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**CLIMATE CHANGE REGIME AS THE  
BASIS FOR THE PROTECTION OF HUMAN  
RIGHTS:**

Enforcing the UNFCCC, the Kyoto Protocol and the Paris Agreement through  
Climate Litigation

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## THE TABLE OF CONTENTS

<b>ABSTRACT</b> .....	3
<b>INTRODUCTION</b> .....	4
<b>1. THE INTERPLAY AND COHERENCE BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE</b> .....	11
<b>1.1. The Relevance of Climate Change Regime to Human Rights</b> .....	11
<b>1.2. States' Responsibilities towards Human Rights Affected by Climate Change</b> .....	13
<b>1.3. States' Solidary in Climate Change</b> .....	16
<b>2. HUMAN RIGHTS UNDER THE UNFCCC, THE KYOTO PROTOCOL AND THE PARIS AGREEMENT</b> .....	20
<b>2.1. Human rights in the UNFCCC</b> .....	20
<b>2.2. Human rights in the Kyoto Protocol</b> .....	24
<b>2.3. Human rights in the Paris Agreement</b> .....	27
<b>3. CLIMATE CHANGE LITIGATION BASED ON THE UNFCCC, KYOTO PROTOCOL AND THE PARIS AGREEMENT</b> .....	34
<b>3.1. Climate change litigation</b> .....	34
<b>3.2. Climate change litigation to protect human rights against climate change and its consequences in the Netherlands</b> .....	35
<b>3.3. Climate change litigation to protect human rights against climate change and its consequences in Pakistan</b> .....	39
<b>3.4. Assessing the impact of climate change litigation on enforcing climate change instruments to protect human rights</b> .....	42
<b>CONCLUSION</b> .....	44
<b>BIBLIOGRAFY</b> .....	47
<b>Books and articles</b> .....	47
<b>Case law</b> .....	50
<b>Legislation</b> .....	51
<b>Others</b> .....	54
<b>ANNEXES</b> .....	55

## **ABSTRACT**

Climate change continues to have adverse implications for the fulfillment of human rights worldwide. Unfortunately, after almost 30 years, since the adoption of the United Nations Framework Convention on Climate Change, there still is no international climate change instrument that can effectively implement international law norms, prevent the further deterioration of the climate as well as ensure and protect the enjoyment of human rights in relation to climate change, as 2017's temperatures stand to show. This master's thesis seeks to answer the question, to what extent is it possible to invoke the provisions of the UNFCCC, the Kyoto Protocol and the recently adopted and entered into force Paris Agreement, to ensure and protect the enjoyment of human rights against the adverse effects of climate change. This thesis examines the use of climate change litigation as an alternative way to force governments to combat climate change, so as to ensure and protect the fulfillment of human rights against the adverse effects of climate change. More broadly, it investigates the capacity of courts at the national level to enforce states' obligations under the UNFCCC, the Kyoto Protocol and especially the Paris Agreement to tackle climate change and ensure and protect the effective enjoyment of human rights against the harm caused by climate change.

## INTRODUCTION

Climate change, which is a function of global warming, is caused by anthropogenic emissions of greenhouse gases.<sup>1</sup> The last report of the Intergovernmental Panel on Climate Change (IPCC), in 2014, warned that the warming of the climate system is unequivocal and accelerating.<sup>2</sup> Another report related to climate change submitted to the UNFCCC on behalf of the Climate Vulnerable Forum, also stated that a temperature increase of just 1.5 degrees Celsius would greatly threaten human rights.<sup>3</sup> However, it is already predicted that the global temperature will increase by 1.8 to 6.4 degrees centigrade.<sup>4</sup> To mitigate climate change, states must act to limit anthropogenic emissions of greenhouse gases, in order to prevent, to the greatest extent possible, the current and future negative human rights impacts of climate change.<sup>5</sup> However, there is still no global human rights instrument that explicitly protects human rights against the dangers of climate change by forcing states to effectively tackle climate change or obliging states to refrain from emitting GHGs at levels that adversely affect the fulfillment of human rights globally.<sup>6</sup>

Although there is no global human rights instrument to protect human rights against climate change, the first important and collective attempt to address climate change was made in 1992 by the United Nations in Rio de Janeiro, with the introduction of the United Nations Framework Convention on

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<sup>1</sup> The Synthesis Report of the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, available at [https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf), [IPCC Report 2007]. The IPCC Fifth Report, provides an authoritative international statement, which is based on the work of some 2,400 scientists and 193 member governments of the IPCC. It provides scientific understanding of climate change, presenting the most comprehensive and up-to-date scientific assessment of the impacts of climate change. Also, see a general explanation for how anthropogenic emissions of greenhouse gases interference with the climate system at J. Glazebrook, *Human Rights and the Environment*. Victoria University of Wellington Law Review Volume 40, 2009, pp 329-330. J. Blau. *The Paris Agreement: Climate Change, Solidarity, and Human Rights*. Palgrave Macmillan, 2017.

<sup>2</sup> The IPCC Report 2014, pages 3-5.

<sup>3</sup> The report 'The Effects of Climate Change on the Full Enjoyment of Human Rights' was submitted on 1 May 2015 to the UNFCCC on behalf of the Climate Vulnerable Forum. Available at: [http://www.ohchr.org/Documents/HRBodies/SP/SP To UNFCCC.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP%20To%20UNFCCC.pdf).

<sup>4</sup> The IPCC Report 2014, see the Summary for Policy Makers. Also, NGOs, like Climate Action Tracker calculated that if the pledges are fulfilled then the temperature will still have a 2.7°C increase, while Climate Interactive estimated a 3.5°C increase. See Climate Action Tracker. Available at <http://climateactiontracker.org/news/253/Climate-pledges-will-bring-2.7C-of-warming-potential-for-more-action.html>.

<sup>5</sup> The IPCC Report 2014, page 8. Also, see the Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 2015, page 2. Available at <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>. Also, for example article 7(4) of the Paris Agreement states, "that greater levels of mitigation can reduce the need for additional adaptation efforts".

<sup>6</sup> See the analysis of different instruments to tackle climate change in T. Bach. *Human Rights in a Climate Changed World: The Impact of COP21, Nationally Determined Contributions, and National Courts*, Vermont Law Review, Vol. 40, 2016, p 565. See also C. Y. Nyinevi. *Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation*. Journal of Politics and Law; Vol. 8 No 3, 2015, p 142.

Climate Change (UNFCCC).<sup>7</sup> The UNFCCC and its Kyoto Protocol<sup>8</sup> are considered the international community's first significant steps forward to collectively prevent dangerous anthropogenic interference with the climate; with almost universal adherence<sup>9</sup> these instruments provide the world with an international legal framework for common but differentiated responsibility for the reduction of greenhouse gas emissions.<sup>10</sup> Most recently, on 4 November 2016, the climate change regime under the umbrella of the UNFCCC was supplemented by the Paris Agreement.<sup>11</sup> The UNFCCC, the Kyoto Protocol and the Paris agreements are the only international instruments with their central purpose to reduce greenhouse gas emissions for the prevention of further dangerous anthropogenic interference with the climate. Thus, since the UNFCCC, the Kyoto Protocol and the Paris agreements are internationally recognized instruments that tackle the global threat that climate warming poses to the effective enjoyment of human rights, the main aim of this master's thesis to analyze to what extent the UNFCCC, the Kyoto Protocol and the Paris agreements could protect human rights against the adverse effects of climate change.

This master's thesis seeks to provide an analysis of the UNFCCC, the Kyoto Protocol and the Paris Agreement and its provisions in relationship to human rights, and the extent to which these documents provide protection to human rights against the adverse effects of climate change. What role does the UNFCCC framework play in protecting human rights against climate change issue? How can the provisions of the UNFCCC, the Kyoto Protocol and the Paris Agreement be used to protect human rights from the adverse effects of climate change? Since the Paris Agreement after 2020 is supposed to be domineering international instrument to deal with climate change for the next few decades, it will be examined in more depth and compared to the analysis of the UNFCCC and the Kyoto Protocol.

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<sup>7</sup> United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994). Available at [http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php)

<sup>8</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, entered into force 16 February 2005, Available at [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php).

<sup>9</sup> For example, the UNFCCC was ratified by 197 countries. See the United Nations website on the UNFCCC [http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php).

<sup>10</sup> According to Article 2 of the UNFCCC, an ultimate objective of the UNFCCC is preventing dangerous anthropogenic interference with the climate system... to be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. The Kyoto Protocol endorses the ultimate objective of the UNFCCC.

<sup>11</sup> In accordance with article 21(1) of the Paris Agreement, the agreement entered into force on 4 November 2016 after at least 55 parties to the Paris Agreement accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession. See the United Nations website on the UNFCCC about the Paris Agreement, available at [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php). Also see United Nations Treaty Collection, Depository: Status of Treaties, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXVII-7-d&chapter=27&clang=_en).

To conclude on the research problems, despite the presence of the UNFCCC, the Kyoto Protocol and the Paris Agreements and all the progress that has been made with the UNFCCC and the Kyoto Protocol towards solving climate change, the states have been reluctant to adopt progressive, action-forcing targets and policies to reduce their GHG emissions.<sup>12</sup> The 21 years of talks within the UNFCCC have resulted in inadequate climate change measures and poorly implemented commitments,<sup>13</sup> which has led to the growing frustration among different actors.<sup>14</sup> Environmental groups, affected individuals, including even children, have been arguing that the implementation pace of relevant measures is slow and the nature of regulatory developments are fragmented.<sup>15</sup> The perceived reluctance and inaction of governments on climate change at the national political level has been leading civil society to explore non-legislative solutions to protect human rights against climate change, including taking the matter before courts.<sup>16</sup> Thus, as mentioned above, the core research question of this thesis is the effectiveness of the provision of the UNFCCC, the Kyoto Protocol and the Paris Agreements in protecting human rights against climate change and by bringing the matter before courts, how these documents could be used to oblige state to take active steps to put in place relevant laws, policies and measures to tackle global warming and protect human rights against the negative impacts of climate change.

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<sup>12</sup> On this issue see S. McInerney-Lankford, M. Darrow, R. Lavanya. *Human Rights and Climate Change: A Review of the International Legal Dimensions*. Washington, D.C: World Bank, 2011, p 8. T. Bach, 2016, p 565. E. Gladun and D. Ahsan. *BRICS Countries' Political And Legal Participation In The Global Climate Change Agenda*. *BRICS Law Journal* Volume III, Issue 3, 2016, p 10 and 21. T. Bach, 2016, p 459. Esmeralda Colombo. *Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?* *Journal of Environmental Law*, Volume 34, Issue 1, 2017, p 455.

<sup>13</sup> S. McInerney-Lankford, M. Darrow, R. Lavanya, 2011, p 393.

<sup>14</sup> See e.g. M. Limon. *Human Rights and Climate Change: Constructing a Case for Political Action*. *Harvard Environmental Law Review*, Volume 38, 2009, pp 486 and 487; Esmeralda Colombo. *Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?* *Journal of Environmental Law*, Volume 34, Issue 1, 2017, 99. J. D. Fry and I. Amesheva. *Cleaved International Law: Exploring the Dynamic Relationship between International Climate Change Law and International Health Law*. *The Fletcher Forum of World Affairs*, Vol 40, No 1, 2016, p 84. See also A. M. Halvorssen. *Common, but Differentiated Commitments in the Future Climate Change Regime: Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund*, *Colorado Journal of International Environmental Law and Policy*, Volume 18, 2007. E. N. Gilde. *State responsibility for climate change related damage*. Master's thesis, supervisor R.J.M. Lefeber, University of Amsterdam, 2016, p 4.

