on human rights to hold governments accountable for the climate crisis. In order to set an important context to this recent phenomenon of plaintiffs relying on human rights in order to hold governments accountable for the climate crisis, a brief overview of the international climate change regime is necessary and informative.

1.2 The rise of the international climate change regime

The first phase of the United Nation's climate change regime ran from 1990 to 1995,[19] leading to the entry into force of the United Nations Framework Convention on Climate Change (UNFCCC).[20] The second phase, which ran from 1995 to 2004, led to the adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol).[21] Negotiations that marked the beginning of the third phase commenced in 2005 and ended with the adoption of the Paris Agreement and its entry into force in November 2016.

1.2.1 The 1992 Climate Change Convention

As early as 1988 and 1989, the UN General Assembly and specialised agencies determined that climate change is a shared concern for humankind.[22] Negotiations subsequently commenced in order to bring forth a treaty that would address the growing climate change issue.[23]

In 1992, the UNFCCC was signed by 155 states, as well as the European Union, at the United Nations Conference on Environment and Development (Rio Declaration).[24] It was the first treaty of its kind.

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[19] Bodansky 2016 (110) 2 *American Journal of International Law* 291.
[20] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992); U.N. Doc. A/AC.237/18 (Part II)/Add. 1; 31 I.L.M. 849 (1992) (hereinafter UNFCCC).
[21] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc FCCC/CP/1997/7/Add.1 (hereinafter Kyoto Protocol).
[22] UNGA Res. 45/53 (1988); UNGA Res. 44/207 (1989); Sands 299.
[23] Sands & Peel *Principles of International Environmental Law* 299.
[24] United Nations Conference on Environment and Development 31 I.L.M. 874 (1992) (hereinafter Rio Declaration).

The main objective of the UNFCCC is to stabilise greenhouse gas concentrations in the atmosphere.[25] However, it states that 'ecosystems [must be allowed] to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'.[26] The UNFCCC thus acknowledges that climate change is inevitable.[27]

Article 3 of the UNFCCC sets out numerous principles to which the parties thereto must adhere. These include, *inter alia,* that the parties must protect the climate 'for the benefit of present and future generations of humankind'. In Article 3, the UNFCCC further makes a clear distinction between developed and developing countries, stating that developed country parties must take the lead in fighting climate change and the negative effects thereof.

The UNFCCC sets out a list of commitments in Article 4, in order to give effect to its stated objective. These commitments are subject to the parties' 'common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances'.[28]

It is a commonly held view that the UNFCCC 'attempted to adopt a comprehensive approach to integrating environmental considerations into economic development'.[29] Arguably, however, the guiding principles of the UNFCCC reflect political compromises, such as the differentiation between the obligations of developed and developing countries. A list of developed countries was set out in Annexure 1 of the UNFCCC and is known as Annex 1 countries. A further list of developing countries was set out in Annexure 2 of the UNFCCC and is known as Annex 2 countries. These political compromises have led to contentions throughout climate change negotiations.[30]

1.2.2 The 1997 Kyoto Protocol

After the first Conference of the Parties in 1995, it was determined that

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[25] Article 2 of the UNFCCC.
[26] Ibid.
[27] French 1998 (10) 2 *Journal of International Law* 228.
[28] Article 4 of the UNFCCC.
[29] Sands & Peel *Principles of International Environmental Law* 300.
[30] Vespa 2001 (29) 2 *Ecology Law Quarterly* 398.

Articles 4(2)(a) and (b) of the UNFCCC were inadequate.[31] A process was launched in order to strengthen the commitments of Annex 1 parties.[32] The considerations which were to guide the negotiations, were set out in the Berlin Mandate, which explicitly stated that developing countries will not be introduced to new commitments. However, quantified limitation and reduction objectives were to be set for developed country parties.[33]

Consequently, on 11 December 1997, a Protocol to the UNFCCC, the Kyoto Protocol, was adopted.[34] Under the Kyoto Protocol, industrialised countries undertook to reduce their collective emissions of six greenhouse gasses by not less than 5% by 2008 – 2012 compared to 1990 levels.[35]

The Kyoto Protocol introduced three controversial flexibility measures in order to enable Annex 1 countries to meet their commitments under the Protocol, namely Emissions Trading, Joint Implementation and the Clean Development Mechanism (CDM).[36] Emissions Trading established individual quotas for each country regarding the amount of greenhouse gases that country can emit.[37] Should a country not use all its quota, it can sell the remaining quota to another country, who will then be able to emit greenhouse gases without breaching their obligations in terms of the Protocol.[38] The second flexibility measure that was introduced, was that joint implementation of emission reduction commitments by Annex 1 countries was allowed.[39] In terms of Article 6 of the Kyoto Protocol, any Annex 1 country may transfer to or acquire emission reduction units from any other Annex 1 country.[40] Lastly, the Kyoto Protocol introduced the CDM. Set out in Article 12 of the Kyoto Protocol, the purpose thereof was to assist non-Annex 1 countries in achieving sustainable development.[41]

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[31] Sands & Peel *Principles of International Environmental Law* 307.
[32] Ibid., 307.
[33] Report of the Conference of the Parties on Its First Session, Berlin, 28 March-7 April 1995, FCCC/CP/1995/7/Add.1.
[34] Davies 1998 (47) 2 *The International and Comparative Law Quarterly* 446.
[35] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998); 2303 U.N.T.S. 148; U.N. Doc FCCC/CP/1997/7/Add.1.
[36] Sands & Peel *Principles of International Environmental Law* 310.
[37] French 1998 (10) 2 *Journal of International Law* 235.
[38] Ibid., 235.
[39] Sands & Peel *Principles of International Environmental Law* 310.
[40] Article 6(1) of the Kyoto Protocol.
[41] Article 12 of the Kyoto Protocol.

The goal of the negotiations was not, however, to introduce new commitments, but merely to 'reaffirm existing commitments in Article 4.1 and continue to advance the implementation of these commitments'.[42] However, this 'firewall', as it is called by some commentators,[43] between the commitments of developed and developing countries was problematic. Opposition was received from major emitters such as China and the United States, which ultimately led to the Kyoto Protocol failing to limit the growth of emissions.[44]

A different view is, however, held by certain commentators. Some argue that, despite the Kyoto Protocol's weaknesses, its strength lies in its flexibility, seeing that it is renegotiated with every commitment period.[45] It is, however, hard to ignore the fact that the Kyoto Protocol did little 'to reduce the justifiable criticism that for a number of influential states, traditional economic growth dependent on fossil fuels is still the imperative consideration'.[46]

1.2.3 The Paris Agreement

Negotiations that ultimately led to the Paris Agreement started in 2005, when it was contemplated what will happen after 2012, when the Kyoto Protocol's first commitment period ended.[47] At the Durban Conference of the Parties in 2011, an in-principle agreement was reached with regards to a second commitment period.[48] This Agreement was subsequently formalised in 2012 in Doha, Qatar, as the Doha Amendment to the Kyoto Protocol.[49] Between the Conference of the Parties in Doha and the Conference of the Parties in Paris in 2015, a new agreement was drafted through further negotiations. The Paris Agreement was subsequently adopted on 12 December 2015, as an annexure to the decision of the Conference of the Parties.[50]

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[42] Decision 1/CP.1, Report of the Conference of the Parties on its 1st Session, Berlin, 28 March – 7 April 1995, FCCC/CP/1995/7/Add.1, para. 2(b); Sands & Peel *Principles of International Environmental Law* 308.
[43] Sands & Peel *Principles of International Environmental Law* 308.
[44] Ibid., 308.
[45] Vespa 2001 (29) 2 *Ecology Law Quarterly* 420.
[46] French 1998 (10) 2 *Journal of International Law* 239.
[47] Bodansky 2016 (110) 2 *American Journal of International Law* 291.
[48] Sands & Peel *Principles of International Environmental Law* 317.
[49] Ibid., 317.
[50] Ibid., 318.

1.2.3.1 The status of the Paris Agreement

The Paris Agreement is heralded by some commentators as a landmark agreement.[51] In order to promote stronger action, the Paris Agreement complements states' nationally determined contributions (NDCs) with international norms 'to ensure transparency and accountability and to prod states to progressively ratchet up their efforts'.[52]

The Paris Agreement is a treaty under international law, seeing that it makes provision for its 'entry into force' and that it is subject to ratification.[53] Article 2 of the Paris Agreement provides for three purposes, namely to stay 'well below' 2 degrees, or even 1.5 degrees,[54] to increase the 'ability to adapt to the adverse impacts of climate change'[55] and to make finance flows 'consistent with a pathway towards low greenhouse gas emissions and climate-resilient development'.[56]

It is expressly stated that, in enhancing the said objectives, it 'aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty'.[57]

1.2.3.2 Substantial differences introduced by the Paris Agreement

It is argued that '[e]ffective global cooperation on climate change is ultimately about motivating nation-states to take action beyond what they would consider to be in their national interest in the absence of global cooperation'.[58] The Kyoto Protocol's approach to achieving this goal was based on the idea that states were more likely to take the desired action if they are assured that other countries will also take action.[59] It is argued that this is the reason why emission-reduction targets were 'negotiated jointly, encouraging countries to take on more ambitious targets in light of, and conditional on, comparable

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[51] Bodle et al 2016 (10) 1 *Carbon and Climate Law Review* 5.
[52] Bodansky 2016 (110) 2 *American Journal of International Law* 289.
[53] Bodle et al 2016 (10) 1 *Carbon and Climate Law Review* 6; Article 20 and 21 of the Paris Agreement.
[54] Article 2(1)(a) of the Paris Agreement.
[55] Article 2(1)(b) of the Paris Agreement.
[56] Article 2(1)(c) of the Paris Agreement.
[57] Article 2(1) of the Paris Agreement.
[58] Doelle 2016 (6) *Climate Law* 2.
[59] Ibid., 3.

commitments made by others'.[60] The Kyoto Protocol's architecture was not one of flexibility.[61] It also categorically differentiated between developed and developing countries.[62]

The Paris Agreement, on the other hand, follows a fundamentally different and more flexible approach. Commentators argue that the Paris Agreement is 'based on the idea that self-imposed, voluntary commitments are more likely to be met than those imposed by the global community'.[63] It is argued that 'attention to science, demonstrated domestic progress, full transparency, and regular review of the collective effort are the key to moving parties beyond no-regrets actions'.[64]

Furthermore, the Paris Agreement does not refer to the annex structure of the UNFCCC. Alternatively, the commitments with regards to NDCs are common in their nature. It provides that all countries must, in time, move towards emission-reduction targets.[65] The framework does, however, take into account the capacities of the different parties. Article 4(5) provides that support will be provided to developing country parties rather than differentiating developing countries as a class.[66] Commentators argue that this is a 'more carefully calibrated approach' where 'differentiation remains, but in the context of what can fairly be described as a common global framework'.[67]

1.2.3.3 The Paris Agreement and Human Rights

A further substantial difference in the framework of the Paris Agreement in relation to the UNFCCC and the Kyoto Protocol, is that it marks the first time that the relationship between human rights and climate change has been included in any climate change treaty.[68] It states in its Preamble that 'climate change is a common concern of humankind'. It continues in stating that the parties to the Agreement 'should, when taking action to address climate

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[60] Ibid., 3.
[61] Bodansky 2016 (110) 2 *American Journal of International Law* 290.
[62] Ibid., 300.
[63] Doelle 2016 (6) *Climate Law* 3.
[64] Ibid.
[65] Bodansky 2016 (110) 2 *American Journal of International Law* 300.
[66] Ibid., 300.
[67] Ibid., 300.
[68] Sands & Peel *Principles of International Environmental Law* 319.

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'.[69]

The effect of this insertion is that a positive obligation is placed on states to promote and consider human rights through their climate change actions.[70] However, the preamble of a treaty is not capable of creating rights or obligations on its own.[71] Clauses in the preamble are, however, clearly recognised in customary international law.[72] This has the effect that, even though the Paris Agreement does not create any self-standing human rights obligations, the parties to the Agreement are obligated to comply with human rights obligations when they carry out actions related to climate change under the Paris Agreement.[73]

1.3 The growth of rights-based climate change litigation

Even though the relationship between the quality of the environment and human rights was first recognised in 1968 by the United Nations General Assembly,[74] the 2015 Paris Agreement was the first treaty to recognise the relationship between climate change and human rights.

A widespread consensus has subsequently emerged in international law and public policy that there exists an interdependence between human rights and a healthy environment.[75] This has arguably brought about what some

[69] Preamble of the Paris Agreement
[70] Mayer 2016 (6) *Climate Law* 113.
[71] Ibid., 113.
[72] Article 31(2) of the Vienna Convention on the Law of Treaties states that '[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including the preamble […]'.
[73] Mayer 2016 (6) *Climate Law* 114.
[74] UNGA Res. 2398 (XXII) (1968); Sands & Peel *Principles of International Environmental Law* 814; In 1972, the United Nations Conference on the Human Environment stated in its first Principle that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.
[75] Davies et al 2017 (8) 2 *Journal of Human Rights and the Environment* 219.

commentators have dubbed a rights-based turn in climate change litigation.[76] As the effects of climate change, such as an increase in floods, an increase in temperatures and diminishing of resources, worsens, its effects on humans are becoming more evident. As these negative impacts of climate change affects communities more substantially and more directly, the human rights impacts are becoming even more evident.[77]

According to a study conducted by the Office of the UN High Commissioner for Human Rights (OHCHR),[78] climate change has the potential to have implications on the full range of human rights. The OHCHR stated that there are, however, some rights which relate more directly to the impacts of climate change.

