The Role of Judges in Climate Governance and Discourse

By Hon Justice Susan Glazebrook*

I. Introduction

Climate change litigation is on the rise. Of the estimated 1841 cases of climate change litigation around the world since 1986, 1006 cases have been filed since 2015,[1] as compared to a mere 834 cases between 1986 and 2014.[2] Over 80 per cent of cases were against national and sub-national governments, although some claims have been made by governments against corporates and others.[3] Much of the global climate litigation is in the United States although this is changing, and since 2007, other countries have seen an increase in climate litigation cases. Of the 1841 cases, 58 of them are in the Global South with at least 11 of these filed in 2020 alone.[4]

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* Judge of the Supreme Court of New Zealand and President of the International Association of Women Judges. This paper is based on a presentation I gave at the Asia Pacific Judicial Conference on Climate Change: Adjudication in the Time of COVID-19 (virtual, November 2020). The event was co-organised by the Asian Development Bank and the United Nations Environment Programme. Thank you to my clerks, Don Lye and Rebecca McMenamin for their invaluable assistance with this paper.

1 And thus since the United Nations Conference of Parties' Paris Agreement in 2015 (COP21): Paris Agreement (opened for signature 16 February 2016, entered into force 4 November 2016). More recently in November 2021, the Glasgow Climate Pact was agreed to by almost 200 countries at the COP26 summit: see Fiona Harvey "What are the key points of the Glasgow Climate pact?" *The Guardian* (14 November 2021) <www.theguardian.com>. Reception to the Glasgow Climate Pact has ranged from lukewarm to highly critical: see for example Matt McGrath "COP26: Evasive words and coal compromise, but deal shows progress" *BBC News* (13 November 2021) <www.bbc.com>; and Tishiko King "Empty words, no action: Cop 26 has failed First Nations people" *The Guardian* (15 November 2021) <www.theguardian.com>.

2 Joana Setzer and Catherine Higham *Global trends in climate change litigation: 2021 snapshot* (Grantham Research Institute on Climate Change and the Environment, July 2021) at 5. For the purposes of the report, cases must generally be brought before judicial bodies and raise an issue of law or fact relating to climate change as a significant issue. Note that the sum total of 1841 cases is one more than the figures of 1,006 and 834 because one case has an unknown filing date: see 5, n 1. The report relies predominantly on the Climate Change Laws of the World (CCLW) database, accessible at <climate-laws.org>. For a regularly updated database which canvasses a wider range of cases, see Sabin Center for Climate Change Law "Climate Change Litigation Databases" <climatecasechart.com>.

3 Setzer and Higham, above n 2, at 43–44. This is a trend in the United States, where there is currently much litigation about whether these claims by cities are properly pursed at state or federal level. See for example *City of New York v Chevron Corp* 993 F 3d 81 (2d Cir); *Commonwealth v Exxon Mobil Corp* 462 F Supp 3d 31 (DC Mass 2020); *BP plc v Mayor and City Council of Baltimore* 19–1189, 17 May 2021 (United States Supreme Court) slip op; and *Shell Oil Products v Rhode Island* 20-900, 24 May 2021 (United States Supreme Court).

4 Setzer and Higham, above n 2, at 11. On climate litigation in the Global South, see Jolene Lin and Douglas A Kysar (eds) *Climate Change Litigation in the Asia Pacific* (Cambridge University Press, Cambridge, 2020); César Rodríguez-Garavito "Human Rights: The Global South's Route to Climate Litigation" (2020) 114 AJIL Unbound 40; and Randall S Abate and Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, United Kingdom, 2013).

These figures show that courts worldwide are being increasingly asked to adjudicate on climate change issues and, therefore, that judges cannot avoid being part of both governance and discourse on climate change.[5] The types of cases and arguments cover a wide field, meaning that this litigation permeates almost all areas of the work of the courts.

II. Cases Involving Legislation

An important function of courts is to interpret and apply legislation. Climate change is most obviously relevant where legislation directly relates to climate change.[6] Cases have been brought to force governments to meet their perceived obligations under such legislation. For example, the Irish Supreme Court quashed Ireland's 2017 National Mitigation Plan on the basis that it failed to provide the specificity required by the legislation to meet the legislative objective of achieving a low carbon, climate resilient and environmentally sustainable economy by 2050 (the National Transitional Objective).[7] In December 2020, Greenpeace Spain filed suit against the Spanish government, asserting that Spain unlawfully failed to produce a National Energy and Climate Plan with 2030 climate targets, in violation of national law in addition to EU regulations and Spain's Paris Agreement obligations.[8] More recently in France, the Administrative Court of Paris found that measures taken so far by the French government were insufficient to meet its own climate targets (40 per cent emission reduction by 2030 and carbon neutrality by 2050).[9]

Climate change can also be relevant to decisions under general planning and environmental legislation. Cases have thus been brought to ensure climate change issues are considered in relation

5 See the "Declaration on Climate Change, Rule of Law and the Courts" (2020) British Institute of International and Comparative Law <www.biicl.org/climate-change-declaration>. The Declaration builds on discussions between judges, policymakers, academics and legal practitioners at a two-day summit "Our Future in the Balance: The Role of Courts and Tribunals in Meeting the Climate Crisis" held on 7–8 July 2021.

6 For New Zealand's climate legislation, see Climate Change Response Act 2002 which was amended by the Climate Change Response (Zero Carbon) Amendment Act 2019. For a critical analysis, see Philipp Semmelmayer "The Climate Change Response (Zero Carbon) Amendment Act — A Critical Analysis of New Zealand's Response to Climate Change" (2020) 24 NZJEL 158.

7 Friends of the Irish Environment v Government of Ireland 205/19, 31 July 2020 (Supreme Court of Ireland). For commentary, see Orla Kelleher "A critical appraisal of Friends of the Irish Environment v Government of Ireland" (2021) 30 RECIEL 138.

8 For updates on the case, see Sabin Center for Climate Change Law "Greenpeace v Spain" (2021) <climatecasechart.com>.

9 *Notre Affaire à Tous v France* 1904967, 1904968, 1904972, 1904976/4-1, 3 February 2021 (Tribunal Administratif de Paris) unofficial English translation available at <www.climatecasechart.com>. In its final decision, the Court ordered the State to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damages caused by its inaction by 31 December 2022: *Notre Affaire à Tous v France* 1904967, 1904968, 1904972, 1904976/4-1, 14 October 2021 (Tribunal Administratif de Paris) unofficial English translation available at <www.climatecasechart.com>. For updates on the case, see Sabin Center for Climate Change Law "*Notre Affaire à Tous and Others v France*" (2021) <climatecasechart.com>.

to particular projects, particularly mining projects or oil production projects.[10] In South Africa, courts have in effect gone further than the Irish courts recently did by interpreting existing environmental planning legislation to require additional climate change considerations. For example, in what has been hailed as South Africa's first climate change-related decision, the High Court of South Africa recently ruled that climate change is a relevant consideration when granting an environmental authorisation, notwithstanding the lack of an express statutory obligation to conduct a climate-focussed impact assessment.[11] Similarly, and in the context of the tort of negligence, the Federal Court of Australia recently ruled that Australia's Minister for the Environment owes a duty of care towards the children of Australia to take reasonable care not to cause them personal injury in exercising her statutory power under federal environmental law to approve projects producing greenhouse gases contributing to climate change.[12]

Cases have also been brought under more general legislation or regulation. There have been cases relating to allegations of misleading conduct in trade, including so-called greenwashing (misleading claims about the environmental impact of products).[13] Exxon Mobil, in particular, has faced multiple lawsuits about making misleading statements and misrepresentations to investors as to the dangers and business risks associated with climate change as well as for deceiving consumers

10 In Australia, see for example *Gray v Minister for Planning* [2006] NSWLEC 720, [2006] 152 LGERA 258; *Minister for Planning v Walker* [2008] NSWCA 224, [2008] 161 LGERA 423; and *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7, (2019) 234 LGERA 257 in which the Court held that greenhouse gas emissions were causally linked to climate change and its consequences on the basis that each emission made a cumulative contribution. In New Zealand, similar cases have also been brought: see for example *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730; and *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32. *Buller Coal* has been criticised for taking an overly narrow approach: Catherine Iorns and Estair van Wagner "Commentary on *West Coast ENT Inc v Buller Coal Ltd* Broadening an Ethic of Care to Recognise Responsibility for Climate Change" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand—Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 389 at 394–395. For an example in the United States, see *Center for Biological Diversity v Bernhardt* 982 F 3d 723 (9th Cir 2020) where the Court held that the government failed in analysing reasonable alternatives to the challenged approval of an offshore oil drilling and production facility as required under the National Environmental Policy Act of 1969 because it failed to consider greenhouse gas emissions from foreign oil consumption.