<sup>15</sup> For example, the United States and Australia refused to ratify the Kyoto Protocol and accept legally binding emissions mitigation targets. Domestically the governments of these countries are also reluctant to mitigate GHG emissions, they rely on voluntary action and other "soft" or non-binding regulations for industry to reduce its carbon output. As an example of this frustration, in June of 2015, a group of plaintiffs, ranging in age from 8 to 19, initiated a suit in the United States District Court of Oregon, against the United States government (*Juliana, et al v. United States, et al*, case number 6:15-cv-01517). The plaintiffs accused the federal government that the latter knowingly "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels" as well as "deliberately allow[ing] atmospheric CO<sub>2</sub> concentrations to escalate to levels unprecedented in human history".

<sup>16</sup> For examples, see an in-depth analysis of recent climate change cases from different jurisdictions, K. Boom, J-A. Richards, S. Leonard. *Climate Justice: The international momentum towards climate litigation*. *Heinrich-Böll-Stiftung and Climate Justice Programme*, 2016. Also see K. Boom, J. A. Richards and S. Leonard. *Climate Justice: The international momentum towards climate litigation*, *Heinrich-Böll-Stiftung and Climate Justice Programme*, 2016. Available at <https://www.boell.de/sites/default/files/report-climate-justice-2016.pdf>

The relevance of the thesis is that there is still no explicit instrument to ensure and protect human rights against dangerous climate change, which poses direct and indirect threats to human lives.<sup>17</sup> In addition, the relevance of this topic becomes clear when considering the fact that nowadays, climate change adversely affects various human rights, such as right to life, food, nutrition, housing, self-determination, development and water and sanitation<sup>18</sup>; likewise the negative impacts of climate change on human rights will only worsen with the increase in global average temperatures.<sup>19</sup> Thus, the thesis will try to propose ways in which the provisions of the Paris Agreement, which was recently entered into force, could more adequately improve the protection of human rights against climate change; this will be compared to the possible protection of human rights against the adverse effects of climate change under the UNFCCC and the Kyoto Protocol. The relevance of the possible enforcement of the Paris Agreement is that states have been reluctant to take proactive steps to reduce emissions to safeguard human rights to the adverse effects of climate change.<sup>20</sup> Especially, when the United States, as the second biggest emitter of GHG emissions has announced their intention to abandon the Paris Agreement.<sup>21</sup>

Based on the above, the master's thesis is composed of three parts. The first chapter briefly demonstrates the link between climate change and human rights, how climate change is related to and affecting human rights, and the obligations that states have if climate change interferes with the enjoyment of the right. This is the necessary knowledge to continue with the research problems and it answers also the question, whether the UNFCCC, the Kyoto Protocol and the Paris Agreement could be important for the human right's regime and why states could be obliged to act in accordance with these documents. It also focuses on importance of the third generation so-called solidarity rights, since climate change is already affecting vulnerable groups because of poverty, gender, age, minority status, or disability as well as small island states. The first chapter gives a clear representation of the

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<sup>17</sup> On the inefficiency of the existing international documents and their lack to tackle climate change see generally e.g. E. Colombo. *Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?* *CLA Journal of Environmental Law and Policy*, Volume 35, Issue 1, 2017. S. Alabi. *Using Litigation to Enforce Climate Obligations under Domestic and International Laws.* *Carbon and Climate Law Review*, Volume 6, Issue 3, 2012. T. Bach (2016), p 565. See sections about human rights jurisprudence and climate change in J. H. Knox. *Climate Change and Human Rights Law.* *Virginia Journal of International Law*, Vol. 50, No. 1, 2009.

<sup>18</sup> See J. D. Fry and I. Amesheva, 2016, p 81; United Nations Office of the High Commissioner for Human Rights, *Understanding Human Rights and Climate Change: Submission of the Office of the High Commissioner for Human Rights to the 21<sup>st</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change (2015)*, p 21. Available at <http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

<sup>19</sup> See e.g. the IPCC Report 2014, pages 3-5. See also UN Human Rights Council Resolution 7/23, A/HRC/7/L.21/Rev.1 (2008). OHCHR Submission, 2015.

<sup>20</sup> See e.g. M. Wewerinke-Singh, and C. Doebbler. *The Paris Agreement: Some critical reflections on process and substance.* *UNSW Law Journal*, Volume 39, Issue 4, 2016, p 1489. Also, see J. Lin. *The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands.* *Climate Law*, Volume 5, No 1, 2015.

<sup>21</sup> See e.g. L. Dong. *The Trump administration's decision to withdraw the United States from the Paris Climate Agreement.* *Chinese Journal of Population Resources and Environment*, 2016, p 1.

interdependence of human rights and climate change as well as the emergence of solidarity rights within climate change.

The second chapter analyzes the major environmental documents tackling climate change and their interrelation with human rights. It looks into the relevance of the UNFCCC, the Kyoto Protocol, the Paris Agreement and their provisions for international human rights protection, their potential roles in strengthening the legal protection of human beings against climate change. It identifies the provisions of the UNFCCC and the Kyoto Protocol that are relevant to human rights protection as well as assesses States' compliance with human rights obligations. In the second chapter, a special emphasis is given to the legal form and nature of the Paris Agreement, by exploring its provisions in relevance to human rights. Since the Paris Agreement is the 'major leap for mankind' and this document will replace the Kyoto Protocol, whose second commitment period ends in 2020,<sup>22</sup> it is relevant to look into provisions of the Paris Agreement to understand what it brings to different actors in the climate change regime, to effectively protect and ensure the enjoyment of human rights against the adverse effects of climate change.

The third part concludes with a discussion of a possible theory of climate change litigation enforcing GHG emissions targets made under the Paris Agreement. The third chapter assesses possibilities for the enforcement of the UNFCCC, the Kyoto Protocol and with a special emphasis on the Paris Agreement before domestic courts – taking into account that domestic courts are more favorable today than a few years ago – and compare it to climate change litigation at the international level.<sup>23</sup> Taking into account trends that show how different actors have been innovative in using different legal mechanisms to address environmental and climate change issues, the third chapter seeks to provide an analysis of how the UNFCCC, the Kyoto Protocol and the Paris Agreement could be used in climate change litigation as a legal tool to force governments to tackle climate change. The analysis is provided in two examples from two different jurisdictions: one from Pakistan<sup>24</sup> and another from the Netherlands<sup>25</sup>. Cases from Pakistan and the Netherlands show how through the UNFCCC, the Kyoto Protocol and the Paris Agreement, claimants can seek the development and implementation of

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<sup>22</sup> On 8 December 2012, within the Kyoto Protocol under the UNFCCC, an amendment to the Kyoto Protocol was reached to extend the Protocol to 2020. See [http://unfccc.int/kyoto\\_protocol/doha\\_amendment/items/7362.php](http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php). However, Doha Amendment never had formal legal effect, because only 66 parties to the Kyoto Protocol have ratified the Doha Amendment, while 144 ratifications are required for its entry into force.

<sup>23</sup> See generally e.g. K. Boom, J-A. Richards, S. Leonard. *Climate Justice*, 2016. E. Colombo, 2017. Philippe Sands QC. *Climate Change and the Rule of Law: Adjudicating the Future in International Law*. *Journal of Environmental Law*, 28, 2016.

<sup>24</sup> *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Pakistan.

<sup>25</sup> *Urgenda Foundation v. Kingdom of the Netherlands* ( HAZA. C/09/00456689), District Court of the Hague, The Netherlands.



comprehensive climate recovery plans to achieve more ambitious, science-based targets for climate mitigation, better implementation of existing laws or to force fossil fuels to remain in the ground. The enforcement of the Paris Agreement is an actual problem, since despite the progress made through the UNFCCC framework, some states have been reluctant to meet their obligations under the UNFCCC and the Kyoto Protocol, also taking into account a resent promise by the president of the United States to withdraw from the Paris Agreement. In addition, referring to the Paris Agreement, Nicaragua and Syria also have refused to participate.

The most important normative sources used for the master's thesis are climate change regulating instruments, the UNFCCC, the Kyoto Protocol and the Paris Agreement and related documents that have led to the adoption of these documents, as well as other relevant international (human rights, environmental, climate change) treaties, the so-called soft law, general comments to the treaties and case law. The thesis also analyses the case law related to climate change on the domestic level in two different jurisdictions and the approaches towards climate change in the Netherlands and Pakistan. Only relevant climate change cases at the domestic level are analyzed, since there is still no effective nor successful case to tackle climate at the international level.<sup>26</sup> While writing the thesis I have used a wide range of sources, for example legal articles, research papers and books from different legal scholars, like C. P. Carlarne, K. R. Grey, R. Tarasofsky, D. Bodansky, M. Wewerinke-Sing and J. Knox who, in their works, have often addressed the problem of climate change, human rights and climate litigation.

During writing the master's thesis, various combined research methods have been used to look into the research questions. Firstly, to the thesis is applied empirical legal research methods. The methods used in this master's thesis are mostly traditional methods the analytical, systematic and historical methods. The research problem and questions are approached in a systematic way. First it is explained whether the interrelationship between human rights and climate change and why the states have obligations to mitigate climate change, and the extent to which the UNFCCC, the Kyoto Protocol and the Paris Agreement protect human rights, if the latter is affirmative, then the possible effect of the enforcement of these documents before domestic courts. The comparative method is used to understand what new aspects the Paris Agreement brings to the climate change regime compared with the UNFCCC and the Kyoto Protocol. The historical method is also used in case-law analysis to see

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<sup>26</sup> See e.g Philippe Sands QC. Climate Change and the Rule of Law: Adjudicating the Future in International Law. *Journal of Environmental Law*, 28, 2016, 19-35. . S. Alabi. Using Litigation to Enforce Climate Obligations under Domestic and International Laws. *Carbon and Climate Law Review*, Volume 6, Issue 3, 2012. K. R. Gray, R. Tarasofsky, and C. Carlarne. *The Oxford Handbook of International Climate Change Law*. Oxford University Press, Oxford, United Kingdom, 2016, Part V - Climate Change Litigation.

whether climate change litigation for the Paris Agreement at the national level could be effective, and to compare the opinions on the current issue by different scholars.

# 1. THE INTERPLAY AND COHERENCE BETWEEN HUMAN RIGHTS AND CLIMATE CHANGE

## 1.1. The Relevance of Climate Change Regime to Human Rights

Climate change has been described as one of the greatest challenges facing humankind.<sup>27</sup> Over the last several years, interest in the subject of climate change and human rights has been growing colossally.<sup>28</sup> Many NGOs and different countries have begun to bring claims asserting that climate change is responsible for human rights violations.<sup>29</sup> The UN Human Rights Council has adopted several resolutions on climate change; the High Commissioner on Human Rights produced a report on the subject.<sup>30</sup> The recognition of the link between climate change and human rights has been increased at the international level, in the academic community.<sup>31</sup> Thus, it has been found that the adverse effects of climate change threaten the enjoyment of a broad array of human rights, such as the right to life, self-determination, food, and health.<sup>32</sup>

The OHCHR report and the IPCC report state, for example, that projected trends in climate change will pose direct and indirect threats to the enjoyment of human rights, as a result of extreme weather events such as more frequent and intense floods, fires, storms, droughts and heat waves, fires.<sup>33</sup> These weather events will threaten the right to life, since represent a threat and danger to human life. Climate

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<sup>27</sup> See e.g. the Submission of the OHCHR, p 11. A. Honniball, C. Ryngaert. Editorial Introduction: The Interrelationship between Human Rights and Climate Change. *Human Rights and International Legal Discourse*, Volume 1, 2014, p 3. P. Sands QC, 2016, p 33.

<sup>28</sup> See generally S. Kravchenko and J. Bonine. *Human Rights and the Environment: Cases, Law, and Policy*. Carolina Academic Press, 2008; A. E. Boyle and M. R. Anderson. *Human Rights Approaches to Environmental Protection*. Oxford: Clarendon Press, 1996.