The impacts of climate change have the ability to affect the right to life and the right to health (due to death, disease or malnutrition); the right to food (by threatening food security and the livelihoods of persons); the right to water (by compromising safe drinking water); the right to adequate housing (by destroying coastal settlements); and the right to self-determination (through the forced relocation of groups of people from their ancestral ground).[79]

Due to the growing threat of climate change, as well as our growing understanding of the impacts thereof on our most fundamental human rights, a rights-based turn in climate change litigation has been emerging. With some exceptions, the defendants in human rights-based climate change cases are nearly always governments.[80] As governments become more committed to the climate change agenda, these governments' administrative agencies become more susceptible to litigation. When a government articulates its commitment to combatting climate change, and commits through the adoption and adaptation of legislation, mitigation of climate change, regulation and the making and enforcing of different policies,[81] it is inevitable that it will be held to

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[76] Peel & Osofsky 2018 (7) 1 *Transnational Environmental Law*.
[77] Ibid., 40.
[78] OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 Jan. 2009 (OHCHR Report).
[79] Ibid., paras 20-41.
[80] United Nations Environment Program 2017 *The Status of Climate Change Litigation: A Global Review* 14.
[81] Ibid., 15.

a higher standard by those seeking to ensure that their fundamental human rights are protected.

1.4 Purpose and scope

The broad purpose of this dissertation is to survey recent human rights-based climate change litigation targeting government accountability ('relevant litigation'), with a view to determining if it follows previous trends or if new trends are emerging.

In terms of the scope of this dissertation, three distinctions will be made, namely the form of litigation that will be explored, the timeframe in which these cases emerged and the choice of cases.

The pre-2019 cases that are identified in Chapter 2, consist of climate change-related litigation that was brought against governments as well as private entities, using numerous arguments and causes of action. The first pre-2019 trend that will be explored, is how the courts in climate change litigation held governments accountable for not adhering to its stated national commitments.[82] The second trend that will be looked at, is how claimants in these cases linked the impacts of extracting resources to climate change.[83] Thereafter, it will be surveyed how it was established in various cases that certain emissions are the cause of particular adverse climate effects.[84] The trend of courts applying the public trust doctrine will also be explored.[85] Lastly, it will look at how liability for governments that failed to adapt to the climate crisis was established.[86]

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[82] *Leghari v Republic of Pakistan* WP No. 25501/2015, Lahore High Court (2015); *Thomson v Minister for Climate Change Issues* CIV 2015-485-919 [2017] NZHC 733, New Zealand High Court (2017).
[83] *Ali v Federation of Pakistan* Constitutional Petition Number ___ / I of 2016, Lahore High Court (2016); *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 16-166674TVI-OTIR/06 Oslo District Court (2018).
[84] *Connecticut et al v American Electric Power Company et al* 04 Civ. 5669, 04 Civ. 5670, US District Court, Southern District of New York (2005); *Native Village of Kivalina v ExxonMobil Corporation* 12-1072, US Court of Appeals for the Ninth Circuit (2012); *Luciano Lliuya v RWE AG* 2O 285/15, Essen Regional Court (2015).
[85] *Environmental People Law v Cabinet of Ministers of Ukraine* 01025, Kyiv District Administrative Court (2011).
[86] *In re Katrina Canal Beaches Litigation* 696 F.3d 436, 436, US 5th Circuit Court of Appeals (2012); *St. Bernard Parish Government v United States* 121 Fed. Cl. 687, Federal Circuit (2015).

The selection of the post-2019 cases in Chapter 3, however, consist of certain delineations. This chapter will only focus on cases where plaintiffs argued that their human rights were being violated due to the effects of climate change. It will furthermore only use litigation of a public nature with governments as the opposing parties in order to identify these trends. The litigation that will be discussed will only be litigation decided by domestic courts, and not litigation decided by regional or international bodies. The reason for these delineations is multi-faceted. Firstly, due to the Paris Agreement being the first climate change treaty to acknowledge the relationship between human rights and climate change,[87] human rights-based climate change litigation against governments has increased dramatically. Secondly, the ground-breaking 2019 decision by the Supreme Court of the Netherlands in the case of *State of the Netherlands v Urgenda Foundation* (*Urgenda*)[88] marked the first time that any court in the world ordered a government to reduce its greenhouse gas emissions. This decision exponentially increased the cases brought in terms of the relevant litigation.

In order to identify the recent trends in human rights-based climate change litigation targeting government accountability, the research will focus on cases filed in 2019 and 2020, and on cases that have had major developments, like appeals filed or judgements delivered, in 2019 and 2020. The reason for this delineation is that, preceding this time period, climate change cases were canvassed comprehensively in other publications.[89]

Where such contemporary trends are evident, this dissertation will seek to identify key themes under which to group these trends.

The first post-2019 trend that will be explored is how claimants are relying on regional instruments in the relevant litigation by discussing the Supreme Court of the Netherland's 2019 judgement of *Urgenda.* Following the logic followed by the Netherlands' highest court in the *Urgenda* decision, this

[87] Sands & Peel *Principles of International Environmental Law* 319.
[88] *State of the Netherlands v Urgenda Foundation* C/09/456689 / HA ZA 13-1396, Hoge Raad (2019).
[89] See United Nations Environment Program 2017: The Status of Climate Change Litigation: A Global Review & Setzer & Byrnes (2019) Global trends in climate change litigation: 2019 snapshot.

trend was followed by further litigants.[90] Secondly, the use of judicial review in the relevant litigation will be examined by discussing the relevant caselaw.[91] Thirdly, the increasing use of children's rights in the relevant litigation will be explored.[92] Finally, the linking of climate change and the displacement of indigenous people will be explored.[93]

In Chapter 4, the above four emerging trends will be critiqued. The view of this critique will be to identify possible ongoing shortcomings and potential future opportunities with regards to the relevant litigation.

1.5 Methodology and structure

The methodology of this research is to undertake a desktop-based study of the trends and literature that have emerged post-2019 regarding the relevant litigation. The desktop-based research will be undertaken by drawing from an array of sources, namely primary sources and secondary sources. The primary sources include international instruments, regional instruments and domestic and regional cases. The secondary sources include books, chapters in books, journal articles, reports and electronic sources. The dissertation's approach to researching the issue comprises of three components.

The first component of the research seeks to survey and then synthesis key trends inherent in the relevant pre-2019 litigation. This forms the focus of Chapter 2 of the dissertation. The inclusion of this component is necessary to create a baseline against which to ascertain whether or not new trends are emerging in post-2019 relevant litigation. Through the UNEP Report, five trends

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[90] *Greenpeace Netherlands v State of the Netherlands* C/09/600364/KG ZA 20-933, Hague District Court (2020); *Greenpeace et al v Austria* G144-145/2020-13, V 332/2020-13, Constitutional Court of Austria (2020); *Notre Affaire à Tous and Others v France* 1904976/4-1, Administrative Court of Paris (2021); *Friends of the Irish Environment v Ireland* 2017 No. 793 JR, Supreme Court (2019); *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* No. A2992/2017, Swiss Supreme Court (2017).

[91] *Family Farmers and Greenpeace Germany v Germany* 00271/17/R/SP, Administrative Court of Berlin (2018); *Friends of the Irish Environment v Ireland* 2017 No. 793 JR, Supreme Court (2019); *Neubauer et al v Germany* 00362/19/R/H, Federal Constitutional Court (2020).

[92] *Juliana v United States* 18-36082, D.C. No. 6-15-cv-01517AA, Ninth Circuit (2015); *La Rose v Her Majesty the Queen* T-1750-2019, Federal Court of Appeal (2019), *Associacion Civil por la Justicia Ambiental v Province of Entre Rios et al,* Argentinian Supreme Court (2020); *ENvironnement JEUnesse v Canada* 500-06-000955-183, Quebec Superior Court (2018); *Aji P. v State of Washington* 80007-8-I, Court of Appeals of the State of Washington (2018).

[93] *La Rose v Her Majesty the Queen* T-1750-2019, Federal Court of Appeal (2019); *Lho'imggin et al. v Her Majesty the Queen* 2020 FC 1059, Federal Court of Appeal (2020).

appear apparent in this pre-2019 litigation era and these will be used as the main structural divisions for Chapter 2. These five trends are the following: governments being held accountable for not adhering to stated national commitments;[94] the linking of the impacts of extracting resources to climate change;[95] establishing that certain emissions are causing particular adverse climate effects;[96] the use of the public trust doctrine[97] and the liability of governments that failed to adapt to the climate crisis.[98]

Having established the above baseline, the dissertation then reviews key post-2019 relevant climate change litigation. This forms the focus of Chapter 3 of the dissertation. It is important to note that the purpose of this chapter is simply to identify possible emerging trends. The purpose of Chapter 4, on the other hand, is to critically evaluate shortcomings and opportunities associated with each trend.

In considering the relevant litigation in Chapter 3, four trends seem to be apparent, namely the use of regional instruments in the relevant litigation,[99] the use of judicial review,[100] the increasing use of children's rights[101] and the linking

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[94] *Leghari v Republic of Pakistan* WP No. 25501/2015, Lahore High Court (2015); *Thomson v Minister for Climate Change Issues* CIV 2015-485-919 [2017] NZHC 733, New Zealand High Court (2017).
[95] *Ali v Federation of Pakistan* Constitutional Petition Number ___ / I of 2016, Lahore High Court (2016); *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 16-166674TVI-OTIR/06 Oslo District Court (2018).
[96] *Connecticut et al v American Electric Power Company et al* 04 Civ. 5669, 04 Civ. 5670, US District Court, Southern District of New York (2005); *Native Village of Kivalina v ExxonMobil Corporation* 12-1072, US Court of Appeals for the Ninth Circuit (2012); *Luciano Lliuya v RWE AG* 2O 285/15, Essen Regional Court (2015).
[97] *Environmental People Law v Cabinet of Ministers of Ukraine* 01025, Kyiv District Administrative Court (2011).
[98] *In re Katrina Canal Beaches Litigation* 696 F.3d 436, 436, US 5th Circuit Court of Appeals (2012); *St. Bernard Parish Government v United States* 121 Fed. Cl. 687, Federal Circuit (2015).
[99] *State of the Netherlands v Urgenda Foundation* C/09/456689 / HA ZA 13-1396, Hoge Raad (2019); *Greenpeace Netherlands v State of the Netherlands* C/09/600364/KG ZA 20-933, Hague District Court (2020); *Greenpeace et al v Austria* G144-145/2020-13, V 332/2020-13, Constitutional Court of Austria (2020); *Notre Affaire à Tous and Others v France* 1904976/4-1, Administrative Court of Paris (2021); *Friends of the Irish Environment v Ireland* 2017 No. 793 JR, Supreme Court (2019); *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* No. A2992/2017, Swiss Supreme Court (2017).
[100] *Family Farmers and Greenpeace Germany v Germany* 00271/17/R/SP, Administrative Court of Berlin (2018); *Friends of the Irish Environment v Ireland* 2017 No. 793 JR, Supreme Court (2019); *Neubauer et al v Germany* 00362/19/R/H, Federal Constitutional Court (2020).
[101] *Juliana v United States* 18-36082, D.C. No. 6-15-cv-01517AA, Ninth Circuit (2015); *La Rose v Her Majesty the Queen* T-1750-2019, Federal Court of Appeal (2019), *Associacion Civil por la Justicia Ambiental v Province of Entre Rios et al,* Argentinian Supreme Court (2020);

of climate change and the displacement of indigenous people.[102] These four trends shall inform the structure of Chapter 3 – with the relevant cases being discussed under each trend – in order to explain the nature of and to provide evidence for each of these apparent trends.

Having identified these four emerging trends with regards to the relevant litigation, the dissertation will then move on to the third component of the research in Chapter 4. This chapter will consider possible challenges associated with these contemporary trends and future opportunities which are yet to be realised.

ENvironnement JEUnesse v Canada 500-06-000955-183, Quebec Superior Court (2018); *Aji P. v State of Washington* 80007-8-I, Court of Appeals of the State of Washington (2018).

[102] *La Rose v Her Majesty the Queen* T-1750-2019, Federal Court of Appeal (2019); *Lho'imggin et al. v Her Majesty the Queen* 2020 FC 1059, Federal Court of Appeal (2020).

Chapter 2: Relevant trends in pre-2019 litigation

Up until 2019, climate change cases were brought in approximately 28 countries worldwide.[103] More than 90% of these cases were heard in common law jurisdictions, including the United States, Australia, the United Kingdom and New Zealand.[104] Between 1990 and 2016, 873 climate lawsuits were brought in the United States alone.[105] Up until March 2017, more than 230 climate change cases were brought in non-US countries.[106] In May 2019, this figure stood at 305.[107]

In light of the above, the United Nations Environment Program (UNEP) identified trends that emerged from climate change litigation. This chapter surveys these historic trends in climate change litigation that emerged prior to 2019, in order to set a baseline against which to ascertain whether new trends have emerged in the post-2019 period.

Firstly, this chapter explores how the courts in climate change litigation held governments accountable for not adhering to its national stated commitments through the case of *Leghari v Republic of Pakistan* (*Leghari*)[108] and the New Zealand case of *Thomson v Minister for Climate Change Issues* (*Thomson*).[109] Secondly, it looks at how the claimants in these cases linked the impacts of extracting resources to climate change through *Ali v Federation of Pakistan* (*Ali*)[110] and *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (*Greenpeace Nordic Association*).[111] Thirdly, the chapter discusses how it was established in various cases that certain emissions are the cause of particular adverse climate effects through the cases of *Connecticut et al v American Electric Power Company et al* (*Connecticut*)[112] and *Native Village of Kivalina v ExxonMobil Corporation* (*Kivalina*),[113] as well as *Luciano*

[103] Setzer & Byrnes (2019) 1.
[104] Preston 2018 (2) *CJEL* 132.
[105] Setzer & Byrnes (2019) 4.
[106] United Nations Environment Programme (2017) 10.
[107] Setzer & Byrnes (2019) 4.
[108] *Leghari v Republic of Pakistan* WP No. 25501/2015, Lahore High Court (2015).
[109] *Thomson v Minister for Climate Change Issues* CIV 2015-485-919 [2017] NZHC 733, New Zealand High Court (2017).
[110] *Ali v Federation of Pakistan* Constitutional Petition Number ___ / I of 2016, Lahore High Court (2016).
[111] *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 16-166674TVI-OTIR/06 Oslo District Court (2018).
[112] *Connecticut et al v American Electric Power Company et al* 04 Civ. 5669, 04 Civ. 5670, US District Court, Southern District of New York (2005).
[113] *Native Village of Kivalina v ExxonMobil Corporation* 12-1072, US Court of Appeals for the Ninth Circuit (2012).