11 *EarthLife Africa Johannesburg v Minister of Environmental Affairs* [2017] ZAGPPHC 58, [2017] 2 All SA 519 (GP). See generally Tracy-Lynn Humby "The *Thabametsi* case: Case No 65622/16 *Earthlife Africa Johannesburg v Minister of Environmental Affairs*" (2018) 30 J Env Law 145.

12 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [*Sharma No 1*]. Since the Minister's decision to approve or not to approve the project had not yet been made, the Court declined to issue a quia timet injunction to restrain the Minister from an apprehended breach of the duty of care: at [508]. Subsequently, however, the Court issued a declaration that the Minister had a duty to take reasonable care in the exercise of her powers under the consenting legislation to avoid causing personal injury or harm to Australian residents under the age of 18 at the time of the proceeding arising from carbon emissions; the Court also ordered that the Minister pay the applicants' costs: *Sharma by her litigation representative Sister Marie Brigid Arthur (No 2)* [2021] FCA 774. Notwithstanding the declaration made by the Federal Court, the Minister granted approval for the proposed mine expansion and lodged an appeal against the judgment to the Full Federal Court. For updates on the case, see Sabin Center for Climate Change Law "Sharma and others v Minister for the Environment" (2021) <climatecasechart.com>.

13 Under Australian Consumer Law, it is illegal for businesses to engage in conduct that misleads consumers, including through greenwashing: Competition and Consumer Act 2010 (Cth), vol 3, sch 2. See also the New Zealand Fair Trading Act 1986. In New Zealand, the Commerce Commission has released its Environmental Claims Guidelines which provide guidance on the making of environmental claims in the media, on products and on packaging: Te Komihana Tauhokohoko | Commerce Commission New Zealand *Environmental Claims Guidelines: a guide for traders* (July 2020).

about the purported environmental benefit of some of its products and promoting a misleading "greenwashing" campaign.[14]

Multiple claims have also been made against corporates alleging inadequate environmental assessments of particular projects.[15] More generally, there have also been cases alleging breach of disclosure requirements by corporates of climate change-related risk or a breach of directors' duties by failing to address such risks.[16]

III. Claims for Damages

Outside of the context of the application of legislation, direct claims for damages for climaterelated harm have been made against corporates, including increasingly against Carbon Majors,[17] for example in tort or nuisance. While legal causation has often been one of the main hurdles in establishing tortious liability, there is increasingly accurate science tying emission production in these cases to the effects of climate change which may increase the likelihood of such claims being made out.[18]

Some of these climate cases have been transnational – suing for damage allegedly caused in another jurisdiction. One example of this is the *Luciano Lliuya v RWE AG* case brought in Germany by a Peruvian farmer against Germany's largest electric utilities company, RWE.[19] Mr Luciano Lliuya alleges that his hometown of Huaraz, Peru is threatened by climate change, in particular, glacial melt flooding the nearby Lake Palcacocha. Mr Luciano Lliuya's claim was that RWE caused part of that climate-related damage and he seeks damages to mitigate the cost he and Huaraz authorities are expected to incur to establish flood protections. Based on the Institute of Climate

14 See *Commonwealth v Exxon Mobil Corp*, above n 3; Sabin Center for Climate Change Law "*Ramirez v Exxon Mobil Corp*" <www.climatecasechart.com>; *Ramirez v Exxon Mobil Corp* 334 F Supp 3d 832 (ND Tex 2018); and *People of the State of New York v Exxon Mobil Corp* 199 NYS 3d 829 (SC NY 2019).

15 See for example *ClientEarth v Polska Grupa Energetyczna* [2020] District Court of Lodz (Poland) where the Court required Europe's largest power plant, the Belchatow coal plant, to engage in negotiations with ClientEarth to reduce its climate impacts.

16 See for example *McVeigh v Retail Employees Superannuation Pty Ltd (Rest)* (about climate risk disclosure and breach of trustees' duties, filed in the Federal Court of Australia in 2018 but dismissed by consent of the parties after they settled); *O'Donnell v Commonwealth* (about the Australian government's climate risk disclosure failures, filed in the Federal Court of Australia in July 2020); and *Abrahams v Commonwealth Bank of Australia* (about the Commonwealth Bank's climate risk disclosure failures, filed in the Federal Court of Australia by the defendant's shareholders but withdrawn after the Commonwealth Bank released a 2017 annual report acknowledge the risk of climate change and pledging to undertake climate change scenario analysis to estimate business risks).

17 The 100 major fossil fuel companies responsible for producing 52 per cent of global industrial greenhouse gasses since the industrial revolution: Paul Griffin *The Carbon Majors Database: CDP Carbon Majors Report 2017* (Climate Accountability Institute, Carbon Disclosure Project, July 2017) <https://climateaccountability.org/> at 5.

18 See the recent leading research by Petra Minnerop and Friederike E L Otto "Climate Change and Causation: Joining Law and Climate Science on the basis of Formal Logic (2020) 27 Buff Env L J 49. See also Michael Burger, Jessica Wentz and Radley Horton "The Law and Science of Climate Change Attribution" (2020) 45 Columb J Envtl L 57; and Sophie Marjanac and Lindene Patton "Extreme weather event attribution science and climate change litigation: an essential step in the casual chain" (2018) 36 Journal of Energy & Natural Resources Law 265.

19 *Luciano Lliuya v RWE AG* 2 O 285/15, 15 December 2016 (District Court Essen) unofficial English translation available at <www.climatecasechart.com>.

Responsibility's estimation that RWE has contributed 0.47 per cent of all greenhouse gases since the industrial age, the damage claimed is 0.47 per cent of the estimated mitigation cost. While the case was unsuccessful at first instance, it is currently on appeal to the Higher Regional Court of Hamm where the Court has recognised the complaint as admissible.[20]

IV. Financial Risk

The fact that climate risk is a financial risk is now well-accepted.[21] Regulation is responding to require proper accounting of climate risks. The G20 Financial Stability Board Task Force on Climate-related Financial Disclosures (TCFD), established in 2015, has provided a voluntary framework on how companies can make climate related disclosures.[22] The International Financial Reporting Standards Foundation (IFRS) is currently developing a new global standard for sustainability reporting based off the TCFD framework aiming for publication by mid-2022.[23] New Zealand is the first country in the world to require the financial sector to disclose the impacts of climate change on their business and how they will manage climate-related risks.[24]

In Australia, the Senate Economics Reference Committee has issued recommendations that the Australian Securities and Investment Commission (ASIC) and the Australian Stock Exchange review their guidance to directors to ensure that carbon risk is properly taken into account.[25] In September 2018, ASIC published a report indicating that directors and officers of listed companies

20 For updates on the case, see Sabin Center for Climate Change Law "Luciano Lliuya v RWE" <www.climatecasechart.com>; and Climate Change Laws of the World "Luciano Lliuya v RWE" <www.climate-laws.org>.

21 On how climate change affects businesses, see generally; World Economic Forum *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy* (2020); Noel Hutley and Sebastian Hartford Davis "Climate Change and Directors' Duties: Supplementary Memorandum of Opinion" (The Centre for Policy Development, 26 March 2019); Noel Hutley and Sebastian Hartford Davis "Climate Change and Directors' Duties: Further Supplementary Memorandum of Opinion" (The Centre for Policy Development, 23 April 2021); Alice Garton "The Legal Perspective: Climate Change's Influence on Future Business Ventures" (Keynote address, European Refining and Technology Conference, Cannes, 28 November 2018); Chapman Tripp "Managing climate risk in New Zealand in 2020: A toolkit for directors" (November 2020); and Susan Glazebrook "Meeting the challenge of corporate governance in the 21st century" (2019) 34 Aust Jnl of Corp Law 1 at 14–17.

22 Task Force on Climate-Related Financial Disclosures Final Report: Recommendations (June 2017). The G7 nations, have also recently agreed to mandate climate reporting following the TCFD recommendations: Matt Mace "G7 agree on 'historic steps' to make climate reporting mandatory" Euractiv (online ed, Brussels, 7 June 2021).

23 Huw Jones "New standards board targets mid-2022 for global climate company disclosures" *Reuters* (online ed, London, 1 May 2021).

24 David Clark and James Shaw "NZ becomes first in world for climate reporting" (press release, 13 April 2021). See Ministry advice on the legislation: Hīkina Whakatutuki | Ministry of Business, Innovation and Employment "Mandatory climate-related disclosures" (25 May 2021) <www.mbie.govt.nz>. The United Kingdom has also followed suit: Department for Business, Energy and Industrial Strategy and others "UK to enshrine mandatory climate disclosures for largest companies in law" (press release, 29 October 2021).