<sup>29</sup> For example a petition submitted in 2005 in the Inter-American Commission on Human Rights against the United States on behalf of Inuits, available at <http://earthjustice.org/news/press/2005/inuit-human-rights-petition-filed-over-climate-change>.

<sup>30</sup> The OHCHR published its report on climate change and human rights in January 2009, after receiving submissions from states, international agencies, and NGOs. The United Nations Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61. Available at <http://www.ohchr.org/Documents/Press/AnalyticalStudy.pdf>

<sup>31</sup> See e.g. S. McInerney-Lankford, M. Darrow and L. Rajamani, *Human Rights and Climate Change: a Review of the International Legal Dimensions* (World Bank Study 61308, 2011, available at <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/HumanRightsAndClimateChange.pdf>). Also see S. Humphreys. *Human Rights and Climate Change*. Cambridge University Press, 2010; J. H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 2009; E. A. Posner. *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 2007.

<sup>32</sup> See e.g. UNCHR (2007), Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, para. 104, UN Doc A/62/214; UNCHR (2009a), Report of the Special Rapporteur on the Right to Food, Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, para. 21, UN Doc. A/HRC/13/33/Add.2; UNCHR (2012a), Interim Report of the Special Rapporteur on the Right to Food, UN Doc. A/67/268.

<sup>33</sup> OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61, at 22. IPCC 2007 Report, pp 85-90.

change will affect the availability of water and food by causing malnutrition.<sup>34</sup> The right to health will be infringed by extreme weather patterns, malaria, diarrhoeal and other diseases that rapidly grow in warmer weather will increase.<sup>35</sup> The impacts of the rising sea is already affecting the right to adequate housing and self-determination in small islands and low-lying coastal areas and in the Arctic.<sup>36</sup> Additionally, “[t]he inundation and disappearance of small island States would have implications for the right to self-determination, as well as for the full range of rights for which individuals depend on the State for their protection”.<sup>37</sup>

The OHCHR report also cites that climate change especially pose an enormous threat to already vulnerable communities as a result of their status or location. For example, because of their poverty, gender, age, minority status, disability or low-lying coral atolls.<sup>38</sup> However, rights of every vulnerable group are protected by specific human rights treaties.<sup>39</sup> The report also draws attention a lot of people will become migrants as a result of losing their land or endless water and food shortages.<sup>40</sup> Maldives, in its submission to the OHCHR, in a very detailed way described how rising sea levels and other effects of climate change have already affected the human rights of the residents of small islands.<sup>41</sup> John Knox, Special Rapporteur on Human Rights and the Environment, concludes that climate change will deprive small islands and low-lying coastal areas residents of right to life, property, enjoyment of their rights to health, food, water, and housing and their collective right to self-determination by the loss of the country itself..<sup>42</sup>

An explicit example of how climate change interferes with the enjoyment of a broad array recognized human rights is the case of Inuit people. In December 2005, the Inuit, an indigenous people living in the Arctic region, filed a petition with the Inter-American Commission on Human Rights that accused the United States of violating human rights by failing to reduce its GHG emissions.<sup>43</sup> The Inuit stated that “temperatures in the Arctic have begun to violate their enjoyment of many human rights such as

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<sup>34</sup> U.N. Doc. A/HRC/10/61, at 26 and 29.

<sup>35</sup> Id. at 32.

<sup>36</sup> Id. at 36.

<sup>37</sup> Id. at 41.

<sup>38</sup> OHCHR Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61, Jan. 15, 2009, at 15.

<sup>39</sup> Id. at 42-54; see Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention Concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>40</sup> Id. at 42-54.

<sup>41</sup> See Submission of the Marshall Islands to the OHCHR under Human Rights Council Res. 7/23, 2008, at 2, available at [http://www2.ohchr.org/english/issues/climatechange/docs/Republic\\_of\\_the\\_Marshall\\_Islands.doc](http://www2.ohchr.org/english/issues/climatechange/docs/Republic_of_the_Marshall_Islands.doc). Also see Maldives Res. 7/23 Submission, available at [http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives\\_Submission.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf).

<sup>42</sup> J. H. Knox. Linking Human Rights and Climate Change at the U.N. Harvard Environmental Law Review, Volume 33, 2009, p 485. In addition see Marshall Islands Res. 7/23 Submission, at 8-11; Maldives Res. 7/23 Submission, at 39-56.

<sup>43</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, 2005.

rights to life (because melting ice and permafrost make travel more dangerous), to property (melting permafrost undermines houses and forces residents to leave their traditional homes), and to health (changing temperatures cause the populations of animals on which the Inuit depend for sustenance to decline, leading to reduced nutrition”.<sup>44</sup> Another example related to impacts of climate change on human rights is the people of Solomon Archipelago, which have already lost islands and had to abandon their land. Kiribati, Tuvalu, Marshall Islands, Tonga and Papua New Guinea with a high probability will repeat the history of the Solomon Archipelago.<sup>45</sup> As changes in the climate become more severe and widespread, they will threaten the human rights of more and more people, as the OHCHR report explains. In short, there can be no doubt that climate change interferes with the enjoyment of many recognized and protected by international law human rights.

Regardless that climate change poses a threat to human rights, there is still no international human rights treaty that would explicitly address climate change to protect human rights. None of the existing international human rights treaty explicitly includes a right to a healthy and safe environment. However, it is already well established that environmental harm violates the enjoyment of many recognized human rights. For example, human rights bodies found “the intrinsic link between the environment and the realization of a range of human rights.”<sup>46</sup> Regional tribunals with contribution of treaty bodies established that environmental decay could deprive people of many rights, including rights to life,<sup>47</sup> health,<sup>48</sup> privacy,<sup>49</sup> and property,<sup>50</sup> water<sup>51</sup> and food.<sup>52</sup> All these rights are protected by international human rights law and states have duties to take actions to protect their people from threats.

## **1.2. States’ Responsibilities towards Human Rights Affected by Climate Change**

Human rights instruments impose broad obligations upon signatory states. In international law, when a state ratifies an international human rights instrument, it has agreed to respect, protect and fulfil the

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<sup>44</sup> J. H. Knox. Human Rights Principles and Climate change. Wake Forest Univ. Legal Studies Paper No. 2523599, 2014, p 3.

<sup>45</sup> See J. Blau, 2016, pp 96-97.

<sup>46</sup> OHCHR Report, at 18.

<sup>47</sup> See ECtHR, *Budayeva v. Russia*, Application No. 15339/02; ECtHR, *Oneryildiz v. Turkey*, No. 48939/99.

<sup>48</sup> See ECSR, *Marangopoulos Foundation for Human Rights v. Greece*. Complaint No.30/2005; OHCHR, General Comment 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (2000).

<sup>49</sup> See ECtHR, *Fadeyeva v. Russia*, No. 55723/00; ECtHR, *Lopez Ostra v. Spain*, No. 16798/90.

<sup>50</sup> See *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172 (2007); *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/ 04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 at 5-6 (2004).

<sup>51</sup> See ECSR, General Comment 15: The Right to Water, U.N. Doc. E/C.12/2002/11 (2003).

<sup>52</sup> See ACHPR, *SERAC and CESR v. Nigeria*, 2006, at 65.

rights as well as undertakes ensure to all individuals within its territory and subject to its jurisdiction the standards contained therein.<sup>53</sup> The obligation to respect means states must refrain from interfering with the enjoyment of human rights. The obligation to fulfil means that states have a positive duty to take appropriate measures to facilitate the enjoyment of basic human rights. The obligation to protect means that states have must protect individuals and groups against against interference with human rights, including abuses from private actors<sup>54</sup> or natural disasters.<sup>55</sup> Thus, states have duties take positive measures to protect and ensure the human rights from any possible abuses, without regard to the cause of a threat to human rights.<sup>56</sup>

Since climate change has obvious implications for the enjoyment of human rights as it was indicated above, then state have the obligations under the international human rights treaties to protect people under their jurisdiction from the threats posed by climate change. For example, the right to life is protected under article 6 of the ICCPR, and also in many other international and regional human rights instruments.<sup>57</sup> It has been recognized, that even in time of public emergency the right to life must not be derogated from people.<sup>58</sup> Moreover, the HRC stated that, it would be “desirable for States parties to take all possible measures to increase life expectancy and to reduce death from environmental factors such as malnutrition and epidemics”.<sup>59</sup> In addition, is a state fails to protect individuals from certain imminent environmental threats to life, the state might be held responsible for failure to protect the rights to life under human rights instruments.<sup>60</sup> The right to life place strict obligations on a state to prepare, prevent and respond to the occurrence of environmental hazards, that interferes with the exercise of human rights.<sup>61</sup> Thus, a state might be held responsible irrespective of whether an act or omission is due to deliberate, reckless, or merely negligent.<sup>62</sup> Following this

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<sup>53</sup> See OHCHR, General Comment No. 3: Nature of the General Legal Obligation imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), at 10.

<sup>54</sup> See UN Committee on the Rights of the Child, General comment No 5: General Measures of Implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5 (2003); OHCHR, General comment No 9: the Domestic Application of the Covenant, UN Doc E/C. 12/1998/24 (1998); UN Human Rights Committee, General comment 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add13 (2004). ECHR also stated, that if environmental degradation causes adverse impacts on health and the quality of life, then it may interfere with the right to privacy.

<sup>55</sup> See *Fadeyeva v. Russia* and *Lopez Ostra v. Spain*.

<sup>56</sup> OHCHR, General comment No. 3: On the Nature of State Parties' Obligations UN Doc, E/1991/23 (1990).

<sup>57</sup> Article 6 of the Convention of the Rights of the Child; Article 2 of the European Convention on Human Rights; Article 1 of the American Declaration of the Rights and Duties of Man; Article 4 of the American Convention on Human Rights; and Article 4 of the African Charter on Human and Peoples' Rights.

<sup>58</sup> HRC General Comment No. 6: The Right to Life, UN Doc HR/GEN/I/Rev1 (1982).

<sup>59</sup> *Id.*, at para 5.

<sup>60</sup> In *Budayeva v. Russia*, for example, the ECHR ruled that Russia had not implemented necessary policies to protect the inhabitants of a region prone to deadly mudslides.

<sup>61</sup> For example, In *Oneryildiz v. Turkey*, the the ECHR stated that the positive duty to take all appropriate measres to safeguard life “entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.” See *Oneryildiz v. Turkey*, at 89 and 90.

<sup>62</sup> F.Z. Ksentini. Final Report of the Special Rapporteur, Human Rights and the Environment, 1994.

view, the obligation to protect the right to life would entail an obligation of a state to carry out legislative and administrative policies that would protect people the hazards of climate change before they threaten human survival.<sup>63</sup>

However, analyzing the adverse impacts of climate change all these imposed obligations to take appropriate measures to protect human rights against the hazards of climate change, in several cases would present only temporary protections from persistent, pervasive and pernicious effects of climate change. For examples, Maldives or any other small island state can do little to protect its citizens from sea-level rises, that could significantly reduce land surface and maybe even wipe out the whole country, if GHG emissions will not go to zero.<sup>64</sup> Since climate change, with its dramatic consequences, brings unprecedented impacts on sea-level and the whole environment, adaptation methods may not yet exist to adequately protect human life from the most severe effects of climate change.

As noted above, mitigation remains the only known means to fully prevent the catastrophic impacts of climate change.<sup>65</sup> The IPCC report states, that the only available tool to effectively tackle and to prevent dangerous climate change and protect the enjoyment of human rights against climate change, is to collectively to refrain from emitting GHGs at levels that adversely affect the enjoyment of human rights globally.<sup>66</sup> However, it has to be understood that without developed the largest GHG emitting countries' willingness to commit to and implement mitigation action to make deep cuts in greenhouse gas emissions, there will be not difference. Since if the small island states cut their emissions to zero this would make any appreciable contribution to the mitigation of global warming. The full protection of the right to life from climate change impacts therefore depends upon the actions of the whole international community.