Lliuya v RWE AG (*Lliuya*).[114] Fourthly, the way in which the courts applied the public trust doctrine is explored through *Environmental People Law v Cabinet of Ministers of Ukraine* (*Environmental People Law*)[115] and, lastly, the chapter looks at how liability for governments that failed to adapt to the climate crisis was established through the cases of *In re Katrina Canal Beaches Litigation* (*Katrina Canal Beaches*)[116] and *St. Bernard Parish Government v United States* (*St. Bernard Parish*).[117]

2.1 Holding governments to their stated national commitments

The first trend identified by the UNEP, is how governments were held accountable for not adhering to its stated commitments. Two cases that illustrate this trend, is that of *Leghari* and *Thomson.*

A few months prior to the conclusion of the Paris Agreement, in August 2015, Mr Ashgar Leghari, a farmer from Pakistan, filed a Petition with the Lahore High Court in the case of *Leghari.* He claimed that the government of Pakistan's failure to regulate climate change led to an infringement of his fundamental rights.[118] The Petitioner argued that the government failed to adhere to its stated national commitments set out in the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030), which included 774 action points.[119]

The Court ultimately agreed with the Petitioner and held that this failure of the government infringes on the Pakistani citizens' rights to life, human dignity, information and property, as set out in the Pakistani constitution.[120] The Court held that on a constitutional and legal basis, this issue was a 'clarion call for the protection of fundamental rights of the citizens of Pakistan'.[121] As a remedy, the Court ordered the creation of a Climate Change Commission to monitor the government's progress.[122]

Arguably, the case is an illustration of the worldwide growth and increasing influence of climate change litigation in the last decade, particularly in the lead-up to,

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[114] *Luciano Lliuya v RWE AG* 2O 285/15, Essen Regional Court (2015).
[115] *Environmental People Law v Cabinet of Ministers of Ukraine* 01025, Kyiv District Administrative Court (2011).
[116] *In re Katrina Canal Beaches Litigation* 696 F.3d 436, 436, US 5th Circuit Court of Appeals (2012).
[117] *St. Bernard Parish Government v United States* 121 Fed. Cl. 687, Federal Circuit (2015).
[118] Gill (2015) *Thomson Reuters Foundation* 1.
[119] *Leghari* Case (note 107 above).
[120] Ibid.
[121] Ibid., para 6.
[122] Ibid.

and following, the Paris Agreement.[123] This case is an example of claimants basing their claims on a government's statutory or policy framework that sets out the said government's responsibilities regarding climate change.[124] Arguably, had the Pakistani government not set out their stated national commitments in such detail, the claimants would have had more difficulty in proving that the government's failure to adhere to these commitments had led to an infringement on the Petitioner's rights.

In the case of *Thomson,* a law student brought an application to the High Court of New Zealand, challenging its response to climate change.[125] The application was brought on two grounds. She argued that the 2050 GHG emissions targets set by domestic legislation, as well as the 2030 target in accordance with the Paris Agreement, were inadequate.[126]

The Petitioner argued for stricter emissions reduction targets by the New Zealand government.[127] She argued that 'when a decision-maker has exercised a statutory power intended to have long term effect on a certain factual basis, and that factual basis is later materially qualified or superseded, a refusal to review and remake the decision is unlawful'.[128] However, the Court found that, even though New Zealand's target for 2030 is less ambitious than its target for 2050 and the target of the EU, this does not mean that its stated national commitments are inconsistent with the goal under the Paris Agreement.[129] The Court subsequently dismissed the application for judicial review.[130]

It is thus evident that domestic courts can vary in whether or not they hold governments to account or interfere with their target setting.

2.2 Linking the impacts of resource extraction to climate change

The second pre-2019 trend, is plaintiffs linking the impacts of resource extraction to climate change, which was evident in the cases of *Ali* and *Greenpeace Nordic Association*.

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[123] Peel & Lin 2019 (113) *American Society of International Law* 680.
[124] United Nations Environment Programme (2017) 16.
[125] Peel & Lin 2019 (113) *American Society of International Law* 723.
[126] Anon. 'Thompson v The Minister for Climate Change Issues' (2 November 2017) *Centre for Environmental Rights.*
[127] Peel & Lin 2019 (113) *American Society of International Law* 715.
[128] *Thomson* Case (note 108 above), para 85.
[129] Ibid., para 176.
[130] Ibid., para 180.

In the case of *Ali,* a Petition was brought in the name of Rabab Ali, a seven-year-old who lives in Karachi.[131] The Petition relates to the approval by the Pakistani government of the development of the Thar coal field. It is estimated that the coal field will produce 4.5 to 60 million metric tons of coal each year.[132]

The Petition states that the Petitioner along with other Pakistani children are severely and adversely affected by the increasing level of CO_2 pollution in the atmosphere'.[133] This not only 'harms and continuously threatens their mental and physical health, quality of life and wellbeing, but also infringes upon their constitutionally guaranteed Right to Life and the inalienable Fundamental Rights of [the Petitioner] and the future generations of Pakistan'.[134]

The Petition argued that there exists a direct link between the effects of CO_2 emissions through the burning of fossil fuels and the infringement of the rights of current and future generations. It argued that the Thar coal field, and the subsequent emissions, will 'make life inhospitable and unsafe, for young people alive today and for future generations, through increased threats to food and water security, increased climate-related illnesses and deaths, and increased severity and frequency of weather-related disasters'.[135] The outcome of the case is still pending.

In 2016, a declaratory judgement was sought from the Oslo District Court by a coalition of environmental groups[136] in *Greenpeace Nordic Association.* The Petition alleged that, on 18 May 2016, the Norwegian Government offered 13 companies ten production licences for deep-sea extraction of oil and gas from certain areas in the Barents Sea.[137]

The Petitioners argued that the licencing decision to extract these resources 'will have serious environmental repercussions' and that, by doing this, 'Norway will continue to contribute major greenhouse gas emissions and thus exacerbate global warming'.[138] It further relied on the Paris Agreement, to which Norway is a State Party,

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[131] Ali Case (note 109 above).
[132] Ibid.
[133] Ibid., p.1.
[134] Ibid.
[135] Ibid., p. 5.
[136] *Greenpeace Nordic* Case (note 110 above).
[137] Ibid.
[138] Ibid.

which strives to limit global warming to 2ºC. The Petition stated that '[i]t is impossible to reconcile the petroleum production permitted by the Licencing Decision with the reduction in emissions that Norway must contribute in order to avoid devastating and irreversible climate change'.[139] It was argued by the Petitioners that the climate impacts of the decision to extract the said resources, constituted an infringement of Article 112 of the Norwegian Constitution, which guarantees the fundamental right to a healthy environment.

On 4 January 2018, the Oslo District Court ruled in favour of the Norwegian Government, finding that there was no violation of any relevant rights. The Court reasoned that no violation occurred, seeing that the duty by the government to take reasonable measures before granting the licencing, was fulfilled.[140] The Petitioners subsequently appealed to the Borgarting Court of Appeal, which Court affirmed the court of first instance's decision on 22 January 2020. The decision was appealed yet again but, on 22 December 2020, the Supreme Court upheld the decision to grant licencing for deep-sea extraction of resources.[141] The Court held that, even though Article 112 of the Norwegian Constitution protects its citizens from environmental harm, the future emissions from the said extraction of oil is too uncertain to validate the revoking of the licences for the extraction.[142]

Through the outcome of the *Greenpeace Nordic* case, it is evident that this trend poses potential difficulties for plaintiffs. It is, however, also evident that the UNEP correctly identified this as a growing trend, seeing that it was also followed in Pakistan in the case of *Ali*.

2.3 Particular emissions being the cause of particular adverse climate effects

The third pre-2019 trend identified by the UNEP, was evident in the United States cases of *Connecticut et al* and *Kivalina,* as well as in the German case of *Lliuya.* The plaintiffs in both the cases of *Connecticut* and *Kivalina* based their claims on the theory of public nuisance under the US federal common law.[143] In *Connecticut*, suit

[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] United Nations Environment Programme (2017) 20.

was filed in 2004 by eight states, three land trusts and the City of New York against five electric power companies.[144] It was argued in the United States District Court for the Southern District of New York that the carbon dioxide emissions of the defendants contributed to climate change and that it subsequently constituted public nuisance.[145] The case was dismissed in the court of first instance, as well as on appeal by the United States Supreme Court.[146]

The case of *Kivalina* concerned a matter regarding a small village in the Arctic inhabited by approximately 400 Inupiat Eskimos.[147] In 2008, Kivalina instituted a claim for monetary damages against twenty-four of the largest greenhouse gas emitters in the United States.[148] It was argued that, due to the emissions of these companies, the sea ice that surrounds Kivalina and protects its coast has become less, leaving the coast susceptible to winter storms.[149] It was argued that this has had the effect of leaving the village uninhabitable. The court, however, dismissed the claim on the basis of lack of standing and justiciability.[150]

The trend of linking specific emissions to specific adverse climate effects, was also identified through the German case of *Lliuya*. In *Lliuya*, a Peruvian farmer sought a declaratory judgement and damages in a German court against RWE, Germany's largest producer of electricity.[151] He alleged that RWE had knowingly contributed to climate change, which in turn was the reason for the melting of mountain glaciers near his hometown of Huaraz in Peru.

The melting of the glaciers had the effect of creating a substantial threat to the 120 000 inhabitants of Huaraz, seeing that the glacial lake located above the town had experienced a rapid increase in volume since 1975.[152] Between 2009 and 2012, the Peruvian government had declared a state of emergency eleven times in relation to the flood risk.[153]

Mr Lliuya acknowledged that RWE is only one of the many contributors to

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[144] Eisenstat 2011 (25) 1 *Tulane Environmental Law Journal* 221.
[145] Ibid., 221.
[146] Ibid., 224.
[147] Peloffy 2013 (9) 1 *McGill International Journal of Sustainable Development Law and Policy* 122.
[148] Ibid., 123
[149] Ibid., 123.
[150] Peloffy 2013 (9) 1 *McGill International Journal of Sustainable Development Law and Policy* 124.
[151] United Nations Environment Programme (2017) 21.
[152] Ibid.
[153] Kumar & Frank 2018 (12) 2 *Carbon & Climate Law Review* 111.

climate change, and thus the rise in volume of the Palcacocha Lake. The plaintiff subsequently asked the Court to order RWE to pay 0.47% of the total cost – which is the same percentage as RWE's projected contribution to global GHG emissions since the start of industrialisation.[154]

The Court dismissed the claim, holding that no linear causal link existed between RWE's emissions and the specific injury suffered.[155] It held that the pollutants emitted by RWE 'are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted'.[156] However, on 30 November 2017, the Court of Appeals held that the complaint is, in fact, admissible. The case is currently pending on appeal.

It is thus evident that domestic courts differ in their approach to linking specific emissions to specific effects of climate change.

2.4 The public trust doctrine applied by the courts

The public trust doctrine,[157] which has its roots in both Roman and English common law, provides that ownership and use of natural resources is vested in the public, while it is held in trust and protected by states for the benefit of current and future generations.[158]

The doctrine has been used in various climate cases across different jurisdictions, including in the Ukraine, Pakistan, the Philippines and the United States.[159] The argument that the doctrine compels states to ensure that climate change is mitigated within their jurisdictions, has been identified by the UNEP as a trend that has emerged through pre-2019 climate change litigation.[160] This trend is illustrated through the case of *Environmental People Law.*

In October 2009, a public interest group known as Environment-People-Law

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[154] Ibid.
[155] United Nations Environment Programme (2017) 21.
[156] *Lliuya* Case (note 113 above).
[157] For an in-depth analysis of the public trust doctrine within the context of natural resources and environmental law, see Blumm *The Public Trust Doctrine.*
[158] Derus 2015 (99) 2 *Marquette Law Review* 448.
[159] See, *inter alia, Ali v Pakistan* Constitutional Petition Number ___ / I of 2016; *Segovia v Climate Change Commission* Special Civil Action Number___ (S.C. Feb. 17, 2014); *PPL Montana, LLC v Montana*, 565 U.S. 576, 604 (2012); *Alec L. ex rel. Loorz v. McCarthy,* 561 Fed. Appx. 7,8 (D.C. Cir. 2014) and *Juliana v United States*, No. 6:15-CV-01517-TC, 2016 WL 6661146.
[160] United Nations Environment Programme (2017) 24.

brought an action against the Ukrainian government. The organisation sought to compel the dissemination of information from the Ukrainian government on its GHG emissions trading.[161] The organisation specifically sought information with regards to an agreement made between Japan and Ukraine, where the former were to buy 30 million tons of carbon offsets from the latter.[162]

It was argued that, based on the public trust doctrine, the Ukrainian government had a constitutional obligation to regulate climate change 'on behalf of and for the people of Ukraine'.[163] Even though the Court agreed that such a duty exists, it merely held that the Ukrainian government must report on its efforts under the Kyoto Protocol.[164]

2.5 Establishing liability for failure to adapt to the climate crisis

The final trend identified by the UNEP is plaintiffs seeking to establish liability for failure to adapt to the climate crisis. This trend was evident in the cases of *St. Bernard Parish* and *Katrina Canal Beaches*, which were brought in the aftermath of Hurricane Katrina in 2005.

