

SYMPOSIUM ARTICLE

A Rights Turn in Climate Change Litigation?[†]

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First published online 29 December 2017

Abstract

In 2015, a Pakistani court in the case of *Leghari v. Federation of Pakistan* made history by accepting arguments that governmental failures to address climate change adequately violated petitioners' rights. This case forms part of an emerging body of pending or decided climate change-related lawsuits that incorporate rights-based arguments in several countries, including the Netherlands, the Philippines, Austria, South Africa, and the United States (US). These decisions align with efforts to recognize the human rights dimensions of climate change, which received important endorsement in the Paris Agreement. The decisions also represent a significant milestone in climate change litigation. Although there have been hundreds of climate-based cases around the world over the past two decades – especially in the US – past and much of the ongoing litigation focuses primarily on statutory interpretation avenues. Previous efforts to bring human rights cases have also failed to achieve formal success. The new cases demonstrate an increasing trend for petitioners to employ rights claims in climate change lawsuits, as well as a growing receptivity of courts to this framing. This 'rights turn' could serve as a model or inspiration for rights-based litigation in other jurisdictions, especially those with similarly structured law and court access.

Keywords: Climate change litigation, Human rights, *Leghari* case, *Urgenda* case, Adaptation, Mitigation

1. INTRODUCTION

The sooner that they realize that global warming is much more than the plight of polar bears and other animals or just some abstract warming of the planet or ocean

[†] This contribution is part of a collection of articles growing out of the conference 'A Rights-Based Approach to Climate Change', held at QUT Law School, Brisbane (Australia), on 18–19 Feb. 2016.

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This work was supported by the Australian Research Council, DP130100500, J. Peel & H. Osofsky, 'Transition to a Clean Energy Future: The Role of Climate Change Litigation in Shaping our Regulatory Path'. The article was presented as a keynote address at a two-day conference on 'A Rights-Based Approach to Climate Change' held at QUT Law School, Brisbane (Australia), on 18–19 Feb. 2016. The authors would like to thank the conference participants and *TEL* reviewers for their feedback on earlier drafts of this article.

acidification; the sooner that they come to Jesus and realize that the people are being harmed right now and will be increasingly harmed; that's a much better way to advocate for climate change policy than arguing for protections for the polar bear. So if Leonardo Dicaprio wanted to be a bigger player on global warming he should step up and advocate for people instead of polar bears.¹

In September 2015, Judge Syed Mansoor Ali Shah of the Lahore High Court in Pakistan made history with his finding that the national government's delay in implementing the country's climate policy framework violated citizens' fundamental rights.² A few months earlier, the Hague District Court in the Netherlands had handed down its decision in *Urgenda v. The State of the Netherlands* to considerably more media fanfare.³ The Hague District Court ordered the Dutch government to adopt more stringent greenhouse gas (GHG) emissions reduction measures in line with international scientific recommendations.⁴ In the academic and media commentary that followed the *Urgenda* decision, much was made of the case being the first to use a tortious cause of action to hold a government to account for its inadequate climate change mitigation efforts.⁵ Far less remarked upon were the rights-based arguments put by the Dutch non-governmental organization (NGO), *Urgenda*, in support of its contention that the Dutch government was not doing enough to protect its citizens from climate change harm. Unlike the Lahore High Court in *Leghari*, which based its decision on the breach of rights obligations, the Hague District Court did not find a violation of the petitioners' human rights in *Urgenda*. Nonetheless, it gave serious consideration to the arguments based on human rights, and used rights as an interpretative tool in analyzing the question of whether the Dutch government had breached its duty of care towards *Urgenda* and the Dutch people.⁶

¹ In-person interview for Australian Research Council project, 'Transition to a Clean Energy Future: The Role of Climate Change Litigation in Shaping Our Regulatory Path', Participant 10, 14 Jan. 2013, San Francisco, CA (US).

² *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, available at: https://elaw.org/pk_Leghari (*Leghari*).

³ See, e.g., A. Neslen, 'Dutch Government Ordered to Cut Emissions in Landmark Ruling', *The Guardian*, 24 June 2015, available at: <https://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>; D. Anton, 'A Dutch Blueprint for Climate Litigation', *Sydney Morning Herald*, 2 July 2015, available at: <http://www.smh.com.au/comment/a-dutch-blueprint-for-climate-litigation-20150702-gi3d5d.html>; J. Schwartz, 'Ruling Says Netherlands Must Reduce Greenhouse Gas Emissions', *The New York Times*, 24 June 2015, available at: http://www.nytimes.com/2015/06/25/science/ruling-says-netherlands-must-reduce-greenhouse-gas-emissions.html?_r=0; 'Netherlands Ordered to Cut Greenhouse Gas Emissions', *BBC News*, 24 June 2015, available at: <http://www.bbc.com/news/world-europe-33253772>.

⁴ *Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396 (*Urgenda*).

⁵ J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; K. Graaf & J. Jans, 'The *Urgenda* Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27(3) *Journal of Environmental Law*, pp. 517–27; R. Cox, 'A Climate Change Litigation Precedent: *Urgenda* Foundation v. The State of the Netherlands', *Centre for International Governance Innovation (CIGI) Papers Series*, No. 79, Nov. 2015, available at: https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf; J. Lin, 'The First Successful Climate Change Negligence Case: A Comment on *Urgenda* Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)' (2015) 5(1) *Climate Law*, pp. 65–81.

⁶ *Urgenda*, n. 4 above, para. 4.52.

While cases that urge courts to address climate change on human rights grounds are not an entirely new phenomenon,⁷ success in rights-based climate change claims has been more elusive. However, the result in the *Leghari* case, coupled with other recent pending and decided cases that raise rights arguments, suggests that this situation may be changing.⁸ In addition to the *Urgenda* case, petitioners have raised rights claims in recent climate change litigation in the Philippines,⁹ the United States (US),¹⁰ Austria,¹¹ and South Africa.¹²

Up to this point, the vast majority of lawsuits in countries with the most extensive climate change litigation, such as the US and Australia, have involved statutory law causes of action alleging that governments failed to take climate change considerations adequately into account in their decision-making processes.¹³ The most high-profile US climate change case to date, *Massachusetts v. Environmental Protection Agency*,¹⁴ focused on statutory interpretation: whether the US Environmental Protection Agency (EPA) had abused its discretion through the manner in which it refused to regulate GHG emissions under the Clean Air Act.¹⁵ However, climate change lawsuits based on claims of rights violations represent a turn away from these more conventional modes of litigation.¹⁶ They coincide with the increasing prominence internationally of human

⁷ See, e.g., Inuit Circumpolar Council Canada, Inuit Petition Inter-American Commission on Human Rights to Oppose Climate Change Caused by the United States of America, 7 Dec. 2005, available at: <http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html> (Inuit petition), discussed further in Section 2.2 below. See also the Nigerian case of *Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others* (2005) AHRLR 151 (NgHC 2005), discussed in Section 4.3 below.

⁸ See M.B. Gerrard, 'Climate Litigation Scores Successes in the Netherlands and Pakistan' (2016) 47(5) *Trends: American Bar Association Section of Environment, Energy, and Resources Newsletter*, available at: http://www.americanbar.org/publications/trends/2015-2016/may-june-2016/climate_litigation_scores_successes.html.

⁹ Greenpeace, Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations resulting from the Impacts of Climate Change, available at: <http://www.greenpeace.org/seasia/ph/press/releases/Worlds-largest-carbon-producers-ordered-to-respond-to-allegations-of-human-rights-abuses-from-climate-change/The-Climate-Change-and-Human-Rights-Petition>. The petition is discussed further in Section 3.3 below.

¹⁰ *Juliana v. United States*, No. 6:15-cv-01517, (D.Or., 10 Nov. 2016) (Aiken, J.), 46 ELR 20175 (*Juliana*), discussed further in Section 3.3 below.

¹¹ *Third Runway at Vienna International Airport* case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017, discussed further in Section 3.3 below. An unofficial English translation of the decision by Columbia University student, P.B. Chawda, which links to the original decision (in German), is available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/files/non-us-case-documents/2017/20170317_W109-2000179-1291E_decision.pdf.

¹² *Earthlife Africa Johannesburg v. Minister for Environmental Affairs & Others*, Case No. 65662/16, Judgment of High Court of South Africa, Gauteng Division, Pretoria (South Africa), 8 Mar. 2017, available at: <http://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf> (*Earthlife Africa Johannesburg*), discussed further in Section 3.3 below.

¹³ D. Markell & J.B. Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual' (2012) 64(1) *Florida Law Review*, pp. 15–86; J. Peel & H.M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015); M. Nachmany et al., 'Global Trends in Climate Change Legislation and Litigation, 2017 Update', Grantham Research Institute on Climate Change and the Environment, May 2017, pp. 13–8 (noting that the US has the most cases at around 600 decisions, followed by Australia with over 50 climate change-related cases).

¹⁴ 549 U.S. 497 (2007).

¹⁵ 42 U.S.C. § 7401 et seq. (1970).

¹⁶ For discussion of these 'traditional' or 'first generation' climate change cases see Markell & Ruhl, n. 13 above, and Peel & Osofsky, n. 13 above; see also E. Fisher, 'Climate Change Litigation, Obsession and

rights–climate change linkages, including the endorsement of this linkage in the Preamble to the Paris Climate Agreement concluded in December 2015.¹⁷ In parallel with these policy and legal developments at the international level, rights claims in climate change litigation seek to direct public and political attention to the detrimental human consequences of climate change, arguments that ultimately may be more persuasive in motivating action to address the problem.¹⁸

This article contends that emerging case law, such as the *Leghari* and *Urgenda* decisions, illustrates a trend towards petitioners increasingly employing rights claims in climate change lawsuits, and a growing receptivity of courts to this framing. As early cases demonstrate the potential of rights-based claims in a climate change context, they are likely to encourage similar cases in other jurisdictions. This could facilitate a greater ‘turn’ towards rights in climate change litigation around the world. Indeed, human rights suits are particularly apposite as the basis for the development of a transnational climate change jurisprudence given the widespread adoption, and similarities in formulations, of rights across diverse legal instruments, including human rights treaties, domestic statutory or constitutional bills of rights, and national and subnational constitutional rights provisions.¹⁹ Moreover, with worsening impacts from climate change which affect human communities more directly and substantially,²⁰ linkages between climate change and rights protection are likely to become ever more salient, attracting further litigation on this basis. While it is important not to overstate the extent of this ‘turn’ – and many jurisdictions may continue to be largely resistant to such framing²¹ – this emerging jurisprudence

Expertise: Reflecting on the Scholarly Response to *Massachusetts v. EPA*’ (2013) 35(3) *Law and Policy*, pp. 236–60; L. Vanhala, ‘The Comparative Politics of Courts and Climate Change’ (2013) 22(3) *Environmental Politics*, pp. 447–74; B.J. Preston, ‘Climate Change Litigation (Part 2)’ (2011) 5(2) *Carbon and Climate Law Review*, pp. 244–63; B.J. Preston, ‘Climate Change Litigation (Part 1)’ (2011) 5(1) *Carbon and Climate Law Review*, pp. 3–14; M. Gerrard et al., ‘Climate Change Litigation in the U.S.’, Arnold & Porter LLP., available at: <http://www.climatecasechart.com>. Rights-based claims are one example of litigants pursuing new directions in this ‘next generation’ of climate change litigation: see J. Peel, H.M. Osofsky & A. Foerster, ‘Shaping the Next Generation of Climate Change Litigation in Australia’ (2017) 41(2) *Melbourne University Law Review* (forthcoming). For other examples see D. Estrin, ‘Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts – Despite the Paris Agreement’, *CIGI Papers Series*, Paper No. 101, 11 May 2016, available at: <https://www.cigionline.org/publications/limiting-dangerous-climate-change-critical-role-citizen-suits-and-domestic-courts>; and M. Taws, ‘Atmospheric Trust Litigation: A Potential Tool in the Search for Climate Justice in the United States’, CIGI, Interview with Randall Abate, 20 July 2016, available at: <https://www.cigionline.org/articles/atmospheric-trust-litigation-potential-tool-search-climate-justice-united-states>.