25 Senate Economic References Committee *Carbon risk: a burning issue* (April 2017). The Australian government's response was to suggest that ASIC consider its high-level guidance on disclosure to ensure corporate governance of ASX-listed entities remains best practice: *Australian Government response to the Senate Economics Reference Committee report: Carbon risk: a burning issue* (March 2018) at 2.

"need to understand and continually reassess existing and emerging risks (including climate risk) that may affect the company's business. This extends to both short-term and long-term risks."[26]

These developments are likely to mean that there could be more cases challenging the adequacy of financial reporting in the area of climate change risks. The risk of climate change litigation would also have to be factored in. As Australian barristers Noel Hutley and Sebastian Hartford Davis, in a widely published joint opinion commissioned by the Australian Centre for Policy Development in 2019, said:[27]

> It is increasingly difficult in our view for directors of companies of scale to pretend that climate change will not intersect with the interests of their firms. In turn, that means that the exposure of the individual directors to 'climate change litigation' is increasing, probably exponentially, with time.

V. Climate Change Activists

It should be noted that polluters are not the only defendants in climate cases. There have been criminal cases for civil disobedience brought against climate change protestors who then rely on statements about climate change or claims of a defence of necessity in answer to charges.[28] In Switzerland, 12 climate activists, convicted of trespassing for occupying a bank branch to protest against the bank's fossil fuel investments, were initially successful on appeal in arguing that their actions were a necessary and proportional means in achieving their goal.[29] However, their acquittal was overturned by the Court of Appeals, which was then upheld by the Federal Court.[30] An application for review of the decision of the Federal Court has been filed with the European Court of Human Rights.[31]

More broadly, the use of Strategic Lawsuits Against Public Participation (SLAPPs) by big polluters against environmental advocates is highly concerning.[32] The objective of these SLAPPs is

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26 Australian Securities and Investment *Commission Climate risk disclosure by Australia's listed companies* (Report 593, September 2018) at 12. See also Governance Institute of Australia *Climate change risk disclosure: A practical guide to reporting against ASX Corporate Governance Council's* Corporate Governance Principles and Recommendations (February 2020). 58 per cent of Australia's ASX100 companies are now following the recommendations of the TCFD, with 78 percent ASX100 companies acknowledging climate change as a financial risk: KPMG Australia *Towards net zero: Australian supplement – How the top Australian companies report on climate risk and carbonisation* (November 2020) at 2.

27 Hutley and Davis "Climate Change and Directors' Duties: Supplementary Memorandum of Opinion", above n 21, at 9. Some of that climate litigation has been canvassed in Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) <www.courtsofnz.govt.nz> at [111]–[127].

28 For an extensive overview of cases, see Climate Defense Project *Climate Necessity Defence Case Guide* (28 March 2019) <www.climatedefenseproject.org>. See also Lange N Long and Ted Hamilton "The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases" (2020) 38 Stan Env LJ 57.

29 *Credit Suisse Protesters Trials* 13 January 2020 (Lausanne District Court).

30 *Credit Suisse Protesters Trials* 317, PE19.000742/PCL, 22 September 2020 (Court of Appeals in Renens). For updates on the case, see Sabin Center for Climate Change Law "Credit Suisse Protesters Trials" <www.climatecasechart.com>.

31 See Emma Farge "Activists take Credit Suisse climate case to Europe human rights court" *Reuters* (5 November 2021) <news.trust.org>.

32 For a discussion of SLAPPs generally, see Oscar Reyes *Sued into Silence: How the rich and powerful use legal tactics to shut critics up* (Greenpeace European Unit, July 2020).

to pressure, intimidate and silence environmental activists, often seeking grossly disproportionate amounts in damages.[33] In response to the use of such lawsuits, some jurisdictions have enacted anti-SLAPPs legislation.[34] The application of such legislation was the subject of the recent *Pointes Protection* judgment by the Supreme Court of Canada.[35] In *Pointes Protection*, the Court dismissed a CA$ 6 million defamation and breach of contract suit by a developer against Pointes Protection which had previously testified that the development would cause a significant loss of coastal wetlands leading to serious environmental damage.

VI. Human Rights

An increasing trend is for claims to be made or arguments supplemented by allegations of human rights violations in relation to climate change.[36] A benefit to reliance on human rights law is recourse to international obligations in respect of human rights and possible access to regional human rights courts and international human rights treaty bodies. Virtually all countries in the world have some human rights guarantees in the constitution so cases which invoke human rights to protect the environment seek to place the environment at the very heart of the state.[37]

The most prominent human rights climate case is *Urgenda Foundation v Kingdom of the Netherlands*.[38] In December 2019, the Supreme Court of the Netherlands confirmed that the Dutch government must reduce its greenhouse gas emissions to prevent dangerous climate change and that inaction breached the European Convention on Human Rights (ECHR) and, in particular, the right to life (art 2) and the right to private and family life (art 8).[39] In response, the Dutch Government announced a new package of measures to lower greenhouse gas emissions, including a 75 per cent reduction in the capacity of the country's coal power stations and a €3 billion investment package (including earlier compliance measures) in solar energy, energy efficient technology, subsidies to compensate farmers for livestock reduction and changes in the use of concrete.[40]

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33 For a snapshot of 24 SLAPPs brought by 12 carbon majors, mining companies and an industry association, see Business & Human Rights Resource Centre *Silencing the Critics: How big polluters try to paralyse environmental and human rights advocacy through the courts* (30 September 2019).

34 See for example, in Ontario, the Protection of Public Participation Act 2015 S O 2015 c 23, which amended the Courts of Justice Act RS O 1990 c C43.

35 *1704604 Ontario Ltd v Pointes Protection Association* 2020 SCC 22.

36 Setzer and Higham, above n 2, at 32.

37 Additionally, as of 2017, 150 countries have enshrined environmental protection or the right to a healthy environment in their constitutions, while 164 countries have created cabinet-level bodies responsible for environmental protection: United Nations Environment Programme *Environmental Rule of Law: First Global Report* (24 January 2019) at viii.

38 *Urgenda Foundation v Kingdom of the Netherlands* 19/00135, 20 December 2019 (Supreme Court of the Netherlands) English judgment available at <www.climatecasechart.com>. The claimants also relied on other principles, such as the "no harm" principle of international law, the doctrine of hazardous negligence, and the prevention principle embodied in European climate policy, but the decision was made on the basis of the European Convention on Human Rights (ECHR). See also *Notre Affaire à Tous v France*, above n 9, which concerned the right to life (art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR)) and the right to respect for private and family life (art 8 of the ECPHR).

39 *Urgenda*, above n 38, at [9].

40 Jonathan Watts "Dutch officials reveal measures to cut emissions after court ruling" *The Guardian* (24 April 2020) <www.theguardian.com>.

Similar rights-based approaches have also been taken in other cases. The Lahore High Court in *Leghari v Federation of Pakistan* held that the national government's delay in implementing Pakistan's climate policy framework violated the fundamental rights of citizens to life and human dignity (arts 9 and 14 of the Pakistan Constitution).[41] Germany's highest court also recently ruled that the climate measures taken by the German federal government were incompatible with fundamental rights, ordering the government to set clear goals for reducing greenhouse gas emissions after 2030.[42] The Court also considered that the State's duty to protect life and physical integrity under art 2(2) of the Basic Law for the Federal Republic of Germany includes risks to life and health caused by climate change.[43]

Nevertheless, human rights arguments have not invariably been successful. For example, while the outcome reached in *Friends of the Irish Environment* was largely similar to *Urgenda* in that the Supreme Court of Ireland quashed the national mitigation plan, the Court did so based on its conclusion that the plan failed to reach a sufficient level of specificity to achieve the National Transitional Objective required by the Climate Action and Low Carbon Development Act 2015 (Ireland).[44] As to the rights-based arguments, the Court did not consider it appropriate to address them, holding that Friends of the Irish Environment, as a corporate entity, did not have standing.[45] While reserving its position "whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation" in a case in which those issues would be crucial, the Court made obiter statements rejecting a derived or unenumerated right to a healthy environment in the Irish Constitution, expressing the provisional view that such a right would either be superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or be excessively vague (if it does extend beyond those rights).[46]

Another exception to the success of the human rights arguments in climate litigation was the Norwegian decision of *Greenpeace Nordic Association v Ministry of Petroleum and Energy*. The Court of Appeal rejected the application of arts 2 and 8 of the ECHR (which had been successfully argued in the *Urgenda* case) as the consequences of climate change globally are beyond the Norwegian State's obligations under the Convention.[47] The Court distinguished *Urgenda* as a claim involving issues regarding general emissions targets and not, as in this case, specific future emissions from individual fields that might be used in the future to produce oil.[48] The Court further

41 Leghari v Federation of Pakistan WP 25501/2015, 4 and 14 September 2015 (Lahore High Court Green Bench) English judgment available at <www.climatecasechart.com>. For commentary, see Jacqueline Peel and Hari M Osofsky "A Rights Turn in Climate Change Litigation" (2017) 7 TEL 37.