In *St. Bernard Parish*, it was argued by property owners in Louisiana that the United States government was liable for the damage caused to their properties by Hurricane Katrina.[165] The plaintiffs alleged that the construction by the federal government of the Mississippi River Gulf Outlet (MRGO), and their subsequent failure to maintain it, was a direct cause of the flooding and damage that occurred.[166] The plaintiffs argued that the flooding caused by the construction and failed maintenance amounted to a 'taking' under the Fifth Amendment of the United States Constitution.[167]

In *Katrina Canal Beaches* a tort claim was brought against the Army Corps of Engineers alleging that the MRGO was negligently built and that a failure to maintain the levee systems occurred.[168] Even though different routes were followed by plaintiffs in *St. Bernard Parish* and *Katrina Canal Beaches*, both claims were unsuccessful. It is

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[161] *Environment People Law* Case (note 114 above).
[162] Ibid.
[163] United Nations Environment Programme (2017) 24.
[164] Ibid.
[165] Chan et al 2019 (49) 1 *Environmental Law Reporter News & Analysis* 10005.
[166] Sinclair 2019 (46) 2 *Ecology Law Quarterly* 269.
[167] Ibid.
[168] Sinclair 2019 (46) 2 *Ecology Law Quarterly* 267.

interesting to note that, even though the UNEP identified the trend of climate change litigation focused on adaptation, climate change was merely a background issue in these cases.

2.6 Summary of pre-2019 trends

This chapter consisted of a broad discussion of trends inherent in climate change litigation prior to 2019. The insertion of this component in this dissertation is necessary in order to create some form of baseline against which to ascertain whether or not new trends have emerged in the post-2019 era.

The chapter has highlighted five trends, with the relevant cases under each trend being briefly discussed in order to provide evidence in respect of each trend. The cases of *Leghari* and *Thomson* highlighted the first trend, namely governments being held accountable for not adhering to stated national commitments. The second trend, the linking of the impacts of extracting resources to climate change, was illustrated through the cases of *Ali* and *Greenpeace Nordic Association.* The trend of establishing that certain emissions are causing particular adverse climate effects was evident through the cases of *Connecticut, Kivalina* and *Lliuya.* The case of *Environmental People Law* established the fourth trend of utilising the public trust doctrine. Lastly, the trend of liability for governments that failed to adapt to the climate crisis was identified through *Katrina Canal Beaches* and *St. Bernard Parish.*

In light of the above background, it is evident that trends in climate change litigation prior to 2019 have emerged. The following chapter will explore post-2019 trends in, specifically, human rights-based climate change litigation against governments.

Chapter 3: Recent trends in post-2019 litigation

Arguably, human rights-based climate change litigation is a recent phenomenon. Prior to 2015, there were only five human rights-based climate change cases filed worldwide.[169] However, after the recognition of the impacts that climate change has on human rights in the Paris Agreement – being the first major international climate agreement to do so – this type of litigation grew significantly.

The relevant litigation also increased dramatically after the ruling in the ground-breaking *Urgenda* case. The 2015 ruling of the *Rechtbank Den Haag* (District Court of the Hague) marked the first time in history that a government was ordered by its courts to strengthen its climate change response.[170] Following this unprecedented decision of the court of first instance, as well as the subsequent rulings of the Court of Appeal and the Supreme Court of the Netherlands in December 2019, many plaintiffs around the world have used this approach to hold governments to account for failing to mitigate the effects of climate change.

Through various cases that were either filed in 2019 and 2020, or cases in which major developments occurred in the last two years, this chapter will identify four new trends that have emerged regarding the relevant litigation.

Firstly, this chapter explores how plaintiffs are using regional instruments in the relevant litigation. In this context, the Supreme Court of the Netherlands' judgement in *Urgenda* is discussed in detail,[171] seeing that many of the plaintiffs in the subsequent cases have either referred to this judgement, or had asked their respective courts to consider this judgement. This trend is further explored through the cases of *Greenpeace Netherlands v State of the Netherlands* (*Greenpeace Netherlands*),[172] *Greenpeace et al v Austria* (*Greenpeace et al*),[173] *Notre Affaire à Tous and Others v France* (*Notre Affaire*),[174] *Friends of the Irish Environment v Ireland* (*Friends of the*

[169] Setzer & Byrnes 2020 *London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science* 17.
[170] Stein & Castermans 2017 (13) 2 *McGill Journal of Sustainable Development Law* 305.
[171] *State of the Netherlands v Urgenda Foundation* C/09/456689 / HA ZA 13-1396, Hoge Raad (2019).
[172] *Greenpeace Netherlands v State of the Netherlands* C/09/600364/KG ZA 20-933, Hague District Court (2020).
[173] *Greenpeace et al v Austria* G144-145/2020-13, V 332/2020-13, Constitutional Court of Austria (2020).
[174] *Notre Affaire à Tous and Others v France* 1904976/4-1, Administrative Court of Paris (2021).

Irish Environment)[175] and *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* (*Union of Swiss Senior Women*)[176]

The second trend, namely the use of judicial review, is explored in light of the cases of *Family Farmers and Greenpeace Germany v Germany* (*Family Farmers*),[177] *Friends of the Irish Environment* and *Neubauer et al v Germany* (*Neubauer*).[178]

Thirdly, the use of children's rights as an emerging trend is discussed through the case of *Juliana v United States* (*Juliana*),[179] as well as the Canadian case of *La Rose v Her Majesty the Queen* (*La Rose*).[180] The cases of *Associacion Civil por la Justicia Ambiental v Province of Entre Rios et al* (*Associacion Civil*),[181] *ENvironnement JEUnesse v Canada* (*ENJEU*)[182] and *Aji P. v State of Washington* (*Aji P*)[183] is also explored in light of this emerging trend.

Lastly, the chapter discusses cases of *La Rose and Lho'imggin et al. v Her Majesty the Queen* (*Lho'imggin*)[184] in order to illustrate the fourth emerging trend, namely the linking of climate change and the displacement of indigenous people.

3.1 Reliance on regional instruments

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR),[185] entered into force in 1953. It was the first regional instrument to give effect to some of the rights entrenched in the Universal Declaration of Human Rights,[186] thereby making these rights binding upon states parties for the first time.[187] The ECHR is currently ratified

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[175] *Friends of the Irish Environment v Ireland* 2017 No. 793 JR, Supreme Court (2019).
[176] *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* No. A2992/2017, Swiss Supreme Court (2017).
[177] *Family Farmers and Greenpeace Germany v Germany* 00271/17/R/SP, Administrative Court of Berlin (2018).
[178] *Neubauer et al v Germany* 00362/19/R/H, Federal Constitutional Court (2020).
[179] *Juliana v United States* 18-36082, D.C. No. 6-15-cv-01517AA, Ninth Circuit (2015).
[180] *La Rose v Her Majesty the Queen* T-1750-2019, Federal Court of Appeal (2019).
[181] *Associacion Civil por la Justicia Ambiental v Province of Entre Rios et al,* Argentinian Supreme Court (2020).
[182] *ENvironnement JEUnesse v Canada* 500-06-000955-183, Quebec Superior Court (2018).
[183] *Aji P. v State of Washington* 80007-8-I, Court of Appeals of the State of Washington (2018).
[184] *Lho'imggin et al. v Her Majesty the Queen* 2020 FC 1059, Federal Court of Appeal (2020).
[185] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950), ETS 5.
[186] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).
[187] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950), ETS 5.

by all 47 states that form part of the Council of Europe, including the United Kingdom.[188]

Seeing that environmental protection was not seen as an international issue until the 1970s,[189] it is unsurprising that the ECHR does not provide for the protection of environmental rights. Despite this, a trend has emerged over the last two years where plaintiffs have been relying on the ECHR in human rights-based climate change litigation in order to hold governments to account naturally only in the European context.

When examining this trend, it is evident that plaintiffs are mainly relying on Articles 2 and 8 of the ECHR. Article 2(1) provides for the right to life and states that '[e]veryone's right to life shall be protected by law'. Article 8, in turn, provides for the right to respect for private and family life. Article 8(1) states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. Article 8(2) continues by providing that '[t]here shall be no interference by a public authority with the exercise of this right' except upon certain circumstances.[190]

3.1.1 *State of the Netherlands v Urgenda Foundation*

On 20 December 2019, following a seven-year legal battle, the Supreme Court of the Netherlands confirmed the Court of Appeal's decision, finding in favour of the Urgenda Foundation. The Supreme Court upheld the judgement that the Dutch government must reduce its greenhouse gas emissions by at least 25% by the end of 2020.[191]

Seeing that the Netherlands is a party to the UNFCCC and the Paris Agreement, the State did not contest the words of the Court of Appeal when it stated that there is 'a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a

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[188] *European Court of Human Rights* and *Council of Europe* The European Convention on Human Rights – A Living Instrument (2020) 22 & 23.
[189] Thornton & Tromans 1999 (11) *Journal of Environmental Law* 36.
[190] Article 8(2) of the ECHR states that '[t]here shall be no interference of 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 crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.
[191] Spier 2020 (67) *Netherlands International Law Review* 319.

disruption of family life'.[192] The State in fact acknowledged that there is an urgent need to implement certain measures in order to reduce greenhouse gas emissions.[193]

The State did, however, challenge the Court of Appeal's decision that its obligation to take these measures is vested in Articles 2 and 8 of the ECHR.[194] The State argued that Articles 2 and 8 of the ECHR, the right to life and the right to respect for private and family life respectively, do not place an obligation on the State to offer its citizens protection from the threat of climate change.[195] The State argued that the threat of climate change is global in both cause and scope and is not specific enough to fall into the scope of Articles 1[196], 2 and 8 of the ECHR.[197]

The Supreme Court started its investigation into Articles 2 and 8 of the ECHR by looking at the meaning of Article 1 thereof. It interpreted Article 1 as affording protection to the persons who falls inside the contracting state's jurisdiction. It applied this meaning to the current case and came to the conclusion that this means the 'residents of the Netherlands'.[198]

3.1.1.1 Articles 2 and 8 of the ECHR

In its interpretation of Article 2, the right to life, the Supreme Court held that '[a State] is obliged to take appropriate steps if there is a real and immediate risk to persons and the state in question is aware of that risk'.[199] It held that, in this specific context, the term real and immediate risk 'must be understood to refer to a risk that is both genuine and imminent' and that '[t]he term 'immediate' does not refer to imminence in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved'.[200] The Court argued that '[t]he protection of Article 2 [of the ECHR] also regards risks that may only materialise in the longer term'.[201]

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[192] *Urgenda* Case (note 169 above), para 4.8.
[193] Ibid., para 4.8.
[194] Ibid., para 4.8.
[195] Ibid., para 5.1.
[196] Article 1 of the ECHR provides for the Obligation to Respect Human Rights and states that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.
[197] *Urgenda* Case (note 169 above), para 5.1.
[198] Ibid., para 5.2.1.
[199] Ibid., para 5.2.2.
[200] Ibid., para 5.2.2.
[201] Ibid., para 5.2.2.

On interpreting Article 8 of the ECHR, the Court held that, even though it does not provide for a right to protection of the environment, protection may be derived from the said Article 8. According to the Court, this may happen where materialisation of environmental hazards is of a serious nature and where it may have a direct effect on a person's private life, even if the health of the person is not in jeopardy.[202] Referring to the case law of the European Court of Human Rights, the Supreme Court noted that Article 8 places a positive obligation on states to take appropriate and reasonable measure in order to protect persons against damage to their environments.[203] Stemming from its interpretation of the case law, the Court held that an obligation of a State to take certain measures 'exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely'.[204]

The Court held that the positive obligation implied by Article 8 overlaps with the obligation implied by Article 2 of the ECHR.[205] This protection afforded by the two articles applies to society as a whole.[206] This obligation to take the necessary steps to protect society, also includes a duty of the state to take certain preventative measures, even if the materialisation thereof is not certain, which is in line with the precautionary principle.[207] It is a court's duty to determine whether a state has taken the above reasonable and suitable measures.[208] However, the duties imposed on states by Articles 2 and 8 must not result in an 'impossible' or 'disproportionate' burden on the state.[209] The Court stated that '[i]f a state has taken reasonable and suitable measures, the mere fact that those measures were unable to deter the [environmental] hazard does not mean that the state failed to meet the obligation that had been imposed on it'.[210]

The Court stated that Article 13 of the ECHR, the right to an effective remedy, is also relevant when interpreting Articles 2 and 8.[211]

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[202] Ibid., para 5.2.3.
[203] Ibid., para 5.2.3.
[204] Ibid., para 5.2.3.
[205] Ibid., para 5.2.4.
[206] Ibid., para 5.3.1.
[207] Ibid., para 5.3.2.
[208] Ibid., para 5.3.3.
[209] Ibid., para 5.3.4.
[210] Ibid., para 5.3.4.
[211] Ibid., para 5.5.1.

3.1.1.2 The application of Articles 2 and 8 to climate change

On the question of whether Articles 2 and 8 apply to the global problem of the danger of climate change, the Court held that 'no other conclusion can be drawn but that the State is required pursuant to Articles 2 and 8 of the ECHR to take measures to counter the genuine threat of dangerous climate change'.[212] The Court dismissed the State's assertions that Articles 2 and 8 offer no protection from the threat of climate change, seeing that the risk will only materialise in a few decades. This is in line with the precautionary principle. The Court accordingly held that '[t]he mere existence of a sufficiently genuine possibility that this risk will materialise means that suitable measures must be taken'.[213]

The Court asserted that there exists a joint responsibility of states and a partial responsibility of individual states to take certain measures to combat climate change. It argued that, in terms of Articles 2 and 8, the Netherlands must 'do its part in order to prevent dangerous climate change, even if it is a global problem'.[214] The Court based this statement on certain provisions of the UNFCCC.