¹⁷ Paris (France), 12 Dec. 2015, in force 4 Nov. 2016 available at: http://unfccc.int/paris_agreement/items/9485.php (Paris Agreement).

¹⁸ J.H. Knox, ‘Climate Change and Human Rights Law’ (2009) 50(1) *Virginia Journal of International Law*, pp. 163–218, at 166. See also A. Sinden, ‘An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria’, in W.C.G. Burns & H.M. Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009), pp. 173–92.

¹⁹ G.L. Neuman, ‘Human Rights and Constitutional Rights: Harmony and Dissonance’ (2003) 55 *Stanford Law Review*, pp. 1863–900.

²⁰ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2014: Impacts, Adaptation, and Vulnerability* (Cambridge University Press, 2014).

²¹ In the US, major obstacles exist to human rights-based claims against governments for climate-related injury, including questions of standing (showing particularized injury and causation), separation of powers

represents an important step forward for rights arguments in the climate change context.

To ground the analysis of this case law in this article, Section 2 provides an overview of the likely human rights impacts from climate change, which have become an increasing focus of human rights bodies and the international climate change regime over the past decade. It also briefly surveys the principal previous attempt at rights-based climate change litigation – a 2005 petition by the Inuit peoples to the Inter-American Commission on Human Rights – to identify the common legal hurdles faced.²² Section 3 of the article then discusses recently decided cases and pending litigation in which rights arguments have been raised, and sometimes successfully deployed, to force greater action by states to address climate change. It identifies two key uses of rights-based claims by courts in climate change cases: firstly, as the basis for findings that defendants' actions or omissions with regard to climate change potentially give rise to rights violations; or, secondly, as an interpretative tool that assists courts in finding breaches of other legal obligations, such as those in tort, in violation of a statutory obligation, or under the public trust doctrine. Section 4 analyzes the scope for further development of rights-based climate claims in other jurisdictions, drawing on the model offered by decided and ongoing climate change litigation in which rights arguments feature. Section 5 concludes with a consideration of the likely future role of rights-based cases in climate change jurisprudence.

2. HUMAN RIGHTS AND CLIMATE CHANGE

Global warming should be seen not as an environmental crisis but as a human rights issue that risks the lives, livelihoods and homes of millions of people.

Former Maldives President, Mohamed Nasheed.²³

A succession of weather-related disasters around the world – from Superstorm Sandy, Typhoon Haiyan and Cyclone Pam to massive floods in Pakistan, crippling drought in Ethiopia and heatwaves in central Europe – have highlighted the human cost of climate change.²⁴ In developed countries, such events cause extensive damage to

(especially the application of the political question doctrine), and sovereign immunity: N. Perumal & J. Wentz, 'Lawsuit Alleges that U.S. Government Violated Constitutional Rights of America's Youth by Promoting the Development and Use of Fossil Fuels', *Climate Law Blog*, Sabin Center for Climate Change Law, Columbia University, 25 Aug. 2015, available at: <http://blogs.law.columbia.edu/climatechange/2015/08/25/lawsuit-alleges-that-u-s-government-violated-constitutional-rights-of-americas-youth-by-promoting-the-development-and-use-of-fossil-fuels>. For a discussion of obstacles in Australia – another country with a substantial 'traditional' climate change jurisprudence – see Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change Background Paper', 2008, available at: <https://www.humanrights.gov.au/papers-human-rights-and-climate-change-background-paper#2>; and O. Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights Protected by the ICCPR' (2008) 9(2) *Melbourne Journal of International Law*, pp. 405–38. Full analysis of the obstacles to human rights claims in these and other specific jurisdictions lies beyond the scope of this article.

²² Inuit petition, n. 7 above.

²³ Available at: Know Climate Change, http://know.climateofconcern.org/index.php?option=com_content&task=article&id=187.

²⁴ Centre for Research on the Epidemiology of Disasters, 'The Human Cost of Natural Disasters 2015: A Global Perspective', EM-DAT, 2015, available at: http://emdat.be/human_cost_natdis. On the

property and infrastructure, injury and, in some instances, loss of life.²⁵ The death toll from extreme weather disasters is often greater in developing countries, where events like severe storms, floods or droughts may also destroy housing, threaten food supplies and access to clean water, and deprive people of their livelihoods.²⁶ These weather-related disasters – predicted to become more frequent and severe with climate change²⁷ – have obvious implications for the realization of fundamental human rights.

In this section, we briefly survey the growing international recognition of human rights–climate change linkages in the United Nations (UN) human rights system and under the international climate change regime. However, acknowledgement of the potential for climate change to affect the enjoyment of human rights does not translate readily into a strong legal claim for rights violation. Early lawsuits that sought to hold public and private actors accountable for rights violations based on climate change-related harm have faced a number of hurdles that will continue to be pertinent for future efforts at rights-based climate change litigation.

2.1. Recognition of the Human Rights–Climate Change Linkage

It is only relatively recently that the relationship between climate change and human rights has become a sustained focus of international law and policy making.²⁸ The issue of human rights–climate change linkages was first taken up by the UN Human Rights Council (HRC) in 2008.²⁹ Council Resolution 7/23 expressed the body’s concern that ‘climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights’.³⁰ At the same time, the HRC commissioned the Office of the UN High

relationship between elevated GHG emissions, climate change and an increased frequency or severity of extreme weather, see IPCC, *Special Report: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (Cambridge University Press, 2012).

²⁵ See, e.g., Munich Re, *Severe Weather in North America: Perils, Risks, Insurance* (Munich Re, 2012).

²⁶ Centre for Research on the Epidemiology of Disasters, n. 24 above, p. 7.

²⁷ IPCC, n. 24 above; see also E.M. Fischer & R. Knutti, ‘Anthropogenic Contribution to Global Occurrence of Heavy-Precipitation and High-Temperature Extremes’ (2015) 5 *Nature Climate Change*, pp. 560–4, available at: <http://www.nature.com/nclimate/journal/v5/n6/abs/nclimate2617.html>.

²⁸ M.J. Hall & D.C. Weiss, ‘Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law’ (2012) 37(2) *Yale Journal of International Law*, pp. 309–66, at 310; M. Berger & J. Wentz, *Climate Change and Human Rights* (UN Environment Programme (UNEP), 2015), p. 11. However, discussion of human rights–climate change linkages has its roots in a well-established body of literature on human rights and the environment, including seminal texts such as A.E. Boyle & M.R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1998), and international efforts to develop a self-standing human right to a clean, healthy environment: Berger & Wentz, *ibid.*, p. 1; see also S. Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016), particularly Ch. 3.

²⁹ For an account of the efforts to link climate change and human rights at the UN, including the role of the Inuit petition and activism efforts by the Maldives which culminated in the Malé Declaration on the Human Dimension of Global Climate Change (Malé (Republic of Maldives), 14 Nov. 2007, available at: http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf), see J.H. Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33(2) *Harvard Environmental Law Review*, pp. 477–98.

³⁰ UN HRC Resolution A/HRC/7/78, 14 July 2008, on the Report of the Human Rights Council on its Seventh Session, p. 65, Preamble.

Commissioner for Human Rights (OHCHR) to prepare a study on human rights and climate change.

This seminal OHCHR study, released in January 2009, noted broad international agreement that climate change has generally negative effects on the realization of human rights.³¹ Although the universal human rights treaties – such as the International Covenant on Civil and Political Rights (ICCPR)³² and the International Covenant on Economic, Social and Cultural Rights (ICESCR)³³ – do not include a specific right to a safe and healthy environment that might be compromised by climate change, the study emphasized that all UN human rights treaty bodies recognize the intrinsic link between the environment and realization of a range of human rights.³⁴ These include individual rights to life,³⁵ health,³⁶ food,³⁷ water,³⁸ and adequate housing,³⁹ as well as the collective right to self-determination⁴⁰ and procedural rights concerning access to information and participation in decision making regarding environmental risks.⁴¹ As the OHCHR study recognized, weather-related disasters exacerbated by climate change have the potential to affect human rights broadly, for instance, by giving rise to deaths, disease or malnutrition (right to life, right to health), threatening food security or livelihoods (right to food), impacting upon water supplies and compromising access to safe drinking water (right to water), destroying coastal settlements through storm surge (right to adequate housing), and in some cases forcing relocation as traditional territories become uninhabitable (right to self-determination).⁴² The study also highlighted the linkages between climate change harm and threats to international peace and security⁴³ – an issue that has attracted growing international and domestic attention in subsequent years.⁴⁴

³¹ 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).

³² New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

³³ New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

³⁴ OHCHR Report, n. 31 above, para. 18. In the field of international environmental law, Principle 1 of the Declaration of the UN Conference on the Human Environment (Stockholm Declaration) (UN Doc. A/Conf.48/14/Rev. 1(1973), 16 Jun. 1972, available at: <http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503>) also reflects the interdependence of human rights and environmental quality.

³⁵ E.g., ICCPR, n. 32 above, Art. 6.

³⁶ E.g., ICESCR, n. 33 above, Art. 12.

³⁷ E.g., *ibid.*, Art. 11.

³⁸ E.g., *ibid.*, Arts 11 and 12.

³⁹ E.g., *ibid.*, Art. 11.

⁴⁰ E.g., ICCPR, n. 32 above, Art. 1; ICESCR, n. 33 above, Art 1.

⁴¹ 'Report of the Independent Expert on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, J.H. Knox, Mapping Report', UN Doc. A/HRC/25/53, 30 Dec. 2013, paras 29–43.

⁴² OHCHR Report, n. 31 above, paras 20–41.

⁴³ *Ibid.*, paras 61–4.

⁴⁴ J. Barnett & N. Adger, 'Climate Change, Human Security and Violent Conflict' (2007) 26(6) *Political Geography*, pp. 639–55.