At the moment the UNFCCC and the Paris Agreement the only instruments internationally agreed to fight climate change globally, since climate change is likely the biggest collective security problem faced by humanity and the the UNFCCC and the Paris Agreement are the main instruments to mitigate

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<sup>63</sup> Oneryildiz v. Turkey, at 89 and 90.

<sup>64</sup> The Maldives, for example, emits a small fraction of 1% of GHG. If it will cut its emission to zero it will make no difference, since the biggest polluters will contribute 2\3 of all GHG in the world.

<sup>65</sup> Also, for example article 7(4) of the Paris Agreement states, "that greater levels of mitigation can reduce the need for additional adaptation efforts".

<sup>66</sup> As defined by the UNFCCC Secretariat. As examples of mitigation measures, the UNFCCC mentions "using fossil fuels more efficiently for industrial processes or electricity generation, switching to solar energy or wind power, improving the insulation of buildings, and expanding forests and others 'sinks' to remove greater amounts of carbon dioxide from the atmosphere". See also United Nations Development Programme (UNDP), Human Development Report 2007/2008 (Fighting Climate Change: Human Solidarity in a Divided World) (2007), 41, 111.

the causes of climate change, the UNFCCC and the Paris Agreement are important instruments protecting human rights. However, before going to analyze to which extent the UNFCCC, the Kyoto Protocol and the Paris Agreement imply obligations incumbent upon states or give rights to civil society, if there is any, to mitigate or demand for mitigation of the causes of climate change, the next chapter looks into solidarity rights, which have been triggered by climate change and playing an essential role in the climate regime.

### **1.3. States' Solidary in Climate Change**

Climate change, as it was mentioned above, is a problem that can only be effectively addressed through meaningful cooperative action of all members of the international community. However, there are disparities in responsibility and capacity of countries to effectively address climate change as a problem of this magnitude. These disparities have both practical and legal implications for effective climate change action. The implications are related to the recognition of third generation, commonly known as solidarity rights, of collective-development rights.<sup>67</sup> Solidarity rights include the right to self-determination, the right to economic and social development, the right to peace, and the right to a healthy environment.<sup>68</sup> Solidarity rights in the context of climate change are especially essential for “vulnerable ‘climate frontline’ countries”.<sup>69</sup>

Tackling climate change, it is important to emphasize that the states with the least ability to mitigate and adapt to climate change have the weightiest burden of its adverse effects. According to the OHCHR report sea level rise and extreme weather events related are jeopardizing the habitability and the territorial existence of a number of low-lying island States, such as Kiribati, the Maldives, and Tuvalu.<sup>70</sup> However, they could do very little to improve the consequences. In a similar vein, Mauritius and Bhutan argued that they have been already doing their utmost to tackle and adopt to climate change, to protect human rights of their citizens, but there do not have this capacity to meet challenges

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<sup>67</sup> See generally S.J. Scholz. *Solidarity as a Human Right*.

<sup>68</sup> Meinhard Doelle, page 184. See also A. Eide, C. Krause, and A. Rosas. *Economic, Social and Cultural Rights: A Textbook* (2nd rev. ed). M. Nijhoff Publishers, Boston 2001, p 119-120. Boyle and Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996), p. 46. P. Alston. *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law*, *Netherlands International Law Review*, 1982, pp 316-7.

<sup>69</sup> A phrase used by Marc Limon in this article on *Human Rights Obligations and Accountability in the Face of Climate Change*. See M. Limon. *Human Rights Obligations and Accountability in the Face of Climate Change*. *Georgia Journal of International and Comparative Law*, Volume 38, No 3, 2010, p 567.

<sup>70</sup> Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 (2009), paras 40 and 60, available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Study.aspx>.



that climate change poses to them due their small size and limited technical and financial resources. The latter means that it is impossible for anyone staying alone to win this fight against climate change.

For examples in March 2015, Cyclone Pam hit Vanuatu, Tuvalu, Kiribati and the Solomon Islands. Vanuatu was particularly badly affected (killed people, destroyed thousands of homes, infrastructure and some of the outer islands remained without food sources). The damage and loss caused to Vanuatu due to the cyclone was around 443 million dollars, this is around 64% of the its GDP.<sup>71</sup> For meeting these high costs, Vanuatu was able to meet overcome consequences of cyclone, because of humanitarian aid provided by other governments and NGOs.

Low-lying island states could develop and improve and put in place a coherence legislative and administrative framework to mitigate climate change and protect human lives against climate change. However, it is clear that even good domestic policy will not protect human rights of their citizens against climate change. It will do little or have no impact on global emissions if the U.S. or China will continue to pollute at current levels. Therefore, climate change could not be effectively addressed without triggering and promoting solidarity rights. Likewise, according to the number of international human rights instruments, developed countries have a particular responsibility to assist the poorer developing States.<sup>72</sup>

Although this conclusion may seem controversial and contentious, because many developed states have long resisted the that they have any extraterritorial human rights obligations to those, who are not within their territory or direct control, seeing these obligations as a potential unjust basis for developing countries to argue that they are entitled to financial or other assistance. It is valid and undeniable, that the primary obligation of states to protect people against the foreseeable threats of climate change to human rights within their territory or direct control. However, it has been acknowledged that climate change cannot be addressed effectively without action by all major GHG-emitting countries.<sup>73</sup> Moreover, all major GHG-emitting countries have contributed the most to cause the problem. The impacts of climate change that are being experienced today can be tracked back to

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<sup>71</sup> See Global Facility for Disaster Reduction and Recovery, Supporting Resilient Recovery in Vanuatu after Cyclone Pam, 2015. Available at [https://www.gfdr.org/sites/default/files/publication/Vanuatu\\_SoI.pdf](https://www.gfdr.org/sites/default/files/publication/Vanuatu_SoI.pdf).

<sup>72</sup> For example, article 2(1) of the ICESCR requires each party “to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.” Also see Comm. on Econ., Soc. and Cultural Rights, General Comment 12: The Right to Adequate Food, 1 15, U.N. Doc. E/C.12/1999/5 (1999), paras 36 and 38; ECOSOC, Comm. on Econ., Soc. and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health, 1 4, U.N. Doc. E/C.12/2000/4 (2000), paras 39 and 40.

<sup>73</sup> See UNDP, Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World (2007), para 112.

greenhouse gas-emitting activities that have fueled and enhanced the development of climate change.<sup>74</sup> Their contributions to global emissions of developed countries, for example, the Pacific Island States have not emitted anything, since their amount of GHG is amount to less than 0.03% of the total.<sup>75</sup> The Pacific Island States' contribution to emission flows remains extremely low.<sup>76</sup> However, irrespective of extremely low contribution of the Pacific Island States and extremely high contribution of developed countries to GHG, which have been causing climate change, the least developed countries and small island states have been the most affected by climate change regardless of the degree of their small contribution to global greenhouse gas emissions.<sup>77</sup>

Another convincing argument that states to have extraterritorial human rights obligations within the context of climate change is a general principle of affirmative actions in human rights, which is especially relevant to a human rights approach in the climate change regime. The principle of affirmative action is incorporated principle in international law.<sup>78</sup> According to the principle of affirmative action a states has to treat right-holders differently, because by treating right holders similarly when they are in unequal positions, inequalities remain and people could be deprived of their rights. There could some difference between applying the principle of affirmative action to the relationship between states. However, in the context of climate change, P. Cullet argues, that “the focus is on the improvement of the situation of the poorest or most disadvantaged”.<sup>79</sup> He continues that “differential treatment also constitutes an acknowledgement that the existing status quo is not conducive to achieving the basic fairness and solidarity goals that international law sets for itself”.<sup>80</sup>

Moreover, affirmative approach to climate change is reasonable since seven states are responsible for more than 2/3 of all global GHG emissions.<sup>81</sup> According to John Knox “on this basis, it would be possible, at least in principle, to conclude that even if all states contribute to climate change and are therefore joint violators of the human rights affected by it, some states are far more culpable than

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<sup>74</sup> IPCC 2014 Report, para 44.

<sup>75</sup> Secretariat of the Pacific Regional Environment Programme (SPREP), (2014), Climate Change <https://www.sprep.org/international/climate-change>. See also the United Nations Permanent Forum on Indigenous Issues, (2015), available <http://www.un.org/esa/socdev/unpfii/documents/2015/media/pacific.pdf>.

<sup>76</sup> SPREP, 2014.

<sup>77</sup> The United Nations, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (2009). Available at <http://www.un.org/webcast/unhrc/archive.asp?go-090615>.

<sup>78</sup> See, for example, article 6 of the Convention on the Elimination of All Forms of Discrimination against Women. Also see C.F.J. Doebbler, *International Human Rights Law: Cases and Materials* (2004), 116-118; M. Cohen, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations*. *Virginia Journal of International Law*, Volume 43, 2002, p 249.

<sup>79</sup> See P. Cullet. *The Kyoto Protocol and Vulnerability: Human Rights and Equity Dementions*. Published in Stephen Humphreys ed., *Human Rights and Climate Change*. Cambridge: Cambridge University Press, 2010, p 3. Available at <http://www.ielrc.org/content/a1001.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> See J. H. Knox, *Linking Human Rights and Climate Change at the United Nations*, *Harvard Environmental Law Review*, Volume 33, 2009, p 489.

others, and to allocate responsibility accordingly”.<sup>82</sup> In addition, according to some countries, responsibility for climate change could be established by finding which state has contributed historically the most, and also failed to comply with international legal duties.<sup>83</sup> Differential treatment and developed countries’ duty to bear the primary responsibility for creating and inducing climate change and thus to take action to mitigate climate change and support developing countries within the climate change regime.

In sum, due to the economic benefits that developed countries have received from high-carbon industrialization, they still have the greatest capacity for taking the required deep cuts in greenhouse gas emissions; and helping less developed countries to achieve sustainable and effective development.<sup>84</sup> Ignoring this obligation to cooperate and support more vulnerable communities affected by climate change not only increases the threats to the enjoyment of human rights caused by the adverse effects of climate change, but also enhance historical inequities that continue to obstruct the effective and non-discriminatory enjoyment of human rights around the world. Thus, the possibility to mitigate and adapt to climate change depends on the degree to which developed countries comply with solidarity rights.

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<sup>82</sup> Id.

<sup>83</sup> See, for examples, statements of Pakistan, Mauritius, Buthan, India, Bangladesh or Philippines to the United Nations at Geneva, Panel on Human Rights and Climate Change at the Eleventh Session of the Human Rights Council (2009).

<sup>84</sup> Climate and Development Knowledge Network, 2014, at 28.

## 2. HUMAN RIGHTS UNDER THE UNFCCC, THE KYOTO PROTOCOL AND THE PARIS AGREEMENT

### 2.1. Human rights in the UNFCCC

Since the focus of this thesis is how human rights are protected and could be promoted under the climate change regime, it inevitably triggers the question of how the UNFCCC<sup>85</sup>, the Kyoto Protocol and the Paris Agreement, as the main milestones in climate change protects human rights. Since 1992 when United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 19 June 1993) the actions of the international community to tackle climate change have been resting with the United Nations Framework Convention on Climate Change (UNFCCC). However, despite that international environmental law (IEL) has been already sensitive to the different concerns and perspectives of vulnerable groups.<sup>86</sup>

For examples treaties that regulate fisheries management,<sup>87</sup> the conservation of biological diversity,<sup>88</sup> and the reduction of persistent organic pollutants<sup>89</sup> all have specific reference to vulnerabilities of different groups. The UNFCCC is lacking any of such references. Although the UNFCCC recognizes the particular impacts on vulnerable states, such as small island and low-lying States, which should be considered as an essential achievement for solidarity rights.<sup>90</sup>

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<sup>85</sup> The United Nations Framework Convention on Climate Change, opened for signature on 4 June 1992 and entered into force 21 March 1994, available at [http://unfccc.int/essential\\_background/convention/items/6036.php](http://unfccc.int/essential_background/convention/items/6036.php).