The Court noted that the UNFCCC 'is based on the idea that climate change is a global problem that needs to be solved globally'.[215] The Court continues by referring to Articles 2, 3(1), 3(3) and 4 of the UNFCCC.[216] Article 2 provides for the objective of the UNFCCC, which is to stabilise greenhouse gas concentrations 'at a level that would prevent dangerous anthropogenic interference with the climate system'. Article 3(1) states that the climate system should be protected by Parties 'for the benefit of present and future generations of humankind'. Article 3(3) in turn provides that precautionary measures should be taken by Parties 'to anticipate, prevent or minimi[s]e the causes of climate change and mitigate its adverse effects'. Briefly put, in the words of the Court, Article 4 provides that 'all parties will take measures and develop policy in this area'. The Court argued that the effect of these provisions of the UNFCCC is that every state has an obligation to take the necessary steps in accordance with its responsibilities to mitigate climate change.[217]

[212] Ibid., para 5.6.2.
[213] Ibid., para 5.6.2.
[214] Ibid., para 5.7.1.
[215] Ibid., para 5.7.2.
[216] Ibid., para 5.7.3.
[217] Ibid., para 5.7.3.

The Court reiterated that a State cannot assert not to take responsibility on the basis of other countries not complying with their partial responsibility.[218] It also noted that merely because a country's own share of global greenhouse gas emissions may be small, it cannot assert that reducing emissions further would make little difference.[219] Every reduction of greenhouse gas emissions has a positive effect, seeing that 'every reduction means that more room remains in the carbon budget'.[220]

The Court emphasised that '[c]limate change threatens human rights'.[221] It stated that this is not only recognised by the Council of Europe, but also on an international level. It held that '[i]n order to ensure adequate protection from the threat to those rights resulting from climate change, it should be possible to invoke those rights against individual states, also with regard to […] partial responsibility'.[222]

In conclusion, the Court held that the State has a duty in terms of Articles 2 and 8 of the ECHR to protect the residents' right to life and their right to private and family life and upheld the decision by the Court of Appeal.[223] This decision solidified the trend of plaintiffs relying on regional instruments in order to hold governments to account in human rights-based climate change litigation. The *Urgenda* decision was the catalyst for many plaintiffs relying on regional instruments, but especially for plaintiffs relying on the ECHR.

3.1.2 *Greenpeace Netherlands v State of the Netherlands*

Greenpeace Netherlands filed suit on 7 October 2020 against the Dutch Government. It alleged that the Government's €3.4 billion bailout package of the airline, KLM, violated the Government's duty of care.[224] The plaintiffs argued that the State's duty of care to prevent climate change stemmed from Articles 2 and 8 of the ECHR and the Paris Agreement.[225] The plaintiffs asked for an order from the District Court of the Hague to either prohibit the government from providing financial support to the airline, making said bailout conditional on KLM placing a cap on its CO_2

[218] Ibid., para 5.7.7.
[219] Ibid., para 5.7.7.
[220] Ibid., para 5.7.8.
[221] Ibid., para 5.7.9.
[222] Ibid., para 5.7.9.
[223] Ibid., para 8.2.2.
[224] *Greenpeace Netherlands* Case (note 170 above).
[225] Ibid., para 3.2.

emissions.[226]

On 9 December 2020, the Court held that the sustainability conditions ('voorwaarden op het gebied van duurzaamheid en leefbaarheid') that were already included as conditions of the bailout, were sufficient in accordance with Netherland's international climate obligations.[227] Seeing that the bailout was necessary due to the coronavirus pandemic,[228] the Court argued that the executive branch of the government has a wide discretion. It argued that there exists no positive legal right, seeing that the Government is not committed to reducing emissions from cross-border aviation in terms of any international or regional agreements.[229] The Court subsequently dismissed the plaintiff's claim.

3.1.3 *Greenpeace et al v Austria*

On 20 February 2020, 8063 Austrian citizens brought a Petition to Austria's Constitutional Court asking it to invalidate two laws. These laws provide tax credits for air travel, but not for rail transportation.[230] The Petition was based on Article 2 and Article 8 of the ECHR, as well as on Article 2 and Article 7 of the Charter of Fundamental Rights of the European Union ('Charter of Fundamental Rights').[231] Article 2(1) of the Charter of Fundamental Rights states that '[e]veryone has the right to life'. Article 7, in turn, provides that '[e]veryone has the right to respect for his or her private and family life, home and communications'.

The Petitioners argued that the kerosene exemption on national flights and the tax exemption on cross-border flights make it more expensive to travel by train than by aeroplane.[232] It was argued that the climate crisis poses a threat to the rights of Austrian citizens and that the Government has a duty to protect these fundamental human rights.

However, on 30 September 2020, the case was dismissed by the Constitutional Court. The Court held that the case was inadmissible, seeing that rail passengers do

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[226] Ibid.
[227] Ibid., para 4.7.
[228] Ibid., para 2.2.
[229] Ibid.
[230] *Greenpeace et al* Case (note 171 above).
[231] European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (2007/C 303/01),* 14 December 2007, C 303/1.
[232] *Greenpeace et al* Case (note 171 above).

not possess the necessary legal standing.[233]

3.1.4 *Notre Affaire à Tous and Others v France*

On 14 March 2020, four NGOs filed a summary request before the *Conseil d'Etat*, France's highest Administrative Court. The plaintiffs requested that the Government of France, firstly, take measures that are necessary to reduce greenhouse gas emissions 'at a level compatible with the target of containing the growth of the global temperature under 1.5ºC compared to pre-industrial levels, taking into account France's additional emissions since 1990 and the additional efforts that such target requires'.[234] Secondly, to take, 'at the very least, […] all measures to achieve France's objectives in terms of reducing greenhouse gas emissions, developing renewable energies and increasing energy efficiency'.[235] Thirdly, it requested that the Government 'take adequate measures to adapt the national territory to climate-induced changes' and, lastly, to 'take adequate measures to ensure the protection of citizens' life and health against climate-induced hazards'.[236]

The plaintiffs argued that the State has a general obligation to fight climate change, which they based on numerous instruments. These instruments included, *inter alia*, Articles 2 and 8 of the ECHR.[237] They argued that these two provisions 'presupposes the protection of the environment and the fight against climate change, the consequences of which jeopardise nearly 9.75 million people in France'.[238] The plaintiffs argued that the State has disregarded their general obligation to mitigate climate change and that this amounts to fault that is 'sufficient to engage State responsibility'.[239]

In response to the State's argument that France cannot be held accountable in terms of the ECHR,[240] the plaintiffs argued that the ECHR enshrines the requirement that a State must protect its citizens.[241] It argued that 'deficiency can be established considering the fact that the health risks have long been known, though

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[233] *Greenpeace et al* Case (note 171 above).
[234] *Notre Affaire* Case (note 172 above), para 3.
[235] Ibid., para 3.
[236] Ibid., para 3.
[237] Ibid., para 4.
[238] Ibid., para 5.
[239] Ibid., para 8.
[240] Ibid., para 25.
[241] Ibid., para 35.

underestimated'.[242] The plaintiffs continued by arguing that the current legal framework governing climate change is ineffective, seeing that 'despite measures to alleviate climate-induced risks, reduction of greenhouse gas emissions trajectories are constantly exceeded'.[243]

The plaintiffs argued that, in terms of the ECHR, States have an obligation to safeguard its citizens' right to the protection of their homes against environmental risks.[244] They argued that 'there exists a general principle for each individual to have the right to live in a sustainable climate system'.[245]

On 3 February 2021, the *Conseil d'Etat* found that France's inaction with regards to climate change has caused ecological damage.[246] The Court determined liability by referring, *inter* alia, to the UNFCCC, the Paris Agreement and the Charte de l'Environnement (French Environmental Charter).

By relying on official and scientific reports, the Court found that France's targets on efficient use of energy, renewable energy and emission reduction were not being met.[247] Even though the Court condemned the French Government for not complying with its stated commitments, the Court declined to order the government to impose more ambitious targets, seeing that France's targets are already more ambitious that those of the EU.[248] It did, however, order the government to disclose, within two months of the judgement, the measures it was implementing to prevent further ecological harm.[249]

3.1.5 *Friends of the Irish Environment v Ireland*

In January 2019, the advocacy group, Friends of the Irish Environment ('FIE'), argued before the High Court that Ireland's National Mitigation Plan of 2017 ('the Plan') was in violation of Ireland's Climate Action and Low Carbon Development Act of 2015 ('the Act'), as well as the ECHR. [250] They argued that the Plan, which sets the goal of transitioning Ireland to a low-carbon country by 2050, is inconsistent with the Act and

[242] Ibid., para 35.
[243] Ibid., para 35.
[244] Ibid., para 36.
[245] Ibid., para 36.
[246] Ibid.
[247] Lavrysen (12 February 2021) *International Union for Conservation of Nature* 1.
[248] Ibid.
[249] *Notre Affaire* Case (note 172 above), para 46.
[250] *Friends of the Irish Environment* Case (note 173 above).

the ECHR. It was argued that the Plan violates the Act and the ECHR, seeing that it does not set out efficient short-term greenhouse gas emissions reduction.

On 22 November 2019, following a dismissal of their claim by the High Court, FIE lodged an appeal directly to the Supreme Court of Ireland.[251] On 13 February 2020, the Supreme Court held that that it would hear the case, stating that it was a matter of urgency, and that exceptional circumstances existed.[252]

Regarding the ECHR, FIE argued that the Plan violates the rights set out in Article 2 and 8 thereof.[253] It relied on Ireland's European Convention on Human Rights Act of 2003 ('the 2003 Act'), which places an obligation on the Government to act in accordance with the ECHR.[254] However, seeing that the European Court of Human Rights has not issued a judgement pertaining to how these rights may impact climate change decision-making, the Government argued that a national court cannot decide on this.[255]

In arguing that Article 2 and 8 of the ECHR should be engaged in this context, the Appellants relied heavily on the *Urgenda* decision of the Supreme Court of the Netherlands.[256] It argued that the Court should 'consider the reasoning of the Supreme Court of the Netherlands as being persuasive as to the proper application of the ECHR to climate change'.[257]

On this issue, the Court noted that 'many of the contentious issues which may require resolution on this appeal stem from the extent to which the existence of [Articles 2 and 8 of the ECHR] and any potential breach of them can provide a proper legal basis for the type of challenge which FIE has mounted in these proceedings'.[258]

The Court held that FIE did not possess the necessary standing to rely on a rights-based claim. It thus rejected its argument that the Plan is in violation of Articles 2 and 8 of the ECHR.[259] However, the Court held that the Plan does not comply with the Act – specifically section 4 thereof. It held that the 'Plan should be quashed on the

[251] Ibid.
[252] Ibid., para 2.
[253] Ibid., para 5.8.
[254] Ibid., para 5.8.
[255] Ibid., para 5.9.
[256] Ibid., para 5.12.
[257] Ibid., para 5.13.
[258] Ibid., para 5.19.
[259] Ibid., para 7.24.

grounds of having failed to comply with its statutory mandate in that regard'.[260]

3.1.6 *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*

In 2016, suit was filed against the Swiss Government by the Union of Swiss Senior Women for Climate Protection. They alleged that the Swiss Government's failure to reduce greenhouse gas emissions in accordance with their stated goals, constituted a violation of their rights under the Swiss Constitution and Articles 2 and 8 of the ECHR.

In their Petition, the Applicants argued that they are members of 'a most vulnerable group with regard to the effects of climate change'.[261] They argued that there exists an 'increased health risk for older women whose life and health are more severely impacted by periods of hot weather than the health of the rest of the population'.[262]

On 27 November 2018, the case was dismissed by the Swiss Federal Administrative Court. The subsequent appeal was denied by the Supreme Court on 20 May 2020. The Court held that the rights of the Appellants were not affected with 'sufficient intensity'.[263] It further held that such a remedy must be sought through political means and not legal avenues.[264]

3.2 The use of judicial review

It is a commonly held view that one of the central aspects of the rule of law is that any legal act which affects the status of any legal actor, has the potential to be reviewed by a court.[265] Administrative law is the domain in which environmental law primarily operates and, arguably, is a sensitive territory.[266]

Plaintiffs in climate change cases are turning increasingly to existing legal concepts in order to hold governments to account.[267] One of these concepts is that of

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[260] Ibid., para 6.48.
[261] *Union of Swiss Senior Women* Case (note 174 above), para 1.
[262] Ibid., para 1.
[263] Ibid., para 5.5.
[264] Ibid., para 5.5.
[265] Lustig & Weiler 2018 (16) 2 *International Journal of Constitutional Law* 316.
[266] Perraudeau 2019 (21) 1 *Environmental Law Review* 10.
[267] Strydom 'Part V: Judicial Review and International Climate Change Litigation' in *Climate Change: International Law and Global Governance'* 698.

judicial review. It is argued that the second trend that is emerging in human rights-based climate change litigation is plaintiffs relying on national constitutions or legislation in order to ask courts to review climate change policies and measures implemented by governments.

3.2.1 *Family Farmers and Greenpeace Germany v Germany*

On 3 December 2014, the German Cabinet accepted the Action Program on Climate Change ('Action Program') which set out to reduce Germany's greenhouse gas emissions with 40% by 2020 compared to 1990.[268] However, according to a 2018 report by the German government, the 2020 climate target was not going to be reached.[269]

On 29 October 2018, the plaintiffs, consisting of three German farming families and Greenpeace Germany, filed suit in the Administrative Court of Berlin.[270] According to the plaintiffs, the Action Program represented a 'legally binding voluntary commitment by the defendant'.[271] They argued that the failure of the Government to adhere to the Action Program amounts to a violation of their human rights in terms of the *Grundgesetz* (the German Constitution).[272]

On 31 October 2019, the Administrative Court dismissed the plaintiffs' claim. The Court held that the Action Program was not legally binding on the German Government. It also held that the plaintiffs did not demonstrate that there was a violation of its constitutional obligations.[273]

However, the Administrative Court did find that '[c]limate protection programs [are] a form of administrative action'.[274] It thus found that the Action Program is subject to judicial review and that it must be in accordance with the rights under the German Constitution. The Court further held that measures must be taken by the government in order to protect the fundamental rights affected by climate change.[275]

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[268] *Family Farmers* Case (note 175 above), p. 2.
[269] Ibid., p. 2.
[270] Ibid., p. 3.
[271] Ibid., p. 3.
[272] Ibid.
[273] Ibid.
[274] Ibid., p. 4.
[275] Ibid.