In addition to the general implications of climate change for human rights, the OHCHR study noted that impacts are unevenly distributed. Hence, climate change impacts are likely to be ‘felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability’.⁴⁵ In countries with low capacity to adapt to climate change, particular risks exist for women, children and indigenous peoples. These findings were affirmed in HRC Resolution 10/4 (2009) and echoed in subsequent resolutions, including the 2015 HRC Resolution on Human Rights and Climate Change.⁴⁶

In the international climate regime under the auspices of the UN Framework Convention on Climate Change (UNFCCC), the impacts of climate change on individuals and communities have also received more attention in recent years, in tandem with developments in the UN human rights bodies. At the 16th Conference of the Parties (COP) to the UNFCCC in Cancún (Mexico) in 2010, the COP took note of HRC Resolution 10/4:

which recognizes that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights and that the effects of climate change will be felt most acutely by those segments of the population that are already vulnerable owing to geography, gender, age, indigenous or minority status, or disability’.⁴⁷

The Cancún Agreements also affirmed the importance of addressing adaptation ‘with the same priority as mitigation’,⁴⁸ and recognized the need ‘to strengthen international cooperation and expertise in order to understand and reduce loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow-onset events’.⁴⁹

A greater focus in the international climate regime on ‘adaptation’ (i.e., the ‘process of adjustment to actual or expected climate and its effects’)⁵⁰ and ‘loss and damage’ (essentially, those climate change impacts which cannot be avoided through adaptation)⁵¹ has inevitably directed more attention to how individuals and communities are affected by climate change, and their relative adaptive capacity.⁵²

⁴⁵ OHCHR Report, n. 31 above, para. 42.

⁴⁶ UN HRC Res. 29, ‘Human Rights and Climate Change’, UN Doc. A/HRC/29/L.21, 30 June 2015, para 1.

⁴⁷ UNFCCC Secretariat, Decision 1/CP.16, ‘The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention’, UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011, Preamble.

⁴⁸ *Ibid.*, para. 2(b).

⁴⁹ *Ibid.*, para. 25.

⁵⁰ V.R. Barros & C.B. Field (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Vol. II: Regional Aspects, Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2015), Annex II, p. 1758. The IPCC report goes on to clarify that in human systems ‘adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects’.

⁵¹ UNEP, ‘Loss and Damage: When Adaptation Is Not Enough’, Apr. 2014, available at: http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=111.

⁵² Barros & Field, n. 50 above, define ‘adaptive capacity’ as ‘[t]he ability of systems, institutions, humans, and other organisms to adjust to potential damage, to take advantage of opportunities, or to respond to

This emphasis has brought the climate change regime into closer alignment with international efforts on sustainable development, disaster management, and human rights protection.⁵³ Such linkages were the focus of intense lobbying efforts in the lead-up to the UNFCCC Paris negotiations in December 2015, with strong support offered by the UN OHCHR and the Special Rapporteur on Human Rights and the Environment, John Knox.⁵⁴ While the final text of the Paris Agreement did not mention human rights in its operative provisions as many had hoped, it included the following preambular reference:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.⁵⁵

The Paris Agreement also includes significant provisions on adaptation and, for the first time, a self-standing article dealing with loss and damage.⁵⁶ When coupled with the long-term temperature goal of remaining ‘well below’ 2 degrees Celsius (°C) and ‘pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels’ – goals which themselves acknowledge the importance of significantly reducing ‘the risks and impacts of climate change’⁵⁷ – the Paris Agreement arguably reflects recognition of the need to safeguard the interests of the most vulnerable people and communities as part of the global climate change response. Writing in the aftermath of the negotiations, Special Rapporteur Knox summarized this view, concluding that ‘the Paris Agreement signifies the recognition by the international community that climate change poses unacceptable threats to the full enjoyment of human rights and that actions to address climate change must comply with human rights obligations’.⁵⁸

2.2. *Lessons from Early Rights-Based Climate Change Litigation*

Growing recognition of the ways in which climate change implicates human rights has been significant not only as a driver of greater integration in these previously separate international agendas, but also ‘because it provides a tangible legal

consequences’. Low adaptive capacity – for example, as a result of a lack of resources or other factors of disadvantage – increases vulnerability to climate change impacts: *ibid.*, p. 902.

⁵³ For an apt illustration see UN Office for Disaster Risk Reduction (UNISDR), ‘Sendai Framework for Disaster Risk Reduction, 2015–2030’, UNGA Res. 69/283, 23 June 2015, para. 19(c) (guiding principle), available at: <http://www.unisdr.org/we/coordinate/sendai-framework>.

⁵⁴ See, e.g., OHCHR, ‘Human Rights Must Be Part of any Climate Change Agreement in Paris’, 27 Nov. 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/COP21.aspx>; OHCHR, ‘COP21 – “States’ Human Rights Obligations Encompass Climate Change” – UN Expert’, 3 Dec. 2015, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16836&LangID=E>.

⁵⁵ Paris Agreement, n. 17 above, Preamble, recital 11. See also B. Mayer, ‘Human Rights in the Paris Agreement’ (2016) 6(1–2) *Climate Law*, pp. 109–17.

⁵⁶ *Ibid.*, Arts 7 and 8.

⁵⁷ *Ibid.*, Art. 2.

⁵⁸ ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/31/52, 1 Feb. 2016, para. 22.

framework for analyzing state actions that lead to climate change'.⁵⁹ Looking at climate change through a rights lens can aid in framing proactive strategies to try to pre-empt human harm, as well as responses to climate change-related disasters *ex post*.⁶⁰ Although the implications of climate change for the realization of human rights are increasingly obvious, the more difficult issue that arises is whether the effects of climate change on human rights provide evidence of an actionable rights violation.⁶¹ As highlighted by the OHCHR study, discussed above, claimants in rights-based climate change litigation face several hurdles. These include:

- establishing *causal links* between a country's GHG emissions, or failures in adaptation policies, and specific climate change impacts, which in turn adversely affect human rights;
- *specifically attributing* human rights effects to climate change, especially where climate change also causes other social, economic and political types of harm;
- using predictions of *future* climate change impacts to found claims of human rights violations, which are more normally established after actual harm has occurred;⁶² and
- applying rights protections *extraterritorially* with regard to actions occurring outside the state(s) in which the effects are most acutely felt.⁶³

Early rights-based climate litigation, which preceded decisions such as that in the *Leghari* case, struggled with these obstacles. A good illustration is provided by the 2005 petition filed with the Inter-American Commission on Human Rights (IACHR) on behalf of the Inuit indigenous people of the US and Canada, which was the first international attempt to frame a claim for redress for climate change harm in human rights terms.⁶⁴ The Inuit petition set out in great detail how climate change is already interfering with, and will further compromise, the Inuit's human rights as a result of increasing temperatures and earlier melting of the snow and sea ice on which their culture, identity and economy depend. The petition drew on the human rights protections under the American Declaration on the Rights and Duties of Man,⁶⁵ as

⁵⁹ Hall & Weiss, n. 28 above, p. 311.

⁶⁰ *Ibid.*

⁶¹ Knox, n. 18 above, p. 165.

⁶² This time-scale problem also raises questions about the extent to which current generations can seek remedies for human rights violations that may be visited on future generations as a result of climate change.

⁶³ OHCHR Report, n. 31 above, para. 70. See also S. McInerney-Lankford, 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33(2) *Harvard Environmental Law Review*, pp. 431–7, at 433.

⁶⁴ See Inuit petition, n. 7 above. For discussion see H.M. Osofsky, 'Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights', in R.S. Abate & E.A. Kronk, *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013), pp. 313–38.

⁶⁵ Bogotá (Colombia), Apr. 1948, OAS Res. XXX, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/II.4 Rev. 9 (2003), available at: <http://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm>.

well as other international instruments, including rights to life, health, property, cultural identity and self-determination.⁶⁶

At the heart of the petition was the Inuit's claim that the US – as the largest contributor to global GHG emissions at the time, with limited efforts to reduce emissions under the administration of President George W. Bush – was internationally responsible for rights violations brought about by climate change in the Arctic. The petition sought to establish causal links between acts and omissions of the US government and violation of Inuit human rights through climate change on a number of bases. The petitioners pointed to the scientific consensus on the links between increasing global temperatures and anthropogenic GHG emissions accepted even by the US government,⁶⁷ the role of the US as the largest emitter of GHGs at the time,⁶⁸ its refusal to ratify the Kyoto Protocol⁶⁹ and to introduce domestic measures to control and reduce emissions,⁷⁰ and the fact that the US decision to persist with unregulated emissions of GHGs from its territory was taken in full knowledge of the radical impacts of climate change for the Arctic environment on which the Inuit depend for cultural survival.⁷¹ The petition requested the IACHR to issue a report finding the US responsible for violations of the Inuit's human rights and recommending that the country adopt mandatory measures to limit its GHG emissions and cooperate in global efforts to that end.⁷²

However, in a brief response to the Inuit petition, the IACHR found it was not possible 'at present' to process the complaint. The Commission indicated that 'the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration'.⁷³ As a legal intervention designed to protect the Inuit's human rights and to generate action on climate change, the IACHR petition failed. Yet it still had considerable impact. The Commission agreed to hold a subsequent hearing on the connections between climate change and human rights, which has been identified as a factor that helped to put the issue on the agenda of UN human rights bodies.⁷⁴

⁶⁶ The US is not a party to the American Convention on Human Rights (San José (Costa Rica), 22 Nov. 1969, in force 18 July 1978, available at: <http://www.cidh.org/basicos/English/Basic3.American%20Convention.htm>) so the Inuit petition had to rely on rights articulated in the American Declaration of the Rights and Duties of Man, *ibid.*

⁶⁷ Inuit petition, n. 7 above, Part IV.B.

⁶⁸ *Ibid.*, Part IV.D.

⁶⁹ Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.

⁷⁰ Inuit petition, n. 7 above, Part V.D.

⁷¹ *Ibid.*, pp. 6–7.

⁷² *Ibid.*, Part IX. A range of other proactive measures were also sought, such as for the US to take into account the effects of GHG emissions on the Inuit and Arctic in evaluating and before approving major government actions; to implement a plan for protecting Inuit culture and resources and mitigating harm caused by US GHG emissions; and to implement a plan for adaptation assistance.

⁷³ Quoted in H.M. Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31(2) *American Indian Law Review*, pp. 675–97, at 676, citing a letter from A.E. Dulitzky, Assistant Executive Secretary, Organization of American States, to P. Crowley, Legal Representative, 16 Nov. 2006.

⁷⁴ M. Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33(2) *Harvard Environmental Law Review*, pp. 439–76.

The case also received media coverage, which drew attention to the problems faced by the Inuit.⁷⁵

Despite the lack of formal success achieved by rights-based climate change cases in the past, the enhanced international profile of human rights–climate change linkages over the last decade, together with the growth of a body of jurisprudence on the implications of general environmental degradation and natural disasters for the protection of human rights, has encouraged a continued focus on the possibilities for rights-based claims in climate change litigation.⁷⁶ The following section examines the *Leghari* and *Urgenda* decisions in 2015, as well as other recent cases that have raised rights arguments, in order to evaluate the jurisprudential step forward that they may represent.

3. EMERGING RIGHTS-BASED CLIMATE CHANGE LITIGATION

Climate change is a defining challenge of our time and has led to dramatic alterations in our planet's climate system. For Pakistan, these climatic variations have primarily resulted in heavy floods and droughts, raising serious concerns regarding water and food security. On a legal and constitutional plane this is clarion call [sic] for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.