<sup>86</sup> See article 25 of the Rio Declaration on Sustainable Development: “We reaffirm the vital role of the indigenous peoples in sustainable development”. From the principle 20 of the Rio Declaration: “Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development”. Also, Johannesburg Declaration on Sustainable Development § 20 states “We are committed to ensuring that women’s empowerment, emancipation and gender equality are integrated in all the activities encompassed within Agenda 21, the Millennium development goals and the Plan of Implementation of the Summit”.

<sup>87</sup> Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, (1995) According to the article 24.2(b), parties to the agreement “emphasizing the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people”.

<sup>88</sup> Convention on Biological Diversity, 1993. The preamble of the Convention on Biological Diversity recites: “Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources . . .” as well as “Recognizing also the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation.”.

<sup>89</sup> Stockholm Convention on Persistent Organic Pollutants, 2004. The preamble of the Stockholm Convention on Persistent Organic Pollutants recites following: “Acknowledging that the Arctic ecosystems and indigenous communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue,” as well as “Aware of the health concerns, especially in developing countries, resulting from local exposure to persistent organic pollutants, in particular impacts upon women and, through them, upon future generations”.

so See, e.g., the preamble of the UNFCCC, which states: “Recognizing further that low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification,

The UNFCCC does not refer to human rights, nevertheless it establishes both general principles, which states have to respect in their actions addressing climate change.<sup>91</sup> According to article 4 of the UNFCCC the parties have to cooperate in development and transfer of technology, conservation and enhancement of GHG emissions, exchange of information, education, public awareness promotion. However, the UNFCCC has its core principle, which set forth in article 3 of the UNFCCC. It states, that the “parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Thus, the UNFCCC provides technological and financial assistance for mitigation, information exchange, and capacity building as well as has an important role as a framework for further negotiations, political decision, scientific researches related to climate change.<sup>92</sup> However, the core objective of the UNFCCC is still lacking explicit references to human rights.

Nevertheless, even if the UNFCCC does not refer to any human rights explicitly, the relevance of the UNFCCC to the protection of human could derive most obviously from its core objective enshrined in article 3. This objective could be read in light of the preamble of the UNFCCC, the first paragraph of which states: “acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind”.<sup>93</sup> ‘Adverse effects’ are specified in article 1 as “changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare”.<sup>94</sup> Thus, all States have committed take precautionary measures to achieve the core objective.<sup>95</sup> By taking precautionary measures the states mitigate the impacts of anthropogenic climate change and climate change itself, which interfere with the enjoyment of human rights. Therefore, even if it is not explicitly set forth in the UNFCCC, that the UNFCCC protects human rights, it still could be reasonable to consider the commitments, that the states have undertaken to stabilize GHG emission under the UNFCCC as the prevention of dangerous anthropogenic interference with human rights.<sup>96</sup>

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and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change.”.

<sup>91</sup> Article 3 of the UNFCCC.

<sup>92</sup> The United Nations Framework Convention on Climate Change, opened for signature on 4 June 1992 and entered into force 21 March 1994.

<sup>93</sup> Id., Preamble.

<sup>94</sup> Id., article 1(1).

<sup>95</sup> Id., article 3(3).

<sup>96</sup> Id., article 2.

In addition to the core principle of the UNFCCC, the framework recognizes the vulnerability of developing countries to the consequences of climate change such as tropical cyclones, land degradation, drought and desertification, and that these countries tend to have a much lower capacity to cope with these adverse impacts. Recognizing this, the UNFCCC places international obligations on State parties to help developing nations to protect and ensure human rights through providing financial and other forms of support to affected communities so that they can adapt to the impact of changing conditions and meet the costs of climate change adaptation, which could help to reduce the risks and limit the possible damage caused by climate change.<sup>97</sup> Reflecting and following this obligation states fulfill human rights obligations set forth in various human rights instruments as well as we under the third generation of so-called solidarity rights under international law.<sup>98</sup>

Nevertheless, even if it is possible to interpret that human rights are indirectly reflected in the UNFCCC, this instrument as a framework convention does not create enough protection for human rights, since it does not contain concrete obligations,<sup>99</sup> however, some articles of the Convention consist of some arguable legal obligations. For example, article 4 of the UNFCCC requires parties to the framework convention to adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases (GHGs) and protecting and enhancing its GHG sinks and reservoirs. If a State party fails to act when it is in position to do so and knows or should have known that its inaction will contribute to increased GHGs, it violates its legal obligation under Article 4(2) of the UNFCCC. We say that the State party has committed an internationally wrongful act.

Article 2 of the UNFCCC in conjunction with articles 31 and 32 of the Vienna Convention of the Law of Treaties, according to R. Verheyen, could be considered as a violation.<sup>100</sup> Taking into account that the IPCC report has stated that dangerous anthropogenic interference with the climate system is still present and the ecosystem does not have time to adapt to climate change without further degradation,<sup>101</sup> the Parties might be seen in violation of the UNFCCC.

Regardless of apparent violations of the UNFCCC it is also unlikely to apply enforcement of the

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<sup>97</sup> *Id.*, articles 4(l)(b), 4(l)(e), 4(4).

<sup>98</sup> M. Wewerinke, C. F.J. Doebbler. *Exploring the Legal Basis of a Human Rights Approach to Climate Change*. *Chinese Journal of International Law*, Volume 11, No 1, 2011, pp 7-10.

<sup>99</sup> In contrast with the Kyoto Protocol established by the UNFCCC, the framework convention by itself does not set mandatory limits on GHGs for states parties to the convention.

<sup>100</sup> R. Verheyen, *The Climate Change Regime After Montreal*. *Y.B. OF EUR. ENV'T'L L.* Volume 7, 2007, pp 237-38. See generally Vienna Convention on the Law of Treaties, opened for signature May 23, 1969 and entered into force Jan. 27, 1980).

<sup>101</sup> See IPCC 2004 Report, at 64.

parties' obligations under the UNFCCC. M. Wewerinke and C. F. J. Doebbler argue that in a case if a state in breach of its obligation under the UNFCCC, then the scope for the breached legal obligation has to be determine by independent and impartial arbiter. M. Wewerinke and C. F. J. Doebbler conclude that "unfortunately, the UNFCCC does not provide for such a process of adjudication".<sup>102</sup> Another climate change scholar S. Kravchenko analyzing compliance mechanisms under the UNFCCC has also arrived at the same conclusion.<sup>103</sup>

Inadequate compliance and enforcement mechanisms under the UNFCCC dominates over the obligations to provide cooperation, finance support for mitigation and adaptation for developing countries by helping developing country to meet their human rights obligations threatened by climate. The latter put solidarity rights in danger. It is evident, that the UNFCCC set out a good preliminary framework for cooperation as a basis for protecting and ensuring human rights, however, the implementation of the obligations have not materialized as it was foreseen by the drafters of the UNFCCC, both in terms of GHG reduction commitments as well as support for developing countries.<sup>104</sup> For examples, no adequate mechanism has so been put in place to ensure financial support for the adaptation measures necessary for ensuring and protecting the human rights of the most vulnerable states to climate change. The delivery of financial support under the UNFCCC has been limited. Total financing from State parties to date has amounted to around US \$ 26 million.<sup>105</sup>

David B Hunter looking into the relationship between human rights and international climate policy argues, that "the policies and approaches promoted through the UNFCCC are likely designed not to vindicate the rights of those affected by climate change, but rather to manage the problem through a series of complex policy prescriptions, most notably the carbon market created by the Kyoto Protocol".<sup>106</sup> A. E. Boyle and M. R. Anderson find that this technocratic response to climate change in the international is opposed to an approach, when treaty obligations are based on legal liability, compensation for loss, or the protection of fundamental rights rather than just on a system with political compromise, cost-benefit analysis, and risk management.<sup>107</sup>

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<sup>102</sup> M. Wewerinke, C. F.J. Doebbler, 2011, p 3.

<sup>103</sup> See S. Kravchenko. Right to Carbon or Right to Life: Human Rights Approaches to Climate Change. Vermont Journal of International Law, Volume 9, pp 517-518.

<sup>104</sup> See E. Burleson. Paris Agreement and Consensus to Address Climate Challenge. ASIL INSIGHT, Vol 20, No 8, 2016, p 9.

<sup>105</sup> J. von Doussa QC, A. Corkery and R. Chartres. Human Rights and Climate Change. Australian International Law Journal, 2008, p 174. Available at <https://www.humanrights.gov.au/papers-human-rights-and-climate-change-background-paper>.

<sup>106</sup> D. B. Hunter. Human Rights Implications for Climate Change Negotiations. Oregon Review of International Law, Vol 11, 2009, p 335.

<sup>107</sup> See generally A. E. Boyle and M. R. Anderson. Human Rights Approaches to Environmental Protection. Oxford: Clarendon Press, 1996.

In sum, regardless of the importance of the UNFCCC on the part of the objectives stated in it, to prevent climate change interference with the climate by reducing greenhouse gas emissions, the UNFCCC does not provide safeguards to such essential rights as the rights to life, shelter, health, food and water. However, despite the fact that the UNFCCC does not explicitly refer to any human rights and failed to stop or meaningfully mitigate GHG emissions to prevent dangerous anthropogenic interference with the human rights, it has established a platform for continuous negotiations to protect human rights by mitigation and adaptation efforts. One of the results of these negotiations is the Kyoto Protocol under the auspices of the UNFCCC.

## **2.2. Human rights in the Kyoto Protocol**

The Kyoto Protocol<sup>25</sup> is the second significant instrument adopted at the international level by the international community after the UNFCCC to collectively address dangerous climate change. The Kyoto Protocol shares objectives with the UNFCCC. However, in comparison with the UNFCCC, which encourages parties to the Protocol to stabilize greenhouse gas emissions and does not impose mandatory obligations, the Protocol was improved and set up legally binding emission reduction targets for developed countries to reduce their GHG emissions below a level specified for each of them separately.<sup>108</sup>

The core principle of the Kyoto Protocol, as in the case with the UNFCCC, is also to protect the climate system "for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their specific mitigation targets,<sup>109</sup> by stabilizing greenhouse gas concentrations and thereby preventing dangerous anthropogenic interference with human rights.<sup>110</sup> To achieve its main objective the states to the Protocol were supposed to undertake quantified emission reduction commitments. By implication, it could be considered as an aspiration by parties to Kyoto Protocol to reduce and prevent anthropogenic emissions of greenhouse gases and by doing this to protect humankind against climate change interference with the enjoyment on human rights.

The Kyoto Protocol as in the case with the UNFCCC also points out the critical importance of solidarity rights that developed countries have to help vulnerable developing country to tackle climate

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<sup>108</sup> See Kyoto Protocol, Annex B.

<sup>109</sup> See Australian Human Rights and Equal Opportunity Commission. Human Rights and Climate Change: Background Paper, 2008, at 13-14.