3.2.2 *Friends of the Irish Environment v Ireland*

The case of *Friends of the Irish Environment,* the plaintiffs relied not only on the ECHR. They further alleged that Ireland's National Mitigation Plan of 2017 ('the Plan') was *ultra vires* Ireland's Climate Action and Low Carbon Development Act of 2015 ('the Act').[276] FIE's main contention was that the Plan sets out an initial increase, rather than a decrease, in emissions, although its stated objective is to reach net zero emissions by 2050.[277]

On the issue of justiciability, the Government argued that, in terms of the separation of powers doctrine, 'the issues raised are matters of policy which are within the exclusive remit of the Oireachtas and the Executive and not within the scope of questions which can properly be the subject of litigation.[278] They argued that the Plan was merely the adoption of policy and that such matters are not justiciable.[279]

On this matter, the Court held that '[t]here may be an issue as to whether there are any areas which are truly completely outside the scope of judicial review on the grounds of a barrier, based on respect for separation of powers, on the remit of the courts to review the policy[,] [b]ut it does not seem to me that such questions properly arise in the circumstances of this case'.[280] The Court held that there is some form of policy behind most legislation[281] and that judicial review is available. It stated that the requirements of what a plan must contain, set out in section 4 of the Act, fall within 'a category of statutory obligation which is clearly law rather than policy'.[282]

The Court held that the Plan lacks the necessary specificity as required by the Act and that '[t]oo much is left to further study or investigation'.[283] The Court ultimately held that the Plan is inconsistent with the Act – particularly with section 4 thereof. It held that the Plan must be 'quashed on the grounds of having failed to comply with its statutory mandate'.[284]

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[276] *Friends of the Irish Environment* Case (note 173 above), para 1.2.
[277] Ibid., para 5.25.
[278] Ibid., para 5.21.
[279] Ibid., para 6.23.
[280] Ibid., para 6.24.
[281] Ibid., para 6.25.
[282] Ibid., para 6.27.
[283] Ibid., para 6.46.
[284] Ibid., para 6.48.

3.2.3 *Neubauer et al v Germany*

On 6 February 2020, 9 German youths filed suit against the German Government. They argued that the target of reducing Germany's greenhouse gas emissions with 55% by 2030, in terms of Germany's Federal Climate Protection Act ('Act'), was insufficient.[285] They submitted that the Act violates their rights in terms of the German Constitution, specifically the right to human dignity,[286] the right to life and physical integrity,[287] the right to freedom of occupation[288] and the right to freedom of ownership.[289]

The plaintiffs argued that 'the German legislature has enacted an inconclusive, inappropriate law that is incompatible with obligations to protect, which permits far too many greenhouse gas emissions on German territory by 2030, thus depriving the generation of complainants of the opportunity to decide of their own future'[290]

The Complaint refers to the *Urgenda* judgement and the Court's recognition of the threat that basic human rights face due to climate change.[291] They argued that the Government has a duty to protect against climate change and that the Act 'does not pursue this level of protection'.[292] It argued that the Act 'does not provide any reduction path to greenhouse gas neutrality that would be compatible with this level of protection from a global perspective'.[293]

The plaintiffs ask the Court to declare, *inter alia,* that the Legislature has violated the German Constitution by requiring only a 55% reduction in greenhouse gas emissions by 2030.[294] The case is currently pending.

3.3 The use of children's rights

Even though children have the same general human rights as adults, their vulnerability requires more specific rights.[295] According to UNICEF, nearly 160 million

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[285] *Neubauer* Case (note 176 above).
[286] Ibid., p.7.
[287] Ibid., p. 7.
[288] Ibid., p. 7.
[289] Ibid., p. 7.
[290] Ibid., p. 10.
[291] Ibid., p. 9.
[292] Ibid., p. 9.
[293] Ibid., p. 9.
[294] Ibid.
[295] Sandberg 2015 (84) 2 *Nordic Journal of International Law* 222.

children live in high or extremely high drought severity areas and more than half a billion live in extremely high flood occurrence zones.[296] Even though children worldwide are already experiencing the effects of climate change, its effects on children in these areas will be especially felt over the coming decades. The Report states that the effects of climate change are more pronounced for children than they are for adults, seeing that they are more susceptible to disease and undernutrition.[297]

Climate change has also had a significant impact on children's mental health worldwide. According to the American Psychological Association, they are now grappling with new, 21st Century disorders among children. The most noteworthy of these disorders may arguably be climate anxiety, as well as *solastalgia* – the mourning of the destruction of a cherished place.[298]

It is thus not surprising that the third trend that is emerging, is climate change litigation led by minors who are relying on human rights to hold governments to account. Arguably, this trend gives stakeholders who are not part of the decision-making process – minors – the opportunity to have their voices heard. Commentators argue that these types of climate change cases permit the courts to become critical forums, where the issue of climate change is debated and made accessible to all.[299] Furthermore, it is argued that the minors in these cases also represent future generations. Arguably, these minors remind a court of its responsibility towards future generations and form a 'temporal bridge between the present and the future and establish rational grounds for immediate action for future beneficiaries'.[300]

3.3.1 *Juliana v United States*

On 12 August 2015, 21 youth plaintiffs, together with Earth Guardians, filed suit in the District Court for the District of Oregon. They alleged that, through the United States' actions that cause climate change, their constitutional rights to life, property and liberty were violated.[301] The plaintiffs argued that the government has, through its actions, violated these rights, as well as their right to a 'climate system capable of

[296] UNICEF Report: The Impact of Climate Change on Children (2015) 8.
[297] Ibid. 8
[298] Communication to the Committee on the Rights of the Child in the case of *C. Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey* (23 September 2019), para 11.
[299] Bogojevic 2013 (35) *Law & Policy* 184.
[300] Ibid., 184.
[301] *Juliana* Case (note 177 above).

sustaining human life'.[302] The central issue of the case was, should the court conclude that 'such a broad constitutional right exists', whether a court can issue an order 'requiring the government to develop a plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2'.[303]

On 17 January 2020, after a five-year legal process,[304] it was the Ninth Circuit Court of Appeals that made the order. The majority of the Court did not disagree as to the severity of the issue of climate change. It held that '[a] substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse'.[305]

However, the Court dismissed the case on the basis of the plaintiffs' lack of standing.[306] The Court held that 'the plaintiffs' case must be made to the political branches or the electorate at large'.[307] It was held that the requested remedies fall outside the ambit of the powers of the judiciary due to the separation of powers doctrine.[308]

However, the dissenting opinion argued that the plaintiffs brought their suit 'to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's wilful destruction'.[309]

3.3.2 *La Rose v Her Majesty the Queen*

Fifteen children and youth from across Canada brought suit against the Queen and the Attorney General of Canada ('the Government'). The plaintiffs alleged that, even though their circumstances and locations across Canada vary, climate change has had a negative impact on their mental, physical and social health and well-being.[310]

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[302] Ibid., p. 11.
[303] Ibid., p. 11.
[304] For a detailed timeline of events, see Our Children's Trust, available at https://www.ourchildrenstrust.org/juliana-v-us, as well as Climate Case Chart, available at http://climatecasechart.com/case/juliana-v-united-states/.
[305] *Juliana* Case (note 177 above), p. 11.
[306] Ibid., p. 32.
[307] Ibid., p. 32.
[308] Ibid., p. 25 & 30.
[309] Ibid., p. 33.
[310] *La Rose* Case (note 178 above).

In their complaint filed on 25 October 2019, the Plaintiffs allege that '[c]hildren and youth are uniquely vulnerable to the impacts of climate change and air pollution associated with fossil fuels'.[311] The plaintiffs argued that the bodies of children are not fully developed and that they have immature immune systems.[312] It was argued that climate change increases 'asthma, heat-related morbidity and mortality, food borne diseases, infectious diseases and neurological diseases and disorders' among children.[313] They further argued that climate change threatens the basic needs of children, such as clean water and air, adequate nutrition and shelter.[314]

The plaintiffs based their claim on the Government's conduct of continuing to 'cause, contribute to and allow a level of GHG emissions incompatible with a Stable Climate System'.[315] They argued that the Government's conduct violated their rights ('and the rights of all children and youth in Canada, present and future, due to an asserted public interest standing')[316] under the Canadian Charter of Rights and Freedoms ('Charter').[317] The plaintiffs argued that the Government's conduct specifically violated section 7 of the Charter, which protects the rights to life, liberty and security, as well as section 15 of the Charter, which provides for equal protection of every individual under the law.[318] The plaintiffs sought, *inter alia*, a declaratory order providing that the Government has violated the above rights.[319] They further sought an order requiring the Government to develop and implement a climate recovery plan.[320]

On 27 October 2020, the suit was dismissed. The Court held that '[t]he plaintiffs' position fails on the basis that there are some questions that are so political that the Courts are incapable or unsuited to deal with them'.[321] The Court determined that these questions include public policy approaches, as well as issues of significant societal concern'.[322] The Court held that, in order for these questions to be reviewed

[311] Ibid., para 78.
[312] Ibid., para 78.
[313] Ibid., para 79.
[314] Ibid., para 79.
[315] Ibid., para 8.
[316] Ibid Para 7.
[317] Ibid., para 5.
[318] Ibid., para 7.
[319] Ibid., para 12(b).
[320] Ibid., para 12(f).
[321] Ibid., para 40.
[322] Ibid., para 40.

by a Court under the Charter, they must take on the form of law or state action. It argued that 'the plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the [Government] does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to Charter review'.[323]

On 24 November 2020, the youth plaintiffs lodged an appeal to the Federal Court of Appeal. The case is currently pending.

3.3.3 *Asociacion Civil por la Justicia Ambiental v Province of Entre Ríos, et al*

On 2 July 2020, a class action was filed by a group of children in the Argentinian Supreme Court.[324] The plaintiffs alleged that the governments of the Province of Entre Ríos and the Municipality of Victoria City in Argentina violated their rights under the Convention on the Rights of the Child ('CRC').[325]

They argued that the government's failure to protect the Paraná Delta, an environmentally sensitive wetland, constituted an infringement of their rights under the CRC. The case is currently pending.[326]

3.3.4 *ENvironnement JEUnesse v Canada*

The environmental non-profit, ENvironnement JEUnesse ('ENJEU'), applied on 26 November 2018 to the Superior Court of Quebec to bring a class action against the Canadian Government on behalf of Quebec residents aged 35 and under.[327] ENJEU sought a declaratory order holding that the Canadian Government has not adhered to its obligations under the Canadian Charter of Rights and Freedoms ('Canadian Charter') and the Charter of Human Rights and Freedoms ('Quebec Charter') and had failed to protect its citizens' fundamental rights hereunder.[328]

The Court held on 11 July 2019 that the impact that climate change has on human rights is a justiciable issue. It held that the Canadian Charter and the Quebec Charter has the potential to apply to government actions in the area of climate

[323] Ibid., para 40.
[324] *Asociacion Civil* Case (note 179 above).
[325] Ibid.
[326] Ibid.
[327] *ENJEU Case* (note 180 above).
[328] Ibid., p. 2.

change.[329] However, it dismissed the motion to authorise a class action. It reasoned that the cut-off of age 35 is subjective and arbitrary. The decision of the Superior Court of Quebec was appealed by ENJEU on 18 November 2018.[330]

3.3.5 *Aji P. v State of Washington*

Twelve minors, under the age of 18, filed suit against the State of Washington on 16 February 2018. They argued that the Defendant's actions regarding fossil fuel-based energy and transportation violated their rights to life, liberty, property and a healthy environment as enshrined in Washington's Constitution and according to the Public Trust Doctrine.[331] They argued that the actions of the Defendant severely endanger them 'and their ability to grow to adulthood safely and enjoy the rights, benefits, and privileges of past generations of Washingtonians due to the resulting climate change'.[332]

In their complaint, the minor plaintiffs argue that climate change will negatively impact their ability to pursue their dreams and to enjoy the natural resources with which they grew up.[333] They argue that the actions of the Defendants have caused them psychological and emotional harm.[334] It has further threatened their lives and wellbeing, as well as their personal security and interests such as cultural and recreational. They argue that, as a result of the actions of the Defendants, they 'will not be able to continue to engage in many of the activities they currently enjoy and depend upon, nor will they be able to share those experiences with their children and grandchildren, without a remedy from [the] Court'.[335]

Even though the Court agreed with the plaintiffs on the severity of the issue of climate change, it held that, due to the separation of powers, it is not the appropriate forum to address these issues. It concluded that the issues of the case 'are quintessentially political questions that must be addressed by the legislative and executive branches of government'.[336]

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[329] Ibid.
[330] Ibid.
[331] *Aji P* Case (note 181 above), para 1.
[332] Ibid., para 1.
[333] Ibid., para 26.
[334] Ibid., para 26.
[335] Ibid., para 26.
[336] Ibid., para 3.

On Appeal, the Court of Appeals of the State of Washington, also dismissed the claim. On 8 February 2021, the Court of Appeals held that, due to the separation of powers doctrine, it cannot resolve the claim.[337]

3.4 The linking of climate change and the displacement of indigenous people

As the effects of climate change worsens, territories where indigenous communities have resided for millennia are being threatened. These effects include the melting of ice, which lead to poor water quality and diminished food resources. These effects have an impact on indigenous people's ability to practice traditional methods of hunting and fishing. Over time, these areas will become uninhabitable for these communities.