Leghari v. Federation of Pakistan,
Order of 4 Sept. 2015, Lahore High Court,
Judge Syed Mansoor Ali Shah⁷⁷

The lead-up to and aftermath of the Paris climate change negotiations saw the emergence of a new suite of climate change cases in which petitioners have framed their claims, at least partly, in rights terms. These cases illustrate both a greater willingness on the part of litigants to attempt human rights arguments in a climate context, and also a growing receptivity of courts to this approach. The following sections examine the rights-based arguments advanced in the *Urgenda* and *Leghari* decisions, as well as those in more recent cases in other jurisdictions such as the US, the Philippines, Austria and South Africa. These cases suggest new avenues for rights-based claims to challenge government and corporate climate action, whether as the basis for a finding of rights violation or as a supplement to arguments that seek to establish breach of other legal obligations. While these decisions – all issued by lower-level national courts – represent a trickle rather than a flood, and must each be assessed within the particular socio-legal context in which they arise, they nonetheless point the way to how rights-based climate suits may be successfully framed and

⁷⁵ See, e.g., R. Black, 'Inuit Sue US Over Climate Policy', *BBC News*, 8 Dec. 2005, available at: <http://news.bbc.co.uk/2/hi/science/nature/4511556.stm>; A.C. Revkin, 'Inuit Climate Change Petition Rejected', *The New York Times*, 16 Dec. 2006, available at: http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html?_r=0.

⁷⁶ See, e.g., L. Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22(3) *Journal of Environmental Law*, pp. 391–429; Atapattu, n. 28 above, pp. 266–90; V. Jaimes, 'Climate Change and Human Rights Litigation in Europe and the Americas' (2015) 5(1) *Seattle Journal of Environmental Law*, pp. 165–98.

⁷⁷ N. 2 above.

highlight the strategies that might be deployed to overcome hurdles raised in earlier cases. Our preliminary assessment is that these cases may represent the beginnings of a ‘rights turn’ in climate change litigation that is likely to inspire similar lawsuits in other countries, especially those with similarly framed laws and court access. However, the vast majority of cases around the world are likely to continue to be statutory claims.

3.1. *Urgenda v. The Netherlands*

The *Urgenda* case catapulted to international public attention with the ruling of the Hague District Court on 24 June 2015.⁷⁸ The Court held that the emissions reduction efforts of the Dutch government were inadequate judged against the norm of 25 to 40% for developed countries urged by climate science and international climate policy. The Court ordered the Dutch government to ensure that national GHG emissions by the year 2020 are at least 25% below 1990 levels.⁷⁹ Although an appeal has been lodged against the Court’s decision,⁸⁰ in the interim and given that the 2020 deadline is fast approaching, the Dutch government has indicated that it will implement the District Court ruling.⁸¹

The case before the Hague District Court was brought by *Urgenda*⁸² on its own behalf and on behalf of 886 Dutch citizens who authorized the NGO to act in their stead. *Urgenda* invoked a range of legal bases for its claim, only one of which concerned human rights. Most of the Court’s decision focused on another of *Urgenda*’s arguments – namely, that the Dutch government owed a duty of care to the NGO, to the parties it represented, and to Dutch society more generally, which was breached by the government’s inadequate climate change mitigation policy. *Urgenda* also argued that, through its contribution to global GHG emissions, the Dutch government unlawfully exposed the international community to the risk of dangerous climate change, with the potential for irreversible damage to human health and the environment. The Court ultimately upheld *Urgenda*’s claim that the state’s 2020 emissions reduction target was inadequate judged against the standards of climate science and international climate policy, and that this gave rise to a breach of a duty of care under Dutch law. While the content and scope of this duty of care was the focus of much of the Court’s judgment, additional human rights arguments put by the NGO also played a significant role in the analysis. In particular, the decision

⁷⁸ The *Urgenda* case, n. 4 above, has been discussed in detail in the literature (see, e.g., references at n. 5 above). As a consequence, this analysis concentrates primarily on its relevance for human rights and treats other aspects only briefly.

⁷⁹ *Urgenda*, n. 4 above, paras 4.84–4.86.

⁸⁰ *Urgenda*, ‘Dutch Government to Appeal in Groundbreaking Climate Case’, 1 Sept. 2015, available at: <http://www.urgenda.nl/en/climate-case>. The government’s decision to appeal was made despite calls from the Dutch Parliament and international climate experts to let the lower court decision stand.

⁸¹ Government of the Netherlands, ‘Cabinet Begins Implementation of *Urgenda* Ruling but Will File Appeal’, Press Release, 1 Sept. 2015, available at: <https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal>.

⁸² *Urgenda* is a NGO which provides a ‘platform’ for development of plans and measures to prevent climate change; see *Urgenda* website available at: <http://www.urgenda.nl/en>.

illustrates how such arguments were applied as an interpretative tool that assisted the Court in reaching its ultimate finding regarding the existence of a relevant duty of care and its breach.

The human rights arguments developed by Urgenda drew on the protection of the right to life (Article 2) and the right to home and family life (Article 8) under the European Convention on Human Rights (ECHR) to which the Netherlands is a party.⁸³ While the ECHR does not include an explicit right to a safe or healthy environment, the forms of protection in Articles 2 and 8 have been interpreted repeatedly by the European Court of Human Rights (ECtHR) as extending to situations of threatened environmental harm from hazardous activities and natural disasters.⁸⁴ To constitute a rights violation, the effects of the environmental harm concerned must generally be of a serious and direct nature.⁸⁵ In such cases, the state may be under a positive obligation to take measures to safeguard the rights of individuals from such harm.⁸⁶

Urgenda sought to extend the environmental rights jurisprudence of the ECtHR to the climate change context. It contended that the failure of the state to take adequate measures to safeguard its citizens from climate damage constituted a violation of the rights to life and to respect for home and family life. In this regard, the Urgenda claim paralleled the Inuit petition described in Section 2 above. As in the Inuit claim, the Court in *Urgenda* ultimately did not find that inadequacies in the Dutch climate mitigation policy breached human rights.⁸⁷ The Court ruled that Urgenda, as a legal rather than a natural person, could not be a victim of any breach and hence could not advance a claim of human rights violation on its own behalf. In relation to the 886 individual co-claimants, the Court held that it did not have sufficient information about how their interests were affected to rule on the issue of whether a rights violation had arisen.⁸⁸

While not finding a violation of rights in the case, the Court in *Urgenda* nonetheless indicated that rights arguments remained relevant to its analysis in other ways. In assessing the rights-based claims put forward by Urgenda, the Court adopted a similar approach to that applied in its analysis of the relevance of other international environmental obligations cited by Urgenda as a basis for liability on the part of the Dutch government. The Court found that Urgenda could not rely directly on these obligations to derive a right of action, but that they had a ‘reflex effect’ within national law such that they could be taken into account in applying or

⁸³ Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953 (ECHR), available at <http://www.echr.coe.int/pages/home.aspx?p=basictexts>.

⁸⁴ ECtHR, *Manual on Human Rights and the Environment*, 2nd edn (Council of Europe Publishing, 2012), available at: http://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf. See also J. Verschuuren, ‘Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe’, in W. Scholtz & J. Verschuuren (eds), *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (Edward Elgar, 2015), pp. 363–85.

⁸⁵ ECtHR, *ibid.*, pp. 19 and 45–51.

⁸⁶ *Ibid.*, pp. 51–54.

⁸⁷ *Urgenda*, n. 4 above, para. 4.45.

⁸⁸ *Ibid.*, para. 4.109.

interpreting ‘national law open standards or concepts’.⁸⁹ Similarly, the Court found that the ECHR rights protections invoked by Urgenda, and their interpretation by the ECtHR, could ‘serve as a source of interpretation when detailing and implementing open private-law standards ... such as the unwritten standard of care of Book 6, Section 162 of the Dutch Civil Code’.⁹⁰ The human rights standards held ‘meaning’ for the Court in assessing the question of whether the state had failed to meet its duty of care towards Urgenda.⁹¹ Specifically, they informed the analysis of ‘what degree of discretionary power the State is entitled to in how it exercises the tasks and authorities given to it’ and ‘the minimum degree of care the State is expected to observe’.⁹²

The Court’s approach to rights-based claims in the case might be summarized as that of using human rights as an interpretative tool in analyzing Urgenda’s primary contention of breach of a duty of care. Exactly how human rights are to be used in this way was not made clear by the Court, although the judgment offers a few clues. For instance, at several points in its findings the Court described climate change in terms which referenced its impacts on human communities: a ‘highly hazardous situation for man and the environment’,⁹³ ‘a global hazard that could result in an impaired living climate in the Netherlands’,⁹⁴ and a problem with ‘serious consequences for man and the environment, both in the Netherlands and abroad’.⁹⁵ The nature and the extent of the damage ensuing from climate change were also factors taken into account by the Court in determining whether the state exercised the due standard of care through its current climate policy.⁹⁶ It held:

If, and this is the case here, there is a high risk of dangerous climate change with severe and life-threatening consequences for man and the environment, the State has the obligation to protect its citizens from it by taking appropriate and effective measures. For this approach, it can also rely on the aforementioned jurisprudence of the ECtHR.⁹⁷

Arguably, the Court also took human rights into account in judging between the adequacy of mitigation and adaptation measures as a response to the risks posed by climate change. Its conclusion, after reviewing the available scientific evidence, was that mitigation was ‘vital for preventing dangerous climate change’ as adaptation measures would ‘not be sufficient to protect citizens against the aforementioned consequences [of climate change] in the long term. The only effective remedy against hazardous climate change is to reduce the emission of greenhouse gases’.⁹⁸

⁸⁹ *Ibid.*, paras 4.43 and 4.46.

⁹⁰ *Ibid.*, para. 4.46.

⁹¹ *Ibid.*, para. 4.52.

⁹² *Ibid.*

⁹³ *Ibid.*, para. 4.18.

⁹⁴ *Ibid.*, para. 4.55.

⁹⁵ *Ibid.*, para. 4.65.

⁹⁶ *Ibid.*, para. 4.63.

⁹⁷ *Ibid.*, para. 4.74.

⁹⁸ *Ibid.*, para. 4.75.

3.2. Leghari v. Pakistan

Compared with the media storm that followed in the wake of the *Urgenda* ruling, the decision of the Lahore High Court in Pakistan in the *Leghari* case caused barely a ripple.⁹⁹ The ruling of the Lahore High Court, however, is no less innovative and is potentially more transformative than the decision in *Urgenda*. Unlike the *Urgenda* judgment, the *Leghari* case represents a successful use of rights arguments as the legal foundation of a climate change suit. Moreover, its focus on government inaction to address adaptation challenges ties in far more closely with the human consequences of climate change than the technical discussion of carbon budgets and emissions targets that dominated the *Urgenda* hearing. Building adaptive capacity and reducing vulnerability to climate change is also generally regarded as a national and local government responsibility, with failures to take adaptation measures more clearly linked to harm to the nation's populace. These features of the *Leghari* case point to its potential as a model for future rights-based, adaptation-focused litigation, although whether courts in other jurisdictions would be as receptive to such claims as Pakistan's traditionally activist judiciary is more open to question.¹⁰⁰

The petitioner in the case, Mr Ashgar Leghari, was described in the orders of the Court as an 'agriculturalist' with a livelihood dependent on farming.¹⁰¹ Leghari brought his case before the Court using public interest litigation – a concept well-established in Pakistani jurisprudence as providing an exception to common law *locus standi* rules in order to allow the enforcement of the fundamental rights protected under Pakistan's Constitution in respect of a group or a class of people, such as the poor or other vulnerable groups.¹⁰² Leghari submitted that climate change posed a serious threat to water, food, and energy security in Pakistan, and hence offended fundamental rights safeguarded under Pakistan's 1973 Constitution, including the right to life (Article 9), the right to dignity of person and privacy of home (Article 14), and the right to property (Article 23).¹⁰³

⁹⁹ For some of the limited reporting of the case see, e.g., J. Wentz, 'Lahore High Court Orders Pakistan to Act on Climate Change', 26 Sept. 2015, *Climate Law Blog*, Sabin Center for Climate Change Law, available at: <http://blogs.law.columbia.edu/climatechange/2015/09/26/lahore-high-court-orders-pakistan-to-act-on-climate-change/>; M. Mehra, 'Pakistan Ordered to Enforce Climate Law by Lahore Court', 20 Sept. 2015, available at: <http://www.climatechangenews.com/2015/09/20/pakistan-ordered-to-enforce-climate-law-by-lahore-court/>; A. Gill, 'Farmer Sues Pakistan's Government to Demand Action on Climate Change', *Reuters*, 13 Nov. 2015, available at: <http://www.reuters.com/article/pakistan-climatechange-lawsuit-idUSL8N1383YJ20151113>. See also Gerrard, n. 8 above.