42 *Neubauer v Germany* [2021] 2 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, 24 March 2021 (Federal Constitutional Court of Germany) official English translation available at <www.climatecasechart.com>. The German government pledged to swiftly adjust its climate change laws in response to the Court's ruling: "Germany pledges to adjust climate law after court verdict" *Associated Press* (online ed, Berlin, 1 May 2021).

43 *Neubauer v Germany*, above n 42, at [99].

44 *Friends of the Irish Environment*, above n 7. In response, the Irish government has now enacted the Climate Action and Low Carbon Development (Amendment) Act 2021 (Ireland) which puts into place a more sophisticated architecture to achieve its climate objectives.

45 *Friends of the Irish Environment*, above n 7, at [9.4].

46 At [9.5].

47 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 18-060499ASD-BORG/03, 23 January 2020 (Bogarting Court of Appeal) [*Greenpeace Nordic Association (CA)*] at 34–35, unofficial English translation available at <www.climatecasechart.com>.

48 At 35.

held that there was no "direct and immediate link" between the emissions that might result and the art 8 ECHR rights for Norwegian citizens.[49] While accepting that the right to an "environment that is conducive to health and to a natural environment whose productivity and diversity are maintained" in art 112 of the Norwegian constitution was a justiciable right,[50] the Court of Appeal thought that "the risk of local environmental harm is so low that the decision is not contrary to Article 112".[51] The Court of Appeal did recognise that the scope of Norway's responsibilities included environmental harm caused by the use of exported Norwegian oil in other countries (at least in respect of the constitutional right to the environment) but held that there must still be effects of climate change arising in Norway for the claim to succeed.[52] The Supreme Court, by a majority of 11–4, upheld the Court of Appeal's ruling, holding that the net effect of exported oil on global emissions was too uncertain – "[c]uts in Norwegian oil production may be replaced by oil from other countries".[53] The plaintiffs have challenged this decision in the European Court of Human Rights.[54]

These decisions (whether successful or unsuccessful) now form the foundation of an increasing "rights-turn" trend in climate litigation. There are now 112 human rights cases captured in climate litigation databases with 34 filed in the last two years alone.[55]

VII. Youth

Another trend in climate litigation is a burgeoning number of cases being brought by young people to hold governments and corporates to account.[56] Their arguments are predicated on the importance of preserving the environment not only for younger generations, but for future unborn generations.

The first human rights climate case to be heard by the European Court of Human Rights was filed in September 2020 by Portuguese youth against 33 countries (the 27 European Union countries plus the United Kingdom, Switzerland, Norway, Russia, Turkey and Ukraine). The claimants, relying on arts 2 and 8 of the ECHR, as well as art 14 which protects against age discrimination, allege that the respondents are failing to reduce their territorial emissions sufficiently and to take responsibility for their overseas emissions.[57] One of the main features of this case is the claim made of presumptive responsibility: the claim presumes that the respondents are responsible for the harm that climate change at its current trajectory poses to the claimants. The European Court of Human

49 At 35.

50 At 18.

51 At 33.

52 At 21–22.

53 *Greenpeace Nordic Association v Ministry of Petroleum and Energy* 20-051052SIV-HRET, 22 December 2020 (Supreme Court of Norway) [*Greenpeace Nordic Association (SC)*] English judgment available at <www.climatecasechart.com> at [234]. The minority would have held that possible future global emissions of greenhouse gases should have been considered in the impact assessment required to grant the licenses: at [274].

54 For updates on the case, see Sabin Center for Climate Change Law "Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy" <climatecasechart.com>.

55 Setzer and Higham, above 2, at 32.

56 Joana Setzer and Rebecca Byrnes *Global trends in climate change litigation: 2020 snapshot* (Grantham Research Institute on Climate Change and the Environment, July 2020) at 18.

57 Overseas emissions such as are exporting fossil fuels or financing fossil fuel extraction elsewhere.

Rights has granted the case priority status due to its urgency and rejected motions by defendant governments to overturn its fast-tracking decision.[58]

In the United States, a highly significant case brought by young people was *Juliana v United States*.[59] This was a claim that the United States federal government violated the constitutional rights of the claimants, 21 children, by causing dangerous carbon dioxide concentrations.[60] The majority of the United States Court of Appeals for the Ninth Circuit accepted that "[c]opious expert evidence" established that the "unprecedented rise [of carbon levels] stems from fossil fuel combustion and will wreak havoc on the Earth's climate if left unchecked".[61] Further, that the government's contribution to climate change was one of affirmatively promoting fossil fuel use.[62] However, the majority dismissed the case on the basis that the plaintiff's requested remedial action (an order requiring the government to develop a plan to phase out fossil fuel emissions and draw down greenhouse gases) was beyond the constitutional power of the Court.[63] The majority "reluctantly" concluded that "the plaintiffs' case must be made to the political branches or to the electorate at large" and "[t]hat the other branches may have abdicated their responsibility to remediate the problem does not confer on … courts, no matter how well-intentioned, the ability to step into their shoes".[64] The Ninth Circuit rejected the plaintiff's petition for a rehearing en banc.[65]

The youth phenomenon is by no means restricted to Europe and the United States.[66] *Kim v South Korea*, the first climate litigation case kind in East Asia, has recently been filed in the Constitutional Court of Korea by 19 young persons.[67] The applicants claim that South Korea's emissions targets are inadequate to meet the Paris Agreement goal to keep the rise in global average temperatures under two degrees,[68] thus violating their constitutional rights to life, dignity, a healthy environment and equality before the law and non-discrimination.[69]

In South America, a significant case, *Future Generations v Ministry of the Environment*, was brought and won by a group of 25 young persons between the ages of 7 and 26 against several

58 For updates on the case, see Sabin Center for Climate Change Law "Duarte Agostinho and Others v Portugal and 32 Other States" <www.climatecasechart.com>.

59 *Juliana v United States* 947 F 3d 1159 (9th Cir 2020).

60 The claim was for infringement of the Fifth Amendment due process right to a "climate system capable of sustaining human life" (at 1164 per Circuit Judge Hurwitz) – which is comparable to the cases brought under art 2 of the ECHR.

61 At 1166 per Circuit Judge Hurwitz.

62 At 1167 per Circuit Judge Hurwitz.

63 At 1165 per Circuit Judge Hurwitz.

64 At 1175 per Circuit Judge Hurwitz.

65 For updates on the case, see Sabin Center for Climate Change Law "Juliana v United States" <www.climatecasechart.com>.

66 See also cases in Australia: *Sharma No 1*, above n 12; and *Sharma No 2*, above n 12.

67 For updates on the case, see Sabin Center for Climate Change Law "Do-Hyun Kim et al v South Korea" <www.climatecasechart.com>.

68 Paris Agreement, above n 1, art 2(1)(c).

69 There is a specific right to the environment in the South Korea Constitution: art 35(1) provides that "All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavour to protect the environment".

Colombian government entities and a number of corporations.[70] The Supreme Court of Justice of Colombia held that the fundamental rights of life, health, minimum subsistence, freedom and human dignity are "substantially linked and determined by the environment and the ecosystem", declaring that the Colombian Amazon was entitled to protection, conservation, maintenance and restoration.[71]

These are examples of the younger generation taking up an active role in tackling the climate crisis and calling on various actors (State or otherwise) to uphold their climate obligations. This is unsurprising given that the issue of climate change is one that will particularly affect the younger generation and future generations.

VIII. The International Dimension

Climate cases have increasingly taken a further international dimension where international environmental law[72] and treaty obligations[73] have been the subject of litigation, either directly or as a supplement to other arguments.[74]

Beyond national and regional courts, claimants have also now filed cases in international decision-making bodies. One of the highest profile cases is the *Sacchi v Argentina* case brought by a group of youth activists in September 2019 to the United Nations Committee on the Rights of the Child.[75] Sixteen youths, including Greta Thunberg, alleged that Argentina, Brazil, France, Germany and Turkey have breached their rights under the Convention on the Rights of the Child by failing to sufficiently reduce their greenhouse gas emissions and failing to encourage the world's biggest emitters to curb carbon pollution. The rights breached include the right to life, health,

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70 *Future Generations v Ministry of the Environment* STC4360-2018, 5 April 2018 (Supreme Court of Justice of Colombia) unofficial English translation available at <www.climatecasechart.com>.