<sup>110</sup> Article 2 of the UNFCCC.



change by providing special treatment with respect to funding and technology transfer. Under the Kyoto Protocol parties to the Protocol agreed to “take all practical steps to promote, facilitate, and finance as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change” and “to cooperate and promote at the international level and strengthening of national capacity building.”<sup>111</sup>

Nevertheless, irrespective of all abovementioned concerns in the climate change regime, explicit human rights did not appear in the Kyoto Protocol. The Kyoto Protocol does include any explicit references to enforceable human rights or human rights laws, which could help to protect human rights against climate change-related interferences with human rights.<sup>112</sup> Although, the Kyoto Protocol through its main goal to reduce GHG emissions, was supposed to be and serve as an effective tool to protect and ensure human rights by reducing the concentration of greenhouse gases in the atmosphere, the implementation of the obligations has remained unfulfilled.

The results show that since the 2007, global GHG have increased rather than reduced.<sup>113</sup> The principle of common but differentiated responsibilities could be conceived as a reason for undermining the overall climate regime. This principle is based on the idea that developed countries have to accept binding commitments first. After first steps to tackle climate change have been made, then developing countries would be asked to make their commitments. Such an allocation meant that when China and India will economically will continue to grow without a need to take cuts in GHG, the United States U.S. emissions must decline significantly. As a result, the United States has refused to ratify the Kyoto Protocol relying on economic difficulties and expressing a concern that developing countries do not have to make reductions.<sup>114</sup> Furthermore, in 2011 Canada withdrew from the Kyoto Protocol.<sup>115</sup> Japan has also stated that it will not pursue the Kyoto Protocol for its second round after 2012.<sup>116</sup> New Zealand and the Russian Federation refused to undertake new commitments for the second round<sup>117</sup>.<sup>118</sup> What is worse, emissions in these countries have continued to increase significantly from the adoption of the UNFCCC. For example, Canada, the United States, and Australia still remain at

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<sup>111</sup> Article 10(c) and (e) of the Kyoto Protocol.

<sup>112</sup> IPCC 2007 Report, at 64. Available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf).

<sup>113</sup> B. E. Ugochukwu. *Climate Change and Human Rights: How? Where? When?* Volume 12, No 9, 2016, p 3.

<sup>114</sup> M Doelle, *From Kyoto To Marrakech: A Long Walk Through The Desert: Mirage Or Oasis*. *Dalhousie Law Journal*, Vol 25, No 1, p 112.

<sup>115</sup> See M. Slattery. *Pathways from Paris: Does Urgenda Lead to Canada?* *Journal of Environmental Law and Practice*, Volume 30, No 2, 2017, page 21. Government of Canada, *National Inventory Report 1990-2013: Greenhouse Gas Sources and Sinks in Canada - Executive Summary*. Available at <http://www.ec.gc.ca/GES-GHG/default.asp?lang=En&n=5B59470C-1&offset=2&toc=show>.

<sup>116</sup> *Id.*, p 14.

<sup>117</sup> *Id.*, p 15.

<sup>118</sup> *Id.*, p 16.

the top of the list of the developed countries with the highest per capita emissions. From the late 1980s emissions in these countries are almost double the average per capita emissions in other developed countries.

In addition regardless employing a number of mechanisms to secure proper implementation of and compliance with obligations under the Protocol, to make the states comply with the objective of the Kyoto Protocol, were also ineffective. Although the Kyoto Protocol established a specific comprehensive compliance mechanism,<sup>119</sup> but due to political concerns this mechanism was not able to protect the system nor persuade the parties to comply the objective of the Protocol.<sup>120</sup> Even with relatively small matters like information submission, the organ was unsuccessful.

For example, in May 2006 South Africa, on behalf of the Group of 77 and China, brought a case to the facilitative branch against Canada and fourteen other countries.<sup>121</sup> The case was relating compliance with Article 3.1 of the Kyoto Protocol that the alleged countries had failed to hand in information required by the procedures under the Protocol.<sup>122</sup> The facilitative branch prepared to the Compliance Committee two drafts, one draft to proceed the case and one to dismiss the case. The decision to proceed with the case would have stated that alleged countries failed their information obligations under the Kyoto Protocol. In this case the branch would have to proceed with “necessary actions to provide advice, facilitation and promotion to each Party concerned.”<sup>123</sup> However, the proposal failed by a vote of 4-4, with two abstentions.<sup>124</sup> The inability of the facilitative branch to reach a decision on even these relatively minor matters concerning information submissions, does not show the ability force the states to comply with their obligations under the Kyoto Protocol.

In addition, as was stated above the compliance mechanism did not keep countries from not fulfilling their obligations under and withdrawing from the Kyoto Protocol.<sup>125</sup> Oberthür, assessing the compliance mechanisms contained in the Kyoto Protocol in his articles, argues that compliance mechanisms are to be more just a complicated political decision rather than as an effective tool to

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<sup>119</sup> Article 8 of the Kyoto Protocol stated there shall be “approved appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol”. The mechanism was established further with several UNFCCC Decisions. An overview of the compliance system at [http://unfccc.int/files/kyoto\\_mechanisms/compliance/application/pdf/comp\\_schematic.pdf](http://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/comp_schematic.pdf).

<sup>120</sup> See article 2 of the UNFCCC.

<sup>121</sup> Report to the Compliance Committee on the Deliberations in the Facilitative Branch Relating to the Submission Entitled “Compliance with Article 3.1 of the Kyoto Protocol”, U.N. Doc. CC/FB/3/2006/2 (2006), at 3. Available at [http://unfccc.int/files/kyoto\\_mechanisms/compliance/application/pdf/cc-fb-3-2006-2.pdf](http://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/cc-fb-3-2006-2.pdf).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 4.

<sup>125</sup> For examples Canada withdrew from the Kyoto Protocol during the first period commitment period. Japan, New Zealand, and the Russian Federation did participate in the second period. See more on this T. Bach, 2016, p 565.

make states accountable.<sup>126</sup> However, Oberhürt finds that compliance mechanism could be useful for advancing international climate regime.<sup>127</sup>

In sum, despite the technocratic response of the Kyoto Protocol to climate through political compromise, the Kyoto Protocol could not be named as a tool to combat climate change, protect and improve the environment for present and future generations against the harms of dangerous levels of climate change. The Kyoto Protocol was not effective instrument “in protecting human beings against the adverse effects of climate change, especially taking into account the commitments that were much lower in comparison with mitigation needs.<sup>128</sup> As L. Rajamani described, that the states could choose to ‘kill Kyoto softly’<sup>129</sup> and it probably would not affect even mitigation of climate change nor the legal protection of human rights violations by climate change.<sup>130</sup> However, the Kyoto Protocol was and remains the main predecessor, which with all its weaknesses led the international community to the Paris Agreement, which will be discussed in detail below.

### **2.3. Human rights in the Paris Agreement**

The UNFCCC and the Kyoto Protocol reflect concern for human rights by setting emissions mitigation norms to prevent or limit atmospheric warming, however neither the UNFCCC nor its Kyoto Protocol do not contain explicit references to specific human rights or human rights laws. As the adverse effects of climate change catalyze and become more apparent and the environmental and human rights groups have been trying to bridge this gap.<sup>131</sup>

The environmental and human rights groups achieved their first success 2010 in Cancun, Mexico, at the United Nations Climate Change Conference, when the insertion of human-rights language was added to the Cancun Agreements.<sup>132</sup> The preamble of the decision states that noting resolution 10/4

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<sup>126</sup> See Oberthür’s Chapter 6 in the Oxford Handbook of International Climate Change Law. K. R. Gray, R. Tarasofsky, and C. Carlarne. The Oxford Handbook of International Climate Change Law. Oxford University Press, Oxford, United Kingdom, 2016.

<sup>127</sup> Id.

<sup>128</sup> M. Wewerinke. The Role of the UN Human Rights Council in Addressing Climate Change, page 20.

<sup>129</sup> L. Rajamani, From Berlin to Bali and Beyond: Killing Kyoto Softly? International and Comparative Law Quarterly, Volume 57, Issue 4, 2008, p 909.

<sup>130</sup> See M. Wewerinke. The Role of the UN Human Rights Council in Addressing Climate Change. Human Rights and International Legal Discourse, Vol 8, No 1, 2014, p 20.

<sup>131</sup> Numerous academic publications and civil-society reports have revealed the connections between climate change and human rights. See e.g. S. Humphreys. Human Rights and Climate Change. Cambridge University Press, 2010; O. Quirico and M. Boumghar. Climate Change and Human Rights: An International Law Perspective. Routledge, 2015. Also see Human Rights Council resolutions 7/23 (2008), 10/4 (2009), 18/22 (2011), 26/27 (2014), and 29/15 (2015).

<sup>132</sup> See UNFCCC website on the Cancun Agreements available at <http://unfccc.int/cancun>.

of the United Nations Human Rights Council on human rights and climate change, 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.<sup>133</sup> In addition, paragraph 8 of the decision emphasizes that Parties should, in all climate change related actions, fully respect human rights”.<sup>134</sup> These provisions of the Cancun Agreements were a major step in recognizing human rights in climate change regime, and also they promoted greater demands for the incorporation of human rights language in the climate regime.<sup>135</sup>

As a result of the advocacy campaign to promote human rights language the climate regime, in 2011 after the adoption of the Cancun Agreement, the human rights language was included in multiple working drafts within negotiations on a new agreement to replace the Kyoto Protocol in 2020.<sup>136</sup> Furthermore, human rights and environmental groups and some states pressed for inclusion of a clear and explicit recognition of human rights language in in a new climate agreement text’s preamble, general objective provision, and adaptation provision.<sup>137</sup> As a result of these efforts at the 21<sup>st</sup> Conference of the Parties to the UNFCCC 195 states and the European Union adopted the Paris Agreement,<sup>138</sup> an agreement that represents the first international environmental agreement to recognize explicitly human rights and climate change’s impacts on human rights.

On 22 April 2016 at the United Nations Headquarters in New York the Paris Agreement was opened for signatory and since that has since been signed by 153 parties.<sup>139</sup> The Paris Agreement entered into force on 4 November 2016, after 30 day when the ratification threshold for the agreement was crossed

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<sup>133</sup> Recital 8 of the preamble to the Decision 1/CP.16, available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

<sup>134</sup> *Id.*, at 8.

<sup>135</sup> For more detailed on history of human rights advocacy at the climate change negotiations, see J. H. Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), Report of the Special Rapporteur, paras 7-22, U.N. Doc. A/HRC/31/52 (2016).

<sup>136</sup> For more detailed history on the promotion of human rights within the COP21 negotiations, T. Bach, 2016, pp 566-569.

<sup>137</sup> See e.g. Ad Hoc Working Group on the Durban Platform for Enhanced Action, U.N. Framework Convention on Climate Change, Negotiating Text, U.N. Doc. FCCC/ADP/2015/1. Also see an open letter on “A New Climate Change Agreement Must Include Human Rights Protection for All” from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn, available at [http://www.ohchr.org/Documents/HRBodies/SP/SP\\_To\\_UNFCCC.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf).

<sup>138</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, Report of the Conference of the Parties on Its Twenty-First Session, Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (2015).

<sup>139</sup> See UNFCCC website on the Paris Agreement, available at [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php).

on 5 October 2016.<sup>140</sup> The Paris Agreement could be named as historical, since the agreement was approved by almost all countries in the world, which by the adoption of the agreement have literally recognized that global warming, and climate change affecting the enjoyment of human rights and that it must be tackled.

The Agreement starts with a preamble, which directly recognizes and refers to human rights an integrated approach to tackling climate change: “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”.<sup>141</sup>

However, the legal force of a preamble as opposed to an operative clause could not have any significant impact on the promotion and protection of the enjoyment of human rights in the climate regime. According to the Vienna Convention and its interpretation,<sup>142</sup> the preamble of a treaty does not create rights or obligations on its own.<sup>143</sup> However, according to customary international law the preambular recitals of a treaty could be relevant in the interpretation of that treaty.<sup>144</sup> Thus, even if the reference to the human rights in the Paris Agreement does not create any self-standing rights or obligations related to human rights, parties to the agreement still have to recognize an obligation to comply with their respective obligations related to human rights when fulfill their obligations under the Paris Agreement.