¹⁰⁰ Judicial activism has a considerable history in Pakistan and other South Asian nations, such as India and Bangladesh, but is regarded as a mixed blessing given the dangers of overstepping boundaries between the judiciary and the executive. See further M. Lau, 'Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in Pakistan', in A. Boyle & M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996), pp. 285–302. For a recent analysis of socio-legal scholarship on South Asian judicial activism, particularly in the area of Muslim family law, see L. Holden (ed.), *Legal Pluralism and Governance in South Asia and Diasporas* (Routledge, 2015).

¹⁰¹ *Leghari*, n. 2 above, Order of 4 Sept. 2015, para. 1.

¹⁰² See A.R. Alam (Advocate, Supreme Court of Pakistan), 'Public Interest Litigation and the Role of the Judiciary', available at: <http://www.supremecourt.gov.pk/ijc/Articles/17/2.pdf>; F. Hussain, 'Public Interest Litigation', Sustainable Development Policy Institute, *Working Paper Series* #5, 1993, available at: <https://www.sdpi.org/publications/files/W5-Public%20Interest%20Litigation.pdf>.

¹⁰³ For a discussion of the evolution of fundamental rights and public interest litigation in Pakistan, including the text of the fundamental rights provisions of the Constitution in an Appendix,

The action of the state complained of in the case was inadequate implementation of the country's National Climate Change Policy 2012¹⁰⁴ and supporting Framework for Implementation of Climate Change Policy (2014–2030).¹⁰⁵ Given Pakistan's high vulnerability to climate change impacts – as evidenced by the devastating floods of 2010 and 2011 – the focus of the National Climate Change Policy is adaptation, including vulnerabilities across various sectors such as water, agriculture and forestry, and appropriate adaptation measures to address these vulnerabilities.¹⁰⁶ Adaptation and building climate resilience is similarly the focus of the Framework for Implementation concluded in November 2013. This document categorizes and prioritizes proposed adaptation measures to be taken by federal government departments and provincial and local authorities, with the most urgent items designated as 'priority actions' to be delivered 'within 2 years' (by 2016).¹⁰⁷ However, as the Joint Secretary of the newly reconstituted Ministry of Climate Change admitted frankly to the Court during the proceedings, despite various reminders to government departments to report on their progress in implementing adaptation measures, by and large the response was not positive and indicated a lack of awareness and sensitivity to the issue.¹⁰⁸ Representatives of various ministries – including those with responsibility for water and flood management, planning, forestry, agriculture, and disaster management – also made submissions to the Court, but these 'could not satisfactorily show that adaptation measures as listed in the Framework were seriously afoot'.¹⁰⁹

In contrast to the 'delay and lethargy' of state agencies, the Lahore High Court in its order of 4 September 2015 saw climate change as 'a defining challenge' and a 'clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court'.¹¹⁰ According to the Court, the failure of Pakistani governmental authorities to implement the national climate policy framework in a timely fashion 'offends the fundamental rights of the citizens which need to be safeguarded'.¹¹¹ It identified various rights and principles that supported this conclusion, including:

- '[f]undamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14);' and

see M.A. Munir, 'Public Interest Litigation in Supreme Court of Pakistan', 4 Aug. 2007, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984583.

¹⁰⁴ Government of Pakistan, National Climate Change Policy, 12 Sept. 2012, available at: http://www.pk.undp.org/content/pakistan/en/home/library/hiv_aids/publication_1.html (National Climate Change Policy).

¹⁰⁵ Government of Pakistan, Climate Change Division, Framework for Implementation of Climate Change Policy (2014–2030), Nov. 2013, available at: <http://www.pk.undp.org/content/dam/pakistan/docs/Environment%20&%20Climate%20Change/Framework%20for%20Implementation%20of%20CC%20Policy.pdf> (Framework for Implementation).

¹⁰⁶ National Climate Change Policy, n. 104 above, Preface.

¹⁰⁷ Framework for Implementation, n. 105 above, Schedule.

¹⁰⁸ *Leghari*, n. 2 above, Order of 4 Sept. 2015, para. 3.

¹⁰⁹ *Ibid.*, para. 5.

¹¹⁰ *Ibid.*, paras 6 and 8.

¹¹¹ *Ibid.*, para. 8.

- [c]onstitutional principles of democracy, equality, social, economic and political justice that included ‘within their ambit and commitment’ the international environmental principles of sustainable development, the precautionary principle, environmental impact assessment, inter- and intragenerational equity and the public trust doctrine.¹¹²

The Court also explicitly – and more fully than has been seen in earlier climate change cases around the world – identified a principle of climate change justice. Past traditions of environmental justice, it said, which were ‘largely localized’, needed to move to climate change justice in recognition of this ‘more urgent and overpowering’ problem.¹¹³ The Court saw fundamental rights as lying ‘at the foundation of these two overlapping justice systems’.¹¹⁴

Taking an activist approach, which has become a feature of many judicial opinions in Pakistan and neighbouring India,¹¹⁵ the Lahore High Court not only found breaches of legal provisions regarding fundamental rights but also went on to design judicially administered machinery for remedying those breaches.¹¹⁶ It held that:

[the r]ight to life, right to human dignity, right to property and right to information under articles 9, 14, 23 and 19A of the Constitution, read with the constitutional values of political, economic and social justice, provide the necessary judicial toolkit to address and monitor the Government’s response to climate change.¹¹⁷

The Court order of 4 September 2015 directed relevant ministries, departments, and authorities to nominate a climate focal person to liaise closely with the Ministry of Climate Change to ensure implementation of the Framework and, out of the priority actions listed in the Framework, to present a list of adaptation action points by the end of 2015.¹¹⁸ Further, to assist the Court in monitoring the departments’ progress in implementing the Framework, the Court ordered the establishment of an expert climate change commission comprising representatives of the key government ministries, NGOs, and technical experts.¹¹⁹

A mere ten days later, on 14 September 2015, Judge Syed Mansoor Ali Shah of the Lahore High Court had before him, as ordered, 18 representatives from federal and provincial authorities and a list of their nominated ‘focal persons’ for liaison with the

¹¹² Ibid., para. 7.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ See L. Rajamani & S. Ghosh, ‘India’, in R. Lord et al. (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012), pp. 139–77, at 147–56 (focusing on the situation in India, which has influenced Pakistani traditions).

¹¹⁶ On judicial remedies entailing court supervision of executive branch implementation as a form of judicial policy making, argued to be a standard and legitimate function of courts, see M. Feeley & E.L. Rubin, *Judicial Policy Making and the Modern State* (Cambridge University Press, 1998); E.L. Rubin & M. Feeley, ‘Judicial Policy Making and Litigation against the Government’ (2003) 5(3) *University of Pennsylvania Journal of Constitutional Law*, pp. 617–64.

¹¹⁷ *Leghari*, n. 2 above, Order of 4 Sept. 2015, para. 7.

¹¹⁸ Ibid., para. 8.

¹¹⁹ Ibid., para. 8iii.

Ministry of Climate Change. The Court order of 14 September reiterated that ‘climate change is no longer a distant threat’ for Pakistan,¹²⁰ but the judge opined, after listening to the government representatives appearing before him, that ‘no material exercise has been done on the ground to implement the Framework’.¹²¹ The Court consequently decided to establish a Climate Change Commission to ‘expedite the matter and to effectively implement the fundamental rights of the people of Punjab’.¹²² This Commission will have the responsibility for selecting and implementing adaptation priorities in a way that respects fundamental rights of citizens to be safeguarded from climate harms that affect those rights.¹²³

3.3 Other Recent Domestic Climate Litigation Invoking Rights Arguments

A number of other recent, domestic climate change cases have advanced rights arguments, further reinforcing the jurisprudential trend initiated by the *Urgenda* and *Leghari* decisions. Rights have been invoked in one of two ways, which parallel the approaches taken by the petitioners in *Urgenda* and *Leghari*. In the *Juliana* case in the US, and in a complaint before the Commission on Human Rights in the Philippines, the petitioners argue that the failure of the defendants to reduce GHG emissions adequately, and hence avoid the worst effects of climate change, is in breach of the petitioners’ constitutional rights. Neither of these actions has reached the merits phase, which makes it difficult to predict how decision makers might ultimately rule, although in the US context commentators have highlighted the numerous obstacles to a successful constitutional rights claim.¹²⁴ In other climate-related cases recently decided by courts in Austria and South Africa, rights arguments were deployed as a factor in evaluating other legal claims. Rulings in the plaintiffs’ favour in both cases provide further evidence of the growing receptivity of courts of rights arguments in a climate context, particularly where rights are used as an interpretative tool to analyze the operation of other legal obligations.

Allegations of Rights Violations: US and Philippines Cases

The case of *Juliana v. United States*¹²⁵ represents a novel iteration in a wave of US lawsuits brought in the last few years based on arguments that government failures to adequately constrain GHG emissions breach a public trust obligation to safeguard

¹²⁰ *Leghari*, n. 2 above, Order of 14 Sept. 2015, para. 3.

¹²¹ *Ibid.*, para. 11; see also World Wildlife Fund (WWF)-Pakistan and LUMS, ‘Climate Change Adaptation in the Indus Ecoregion: A Micro-Econometric Study of the Determinants, Impact and Cost Effectiveness of Adaptation Strategies’, 15 Apr. 2015, available at: http://www.wwf-pakistan.org/newsroom/150415_jums.php#sthash.yllmCCR.V.dpuf.

¹²² *Leghari*, n. 2 above, Order of 14 Sept. 2015, para. 11. See also A. Riaz, ‘LHC Forms Climate Change Commission’, *The News*, 17 Sept. 2015, available at: <https://www.thenews.com.pk/print/62925-lhc-forms-climate-change-commission>.

¹²³ A.R. Alam, ‘Pakistan Court Orders Government to Enforce Climate Law’, *thethirdpole.net*, 25 Sept. 2015, available at: <https://www.thethirdpole.net/2015/09/24/pakistan-court-orders-government-to-enforce-climate-law>.

¹²⁴ Wentz, n. 21 above; see also M.O. Berger, ‘Teens Challenge US Government for Not Protecting Them from Climate Change’, *The Guardian*, 10 Mar. 2016, available at: <https://www.theguardian.com/us-news/2016/mar/09/climate-change-teens-sue-us-government-failing-protect>.