Arguably, this violates their fundamental rights to life, freedom, culture and self-determination. The emergence of this trend is evident through the Canadian cases of *La Rose* and *Lho'imggin.*

3.4.1 *La Rose v Her Majesty the Queen*

In this case, which also brought forth the trend of the use of children's rights, the complaint filed on 25 October 2019 also argued that indigenous people are among those most affected by climate change. It was argued that climate change, and the Canadian Government's inaction, harms the cultural rights and livelihoods of Indigenous Communities in Canada.[338] They submitted that these climate change impacts include the melting of permafrost, which in turn leads to poor water quality, limited access to northern communities and loss of biodiversity within these Communities.[339] It was argued that these impacts negatively affect Indigenous fishing, hunting and subsistence rights. In addition to these issues, the melting of sea ice may alter animal ranges, which in turn increase new pathways for disease.

Seeing that Indigenous peoples have a strong cultural connection to the land, air and water, they are more vulnerable to the effects of climate change.[340] It was argued that these adverse impacts 'are causing psychological impacts on Indigenous

[337] Ibid.
[338] *La Rose* Case (note 178 above), para 76.
[339] Ibid., para 76.
[340] Ibid., para 77.

communities flowing from the loss of cultural rights, impacts on traditional knowledge, loss of enjoyment of land and the threat of relocation'.[341]

As discussed above, the suit was dismissed by the Court on the grounds of, *inter alia,* the separation of powers. However, on 24 November 2020, the plaintiffs lodged an appeal to the Federal Court of Appeal. The case is currently pending.

3.4.2 *Lho'imggin et al. v Her Majesty the Queen*

Suit was brought against the Canadian government on 10 February 2020 by two houses of the Wet'suwet'en indigenous group. The two plaintiffs are the Head Chiefs of their respective Houses –Misdzi Yikh and Sa Yikh.[342]

The plaintiffs argue that, due to climate change, their identity, culture and their relationship with the land is under threat.[343] They submit that the culture, legal order, sustenance and identity of these Houses are bound up by their fishing and land territories.[344] Due to climate change, they have seen a decline in forest food-animals and an increase in wildfires and insect infestations. They have also seen a decline in their salmon fishery 'that was the heart of their food security such that they have not been able to fish their preferred salmon species for nearly two decades'.[345] The plaintiffs argue that they have already experienced significant effects due to global warming in their territories[346] but, due to their cultural heritage, '[t]hey cannot be who they are at some other place'.[347]

The plaintiffs contended that Canada has failed to meet its international commitments to reduce greenhouse gas emissions under the UNFCCC, the Kyoto Protocol and the Paris Agreement.[348] It was further submitted that Canada has failed to use its discretionary decision-making power under the necessary environmental legislation to deny approval of high greenhouse gas-emitting projects.[349] The plaintiffs' claims were based, firstly, on section 91 of the Canadian Constitution, which provides that the government must maintain peace, order and good government of Canada.

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[341] Ibid., para 77.
[342] *Lho'imggin* Case (note 182 above), para 2.
[343] Ibid., para 2.
[344] Ibid., para 5.
[345] Ibid., para 5.
[346] Ibid., para 75.
[347] Ibid., para 5.
[348] Ibid., paras 42-58.
[349] Ibid., para 60.

Secondly, it was based on section 7 and 15(1) of the Canadian Charter of Rights and Freedoms ('Charter') which provides for the right to life, liberty and security of person and the right to equality before the law respectively.[350]

On 16 November 2020, the Federal Court granted a motion to strike without leave to amend, as filed by the Government. The Federal Court based its decision on numerous reasons, one of which was the separation of powers doctrine. The Court found that the case was not justiciable seeing that the issue of climate change 'is inherently political, not legal, and is of the realm of the executive and legislative branches of government'.[351]

3.5 Summary of post-2019 trends

Human rights-based climate change litigation increased dramatically after the Paris Agreement recognised the relationship between human rights and climate change, and after the ground-breaking *Urgenda* decision. Through various cases that were either filed in 2019 and 2020, or cases in which major developments occurred in the last two years, this chapter has identified four new trends that have seemingly emerged regarding post-2019 litigation.

Firstly, plaintiffs seem to be increasingly relying on regional instruments. As illustrated in the *Urgenda, Greenpeace Netherlands, Greenpeace, Notre Affaire, Friends of the Irish Environment* and *Union of Swiss Senior Women* cases, it is evident that plaintiffs are primarily relying on the ECHR, and specifically Article 2 (the right to life) and Article 8 (the right to respect for private and family life), in order to hold their respective governments to account.

Secondly, judicial review proceedings are more frequently forming the favoured form of litigation, as highlighted in the German cases of *Family Farmers* and *Neubauer,* and the Irish case of *Friends of the Irish Environment.* Thirdly, the cases of *Juliana*, *La Rose*, *Asociacion Civil*, *ENJEU* and *Aji P* seem to indicate that children's rights are being used more frequently in the relevant litigation. Lastly, it would seem that plaintiffs are increasingly linking climate change and the displacement of indigenous people in the relevant litigation, as highlighted in *La Rose* and *Lho'imggin.* Even though the cases brought with regards to this trend before domestic courts are

[350] Ibid., para 81.
[351] Ibid., para 77.

limited, it is argued that this is an emerging trend, due to the drastic effect that climate change will have on the territories of indigenous people.

Chapter 4: The shortcomings and opportunities

This chapter critically evaluates the four recent trends that have emerged through human rights-based climate change litigation targeting government accountability in the post-2019 era. The chapter argues that one of the main shortcomings of the relevant litigation, is the wall posed by the separation of powers. The chapter critically evaluates how this shortcoming is evident across all four trends. It evaluates the courts' wariness in *Friends of the Irish Environment, Union of Swiss Senior Women, Juliana, La Rose, Aji P* to overstep into the realm of the executive or the legislative branch of government by making decisions of policy rather than law. It further looks at the differing opinions on this issue between the majority and the minority in the *Juliana* case and explores the dissenting judge's disagreement with the majority's interpretation of the separation of powers in relation to the relevant litigation.

Linked to the shortcoming of the wall posed by the separation of powers doctrine, is the issue of a court's interpretation of a legal doctrine being dependant on its jurisdiction. The chapter critically evaluates how the court in the *Urgenda* case interpreted the separation of powers as opposed to the courts in *Friends of the Irish Environment, Union of Swiss Senior Women, Juliana, La Rose, Aji P and Lho'imggin et al.*

This chapter further evaluates the difficulties in establishing a causal link between ecological harm and government action or inaction, as was evident in the case of *Notre Affaire.* The chapter further provides a possible solution for this obstacle in the form of a government's *erga omnes obligations* – obligations that governments owe to the international community as a whole.[352]

The issue of legal standing, as was evident in *Greenpeace et al v Austria* and *Friends of the Irish Environment*, is further critically evaluated in this chapter.

Lastly, this chapter evaluates how there exists a limited reliance on the Rights of the Child by minors and indigenous peoples. It is explored how, despite the two trends that have emerged of children relying on children's rights and the linking of climate change to the displacement of indigenous people, it is only in the Argentinian case of *Asociacion Civil* where the plaintiffs relied on the Convention on the Rights of

[352] Strydom 'Part V: Judicial Review and International Climate Change Litigation' in *Climate Change: International Law and Global Governance'* 700.

the Child (CRC).[353]

4.1 The wall posed by the separation of powers

The first shortcoming of human rights-based climate change litigation targeting government accountability, is that courts are wary to step into the realm of the executive or legislative branch of government. This shortcoming is evident across all four trends and may prove to be one of the main obstacles for plaintiffs in this type of litigation in the future.

In *Friends of the Irish Environment*, the Supreme Court addressed the issue of the separation of powers. It held that a court must guard against a blurring between the three spheres when it permits issues which are more policy or political matters than legal matters.[354] It was held that, where the court can derive rights from the Constitution, this risk does not arise. However, it stated that where courts are simply asked to identify rights, the lines of the separation of powers become blurred.[355]

In *Union of Swiss Senior Women* the Court dismissed the plaintiffs' claim on the basis that matters of climate change 'are to be advanced not by legal action, but by political means'.[356]

In *Juliana* the majority held that the Court would be overstepping the Constitutionally embedded separation of powers were they to find for the youth plaintiffs. The Court emphasised that a federal court cannot allocate political influence and power.[357] It argues that, were it not for the separation of powers, the power of the courts would be 'unlimited in scope and duration'.[358] Even though the majority agrees with the dissent that 'the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals',[359] it maintained that this is not reason enough for a court to grant redress. It held that merely because 'the other branches […] have abdicated their responsibility to remediate the problem' does not grant the courts 'no matter how well-intentioned, the

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[353] UN Commission on Human Rights, *Convention on the Rights of the Child.,* 7 March 1990, E/CN.4/RES/1990/74.
[354] *Friends of the Irish Environment* Case (note 173 above), para 8.9.
[355] Ibid., para 8.9.
[356] *Union of Swiss Senior Women* Case (note 174 above), para 5.5.
[357] *Juliana* Case (note 177 above), p. 28.
[358] Ibid., p. 28.
[359] Ibid., p. 31.

ability to step into their shoes'.[360]

The dissenting judge vehemently disagreed with the majority of the Court. It held that '[t]his deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles'.[361] The dissenting judge held that the *Juliana* case requires answers to scientific questions rather than political ones.[362] It was argued that the majority's decision 'threatens to eviscerate judicial review in a swath of complicated but plainly apolitical contexts'.[363]

In *La Rose*, the Court followed the same logic as the majority in *Juliana.* The Court dismissed the appeal on the basis of, *inter alia*, the separation of powers. It held that questions of a political nature or which falls within the realm of policy, are not suitable for adjudication by a court.[364] It held that '[t]o engage a Court's adjudicative functions, the question must be one that can be resolved by the application of law'.[365] It argued that questions of public policy approaches or approaches to issues of significant societal concern, are too political in nature and that courts are not suited to deal with them.[366]

In the *Aji P* case the Court of Appeals also reasoned that it will act outside its scope should it grant the plaintiffs the requested relief. It held that, in order to grant the plaintiffs with the requested relief, the Court would be required to order the executive and the legislative branch to 'create and implement legislation' in the form of a climate recovery plan.[367] It held that a Court cannot write legislation and that 'resolving the Youth's claims would require the judiciary to legislate', which would be in contravention with the constitutionally embedded separation of powers doctrine.[368] The Court of Appeals subsequently dismissed the appeal and concurred with the court of first instance that the court is not in a position to address the issue of climate change.

In response to the Government's motion to strike for lack of justiciability, the

[360] Ibid., p. 32.
[361] Ibid., p. 49.
[362] Ibid., p. 61.
[363] Ibid., p. 62.
[364] *La Rose* Case (note 178 above), para 33.
[365] Ibid., para 34.
[366] Ibid., para 40.
[367] *Aji P* Case (note 181 above), para 9.
[368] Ibid., para 10.

plaintiffs in *Lho'imggin et al* argued that the Court is authorised to hear cases that 'raise important constitutional issues that affect the other branches of government'.[369] They argued that the Court is equipped to grant them relief, seeing that the issue raised is novel due in part to the unique circumstances.[370] They submitted that the issues are unique due to two reasons. Firstly, the two plaintiff Houses are an Indigenous kinship group that has obligations toward certain status holders. Secondly, they argued that the uniqueness stems from the threat that climate change presents.[371]

It is thus evident that the wall posed by the separation of powers, poses one of the main obstacles for plaintiffs in the relevant litigation.

4.2 Courts' differing interpretations in different jurisdictions

It is evident that one of the biggest challenges that plaintiffs in the relevant litigation is facing, is that of the separation of powers. Linked to this shortcoming, is the issue of a court's interpretation of a legal doctrine being dependant on its jurisdiction. In the *Urgenda* case, the Court interpreted the application of the separation of powers doctrine in the context of human rights-based climate change litigation targeting government accountability differently than the courts in *Friends of the Irish Environment, Union of Swiss Senior Women, Juliana*, *La Rose*, *Aji P* and *Lho'imggin et al.*

In the *Urgenda* judgement, the Government argued that the order by the District Court to reduce greenhouse gas emissions by at least 25% by 2020 compared to 1990 levels, as well as the order by the Court of Appeal to uphold the decision, is not permissible.[372] Firstly, they argued that the order amounts to the court making an order to create legislation. Secondly, it was argued that a Court does not have the power to make a decision on the reduction of greenhouse gas emissions, seeing that this is a political consideration.[373]

On the first argument, the Court held that 'in this case, the State has a legal duty by virtue of the protection it must provide to residents of the Netherlands on the

[369] *Lho'imggin* Case (note 182 above), para 29.
[370] Ibid., para 29.
[371] Ibid., para 29.
[372] *Urgenda* Case (note 169 above), para 8.1.
[373] Ibid., para 8.1.

basis of Articles 2 and 8 [of the] ECHR in order to protect their right to life and their right to private and family life'.[374] The Court held that, on this basis, the courts may order the Government to comply with these duties. It agrees with the case law mentioned throughout the case that a court should not interfere with the political decision-making process that is involved when legislation is created.[375] However, it interpreted this as meaning that 'the courts should not interfere in the political decision-making process regarding the expediency of creating legislation with a specific, concretely defined content by issuing an order to create legislation'.[376] It thus concluded that a courts cannot issue an order for legislation to be created with a specific content, as this will be an infringement on the separation of powers. A court can, however, issue a declaratory decision holding that a public body must take certain actions in order to achieve a specific goal.[377]

Applied to the facts of the *Urgenda* case, the Court held that the order by the District Court does not amount to an order that specific legislative measures must be taken. According to the Court's interpretation, the order leaves the Government free to decide which actions to take in order to achieve a 25% reduction in greenhouse gas emissions by 2020,[378] which does not violate the doctrine.