71 At 13. The Court's findings are further discussed below in the Indigenous cases section of this paper.

72 Including the polluter pays principle (*Rio Declaration on Environment and Development* UN Doc A/CONF.151/26 (12 August 1992), principle 16); the precautionary principle (see for example United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), art 3(3)); the no harm principle (customary international law, affirmed in *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226; see also *Rio Declaration*, principle 2); and the preventative principle (see for example International Law Commission *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* [2001] vol 2, pt 2 YILC 58. See also James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 340–345; and Vernon Rive "International Environmental Law" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 731 at [14.3.3].

73 For example, the Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162 (opened for signature 16 March 1998, entered into force 16 February 2005); and the Paris Agreement, above n 1. The Paris Agreement has both legal and non-legal obligations: see Daniel Bodansky "The Legal Character of the Paris Agreement" (2016) 25 Rev Eur Comp & Int'l Env Law 142.

74 See for example in *Urgenda*, above n 38; *Kim*, above n 67; *Misdzi Yikh v Canada* 2020 FC 1059, [2020] FCJ 1109; *Future Generations v Ministry of the Environment*, above n 70; and *Friends of the Earth v Canada* 2008 FC 1183, [2009] 3 FCR 201. See also Brian J Preston "The Impact of the Paris Agreement on Climate Change Litigation and Law" (paper presented to Dundee Climate Conference, University of Dundee, United Kingdom, 27–28 September 2019); and Lennart Wegener "Can the Paris Agreement Help Climate Change Litigation and Vice Versa?" (2020) 9 TEL 17. How international treaties are applied by domestic courts differs based on each country's constitution and whether the country follows a monist or dualist tradition: see James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) ch 3.

75 For updates on the case, see Sabin Center for Climate Change Law "Sacchi et al v Argentina et al" <www.climatecasechart.com>.

and the prioritisation of the child's best interests as well as the cultural rights from indigenous communities. For example, one of the claims is that rising sea levels poses an existential threat to the culture of indigenous communities.

The Committee, in its recent decision, however, considered that the complaints were inadmissible because domestic remedies had not been exhausted – domestic proceedings had not been initiated by the complainants in any of the States Parties.[76] Nevertheless, the Committee's findings represent a significant advancement in international human rights law with respect to State obligations in the context of climate change. The Committee found that States Parties can be held responsible for the negative impact of carbon emission on the rights of children both within and outside that States Party's territory.[77]

Another issue that will likely arise more and more is that of "climate change refugees". One such example in New Zealand was *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment*.[78] Mr Teitiota claimed refugee or other protection from deportation on the basis that his homeland, Kiribati, was suffering the effects of climate change. His claim was rejected by the New Zealand courts,[79] and Mr Teitiota was duly deported to Kiribati. He then took a case to the United Nations Human Rights Committee. In January 2020, however, the Human Rights Committee held that ultimately it was not in a position to conclude that the claimant's right to life (art 6 of the International Covenant on Civil and Political Rights) was violated upon his deportation.[80] The Committee did, however, observe that protection of art 6 extends to "reasonably foreseeable threats and life-threatening situations that can result in a loss of life" and that environmental degradation can compromise or violate effective enjoyment of the right to life.[81]

As the effects of climate change increase, we are likely to see a burgeoning of cases in this regard as climaterelated migration spills over from being within States to inter-State migration.[82] Sea level rise is one of the long-term changes to the climate system from anthropogenic emissions and poses existential challenges to low-lying coastal areas and islands. This has not only socio-economic

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76 *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No 104/2019* UN Doc CRC/C/88/D/104/2019 (8 October 2021) at [10.20]–[10.21].

77 At [10.7]–[10.10].

78 See T*eitiota v Chief Executive of the Ministry of Business Innovation and Employment* [2014] NZCA 173; [2014] NZAR 688; and *Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment* [2013] NZHC 3125; [2014] NZAR 162. Leave to appeal from the decision of the Court of Appeal was declined by the Supreme Court: *Teitiota v Chief Executive of Ministry of Business, Innovation and Employment* [2015] NZSC 107 [*Teitiota (SC)*].

79 The Supreme Court agreed with the Courts below that on the particular facts of the case, Mr Teitiota could not bring himself within either the Refugee Convention or New Zealand's protected persons jurisdiction (ss 129 and 131 of the Immigration Act 2009: *Teitiota (SC)*, above n 78, at [12]. However, the Court emphasised that its decision did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction: at [13].

80 *Teitiota v New Zealand: Deportation to the Republic of Kiribati* UN Doc CCPR/C/127/D/2728/2016 (Human Rights Committee, 7 January 2020) at [9.12]–[9.14].

81 At [9.4]–[9.5].

82 The International Panel on Climate Change's (IPCC) has said, "[i]ncreased warming amplifies the exposure of small islands, low-lying coastal areas and deltas to the risks associated with sea level rise for many human and ecological systems, including increased saltwater intrusion, flooding and damage to infrastructure (high confidence): IPCC *Global Warming of 1.5°C: Summary for Policymakers* (IPCC, Switzerland, 2018) at 9–10. See also IPCC *Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC, Switzerland, 2019).

implications resulting from forced migration,[83] but also significant legal implications for States facing the complete loss of their territory.[84]

IX. Indigenous Cases

Notable too have been cases brought by indigenous peoples relying on duties owed to them[85] and on indigenous peoples' duties of guardianship of the environment, called kaitiakitanga in New Zealand.[86]

Indigenous rights are sometimes directly relied on. For example, in *Misdzi Yikh v Canada*, a case by First Nations groups against the Canadian government, the claim was that Canada's climate policies were a breach of ss 7 and 15(1) of the Canadian Charter of Rights and Freedoms (the right to life and equality before the law, respectively).[87] On the equality argument, the claimants said that younger and future generations were being denied the equal protection and benefit of the law due to the fact that high emission projects were permissible under current laws.[88] They also asserted that Canada's historical treatment of indigenous leaders and ongoing racial discrimination exacerbate the psychological and social trauma caused by climate change.[89] This argument was not specifically addressed by the Court. In November 2020, the Federal Court struckout the claim as non-justiciable and held that there was no reasonable cause of action.[90] An appeal to the Federal Court of Appeal was filed in December 2020.

A similar indigenous-specific claim was made in New Zealand recently in *Smith v Fonterra Cooperative Group Ltd*.[91] The claimant, Mr Smith, of Māori whakapapa (genealogy), claims a customary interest according to tikanga (indigenous law) in the land at issue in the case where there

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83 Poor people and poor nations are most vulnerable to climate-related shocks due to people living in at-risk areas such as flood prone areas and due to high levels of subsistence living: see generally Stephane Hallegatte and others *Shock Waves: Managing the Impacts of Climate Change on Poverty* (International Bank for Reconstruction and Development, 2016).

84 Whether States can exist separate from their territory may be an open question in international law: see for example *the Island of Palmas Arbitration (Netherlands v United States)* (1928) II RIAA 829 at 839. See generally Benjamin Johnstone "The Unprecedented Sinking Island Phenomenon: The Legal Challenges on Statehood Caused by Rising Sea Level" (2019) 23 NZJEL 97.

85 See Rodríguez-Garavito, above n 4.

86 In modern usage, kaitiakitanga has come to encapsulate an emerging ethic of guardianship or trusteeship, especially over natural resources: see Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 105–114.

87 *Misdzi Yikh v Canada*, above n 74, at [4]. There was also a claim under the Constitution Act 1867 that Parliament must legislate to address greenhouse gas emissions in accordance with the Paris Agreement: at [5].

88 At [14].

89 See *Misdzi Yikh v Canad*a Claimants' Statement of Claim, 2 October 2020 at [79]–[80] available at Sabin Center for Climate Change Law "Lho'imggin et al v Her Majesty the Queen" (2021) <www.climatecasechart.com>.

90 The Federal Court noted that just because something is a political issue does not mean that there cannot be sufficient legal elements to render something justiciable: *Misdzi Yikh v Canada*, above n 74, at [20]. But in this case, there was no sufficient legal component to anchor the analysis: at [72]. The finding that there was no reasonable cause of action was on the basis that the claimants did not reference specific sections of law that cause specific breaches of the Charter rights: at [94]–[102].

91 *Smith v Fonterra Co-operative Group Ltd* [2021] NZCA 552 [*Smith v Fonterra (CA)*]; and *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [*Smith v Fonterra (HC)*].

are various sites of customary, cultural, historical, nutritional and spiritual significance on that land, situated in close proximity to the coast, waterways, low-lying land or the sea.[92] The High Court held that the climate change-related damage claimed by Mr Smith was neither a particular nor a direct result of the defendant's greenhouse gasemitting activities and that it was not appreciably more serious or substantial in degree than that suffered by the public generally as a result of climate change.[93] On that basis it therefore struck out the public nuisance and negligence claims.[94] It did not, however, strikeout a novel tortious duty of care claim – the breach of inchoate duty.[95]

On appeal, the Court of Appeal upheld the strike-out applications for the public nuisance and negligence claims and struck out the novel tort claim.[96] Mr Smith has now filed a notice of application for leave to appeal to the Supreme Court.