¹²⁵ N. 10 above.

natural resources in the public interest.¹²⁶ The organizing force behind this litigation is Our Children’s Trust, a group formed ‘to elevat[e] the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and future generations’.¹²⁷ In the *Juliana* case against the US government, public trust arguments are again being advanced by the youth plaintiffs involved, but this time are coupled with claims that the defendants’ actions in failing to adequately mitigate climate change violate the substantive due process rights of the petitioners to life, liberty and property, as safeguarded in the US Constitution.¹²⁸ The plaintiffs are seeking a declaration that their constitutional and public trust rights have been violated, and an order enjoining the defendants to refrain from violating those rights and directing them to develop a plan to reduce carbon dioxide (CO₂) emissions.¹²⁹

Decisions issued so far in the *Juliana* case do not engage directly with the merits of the constitutional rights claims. On 10 November 2016, Judge Ann Aiken of the US District Court for the District of Oregon issued an opinion and order rejecting the motions of the US government and fossil fuel industry to dismiss the action. This preliminary decision confirmed that the plaintiffs have a justiciable case and standing to pursue their case at trial. A threshold question for the court was whether there was a fundamental liberty right at issue in the claim, which in US constitutional law on due process rights determines the applicable level of judicial scrutiny. A fundamental right can be another enumerated constitutional right or an unenumerated right deeply rooted in history or tradition, or fundamental to the scheme of ordered liberty, the understanding of which may change over time. In her judgment, Judge Aiken determined the existence of a new fundamental right: ‘the right to a climate system capable of sustaining human life’. Her opinion noted that ‘a stable climate system is quite literally the foundation “of society, without which there would be neither civilization nor progress.”’¹³⁰ Accordingly, the Court found that:

where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation.¹³¹

¹²⁶ The public trust doctrine treats certain natural resources as owned by the government, which has trust obligations to the public to maintain them for public use and benefit. The specific manifestations of this doctrine in the US vary from state to state, based on their common law traditions, and what states also have incorporated into their constitutional or statutory law. For full details of US public trust climate lawsuits see M. Gerrard et al., n. 16 above, ‘U.S. Climate Change Litigation Chart’. See also M.C. Wood, ‘Atmospheric Trust Litigation Across the World’, in K. Coghill, C. Sampford & T. Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2012), pp. 99–164.

¹²⁷ Our Children’s Trust, ‘Mission Statement’, available at: <https://www.ourchildrenstrust.org/mission-statement>.

¹²⁸ US Constitution, Amendment V.

¹²⁹ For a review of the potential impact of this case, see M. Blumm & M. Wood, ‘No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine’ (2017) 67(1) *American University Law Review* (forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954661.

¹³⁰ *Juliana*, n. 10 above, p. 32, quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888) and referring also to the Philippines case of *Minors Oposa v. Secretary of the Department of Environmental & Natural Resources*, G.R. No. 101083, 33 ILM 173, at 187–8 (S.C., 30 July 1993).

¹³¹ *Juliana*, n. 10, p. 33.

In March 2017, the US government (now under the administration of President Trump) and fossil fuel industry intervenors requested – in an unusual interlocutory appeal – that the US District Court for the District of Oregon allow the Ninth Circuit Court of Appeals the opportunity to review Judge Aiken’s order before the trial takes place. The defendants also requested that the appeal be expedited, and that the trial be put on hold if the appeal is granted. The *Juliana* plaintiffs resisted this motion, arguing that any delay in getting to trial would irreversibly prejudice the youth in securing and protecting their fundamental constitutional rights. In a decision issued on 1 May 2017, US Magistrate Judge Thomas Coffin recommended the denial of the defendants’ requests.¹³² In his findings and recommendations, the Judge indicated the potential for this landmark case to:

define the contours of plaintiffs’ constitutional rights to life and a habitable atmosphere and climate, declare the levels of atmospheric CO₂ which will violate their rights, determine whether certain government actions in the past and now have and are contributing to or causing the constitutional harm to plaintiffs, and direct the federal defendants to prepare and implement a national plan which would stabilize the climate system and remedy the violation of plaintiffs rights.¹³³

His recommendations and findings also cautioned that the defendants and intervenors ‘underestimate the nature of the danger allegedly created by their actions’,¹³⁴ which would be better fleshed out by the taking of evidence in trial. This ruling, although open to further review, would seem to lessen considerably the chances of the defendants’ interlocutory appeal succeeding, and pave the way for the case to proceed to trial.¹³⁵

Like the *Juliana* case and the *Leghari* decision in Pakistan, the complaint currently being considered by the Commission on Human Rights in the Philippines alleges violations of rights protections as a result of climate change-linked extreme weather disasters to which the defendants’ actions have contributed.¹³⁶ The petition, filed by Greenpeace together with groups and individuals in the Philippines, is unusual in targeting private actors – the 50 largest fossil fuel companies known as ‘carbon majors’.¹³⁷ It calls for ‘a comprehensive investigation into the responsibility of the

¹³² *Juliana v. United States*, No. 6:15-cv-01517-TC, (D.Or., 1 May 2017) (Coffin, Mag. J.), available at: <https://static1.squarespace.com/static/571d109b04426270152febe0/t/590793bb6b8f5bc7d71525da/1493668796765/17.05.01.Coffin+Order+Recommending+Denial+of+Interlocutory+Appeal.pdf>.

¹³³ *Ibid.*, p. 8.

¹³⁴ *Ibid.*, p. 11.

¹³⁵ See Our Children’s Trust, Media Release, ‘Judge Coffin to Trump Administration: Appeal Now “Would Put Cart Before the Horse”’, 1 May 2017, available at: <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5907a22cd2b8574b00089352/1493672493237/17.05.01+Coffin%27s+Order+Recommending+Denial+of+Interlocutory+Appeal+PR.pdf>. In a subsequent decision on 28 June 2017, Judge Coffin set a trial date of 8 Feb. 2018. However, in decisions issued on 25 and 28 July 2017, the 9th Circuit Court of Appeals – responding to the Trump administration’s petition for a writ of mandamus seeking review of Judge Aiken’s Nov. 2016 decision – issued a temporary stay on the proceedings and ordered the plaintiffs to respond within 30 days to the petition. For details of the procedural developments in the case see Our Children’s Trust, ‘Details of Proceedings’, available at: <https://www.ourchildrenstrust.org/federal-proceedings>.

¹³⁶ Greenpeace, n. 9 above.

¹³⁷ R. Heede, ‘Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010’ (2014) 122(1) *Climatic Change*, pp. 229–41.

Carbon Majors for violations or threats of violations of human rights resulting from the impacts of climate change,¹³⁸ drawing on principles articulated in the UN Guiding Principles on Business and Human Rights.¹³⁹ The petition also alleges responsibility on the part of states where carbon majors are incorporated on the basis that such countries have a customary international law duty to prevent harm by ensuring that these companies refrain from the activities that interfere with the rights of Filipinos.¹⁴⁰ The petition was accepted by the Philippines Commission on Human Rights in December 2015 during the Paris Agreement negotiations. The Commission subsequently requested the companies named in the petition to respond by the end of September 2016, which resulted in some fossil fuel companies – such as Exxon, Shell and Peabody – challenging the Commission’s jurisdiction and filing motions to dismiss the complaint.¹⁴¹ While these jurisdictional challenges are ongoing, the Commission has nonetheless moved forward with a national inquiry, which is significant as this procedure is only used (rarely) for matters of great importance to the country and its citizens.¹⁴²

Rights as an Interpretative Tool: Austrian and South African Cases

Recent decisions of courts in Austria and South Africa illustrate an alternative pathway for rights arguments in climate change litigation, which bears some similarities to the use made of rights claims in the *Urgenda* case. In both cases, the plaintiffs challenged authorizations granted for emissions-intensive projects. In the Austrian case, at issue was the Lower Austrian government’s approval for a third runway at the Vienna-Schwechat international airport. In the South African case, the decision challenged was that of the Minister of Environmental Affairs to issue an environmental authorization for a new coal-fired power station before completion and consideration of a climate change impact assessment as part of the overall environmental impact assessment (EIA) for the project. Rights in both these cases were advanced as a supplement to the primary claims focused on government compliance with statutory obligations.

In the *Third Runway at Vienna International Airport* case,¹⁴³ the rights provisions argued before Austria’s Federal Administrative Court (*Bundesverwaltungsgericht*) included Article 37 of the Charter of Fundamental Rights of the European Union (CFREU), which calls for a ‘high level of environmental protection and the improvement of the quality of the environment’ to be integrated into EU policies and

¹³⁸ Greenpeace, n. 9 above, p. 5.

¹³⁹ UN OHCHR, ‘Guiding Principles on Business and Human Rights’, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁴⁰ Greenpeace, n. 9 above, p. 28.

¹⁴¹ For the companies’ responses to this request see Greenpeace Philippines, ‘The Climate Change and Human Rights Petition’, 28 July 2016, available at: <http://www.greenpeace.org/seasia/ph/press/releases/Worlds-largest-carbon-producers-ordered-to-respond-to-allegations-of-human-rights-abuses-from-climate-change/The-Climate-Change-and-Human-Rights-Petition>.

¹⁴² P. Manongdo, ‘Landmark Human Rights Case Against World’s Biggest Fossil Fuel Firms Pushes On’, *Eco-Business*, 13 Dec. 2016, available at: <http://www.eco-business.com/news/landmark-human-rights-case-against-worlds-biggest-fossil-fuel-firms-pushes-on>.

¹⁴³ *Third Runway at Vienna International Airport*, n. 11 above.

‘ensured in accordance with the principle of sustainable development’;¹⁴⁴ provisions of the Austrian Federal Constitution committing the state to the principle of sustainability and to comprehensive environmental protection;¹⁴⁵ and provisions of the Lower Austrian Provincial Constitution, which contain state commitments to ensuring adequate living conditions and which make specific reference to environmental and climate protection.¹⁴⁶

The Court held that these rights provisions, directed primarily at legislators, were relevant as an interpretive aid in seeking to interpret undefined legislative requirements such as the notion of the ‘public interest’.¹⁴⁷ In evaluating where the balance of public interest lay in respect of the runway application, the Court weighed potential public benefits (such as accommodating increased flights, promoting economic development and job creation) against the public interest in avoiding negative impacts, including environmental harm and growth in GHG emissions contributing to climate change. The Court noted that climate change in Austria is already under way and will have broad, major impacts on people, animals, plants and the entire environment. Ultimately it ruled that the construction and operation of a third runway at the Vienna international airport would be contrary to the public interest in environmental protection, and climate protection in particular.

In the South African case, *Earthlife Africa Johannesburg v. Minister for Environmental Affairs and Others*,¹⁴⁸ Earthlife’s arguments centred on the contention that, on the proper interpretation of the EIA legislation at issue, a climate change impact assessment was mandatory before issue of an environmental authorization for a new coal-fired power station, despite the lack of an express legislative requirement for such an assessment.¹⁴⁹ In support of this construction, the NGO contended that the relevant legislative requirement should be interpreted in the light of various domestic and international instruments, including section 24 of the South African Constitution, which enshrines a right to environment. Section 24 provides:

Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.¹⁵⁰

Although the *Earthlife* decision turned largely on the interpretation of the relevant statutory provisions in the course of judicial review, the Court also noted its

¹⁴⁴ [2012] OJ C 326/391, 26 Oct. 2012, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹⁴⁵ Austrian Federal Constitution, BGBl. I No. 111/2013, Art. 73, ss. 1–3.