At the same time, the recognition of climate change direct and indirect impacts on a range of human rights in preamble of the Paris Agreement does not give any additional substantive rights or obligations to the parties to fulfill their obligations under the Paris Agreement. Since according to article 31(1)(c) of the Vienna Convention, a treaty has to be always interpreted with consideration to

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<sup>140</sup> According to art 21(1) of the Paris Agreement, the agreement enters into force before at least 55 parties, representing at least 55 per cent of global emissions, have ratified it. At the time of writing the thesis, the Paris Agreement has been ratified by 153 Parties, of 197 Parties to the Convention. See UNFCCC website, available at <http://unfccc.int/2860.php>.

<sup>141</sup> Recital 12 of the preamble of the Paris Agreement, and Decision 1/CP.21, Adoption of the Paris Agreement, recital 8.

<sup>142</sup> For instance, it provides context (see article 3(2) of the Vienna Convention on the Law of Treaties) or gives ‘color, texture and shading’ to the interpretation of the agreement, including in determining the ‘object and purpose of the agreement’ (see WTO, US - Import Prohibition of Certain Shrimp and Shrimp Products (12 October 1998) WT/DS58/AB/R.).

<sup>143</sup> See, e.g. International Law Commission, the Second report on identification of customary international law by Michael Wood, Special Rapporteur (2014), at para 76(f).

<sup>144</sup> Article 3(2) of Vienna Convention on the Law of Treaties. On the commentary to the draft of the Vienna Convention the International Law Commission states that “that the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment.” See Yearbook of the International Law Commission, 1966, Volume 2, p 221.

the “relevant rules of international law applicable in the relations between the parties”. According to article 103 of the UN Charter the provisions of the Charter shall prevail over any other agreements, which are not made under the UN Charter.<sup>145</sup> Thus, similar conclusion could be reached on the grounds by using general treaty interpretation. Thus, the reference to the human rights in the provision of the Paris Agreement could be named only as a symbolic statement, which Benoit Mayer named as just “reaffirming the relevance of human rights in responses to the greatest problem of our time”.<sup>146</sup>

In addition to the recognition of the applicability of human rights to in all climate change-related actions, the Paris Agreement has also several other provisions with explicit human rights language. As it was mentioned above, if provisions are located in a treaty in the preamble, then they are not be capable of creating rights or obligations on its own. On the contrary, provisions in the operational part of the treaty have the capacity to create rights and obligations for parties. For example, the Paris Agreement in its operational part promotes the advancement of human rights related to gender equality<sup>147</sup>, participation<sup>148</sup>, sustainable development<sup>149</sup> and poverty eradication<sup>150</sup>. According to article 7(5) of the Paris Agreement, adaptation actions should follow a country-driven, gender-responsive, participatory and fully transparent approach. Article 2(1)(b) of the Paris Agreement recites that climate actions towards the adaptation have to conducted “in a manner that does not threaten food production”.<sup>151</sup> Therefore, human rights related to gender equality, participation, sustainable development and poverty eradication supposedly might have some force within climate regime.

However, the legal force of operational provisions of a treaty also depend on the language the provision are phrased, does it contain hard, soft and non-obligatory language.<sup>152</sup> Unfortunately, almost all human-rights-related provisions of the Paris Agreement have vague and inconcrete language, and could not be characterized as hand obligations or even as law. For example, human-

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<sup>145</sup> Article 103 of the UN Charter provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” An affirmation of states’ human rights obligations can be found in article 1(3). Also, see the Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.702 (2006), at 4, 17, and 26. Available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G06/628/63/PDF/G0662863.pdf?OpenElement>.

<sup>146</sup> B. Mayer. Human Rights in the Paris Agreement. *Climate Law*, Issue 6, 2016, p 114.

<sup>147</sup> Articles 7(5) and 11(2) of the Paris Agreement.

<sup>148</sup> Articles 4(b), 8(b), 12 of the Paris Agreement.

<sup>149</sup> Articles 2, 4(a), 6 and 8 of the Paris Agreement.

<sup>150</sup> Articles 2 and 8 of the Paris Agreement.

<sup>151</sup> Article 2(1)(b) of the Paris Agreement.

<sup>152</sup> For example, if in the text of a provision is used the imperative ‘shall’, it typically creates rights and obligations for parties. Likewise, if it has ‘will’, then it typically implies a promise or expectation. If it in a provision was used terms such as ‘should’, ‘strive’ or ‘encourage’, it is just recommendatory.

rights-related provisions in the adaptation could be as an explicit example of that. According to Article 7, adaptation actions have to follow a country-driven approach. L. Rajamani argues that the text of this article “applies in a blanket fashion to Parties, and does not prescribe, whether in mandatory, recommendatory or even cajoling terms, a particular course of action for Parties”.<sup>153</sup> Also, according to other researchers of the Paris Agreement, human-rights-related provisions of the operational part of the Paris Agreement do not contain any obligatory language, and due to the latter in the best-case scenarios these provisions could only “reinforce certain discourses that may contribute to raise a political impetus for action against climate change and its impacts, although they are unlikely to have far-reaching legal implications”.<sup>154</sup>

The last series of provisions of the Paris Agreement that has to be analyzed are related to the solidarity rights. Even, if the Paris Agreement does not mention explicitly solidarity rights, nevertheless most of the provisions of the Paris Agreement are related to human rights of people of small island, low-lying and other developing states.<sup>155</sup> The Paris Agreement has several provisions that might help most vulnerable to adapt to the effects of climate change through the international support. Article 4(5) of the Paris Agreement encourages developed countries to provide support to developing countries for the implementation of the agreement, since enhanced support could allow developing countries to for higher ambition in actions under the agreement, as well as the support should enable most vulnerable communities more likely to meet their obligations under the human rights and climate change regimes. Another significant achievement of the Paris Agreement is its loss and damage provision as the third pillar alongside mitigation and adaptation.<sup>156</sup> Article 8 countries agreed to provide support - which means finance, technology transfer and capacity building - for loss and damage. Within article 8 of the Paris Agreement the parties agreed to provide support for developing and vulnerable countries to climate change - which means finance, technology transfer and capacity building related to climate

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<sup>153</sup> L. Rajamani. The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations. *Journal of Environmental Law*, Issue 28, 2016, p 356.

<sup>154</sup> Benoit Mayer, 2016, p 115.

<sup>155</sup> These countries are the most vulnerable to the adverse effects of climate change. See generally how human rights of people of small island and low-lying states are affected in J. H. Knox. *Climate Change and Human Rights Law*. *Virginia Journal of International Law*, Volume 50, Issue 1, 2009. S. McInemey-Lankfor. *Climate Change and Human Rights: An Introduction to Legal Issues*. *Harvard Environmental Law Review*, Issue 33, 2009, pp 431-437. D. Bodansky. *Introduction: Climate Change and Human Rights: Unpacking the Issues*. *Georgia Journal of International and Comparative Law*, Volume 38, Issue 3, 2010, pp 511-524.

<sup>156</sup> The Alliance of Small Island States called for insurance mechanism from sea-level rise already in 1991, since the UNFCCC was negotiated. However, the UNFCCC does not expressly mention loss and damage, and the Kyoto Protocol rather focuses on mitigation, or reducing emissions. Likewise, in the Paris Agreement loss and damage stays as a separate and stand-alone element. See R. Verheyen and P. Roderick, *Beyond Adaptation: The legal duty to pay compensation for climate change damage*. WWF- UK, Climate Change Programme discussion paper, 2008.

loss and damage. However, this article 8 “does not involve or provide a basis for any liability or compensation”.<sup>157</sup>

In addition to the paragraph, the provisions of the Paris Agreement are trying to elaborate on finance<sup>158</sup>, technology access<sup>159</sup> and capacity building<sup>160</sup> for developing countries. However, a number of climate change law researchers argue, that in general taking into account a new third pillar and other provisions of the Paris Agreement, the language of the Paris Agreement and legal force of the provisions related to help developing countries to effectively address climate change and protect human rights of their population, fall short of requiring developed countries to fulfill their obligation under the Paris Agreement. M. Wewerinke-Singh and C. Doebbler in their article on the Paris Agreement argue, that most of the provisions related to developing countries are “aspirational text with procedures” and have little substance. M. Wewerinke-Singh and C. Doebbler state, that “PSIDS and other developing countries will continue to rely on the good faith of each of the developed countries to provide them with the finance, capacity building and access to technology that they need to adequately adapt to climate change”.<sup>161</sup>

The Paris Agreement is an historic agreement, since it was signed by almost every country on the planet, it has the recognition of the adverse effects of climate change on the enjoyment of human rights. Albeit the Paris Agreement has a legally binding international instrument<sup>162</sup>, the provisions of the Paris Agreement provide weak normative content or in some parts do not have it at all. The provisions of the Paris agreement do not create rights and obligations for parties, apart from weak legal commitments in form of reporting obligations, offering some reassurances and constructing narratives. In addition, there is no meaningful compliance mechanism. Some states alongside human rights and environmental groups could be very frustrated by the Paris Agreement, when they were hoping and advocating for explicit human rights language in the operational part of the agreement with legally binding mitigation targets. Especially, after the inconclusive results of the UNFCCC and the Kyoto Protocol. The Paris Agreement comes even without any significant compliance mechanism. Thus, the Paris Agreement appears to be insufficient as a legally binding instrument,

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<sup>157</sup> The Cancun Agreements, UN Doc FCCC/CP/2010/7/Ass.1, para 26. Decision 1/CP.21 adopted by the Conference of the Parties of UNFCCC on its twenty-first session, 2015, paras 48-52. Available at <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

<sup>158</sup> Article 9 of the Paris Agreement.

<sup>159</sup> Article 10 of the Paris Agreement.

<sup>160</sup> Article 11 of the Paris Agreement.

<sup>161</sup> M. Wewerinke-Singh and C. Doebbler. The Paris Agreement: Some Critical Reflections on Process and Substance. University of New South Wales Law Journal, Vol. 39, No. 4, 2016, p 1050.

<sup>162</sup> Article 1 of the Vienna Convention on the Law of Law of Treaties.



which is able to effectively address climate change and protect human rights against the adverse impacts of climate change on human rights.

A number of scholars argue, that due to the uncertainty and vagueness the provisions of the Paris Agreement, further developments and elaboration on the exact nature of the commitments can occur. Also, due to a failure of non-binding and inadequate pledges within the Paris Agreement and international and domestic persistent political inaction, unwillingness and reluctance to regulate greenhouse gas emissions could force human rights and environmental groups to seek alternative way of pressuring governments to address climate. Climate change litigation could be one of the way to seek solutions to the political unwillingness and to the myriad challenges of climate change, which the latter poses to the effective enjoyment of human rights before courts.

### **3. CLIMATE CHANGE LITIGATION BASED ON THE UNFCCC, KYOTO PROTOCOL AND THE PARIS AGREEMENT**

#### **3.1. Climate change litigation**

Prominent scientists, human rights and environmental NGOs, and even the Pope call governments to act on climate change, however, regardless this acknowledgement states still remain reluctant to adopt effective and action-forcing climate change policies to mitigate their GHG emissions.<sup>163</sup> Even 21 years within the UNFCCC there is still no adequate climate action.<sup>164</sup> Therefore, more and more individuals, communities, organizations and some countries have been exploring non-legislative ways to the problem of global warming and climate change. Frustrated by the perceived inaction on climate change at the national and international political level and concerned about the adverse effects of climate change, civil society has applied to litigation as one of the ways to address climate change through legally binding judicial rulings, which are capable to force governments to act more proactively on the GHG emissions issue. Thus, frustration with the slow pace and fragmented nature of policy developments regarding climate change likely is encouraging different actors of civil society to turn to courts as a possible effective savior.