Another way in which indigenous peoples have striven to protect the environment is by claiming that the ecosystem should receive legal recognition under their respective legal systems. For example in 2017, the New Zealand Parliament passed Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, as part of a Treaty settlement,[97] which recognised Te Awa Tupua | Whanganui River as a legal person with all the rights, powers, duties, and liabilities of a legal person.[98] Since then, other jurisdictions have followed suit with Muteshekau Shipu | the Magpie River being designated as a legal person in Canada by the Innu Council of Ekuanitshit and the Minganie Regional County Municipality.[99] Nor are these developments isolated to regulatory, legislative or indigenous bodies. In *Future Generations v Ministry of the Environment*, the Supreme Court of Justice of Colombia recognised the Colombian Amazon as a "subject of rights", entitled to government-led "protection, conservation, maintenance and restoration".[100] It ordered the government to formulate and implement action plans to address deforestation in the Amazon.

The effect of these legal developments remains to be seen. For instance, notwithstanding the legal rights obtained by the Whanganui river, a water company continues to divert 80 per cent of the river's flow for hydropower until 2039.[101] Nevertheless, the concept possesses transformative power, signalling a growing trend, of necessity, to move away from an "anthropocentric exploitation"

92 *Smith v Fonterra (HC)*, above n 91, at [5].

93 At [62]–[63].

94 At [73] and [100].

95 At [104]. While accepting the significant hurdles such a novel legal duty would face, the Judge did not rule out the possibility of an evolution of the law of tort to recognise such a duty making corporates responsible to the public for their emissions: at [102]–[103], citing Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand "Climate Change and the Law" (paper presented to the Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019).

96 *Smith v Fonterra (CA)*, above n 91, at [36].

97 Treaty settlements, in New Zealand, are agreements between Māori and the Crown seeking to provide redress to Māori for historical grievances arising from breaches of Te Tiriti o Waitangi | the Treaty of Waitangi.

98 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14. See also Te Urewera Act 2014, which had earlier recognised a national park, Te Urewera, as a legal entity: s 11.

99 For other jurisdictions which have also recognised ecosystems as legal persons, see generally Patrick Barkham "Should rivers have the same rights as people" *The Guardian* (25 July 2021) <www.theguardian.com>.

100 *Future Generations v Ministry of the Environment*, above n 70, at 14. The Court characterised the Amazon in a similar manner to the way the Colombian Constitutional Court had recognised the Atrato River as a subject of rights: *The Atrato River case* T622-2016, 10 November 2016 (Constitutional Court of Colombia).

101 See Jeremy Lurgio "Saving the Whanganui: can personhood rescue a river?" *The Guardian* (29 November 2019) <www.theguardian.com>.

conception of nature to one of "protection and stewardship", more in line with indigenous values. At the very least, the conferment of legal personality avoids issues of standing – such as arguments to the effect that all persons are equally affected or that the effects are not felt locally.

X. Role of the Courts

From the summary above, it is clear there is a wide range of cases involving climate change that come before the courts. Individuals, groups, civil society and even governments have turned to litigation as a tool to "strengthen government and allocate responsibility for loss and damage".[102] What do these cases say about the role of the courts in climate change governance and discourse?

A. Discourse

Taking discourse first, the main point is that, win or lose, the issues related to climate change are aired in public due to the principle of open justice and the requirement courts provide reasoned judgments on the case before them. Because of the nature of the issues and the interests at stake, cases will often have numerous interlocutory stages and go through a number of levels of appeal. This means that the publicity (discourse) arising from one case can extend over a number of years.

Even in cases where the claimants are unsuccessful, there have been strong judicial acknowledgements from the courts about the climate crisis, such as the statements of the majority in *Juliana* as discussed above. Even court orders can have considerable rhetorical force, as noted by the dissenting judge in *Juliana*:[103]

> The majority portrays any relief we can offer as just a drop in the bucket. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot*. Properly framed, a court order – even one that merely postpones the day when remedial measures become insufficiently effective – would likely have a real impact on preventing the impending cataclysm.

The idea of discourse between the courts and legislatures parallels the dialogue model of constitutional jurisprudence which has its origins in Canada.[104] This is sometimes called the Commonwealth Model of Rights Protections.[105] It can be seen in the declarations of incompatibility available to United Kingdom courts under s 4 of the Human Rights Act 1998 (UK)[106] and in the declarations of inconsistency recently found to be available to New Zealand courts as a remedy

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102 Preston, above n 74, at 52.

103 *Juliana*, above n 59, at 1182 per District Judge Staton.

104 Peter Hogg and Allison Bushell "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All" (1997) 35 Osgoode Hall LJ 75. There has been extensive discussion on the merits and demerits of the dialogue model: for a snapshot of that discussion, see the articles and commentaries contained in "Charter Dialogue: Ten Years Later" (2007) 45 Osgoode Hall LJ 1 at 1–202.

105 See Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013).

106 Since the Human Rights Act 1998 (UK) came into force (in 2000) until the end of July 2019, 42 declarations of incompatibility had been made, the most recent being *R v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), [2019] 4 All ER 527. For a catalogue of those cases, see Ministry of Justice *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2018–2019* (October 2019) <www.gov.uk>, annex A.

for breaches of the New Zealand Bill of Rights Act 1990.[107] It can be argued as being particularly valuable in Westminster systems where courts do not have the power to overturn legislation, such as in New Zealand. The value of the dialogue/discourse metaphor, however, is not in its ability as a literary device to describe precisely the complex interactions between the judiciary and Parliament. But rather, it captures the idea that court decisions in the climate arena will, by necessity, leave room for a range of legislative responses and will generally receive one.[108]

B. Governance

In terms of governance, the cases discussed above illustrate the most important (and traditional) role of the courts: to make sure that laws are observed, that governments and private parties are acting within the law and that redress is granted where that has not been the case. Where those laws either directly or indirectly involve climate change issues, then the courts are obviously fulfilling a vital climate change governance role.

The contribution of the courts to governance is, however, both defined and limited by the nature and role of courts. It is trite to say that the main function of the courts is to adjudicate cases that come before them. This points to a major limitation of the courts in climate change governance. They are by nature reactive, rather than proactive.

A second limitation is that courts mostly adjudicate on past events and, with the exception of specialist environment courts, are not usually involved in assessing the future impact of current actions or in assessing scientific evidence in this regard.

Third, courts are for the most part reliant on the material, evidence and arguments placed before them by the parties which makes them institutionally unsuited to general policy design. The judicial process is by its very nature adversarial and does not allow for the views of all affected stakeholders to be presented. A systemic view is needed: for example, in trying to solve the climate issue it is important to ensure that other existing inequalities are not exacerbated.[109] This is a task which the political branches of government may be better suited to do with their consultation, debate and review mechanisms.

Fourth, national courts are usually concerned with cases that relate to their own jurisdiction. However, the effects of climate change transcend nation-state borders, and this suggests that what is required is global rather than purely national solutions. Some national courts have taken a more global perspective towards cases before them.[110]

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107 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 held that declarations of inconsistency are available in New Zealand. Unlike the Human Rights Act 1998 (UK), the New Zealand Bill of Rights Act 1990 does not have an explicit provision for this remedy. See the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 which will provide a mechanism for the executive and legislative branches of government to respond to judicial declarations of inconsistency.

108 Peter W Hogg, Allison A Bushell Thornton and Wade K Wright "Charter Dialogue Revisited—Or 'Much Ado About Metaphors'" in "Charter Dialogue: Ten Years Later" (2007) 45 Osgoode Hall LJ 1 at 4.

109 See the comments of New Zealand's Minister for Climate Change: Henry Cooke "James Shaw says climate transition must avoid sparking 'yellow-vest' protests" *Stuff* (online ed, New Zealand, 7 July 2021).

110 See for example the statements in *Neubauer v Germany*, above n 42, at [201]–[203]. But contrast the Norwegian courts' approach in *Greenpeace Nordic Association* as discussed above in the Human Rights section of this paper. See for example the statements in *Neubauer v Germany*, above n 42, at [201]–[203]. But contrast the Norwegian courts' approach in *Greenpeace Nordic Association* as discussed above in the Human Rights section of this paper.