¹⁴⁶ Lower Austria LV 1979, LGBl. 0001-0 idF. LGBl. 0001-21, Art. 4(2) and (3).

¹⁴⁷ This analysis is derived from the unofficial translation of the judgment, n. 11 above.

¹⁴⁸ *Earthlife Africa Johannesburg*, n. 12 above.

¹⁴⁹ The statutory provision at issue in the case was s. 240 of the National Environmental Management Act, which sets out relevant factors for consideration before grant of an environmental authorization.

¹⁵⁰ Constitution of the Republic of South Africa, 1996, s. 24.

constitutional obligation, when interpreting legislation that implicates or affects rights protected in the Constitution's Bill of Rights, to promote the purport, spirit and objects of the Bill of Rights in the interpretation process.¹⁵¹

The Court commented:

Section 24 recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures to protect the environment 'for the benefit of present and future generations' and hence adequate consideration of climate change. Short-term needs must be evaluated and weighed against long-term consequences.¹⁵²

Beyond this paragraph, the Court did not explain specifically the significance of the constitutional environmental right for its analysis. Instead, after referring to the right together with relevant legislative obligations, policy requirements and other obligations such as South Africa's international commitments under climate change treaties, it concluded:

[T]he legislative and policy scheme and framework overwhelming[ly] support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation.¹⁵³

While by no means a direct application of the South African environmental rights provision, this decision suggests that rights arguments were at least a relevant part of the 'extra-statutory context' taken into account by the Court in reaching its conclusion that an environmental authorization for a new coal-fired power station could not be issued without first having a proper assessment of the project's climate change impacts.

4. PROSPECTS FOR A RIGHTS TURN?

We are standing for what is necessary to do. Ten years ago we would not have tried this but I think things are changing ... it's more clear to a broad group we are heading to a catastrophe.

Marjan Minnesma, CEO, Urgenda¹⁵⁴

¹⁵¹ *Earthlife Africa Johannesburg*, n. 12 above, para. 81, referring to s. 39(2) of the Constitution.

¹⁵² *Ibid.*, para. 82.

¹⁵³ *Ibid.*, para. 91.

¹⁵⁴ J. Queally, "Lawsuit Out of Love" as Unprecedented Legal Action Accuses Dutch Government of Failing on Climate', *Common Dreams*, 14 Apr. 2015, available at: <http://www.commondreams.org/news/2015/04/14/lawsuit-out-of-love-unprecedented-legal-action-accuses-dutch-government-failing-climate>.

The decisions surveyed in the previous section provide an early indication of the potential power and effectiveness of rights arguments in climate change litigation in an era where human rights–climate linkages are increasingly recognized at both national and international levels. Are these cases just interesting one-offs or the beginnings of a novel transnational climate change jurisprudence that gives a significant role to rights-based claims in efforts to address climate change? As a scientific matter, six cases against a backdrop of hundreds of climate change cases brought in the last two decades are hardly statistically significant.¹⁵⁵ In addition, each of these cases originated in a very different socio-legal context, which inevitably shaped the resulting decisions. However, which arguments gain prominence in strategic litigation efforts, such as those ongoing in the climate sphere, is often based less on science than on litigators’ perception of what is currently ‘fashionable’ and what might gain favour in judicial eyes at any particular moment.¹⁵⁶ Moreover, the foundation for such cases will only become greater as climate change impacts worsen, especially if the US Trump administration’s decision to cease implementation of, and withdraw from, the Paris Agreement slows the pace of implementation and efforts to increase ambition.¹⁵⁷

With these caveats in mind, in this section we explore possibilities for future rights-based climate litigation globally, based on the cases that have emerged so far. Our focus is on those forums and jurisdictions where the available law and court structures would facilitate rights arguments in a climate change context, and where judiciaries are more likely to be receptive to these arguments. The most promising possibilities in this regard include, firstly, domestic constitutional rights litigation challenging government mitigation or adaptation failures; secondly, cases in European jurisdictions following the *Urgenda* model of using rights to question the adequacy of emissions reduction targets; and, thirdly, possibilities for human rights climate change claims under regional human rights treaties operating outside Europe.

4.1. *Constitutional Rights Claims in a Climate Context*

For climate advocates in countries with forms of constitutional rights protection that extend to safeguarding environmental health, the *Leghari* decision in Pakistan, as well as emerging cases in other jurisdictions, may serve as inspiration to explore options for enhancing adaptation (and mitigation) action by their home states using rights-based claims. The nature of constitutional rights protection and its

¹⁵⁵ Nachmany et al. (n. 13 above, p. 13) record 850 cases across 26 jurisdictions with 600 of those cases in the US; 78% of cases involved administrative challenges to projects such as coal-fired power stations (ibid., pp. 14–5).

¹⁵⁶ Skype interview for Australian Research Council project, ‘Transition to a Clean Energy Future: The Role of Climate Change Litigation in Shaping our Regulatory Path’, Participant 20, 11 Apr. 2013. See also A. Durbach et al., ‘Public Interest Litigation: Making the Case in Australia’ (2013) 38(4) *Alternative Law Journal*, pp. 219–23.

¹⁵⁷ The White House, Office of the Press Secretary, ‘Statement by President Trump on the Paris Climate Accord’, 1 June 2017, available at: <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>.

enforceability vary markedly between countries,¹⁵⁸ as does the extent to which they mirror human rights protection under international treaty law.¹⁵⁹ Nonetheless, both the *Leghari* case and the ongoing litigation in the *Juliana* case illustrate the ways in which non-environmentally focused rights protection – such as rights to life, health, property and privacy (or family) – may be extended to encompass claims based on impacts brought about by climate change.

Alone, the existence of a constitutional right to a healthy environment (or safe climate)¹⁶⁰ is an insufficient indicator of the likely success of deploying rights arguments in climate litigation. Other factors relevant to the success of such arguments might include, firstly, the existence of legislation or procedures that facilitate the bringing of rights claims; and, secondly, existing case law or judicial practice that indicates receptivity towards novel argumentation, especially on environmental or other public interest issues. Applying these criteria, a 2014 report of the Environmental Law Alliance identified India, Brazil, Colombia, Ecuador, Kenya and Mexico as among potential hotspots for constitutional rights-based claims for climate damage.¹⁶¹ Moreover, some countries – such as Pakistan, India and the Philippines – have an established track record of judicial activism in public interest environmental cases that could pave the way for liberal interpretations of constitutional rights protection in a climate context (as occurred in *Leghari*).¹⁶²

For potential litigants considering these types of claim, the most straightforward application of constitutional rights protection in a climate change context is likely to be to address governmental failures with respect to adaptation.¹⁶³ This was the

¹⁵⁸ See D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012); and J.R. May & E. Daly, 'Constitutional Environmental Rights Worldwide', in J.R. May (ed.), *Principles of Constitutional Environmental Law* (ABA Book Publishing, 2011), pp. 329–57.

¹⁵⁹ Constitutional or civil rights protection often draws on formulations of human rights in international law. The principal difference between constitutional/civil rights and human rights is that the latter are generally held to be fundamental rights intrinsic to human existence whereas the former are rights that are granted to citizens of states – or, as civil rights activist Malcolm X put it: 'Civil rights means you're asking Uncle Sam to treat you right. Human rights are something you were born with. Human rights are your God-given rights. Human rights are the rights that are recognized by all nations of this earth': Malcolm X, *The Ballot or the Bullet, Social Justice Speeches*, 3 Apr. 1964, available at: http://www.edchange.org/multicultural/speeches/malcolm_x_ballot.html.

¹⁶⁰ Examples include the Constitution of South Africa, s. 24; Constitution of Kenya, Ch. IV, Pt II, Art. 42; Constitución de la República del Ecuador 2008, Title II, Ch. II, s. II, Arts 14 and 15; and Constitution of the Tunisian Republic (2014), Title II, Art. 45. For an excellent overview of these provisions, see R. O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) *Transnational Environmental Law*, p. 435–62. *EnviroRightsMap.org* also provides a useful resource mapping countries with environmental rights protection, available at: <http://enviroRightsMap.org>.

¹⁶¹ Environmental Law Alliance Worldwide, 'Holding Corporations Accountable for Damaging the Climate', 2014, available at: <https://www.elaw.org/system/files/elaw.climate.litigation.report.pdf>. The report focuses on good country candidates for rights-based litigation against corporate actors for climate harm. The scope for claims against states is likely to be broader.

¹⁶² On India see Rajamani & Ghosh, n. 115 above. See also E.B. Ristorph, 'The Role of Philippine Courts in Establishing the Environmental Rule of Law' (2012) 42(9) *Environmental Law Reporter*, pp. 10866–87.

¹⁶³ It is possible that the utility of bringing an adaptation-focused rights claim in any particular case could depend upon the targeted government being one with some capacity to devote resources to climate adaptation and resilience building, and where the adaptation measures have the potential to ameliorate the kinds of climate risk faced by the population.

case in *Leghari*, where inadequate action to prepare for climate change impacts led to a situation that was found directly to affect rights. Rights claims focused on adaptation have the advantage that the causal link between governmental action (or inaction) and climate change impacts on citizens that implicate their rights is generally easier to establish than in cases involving failure to mitigate. Moreover, issues of extraterritoriality do not arise, given that petitioners would be taking action against their own governments to force greater adaptation efforts in order to safeguard their rights.

By contrast, the constitutional rights-based climate claims brought so far to address mitigation failures – such as the Austrian *Third Runway* case, the *Earthlife Africa* case, the Philippines petition and the *Juliana* case – illustrate the more complex task that confronts claimants in developing rights arguments as part of a challenge to emissions-intensive projects or policies. Here, courts may also have to weigh competing arguments about the economic benefits of GHG-producing activities (for example, for economic development or energy security), the global nature of the climate change problem, and the extent to which a particular project or actor contributes to that larger problem. In these circumstances, use of rights arguments as a supplementary tool to buttress other legal claims may be a more successful strategy than seeking to establish a violation of rights protection.

4.2. *Replicating the Urgenda Model in Other European Countries*

The *Urgenda* decision has spurred much debate about the potential for similar litigation in other countries.¹⁶⁴ The *Urgenda* case itself followed arguments set out in Roger Cox's book, *Revolution Justified*, designed to hold governments accountable for inadequate action on climate change. The work focused on human rights pathways and options for establishing a duty of care.¹⁶⁵ It was written with a view to initiating other cases similar to the *Urgenda* lawsuit.

The possibility for replicating the human rights arguments put forward in *Urgenda* in a new wave of litigation is geographically limited to other European countries that are parties to the regional ECHR. Similar claims are apparently being pursued in at least one *Urgenda*-inspired case in Belgium.¹⁶⁶ The potential for successful legal

¹⁶⁴ See J. Lambrecht & C. Ituarte-Lima, 'Legal Innovation in National Courts for Planetary Challenges: *Urgenda v State of the Netherlands*' (2016) 18(1) *Environmental Law Review*, pp. 57–64; R. Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34(2) *Journal of Energy and Natural Resources Law*, pp. 143–63; S. Roy & E. Woerdman, 'Situating *Urgenda v The Netherlands* within Comparative Climate Change Litigation' (2016) 34(2) *Journal of Energy and Natural Resources Law*, pp. 165–89; M. Loth, 'Climate Change Liability After All: A Dutch Landmark Case' (2016) 21(1) *Tilburg Law Review*, pp. 5–30; J. Huang & M.A. Tigre, 'Trends in Climate Justice Litigation: The Dutch Case and Global Repercussions', in R.S. Abate (ed.), *Climate Justice: Case Studies in Global and Regional Governance Challenges* (ELI Press, 2016), pp. 571–96.