The Court thereafter discussed the second argument of the Government that the courts cannot make the political considerations that are necessary for a decision relating to the reduction of greenhouse gas emissions.[379] The Court acknowledged that the decision-making on this issue falls with the government and parliament.[380] It held that it falls within the court's power to decide whether the government and parliament have 'remained within the limits of the law by which they are bound'.[381] It held that, since the case involves an exceptional situation with regards to the threat of climate change, the District Court and Court of Appeal acted within their powers when it held that the Government must do its part in this context.[382]

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[374] Ibid., para 8.2.2.
[375] Ibid., para 8.2.3.
[376] Ibid., para 8.2.5.
[377] Ibid., para 8.2.6.
[378] Ibid., para 8.2.7.
[379] Ibid., para 8.1.
[380] Ibid., para 8.3.2.
[381] Ibid., para 8.3.2.
[382] Ibid., para 8.3.4.

Another instance where the issue of a court interpreting a legal issue differently due to its jurisdiction, was evident in *Friends of the Irish Environment.* The plaintiffs in this case argued that the Court should consider the reasoning of the Supreme Court of the Netherlands in the *Urgenda* judgement.[383] They referred to the Dutch Court's consideration of the scope of protection of Articles 2 and 8 of the ECHR and its finding that, in terms thereof, the government must take measures against climate change.[384] The plaintiffs argued that, if the Dutch Court had correctly interpreted the application of the ECHR to climate change, it would follow from the facts that the Irish Government is also in breach of its obligations under the ECHR.[385]

However, the Government in *Friends of the Irish Environment* argued that the Court should not consider the *Urgenda* judgement. It argued that, seeing that the European Court of Human Rights has not addressed the issue concerned, the Court should be wary of considering decisions on the issue by other national courts.[386] The Government further argued that the Netherlands, unlike Ireland, follows a monist system. This means that in the Netherlands, international treaties can affect domestic law without it being translated into legislation.[387]

The Court subsequently upheld the opinion of the court of first instance that *Urgenda* must be distinguished from the current case 'on the basis that no particular statutory framework had been impugned'.[388]

4.3 Difficulties in establishing a causal link between ecological harm and government action or inaction

In *Notre Affaire,* the Government argued that the Petitioners did not establish a causal link between the alleged actions and inactions of the French Government and the alleged damage.[389] The plaintiffs, however, argue that the Government contributed to the ecological damage by not complying with its general obligation to combat climate change.[390] The plaintiffs argued that the Government's administrative authorities failed to adopt sufficient measures and that they set targets for the

[383] *Friends of the Irish Environment* Case (note 173 above), para 5.12.
[384] Ibid., para 5.12.
[385] Ibid., para 5.14.
[386] Ibid., para 5.14.
[387] Ibid., para 5.15.
[388] Ibid., para 5.17.
[389] *Notre Affaire* Case (note 172 above), p. 6.
[390] Ibid., p. 26.

reduction of greenhouse gas emissions which are insufficient.[391] However, the Court found that the government cannot be forced to meet more specific targets. It held that these sectoral measures cannot be directly linked to the ecological damage alleged.[392]

Commentators have previously identified this shortcoming as a possible obstacle when following a human rights approach to climate change.[393] It is argued that it may be an obstacle to 'establish a causal link between greenhouse gases emitted in a specific state and an alleged human rights violation'.[394]

Some commentators argue, however, that there are solutions to this obstacle. In terms of the United Nations Charter,[395] there exists a duty for governments to cooperate in terms of the achievement of universal respect for human rights.[396] It has been argued that this duty also includes the duty of every state not to interfere with other states' ability to fulfil their human rights obligations.[397] These obligations are otherwise known as *erga omnes* obligations – obligations that governments owe to the international community as a whole.[398]

It is thus submitted that, in the context of climate change litigation and the issue regarding causation, plaintiffs can argue that the major greenhouse gas emitting countries must substantially reduce its emissions in order to not interfere with the ability of another country to ensure adequate water and other resources such as food and shelter for its citizens.[399]

4.4 The issue of legal standing

Arguably, another shortcoming of the relevant litigation is that a Court may find that a plaintiff lacks the necessary legal standing. In *Greenpeace et al v Austria* the Constitutional Court dismissed the case, seeing that rail passengers do not possess the necessary legal standing.[400]

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[391] Ibid., p. 26.
[392] Ibid., p 28.
[393] Strydom 'Part V: Judicial Review and International Climate Change Litigation' in *Climate Change: International Law and Global Governance'* 699.
[394] Ibid.
[395] United Nations, *Charter of the United Nations,* 24 October 1945, 1 UNTS XVI.
[396] Strydom 'Part V: Judicial Review and International Climate Change Litigation' in *Climate Change: International Law and Global Governance'* 699.
[397] Ibid., 699.
[398] Ibid., 700.
[399] Ibid., 700.
[400] *Greenpeace et al* Case (note 171 above).

In *Friends of the Irish Environment* the Government was also successful with the argument of lack of legal standing. The Government argued that all the rights that FIE relies on – the rights in terms of the Irish Constitution as well as under the ECHR – are personal rights.[401] It was argued that rights such as the right to life, the right to bodily integrity and the right to respect for private and family life, are all personal to individuals and that FIE, as an organisation, cannot rely on these rights.

With regards to using children rights in the relevant litigation, the possibility of standing for future generations is also complicated. Arguably, human rights mostly take on a reactive rather than a preventative stance towards environmental degradation due to climate change,[402] having the effect that courts may find that the plaintiff lacks the necessary legal standing.

4.5 Limited reliance on the Rights of the Child by minors and indigenous peoples

Despite the two trends that have emerged of children relying on children's rights and the linking of climate change to the displacement of indigenous communities, it is only in the Argentinian case of *Asociacion Civil* where the plaintiffs relied on the CRC. In none of the European cases, nor in the Northern American cases, did the plaintiffs or the claim that their rights under the CRC were being violated due to their governments' actions or inactions regarding climate change.

Arguably, the use of this avenue is an opportunity that still exists in the relevant litigation, especially in the context of these two emerging trends. In the Petition that was brought against Argentina, Brazil, France, Germany and Turkey before the Committee on the Rights of the Child by sixteen minors, this violation was argued. This Petition could not be included in the scope of this research, seeing that it was not heard by a domestic court, but by an international body. Nevertheless, its contents are significant.

In *Sacchi* the Petitioners argued that the Respondent States – as some of the highest greenhouse gas emitters – have failed to uphold its obligations under the CRC.[403] The minors from Argentina, Brazil, France, Germany, India, the Marshall

[401] Kelleher 2021 (30) *Review of European, Comparative & International Environmental Law* 140.
[402] Albers 2017 (28) *Security and Human Rights* 120 & 121.
[403] *Sacchi* Case (note 296 above), para 14.

Islands, Nigeria, Palau, South Africa, Sweden, Tunisia and the USA argued that '[t]he climate crisis is a children's crisis'.[404] The Petitioners, which included Greta Thunberg, argued that these states, by 'recklessly causing and perpetuating life-threatening climate change' have 'failed to take necessary preventative and precautionary measures to respect, protect, and fulfil the Petitioners' rights to life (Article 6), health (Article 24), and culture (Article 30) and are thus violating the [CRC]'.[405] They further argued that the Respondent States failed to make the best interests of children a primary consideration in their climate actions, thus violating Article 3 of the CRC.[406]

The Petitioners raised also raised this argument in the context of the displacement of indigenous communities – with a focus on the children in these communities. It was argued that the 'subsistence way of life of many indigenous communities is at stake'.[407] It referred to two Petitioners living in northern Sweden and Alaska whose traditions, of reindeer herding and salmon fishing respectively, is being threatened by climate change.[408] The right to culture of these indigenous children, which must be protected under Article 30 of the CRC, is being violated through the Respondents' actions.

Sacchi marks the first time that a Petition was brought under the CRC.[409] The Petitioners asked the Committee to, *inter alia,* declare that climate change is a children's rights crisis.[410] They further requested the Committee to find that 'by recklessly perpetuating life-threatening climate change, each respondent is violating [the] Petitioners' rights to life, health, and the priority[s]ation of the child's best interests, as well as the cultural rights of the Petitioners from indigenous communities'.[411]

It will be interesting to note what the Court in *Asociacion Civil* decides in this regard, as well as what the outcome in *Sacchi* will be. Nevertheless, it is argued that an opportunity exists for litigants in the relevant litigation to rely on the CRC in order to hold governments to account in domestic courts in the future.

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[404] Ibid., para 13.
[405] Ibid., para 24.
[406] Ibid., para 301.
[407] Ibid., para 10.
[408] Ibid., para 10.
[409] Lee 2020 *UCLA Law Review* 1.
[410] *Sacchi* Case (note 296 above), para 325.
[411] Ibid., para 328.

Chapter 5: Conclusion

It is an undisputed fact that climate change poses significant risks to our planet. Climate action has accelerated not only on the international front through the UNFCCC, the Kyoto Protocol, the Paris Agreement and the UN Sustainable Development Goals, but also on a domestic front. Currently, every country in the world has at least one climate law or policy.

Due to this growth in action on a domestic level, the role of the judiciary has become imperative. Climate change litigation has grown exponentially during the last two years and, as of May 2021, 1 785 climate change related cased had been filed globally.[412]

In 2015, the Paris Agreement was adopted. One of the most substantial differences of the Paris Agreement as opposed to the UNFCCC and the Kyoto Protocol, was that it included the relationship between climate change and human rights. It marked the first time that this relationship was included in any climate change treaty.[413] Following the adoption of the Paris Agreement, and as our understanding of climate change and the impacts thereof grew, a rights-based turn in climate change litigation occurred.

It was the broad purpose of this dissertation to survey recent human rights-based climate change litigation targeting government accountability, with a view to determining if it follows previous trends or if new trends are emerging. In order to identify these recent trends, the research focused on cases filed in 2019 and 2020, and on cases that have had major developments in 2019 and 2020. The research further focused only on litigation of a public nature, with governments as the opposing parties.

The first post-2019 trend that this research identified was the reliance on regional instruments in the relevant litigation. Through discussing the cases of *Urgenda, Greenpeace Netherlands, Greenpeace, Notre Affaire, Friends of the Irish Environment* and *Union of Swiss Senior Women* it became evident that the trend has not progressed to the use of many different regional instruments, seeing that the

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[412] To access the most recent numbers on climate laws and policies, see the Grantham Research Institute on Climate Change and the Environment, available at https:/climate-laws.org/.
[413] Sands & Peel *Principles of International Environmental Law* 319.

plaintiffs in these cases all relied on Articles 2 and 8 of the ECHR. The second trend that was identified is the use of judicial review through the cases of *Family Farmers* and *Neubauer,* as well as the case of *Friends of the Irish Environment.* The use of children's rights was identified as the third trend, as is evident through the cases of *Juliana*, *La Rose*, *Asociacion Civil*, *ENJEU* and *Aji P.* Lastly, through the cases of *La Rose* and *Lho'imggin,* the trend of the linking of climate change and the displacement of indigenous people was identified.

One of the major shortcomings that exist in the post-2019 relevant litigation, is arguably the wall posed by the separation of powers doctrine, which is evident across all four recent trends. It is argued that courts are wary to deliver a judgement in this context that will overstep the confines of the doctrine. The courts are cautious of the roles of the executive and legislative branches of government. This may prove to be one of the biggest obstacles that plaintiffs will face in the relevant litigation in the future.

Linked to this shortcoming, is the issue of jurisdiction and courts' differing interpretations of certain matters. Some of the courts in the relevant litigation interpreted the separation of powers doctrine in meaning that climate change is not a matter for the courts and that they would be overstepping their constitutionally embedded roles if they were to decide on such a matter. However, in the *Urgenda* judgement, the Court held that its decision does not breach the separation of powers doctrine.

Further shortcomings that were evident through the critical evaluation of the post 2019-trends, are that plaintiffs are struggling to establish a causal link between ecological harm and government action or inaction, as well as to establish the necessary legal standing. Through its critical evaluation of the post-2019 trends, this dissertation has further established that there exists limited reliance on the Rights of the Child by minors and indigenous peoples.

It is evident from the post-2019 case law that this research has identified in the sphere of human rights-based climate change litigation, that the majority of cases were brought in first world countries, or the 'Global North'. The governments that were being held accountable through the relevant litigation, were that of the Netherlands, Austria, France, Ireland, Switzerland, Germany, the United States and Canada.

The only case that has contributed to human rights-based climate change

litigation targeting government accountability, which emerged in a third world country, or the 'Global South', is the Argentinian case of *Asociacion Civil.* When one turns to Africa, a continent which falls directly within the Global South, it is interesting to note that, despite being one of the regions that may be most affected by the effects of climate change, there has not been any growth in the field of human rights-based climate change litigation.[414]

Even though the Global South has contributed to climate change litigation as a whole,[415] it has not made a significant contribution to the relevant litigation that this research is exploring. Seeing that the impacts of climate change are felt more intensely by those living in poverty, it is argued that the inhabitants of countries in the Global South may already be experiencing violations of their most fundamental rights. Arguably, opportunity thus exists for litigants in the Global South to hold governments accountable by relying on the relevant litigation. However, financial instability and lack of judicial processes will naturally decrease the contribution of litigation being brought in the Global South. Even though the emergence of the relevant litigation may be slower, one might see more trends emerging should the contribution of the Global South be increased.

The purpose of this dissertation was to survey recent human rights-based climate change litigation targeting government accountability, with a view to determining if it follows previous trends or if new trends are emerging. Having done so, it is evident that new trends are emerging through the relevant litigation and that previous trends are not being followed by plaintiffs. Despite the shortcomings of human rights-based climate change litigation targeting government accountability, it is submitted that many opportunities still exist – both for future litigants and scholars.

[414] Kotze & Du Plessis 2020 (50) 3 *Environmental Law* 615.
[415] For an in-depth analysis of the contribution of the Global South to climate change litigation, see Peel & Lin 2019 (113) *American Journal of International Law.*

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