Fifth, it is also necessary to ask whether climate change litigation is an effective tool in influencing policy outcomes and changing societal behaviour (corporate, government, or otherwise).[111] Generally speaking, litigation as a governance strategy is financially costly and may divert resources away from other efforts.[112] And that is not to mention the uncertain outcomes inherent in the court process as well as the significant time needed to hear and decide cases. While climate litigation has solidified its status as an important tool in the arsenal of climate activists, it will be clear from this paper that it is no silver bullet.

C. Causation

Another limitation arises out of the very nature of the problem. To some degree, we are all responsible for climate change and all are affected, albeit to varying degrees.[113] Climate change has been described as "a collective action problem so pervasive and so complicated as to render at once both all of us and none of us responsible".[114] The fact that greenhouse gasses sit in the atmosphere and affect the whole of the climate (rather than just the climate of the place from which they were emitted) – the very nature of climate change – raises challenges to traditional concepts of causation.[115]

Causation and proximity tests can be seen as line-drawing tests to answer the question of whether it is fair to hold someone responsible for some harm, based on their connection to the harm. In practice, these tests can represent significant hurdles for climate change cases to overcome.[116] For example, with respect to causation, the de minimis rule would say that the specific contribution of individual polluters is so small that causation cannot be proved. On the other hand, attribution research is becoming more accurate and climate science may increasingly enable courts in drawing causative links between climate change and various polluting activities.[117]

In a 2006 case in New South Wales, the Court in *Gray v Minister for Planning* found that, since a proposed coal mine would cause the release of substantial greenhouse gases which contribute to climate change, the test of causation in that particular case based on "a real and sufficient

111 Nor can such impact be easily evaluated given the diversity of the types of cases brought as well as the underlying objectives of the litigants involved. For a brief discussion on assessing the impact of climate litigation see Kim Bouwer and Joana Setzer *Climate Litigation as Climate Activism: What Works?* (The British Academy, November 2020) at 7–14.

112 Setzer and Higham, above n 2, at 12.

113 Groups specially affected by the effects of climate change, including youth, indigenous peoples, women, people living in the least developed countries, displaced peoples, and peoples living in small island states. See Winkelmann, Glazebrook and France, above n 27, at App 2.

114 Douglas A Kysar "What Climate Change Can Do About Tort Law" (2011) 41 Environmental Law 1 at 4.

115 See for example as discussed in David A Murray "Will Climate Change the Courts?" (2019) 57 The New Atlantis 14. Brian Preston, Chief Judge of the Land and Environment Court of New South Wales, has argued that "[a]s societal views and norms evolve, our understanding of existing legal rights and responsibilities similarly must evolve": Preston, above n 74, at 52.

116 For a discussion of selected tort cases in the United States, see Winkelmann, Glazebrook and France, above n 27, at [101]–[108].

117 See articles cited above n 18. The work of the IPCC is also invaluable in this regard: for a recent report see Intergovernmental Panel on Climate Change *Climate Change 2021: The Physical Science Basis – Summary for Policymakers* (9 August 2021).

link" was met.[118] The Court also noted that, notwithstanding that the impact from the greenhouse emissions (both globally and in New South Wales) were at the time "currently not able to be accurately measured, [that] does not suggest that the link to causation of an environmental impact is insufficient".[119]

By contrast, in *Greenpeace Nordic Association (SC)*, the Court considered that the net effect of Norwegian petroleum production on combustion emissions was "complicated and controversial" given its link "to the global market and competition situation for oil and gas".[120] For example, a decrease in exports of Norwegian gas, if replaced by coal from other providers will have a negative effect on combustion emissions, but if replaced by gas from other providers may have none.[121] The Court therefore considered that it would have been more appropriate for the Norwegian government to address the question of climate effects on a societal level as part of Norwegian climate policy, rather than for the Court to attempt to address it in an individual environmental assessment.[122]

Similarly, the District Court of Essen in *Luciano Lliuya v RWE AG*, in considering how emissions from RWE AG contributed to the melting of mountain glaciers near Huaraz, found that that it was "impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage".[123] The case is currently on appeal, and in February 2021, an independent study from the University of Oxford claimed to have established "a direct link between emissions and the need to implement protective measures now, as well as any damages caused by flooding in the future" by Lake Palcacocha.[124] The study concluded that it is virtually certain (more than 99 per cent probability) that the retreat of Palcaraju glacier causing the expansion of Lake Palcacocha cannot be explained by natural variability alone and that the glacier's retreat by 1941 represented an early impact of anthropogenic emissions.[125]

More recently, and in the broader context of the greenhouse gas emissions of States as a whole, the Supreme Court of the Netherlands overcame the de minimis argument in *Urgenda* holding that "a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope".[126] The Court held that countries could not be allowed to "easily evade its partial responsibilities by pointing out [the contributions of] other countries" – instead, "'partial fault' also justifies partial responsibility".[127] The Court emphasised that the serious global consequences of climate change were such that "each reduction of greenhouse gas emissions has a positive effect on combatting

118 *Gray v Minister for Planning*, above n 10, at [97]. The case concerned a judicial review of a decision of the Director-General of the Department of Planning, made under legislation, in relation to an environmental assessment of a proposed coal mine.

119 At [98].

120 *Greenpeace Nordic Association (SC)*, above n 53, at [234].

121 At [234].

122 At [234].

123 *Luciano Lliuya v RWE AG*, above n 19, at 5-6.

124 "Severe flood threat caused by climate change – landmark Oxford study" (4 February 2021) University of Oxford <www.ox.ac.uk>.

125 RF Stuart-Smith and others "Increased outburst flood hazard from Lake Palcacocha due to human-induced glacier retreat" (2021) 14(1) Nature Geoscience 85 at 85.

126 *Urgenda*, above n 38, at [5.6.1]–[5.8].

127 At [5.7.6]–[5.7.7].

dangerous climate change" and therefore that "no reduction is negligible".[128] Likewise, the Court in *Neubauer v Germany* stated that the "state may not evade its responsibilities here by pointing to greenhouse gas emissions in other states", emphasising Germany's part to play in the overall international effort to halt climate change.[129]

D. Standing

Standing, as a condition for parties seeking a legal remedy, may be problematic on a conceptual level because it assumes a certain type of claimant exists to assert an individual right. But there are also collective human rights and Western human rights systems do not often treat collective rights as distinct. Nor do they currently manage to reconcile tensions between individual and collective rights or rights of environment per se.[130] Recognition of collective rights is particularly important given the strong connections of many indigenous cultures to the land (such as kaitiakitanga and whakapapa, in Māori culture) and in light of the disproportionate effect indigenous people are likely to bear in terms of the impact of climate change.[131]

Standing has been a major issue in some of the cases discussed above. For example, in *Friends of the Irish Environment*, the Supreme Court of Ireland refused to recognise standing for corporate bodies (such as Friends of the Irish Environment) to raise constitutional and ECHR rights.[132] In that case, Friends of the Irish Environment was considered by the Court to be relying on personal rights it did not enjoy (the right to life and the right to bodily integrity). Nor did Friends of the Irish Environment sufficiently explain why the proceeding could not have been brought in the ordinary way by persons who enjoy those personal rights.[133] The Court of Appeal in *Greenpeace Nordic Association* reached a similar result – environmental organisations are not a "victim" under art 34 of the ECHR and so are not entitled to bring action under arts 2 and 8 of the ECHR.[134]

The position was different in *Urgenda.* The Court of Appeal of the Netherlands held that, since individuals who fall under the state's jurisdiction may rely on arts 2 and 8 of the ECHR, which have direct effect in the Netherlands, Urgenda may also do so on behalf of the residents of the Netherlands pursuant to art 3:305a of the Dutch Civil Code, which permits foundations or associations to institute legal proceedings on behalf of interest groups.[135] This was upheld by the Supreme Court: the fact that Urgenda itself does not have a right to complain under art 34 of the ECHR to the European Court of Human Rights does not detract from its right to institute proceedings under Dutch law.[136] Similarly, the outcome in *Leghari* was available because the standing hurdle was

128 At [5.7.8].

129 *Neubauer v Germany*, above n 42, at [201] and [202].

130 I discuss this further in Susan Glazebrook "Custom, human rights and Commonwealth constitutions" (paper presented to the Sir Salamo Injia Lecture series, Papua New Guinea, 29 November 2018); and Susan Glazebrook "The Declaration on the Rights of Indigenous Peoples and the Courts" (2019) 25 Auckland U L Rev 11.

131 Winkelmann, Glazebrook and France, above n 27, at [74]–[79] and [153].

132 *Friends of the Irish Environment*, above n 7, at [7.5]–[7.24].

133 At [7.22]. The Court noted that Friends of the Irish Environment could instead have provided support in whatever way it considered appropriate to such individuals (who had standing to bring the claims).

134 *Greenpeace Nordic Association (CA)*, above n 47, at 10.