¹⁶⁵ R. Cox, *Revolution Justified (Revolutie Met Recht)* (Stichting Planet Prosperity, 2012). For further detail see the author's website, available at: <http://www.revolutionjustified.org>.

¹⁶⁶ Berger & Wentz, n. 28 above, p. 23. For details of the Belgian action (in French) see <http://www.klimaatzaak.eu/fr/le-proces/#klimaatzaak>. Other actions are foreshadowed in Norway and Spain: 'Hague Climate Change Verdict: "Not Just a Legal Process but a Process of Hope"', Interview with M. Minnesma, *Urgenda* Director, *The Guardian*, 26 Jun. 2015, available at: <https://www.theguardian.com/global-development-professionals-network/2015/jun/25/hague-climate-change-verdict-marjan-minnesma>.

claims will depend on many factors, including how the ECHR is implemented in particular European state parties (for instance, does the treaty have direct effect in domestic law?), whether NGO petitioners can be considered victims or make claims of injury to human rights, and what legal avenues are available under domestic law for the enforcement of human rights. More generally, the stringency of a country's access to justice laws – and the receptivity of its courts to novel (and potentially politically controversial arguments) – are also likely to be critical. As in *Urgenda*, litigants may achieve greater success with arguments that seek to use rights as part of the interpretative process in evaluating other legal obligations relating to a duty of care.

4.3. Actions under Regional Human Rights Instruments

Claims made before regional human rights tribunals offer another avenue for climate advocates seeking to pursue rights-based claims. This potential avenue for redress was utilized by the Inuit in their original climate change petition to the IACHR. The Arctic Athabaskan Peoples have since filed another petition with the IACHR, alleging human rights violations as a result of emissions of black carbon by Canada.¹⁶⁷ Like the Inuit petition, this latter petition is likely to face some 'significant challenges' although, arguably, advances in climate science and in climate jurisprudence since the 2005 petition offer hope for a better result.¹⁶⁸

Among the regional human rights tribunals, the ECtHR is by far the most well-established with the most extensive jurisprudence on the linkages between human rights and environmental protection. Although the ECtHR has not recognized a freestanding right to a healthy environment,¹⁶⁹ it has found that environmental risks can threaten other human rights protections, such as the right to life and the right to respect of private and family life,¹⁷⁰ as well as procedural rights like the right of access to information or to an effective remedy.¹⁷¹ In the case of *Budayeva v. Russia*, the ECtHR found that Russia had violated its positive obligation to protect the right to life under the ECHR by failing to establish legislative and administrative frameworks to deter any threat to the right to life, including measures in that case to warn citizens of known natural disaster risks associated with mudslides.¹⁷² Future climate cases might seek to extend this jurisprudence to the situation of foreseeable climate disaster risks and harm, arguing a failure on the part of states to take adequate adaptation measures to avoid threats to rights.

¹⁶⁷ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, 23 Apr. 2013, available at: http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf.

¹⁶⁸ V. Jaimes, 'The Arctic Athabaskan Petition: Where Accelerated Global Warming Meets Human Rights' (2015) 45(2) *California Western International Law Journal*, pp. 213–60, at 259.

¹⁶⁹ ECtHR, *Kyrtatos v. Greece*, 22 May 2003, App. No. 41666/98, para. 52.

¹⁷⁰ ECHR, n. 83 above, Arts 2 and 8.

¹⁷¹ See further Jaimes, n. 76 above, pp. 188–9.

¹⁷² ECtHR, *Budayeva v. Russia*, App. No. 15339/02 (2008).

The regional human rights systems in the Americas and Africa also offer the potential for climate litigation alleging breaches of environmental rights, and both tribunals have seen an increasing environmental caseload in recent years.¹⁷³ Article 11 of the San Salvador Protocol to the American Convention on Human Rights declares ‘the right to live in a healthy environment and to have access to basic public services’.¹⁷⁴ Similarly, the African Charter on Human and Peoples’ Rights includes the right of peoples ‘to a general satisfactory environment favourable to their development’.¹⁷⁵ The inclusion of environmental rights in these regional treaties gives scope to bring complaints of rights violations focused specifically on types of climate harm that endanger people’s environmental health and well-being.

The early case of *Gbemre v. Shell Petroleum Development Company Nigeria Ltd and Others*,¹⁷⁶ decided in 2005 by the Nigerian High Court, provides not only a potential template, but also a cautionary tale, in this respect. The case raised rights violations under the African Charter resulting from air pollution and environmental harm caused by the gas-flaring practices of oil companies in Nigeria. The plaintiffs also raised an argument that gas flaring leads to the emission of GHGs and contributes to adverse climate change that in turn could lead to the violation of protected rights. While the Federal High Court of Nigeria did not rule specifically on this point, it referred to the plaintiffs’ climate change argument in its judgment, potentially signalling some judicial receptivity to this approach.¹⁷⁷ However, this ruling has faced significant implementation challenges in Nigeria.¹⁷⁸

The enforceability of these regional environmental rights protections also remains a significant issue. The San Salvador Protocol has only 16 parties (which do not include the US).¹⁷⁹ The African Charter has better state coverage with 53 parties and the African Court on Human and Peoples’ Rights – in operation since 2005 – has a growing caseload,¹⁸⁰ but only a handful of cases before the Court have so far raised environmental claims.¹⁸¹

¹⁷³ Jaimes, n. 76 above; see also M. Chapman, ‘Climate Change and the Regional Human Rights Systems’ (2010) (Spring Issue), *Sustainable Development Law & Policy*, pp. 37–8, 60–1, available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1031&context=sdlp>.

¹⁷⁴ Organization of American States (OAS), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 17 Nov. 1988, in force 16 Nov. 1999, available at: <http://www.oas.org/juridico/english/treaties/a-52.html>.

¹⁷⁵ Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights, 27 Jun. 1981, in force 21 Oct. 1986, CAB/LEG/67/3 rev. 5, Art. 24, available at: <http://www.achpr.org/instruments/achpr/#a24>.

¹⁷⁶ *Gbemre*, n. 7 above.

¹⁷⁷ See further Sinden, n. 18 above.

¹⁷⁸ See H.M. Osofsky, ‘Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria’ (2010) 1(2) *Journal of Human Rights and the Environment*, pp. 189–210.

¹⁷⁹ OAS, ‘Signatories and Ratifications’, available at: <http://www.oas.org/juridico/english/signs/a-52.html>.

¹⁸⁰ See further the Court’s website, available at: <http://en.african-court.org>.

¹⁸¹ For details see UNEP, *Compendium on Human Rights and the Environment: Selected International Legal Materials and Cases* (UNEP, 2014), pp. 49–56, available at: <http://www.unep.org/environmental-governance/Portals/8/publications/UNEP-compendium-human-rights-2014.pdf>.

5. CONCLUSION

Ito na lang ba ang aming kauuwian – ang magbilang, o mapabilang, sa mga biktima ng climate change? (Will this be our fate – to just count the victims of climate change or be counted among them?)

Petition to the Commission on Human Rights of the Philippines.¹⁸²

This article has considered emerging climate change litigation which pursues rights claims, arguing that the trend discernible from the limited number of cases so far shows an increased use of these arguments by litigants and a growing receptivity of courts towards human rights-based argumentation in climate change cases. With creative lawyering, a number of credible avenues beckon to take forward additional rights claims in climate change litigation, which could further consolidate these trends and emphasize the extent of the nascent ‘rights turn’. Indeed, in some jurisdictions, given the coincidence of available environmental rights protection with procedures that enable rights claims and judiciaries willing to entertain them, the prospects for rights-based climate change lawsuits look bright. In other jurisdictions – notably the US, in which traditional, statutory-based climate cases have dominated – rights claims in climate change cases face a much harder road,¹⁸³ although this has not deterred some litigants, such as the youth plaintiffs in the *Juliana* case.

These efforts to raise rights arguments in climate change litigation coincide with a period of increased international attention to human rights–climate linkages, including the preambular reference in the Paris Agreement. Efforts in individual countries to raise rights claims in climate litigation may also draw inspiration from work being done by international expert groups to develop transnational principles for climate change liability. Examples include the Oslo Principles on Global Climate Change Obligations,¹⁸⁴ which draw from international human rights law, environmental law, and tort law to articulate obligations of states and enterprises to address climate change through both mitigation and adaptation actions, and the efforts of a working group of the International Bar Association to develop a Model Statute on Climate Change Actions and Relief.¹⁸⁵ Initiatives such as these seek to articulate a practical legal framework for applying human rights principles in a climate change context that could be used by groups as the foundation for claims.

Of course, court victories are not the only measure of ‘success’ for litigation brought with the strategic purpose of promoting social and policy change with

¹⁸² Greenpeace, n. 9 above.

¹⁸³ Boyd, n. 158 above, p. 51 (noting that obstacles to rights claims are particularly pronounced in common law jurisdictions such as the US, Australia, Canada and the United Kingdom). While the US Federal Constitution lacks a self-standing environmental right, some state constitutions in the US do have such rights: J.R. Tuholske, ‘U.S. State Constitutions and Environmental Protection: Diamonds in the Rough’ (2015) 21 *Widener Law Review*, pp. 239–55.

¹⁸⁴ Oslo Principles on Global Climate Change Obligations, 1 Mar. 2015, available at: <http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf>.

¹⁸⁵ The authors are members of this working group. For further details see N. Leslie, ‘IBA Takes Leading Role in Increasing Awareness of Climate Change Justice’ (2016) 34(1) *Journal of Energy & Natural Resources Law*, pp. 7–15, at 9–10.

respect to climate change. Even ‘losing’ cases can have important flow-on effects through the ways in which they shape public dialogue, business attitudes and government action.¹⁸⁶ Although alleging rights violations in climate cases may not result in formally successful judgments, they may nevertheless garner media and public attention that elevate political discussions about climate change, highlight the plight of particular communities, bring to light mitigation or adaptation failures, and ultimately illuminate the ‘human face’ of climate disaster. In the final analysis, the strongest benefit from a turn towards rights arguments in climate change litigation may stem from these informal effects and the role they play in re-orienting and reframing the climate debate to one that emphasizes impacts on people. Such framing may ultimately prove to be more publicly and politically salient than scientific and technical arguments in motivating strong action to address the problem.¹⁸⁷

¹⁸⁶ Peel and Osofsky, n. 13 above, pp. 47–51.

¹⁸⁷ There is a robust literature on the topic of litigation as regulation, which extends beyond the scope of this article. In addition to Peel and Osofsky, n. 13 above, see W.K. Viscusi (ed.), *Regulation through Litigation* (Brookings Institute, 2002); T.D. Lytton, ‘Using Tort Litigation to Enhance Regulatory Policymaking: Evaluating Climate Change Litigation in Light of Lessons from Gun Industry and Clergy Sexual Abuse Lawsuits’ (2008) 86(7) *Texas Law Review*, pp. 1837–76.