135 *Urgenda Foundation v Kingdom of the Netherlands* 200.178.245/01, 9 October 2018 (Hague Court of Appeal) at [36], unofficial English translation available at <www.climatecasechart.com>.

136 *Urgenda*, above n 38, at [5.9.3].

cleared as Pakistani law provides a public interest litigation exception to common law standing rules to allow the enforcement of fundamental rights protected under Pakistan's constitution in respect of a group or class of people, such as the poor or other vulnerable groups.[137]

Again, we see that the domestic constitutional context will limit or widen action that courts can take in response to climate litigation claims.

E. Constitutional role of the courts

Finally, and most importantly, the courts must respect the boundary between their proper constitutional role and judicial overreach. This is a fine line to draw and it will be drawn in different places by different jurisdictions. For example, the courts in India,[138] Pakistan,[139] South Africa[140] and Colombia[141] have gone much further than courts elsewhere in requiring and supervising the implementation of actions related to climate change.

But all must draw the line somewhere. *Juliana* is a good example of a court, in the United States, "reluctantly" saying that other branches of government are where the issues should be raised and solved. Similarly, in *Misdzi Yikh*, the Federal Court of Canada said that "[t]he issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government."[142] To a different degree, the Irish Supreme Court in *Friends of the Irish Environment* also considered the limits of the judicial role. The Court considered that, although how the Irish government might choose to achieve the National Transition Objective might not be justiciable, whether the government's plan complies with legislation (such as the specificity requirement) is clearly justiciable as a matter of law.[143] With respect to

137 *Leghari*, above n 41. See also Ahmed Rafay Alam "Public Interest Litigation and the Role of the Judiciary" (paper presented to the International Judicial Conference, Islamabad, August 2006).

138 In India, the National Green Tribunal was established in 2010 as a specialised judicial body equipped with expertise solely for the purpose of providing effective and expeditious remedies in cases relating to environmental protection. See Gitanjali Nain Gill *Environmental Justice in India: The National Green Tribunal* (Routledge, Abingdon, 2016). See for example *Society for Protection of Environment and Biodiversity v Union of India* 677/2016, 8 December 2017 (National Green Tribunal), in which the Court held that the government's exemption of the construction industry from an environmental regulatory approval process was illegal and also in derogation of India's commitments under the Paris Agreement (above n 1) and the Rio Declaration (above n 72).

139 See *Legahri*, above n 41, at [25] in which the Court in crafting its remedy to the breach of fundamental rights by the lack of implementation of the national climate policy constituted a Standing Committee on Climate Change, to act as a link between the court and the executive government and to assist government agencies to ensure that the national climate policy is implemented. In Pakistan, like in India, there are "green divisions" in the High Courts as well as the Supreme Court, in response to the recommendations of the "Bhurban Declaration 2012 – A Common Vision on Environment for the South Asian Judiciaries" (South Asian Conference on Environmental Justice, Supreme Court of Pakistan, 24 March 2012).

140 See *EarthLife Africa Johannesburg*, above n 11. After the High Court's decision that the Minister's decision failed to consider a relevant consideration (climate change), the Minister remade the decision. The Minister reasoned that while the power plant would have significant greenhouse gas emissions and therefore cause climate change impacts, the power generation benefit of the project outweighed those harms. The Minister's decision was reviewed a second time. Subsequently, pursuant to an agreement between the parties, the High Court issued an order setting aside all governmental authorisations for the coal-fired power plant: *EarthLife Africa NPC v Minister of Environmental Affairs* 21559/2018, 19 November 2020 (High Court of South Africa, Gauteng Division).

141 *Future Generations v Ministry of the Environment*, above n 70.

142 *Misdzi Yikh*, above n 74, at [77].

143 *Friends of the Irish Environment*, above n 78, at [6.27].

the argument for an "unenumerated" right to a healthy environment in the Irish constitution, the Court also cautioned against "a blurring of the separation of powers by permitting [more properly political and policy matters] to impermissibly drift into the judicial sphere".[144] Instead, any such right would have to "derive from judges considering the Constitution as a whole", its "rights values and structure" as opposed to "judges looking into their hearts and identifying rights which they think should be in the Constitution".[145]

Courts do, however, have a role in developing the law. For common law countries this is most obvious in the incremental development of the common law. We could therefore see developments in the law to accommodate issues arising from climate change, including the possible development of rules related to causation, the relaxation of standing requirements, further development of the public trust doctrine (the view that natural resources belong to the public)[146] and more use of environmental law principles such as the polluter pays principle. Even where legislation is involved, the courts have to interpret that legislation and apply it to circumstances that may not have been thought about when the legislation was passed. Courts also have to give substance to legislation that may be drawn in terms of broad principles, a common characteristic of environmental and human rights legislation.

F. Advantages of court procedures

Some of the limitations discussed above may have advantages for both governance and discourse. For example, the application of the law to particular facts puts substance into the law in terms relating it to individual situations in a practical context. The courts are also fora where evidence is presented, there is (usually) rational argument based on that evidence and a reasoned judgment follows. This may be missing from more general public and political discourse.

In addition, subject to rules on standing and issues of justiciability, courts have to adjudicate the cases that come before them and all are equal before the courts (subject to issues of cost and general access to justice issues).[147] This can give a voice to those who traditionally might be excluded and who have not historically had their point of view heard and taken into account. Regardless of the success of cases, bringing climate issues before the courts may nevertheless represent a moral victory as it creates a broader public-relations benefit and may influence private sector responses.[148]

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144 At [8.9].

145 At [8.6]. The Court did not rule out the role constitutional rights could play in climate litigation, but said that exactly how such rights should be characterised and defined should be a matter addressed in cases where they are material to the outcome of the case: at [8.17].

146 See for example *Illinois Central Railroad v People of the State of Illinois* 146 US 387 (1892) which is widely regarded as the foundational case for the public trust doctrine in the United States.

147 Cost issues in public interest litigation are a real issue: see Rachel Pepper "Costs in Public Interest Climate Change Litigation" (seminar presented to the Australian National University, 11 October 2019), recording available at <www.law.anu.edu.au>; and Jeremy McGuire "The challenges of an appellate audience" [2018] NZLJ 61. See also the majority in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* (costs) [2014] NZSC 167 at [31]–[49] per McGrath, Glazebrook and Arnold JJ. On access to justice issues generally, 1.4 billion people in the world have unmet civil and administrative justice needs and that is particularly the case for traditionally marginalised groups: see World Justice Project *Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries* (Washington, 2019).

148 See David A Murray "Will Climate Change the Courts?" (2019) 57 The New Atlantis 14; Douglas A Ksyar "What Climate Change Can Do About Tort Law" (2011) 41 Environmental Law 1 at 3; and Robert French "Lecture on Climate Change – Opening Remarks" (presented to the University of Western Australia, 30 January 2020).

XI. Conclusion

A note of caution. The tensions that result from the limitations on the courts will inevitably affect public perceptions of the courts.[149] These limitations may leave all dissatisfied. Governments may consider the courts are encroaching too much on the role of the legislature and executive. Corporates may consider the courts are increasing the costs and risks of business unnecessarily. And climate change activists may consider the courts too timid in confronting a problem that is obvious and that needs decisive and immediate attention. This, however, might be no more than the perennial problem facing courts. In any adjudication, there must be one or more losers.

There is no sign that recourse to litigation on climate change issues will diminish. If anything, recourse to climate litigation is likely to increase, subject to overcoming the difficulties arising in the courts through restrictions caused by COVID-19.[150] A survey of cases contained in a comprehensive database of climate cases has found that 58 per cent of cases had direct outcomes favourable to climate change action.[151] This is a reasonable success rate, but the point has been made that whether or not these cases received favourable immediate outcomes, they gave increased publicity and attention to the climate crisis, thereby serving to advance the cause of combatting climate change.[152] As a whole, it seems incontrovertible that judges and courts have a critical part to play, within the limitations of their nature and role, to ensure that the ultimate loser is not the environment on which we all depend on to live.

149 See Winkelmann, Glazebrook and France, above n 27, at [136]–[137]; and Rick Bigwood *Public Interest Litigation* (LexisNexis, Wellington, 2006) at 235–241.

150 Setzer and Byrnes, above n 56, at 13.

151 Setzer and Higham, above n 2, at 19. "Favourable" is used in the sense that the judge ruled in favour of more effective climate regulation or ruled against an outcome that would have resulted in increased greenhouse emissions: Setzer and Byrnes, above n 56, at 11.

152 This is a broader approach which tries to understand the overall impact of the case. These impacts may include changes to the behaviours of the parties, changes to public opinion, financial and reputational consequences for a variety of actors, and further litigation: Setzer and Higham, above n 2, at 18.