Climate litigation has been slowly developing for some time, but has seen a steady growth and tremendous progress across multiple jurisdictions recently.<sup>165</sup> Climate litigation has different means to deal with climate change and its consequences. Usually climate litigation is divided into three sections. First, where claimants seek compensation for climate damages. For example, some of these cases have targeted the world's largest oil companies, since they are the producers of industrial carbon dioxide.<sup>166</sup> Second, where claimants seek the development and implementation of comprehensive climate plans to achieve more progressive, science-based targets for climate mitigation, as well as where claimants seek to force their government to fulfil human rights obligations under human rights

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<sup>163</sup> See P. Sands QC. Climate Change and the Rule of Law: Adjudicating the Future in International Law. *Journal of Environmental Law*, Volume 28, No 1, 2016: J. Lin. The First Successful Climate Negligence Case: A Comment on *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*. University of Hong Kong Faculty of Law Research Paper No. 2015/021, 2015.

<sup>164</sup> For example, India is now the world's fourth largest emitter of greenhouse gases. Between 1990 and 2004 it has increased its emissions by 97%. See Human Development Report 2007/08, United Nations Development Program, at 42 and 152, available at [http://hdr.undp.org/sites/default/files/reports/268/hdr\\_20072008\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf).

<sup>165</sup> See e.g. M. Wilensky. Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation. *Duke Environmental Law and Policy Forum*, Volume 26, 2015, 131-179, where author presents a comprehensive analysis on climate change litigation.

<sup>166</sup> K. Boom, J. A. Richards and S. Leonard. Climate Justice: The international momentum towards climate litigation, 2016, section I. Available at <https://www.boell.de/sites/default/files/report-climate-justice-2016.pdf>.

law.<sup>167</sup> Third, where claimants seek immigration protection to respond to their displacement due to climate impacts.<sup>168</sup>

This chapter of the thesis analyzes the phenomenon of climate change litigation through case-law, where claimants seek the development and implementation of comprehensive climate measures to act more proactively on the GHG emissions issue, climate change and its consequences. According to the Oslo Principles: “no single source of law alone requires States and enterprises to fulfil these Principles. Rather, a network of intersecting sources provides States and enterprises with obligations to respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere”.<sup>169</sup> Taking into account the latter and since international courts are still reluctant to adjudicate climate claims, this part particularly focuses on climate change cases brought before domestic courts relying on international norms and data developed through the UNFCCC and the Kyoto Protocol and IPCC when looking for redress under domestic laws. This section particularly analyzes recent cases against governments in the Netherlands, Pakistan and the US.

In that vein, this chapter examines the implementation of the UNFCCC and the Kyoto Protocol in domestic courts as a tool for the protection of human rights against climate change, considering its effectiveness as a strategy for promoting greater measures to tackle climate change under the different international climate change instrument with a great emphasis on whether the Paris Agreement will be helpful in climate litigation. This section attempts to do so by resorting to the two cases with different jurisdiction and approaches to climate change. The rulings are positive examples of climate litigation, where domestic courts have held their governments responsible for not taking action on climate change on the grounds of international law, rather than national law only.

### **3.2. Climate change litigation to protect human rights against climate change and its consequences in the Netherlands**

In 2015, the Hague District Court ruled that the Dutch government failed to fulfill its obligations to protect the climate and ordered the Dutch government to reduce its GHG emissions by 25% from

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<sup>167</sup> Id, section 2.

<sup>168</sup> Id, section 3. For examples, in New Zealand a family from one low lying Pacific Island State received immigration permits relying on humanitarian grounds.

<sup>169</sup> See the Oslo Principles on Global Obligations to Reduce Climate Change, available at <http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf>.

1990 levels by 2020.<sup>170</sup> The ruling has been named as a historical, since it is the first case of this kind, where a judicial organ orders a government to limit a state's greenhouse gas emissions to protect its citizens from dangerous climate change.

The case was brought in 2013 by 900 Dutch citizens and the Urgenda Foundation, a Dutch NGO, which is fighting for a 'more sustainable society',<sup>171</sup> against The State of the Netherlands (Ministry of Infrastructure and the Environment). The Urgenda Foundation's claim was under human rights and tort law, stating that the Dutch government had not adequately protected its citizens from climate change.<sup>172</sup> The plaintiff in its human rights claim was relying on the case law of the European Court of Human Rights regarding right to life and right to respect for private and family life of the European Convention on Human Rights, which has interpreted the right to life as a positive duty, imposed on the states, to take measures to guarantee these rights, which can be threatened by climate change<sup>173</sup> In its second tort claim the plaintiff was relying on Dutch national law that imposes a duty on the government to protect its citizens from foreseeable harm<sup>174</sup> and improve the country's environment and its livability<sup>175</sup>. Urgenda argued that by emitting GHGs that contribute to surpassing a 2°C cap on warming, the government had breached this duty.<sup>176</sup>

Regarding the human rights claim, the court found that Urgenda, in its own right, could not rely upon the European Convention on Human Rights. Article 34 of the ECHR requires a civil person, not juridical person to be a victim.<sup>177</sup> In addition, the court considered a wide range of international law instruments that applies to the problem of climate change. The court found that the UNFCCC, the Kyoto Protocol and COP decisions do not have a binding force towards citizens irrespective if it is private individuals and legal persons.<sup>178</sup> Notwithstanding, the court relied on international environmental law and EU law in its formulation and application of the duty of care it found under tort law.

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<sup>170</sup> Hague District Court, ECLI:NL:RBDHA:2015:7196 (case name Urgenda Foundation v. The Netherlands), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7145>, English version of the case available at <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf>.

<sup>171</sup> Urgenda Foundation v. The Netherlands, at para 2.2.

<sup>172</sup> Urgenda Foundation v. The Netherlands, at paras 2.1, 2.4, 2.6, 3.2, 4.1.

<sup>173</sup> Urgenda Foundation v. The Netherlands, at paras 4.45-4.46.

<sup>174</sup> Urgenda Foundation v. The Netherlands, at paras 3.2, 4.35.

<sup>175</sup> Urgenda Foundation v. The Netherlands, at paras 2.69, 4.35, 4.74. Article 17 of the Dutch Constitution states the following: "No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law. The Constitution of the Kingdom of the Netherlands available at <https://perma.cc/AK8G-YC4V>.

<sup>176</sup> Urgenda Foundation v. The Netherlands, at paras 3.2, 4.35.

<sup>177</sup> See e.g. Ouardiri v Switzerland (Application No. 65840/09) and Ligue des Musulmans de Suisse and Others v Switzerland (Application No. 66274/09).

<sup>178</sup> Urgenda Foundation v. The Netherlands, para 4.42.

The court found that Urgenda could still rely on its tort claim under the provisions of Dutch Civil Code,<sup>179</sup> however, the Dutch Civil Code provided only the legal theory of unlawful hazardous negligence. So, in the determination of unlawful hazardous negligence, the court applied and examined UNFCCC, the Kyoto Protocol, COP decisions and EU law to clarify the standard of care for the negligence under the tort claim.<sup>180</sup> The court has stated that: “due to the nature of the hazard (a global cause) and the task to be realized accordingly (shared risk management of a global hazard that could result in an impaired living climate in the Netherlands), the objectives and principles, such as those laid down in the UN Climate Change Convention and the TFEU (the Treaty on the Functioning of the European Union), should also be considered in determining the scope for policymaking and duty of care.”<sup>181</sup>

In addition, despite the fact that obligations under the UNFCCC, the Kyoto Protocol and other international commitments do not have a direct effect for the people of the Netherlands, the court stated that these documents still provide the framework for how the Dutch government will exercise its power: “Therefore, these objectives and principles constitute an important viewpoint in assessing whether or not the State acted wrongfully towards Urgenda.”<sup>182</sup>

Firstly, regarding the foreseeability of the damage from climate change, the nature and extent of the damage ensuing from climate change and the chance that hazardous climate change will occur, the court, analyzing IPCC's reports, the UNEP report of 2014, and European reports on climate change, found that “the chances of dangerous climate change should be considered as very high - and this with serious consequences for man and the environment, both in the Netherlands and abroad”.<sup>183</sup> In relation to the government’s knowledge of the climate change threats to human welfare, the court reasoned that the government through its engagement in the UNFCCC negotiations “had known since 1992, and certainly since 2007, about global warming and its associated risks”.<sup>184</sup> The court stated that “when it became a signatory to the UN Climate Change Convention and the Kyoto Protocol, the State expressly accepted its responsibility for the national emission level and in this context accepted the obligation to reduce this emission level as much as needed to prevent dangerous climate change.”<sup>185</sup>

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<sup>179</sup> Urgenda Foundation v. The Netherlands, para 4.9.

<sup>180</sup> Urgenda Foundation v. The Netherlands, at para 4.46.

<sup>181</sup> Urgenda Foundation v. The Netherlands, at paras 4.52, 4.55.

<sup>182</sup> Urgenda Foundation v. The Netherlands, at para 4.63.

<sup>183</sup> Urgenda Foundation v. The Netherlands, at para 4.65.

<sup>184</sup> Urgenda Foundation v. The Netherlands, at para 4.65.

<sup>185</sup> Urgenda Foundation v. The Netherlands, at para 4.66.

The Netherlands is a party to the both climate change instruments to the UNFCCC and the Kyoto Protocol, in both as an individual state and as a member of the European Union. As a party to these documents, it ratified article 3 regarding principles and article 4 regarding commitments of the UNFCCC, and these were cited by the court as evidence of the government's duty and breach.<sup>186</sup>

Relying on the IPCC's data about the CO<sub>2</sub> reductions to keep global warming within the 2°C, the court concluded that since the government's knowledge of it, and taking into account the concept of fairness (the benefit of current and future generations),<sup>187</sup> the precautionary principle, and the principle of sustainable development,<sup>188</sup> and that mitigation measures are the only truly precautionary measures to consider and carry out,<sup>189</sup> the court found the Dutch government had breached its duty of care to its citizens.<sup>190</sup> The court arrived at the conclusion, that the government is liable for such hazardous negligence and enjoined the government to limit Dutch overall annual GHGs emissions, or have them limited, to achieve a target reduction of 25 percent below 1990 levels by 2020.

In addition to the determination of unlawful hazardous negligence on the part of the Dutch government, the court also touched upon solidarity rights within climate change. While analyzing article 21 of the Dutch Constitution,<sup>191</sup> the court stated that it imposes a duty of care on the State relating to the livability of the country and the protection and improvement of the living environment."<sup>192</sup> In addition, the court interpreted the "no harm" principle relying on international law and EU law. The "no harm" principle means that a state shall not use its territory to cause damage to other states.<sup>193</sup> The Netherlands would avoid breaching the no harm principle if it reduces emissions and irrespective of its small contribution to the worldwide amount of GHGs. However, considering the article 21 of the Dutch Constitution, the court did not rule on whether the government is in breach of the article 21 or not.

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<sup>186</sup> Urgenda Foundation v. The Netherlands, at para 2.38-2.40, 2.42, 4.56, 4.63, 4.65, 4.93.

<sup>187</sup> Urgenda Foundation v. The Netherlands, at paras 4.56 and 4.57 (an explanation from the Court about the role for industrialized countries in the climate change regime, and a specific obligation of protection toward future generations. On the same issue see P. G. Ferreira. Common But Differentiated Responsibilities' in the National Courts: Lessons from Urgenda v. The Netherlands. *Transnational Environmental Law*, Volume 5, No 2, 2016, p 337.

<sup>188</sup> Urgenda Foundation v. The Netherlands, at para 4.56.

<sup>189</sup> Urgenda Foundation v. The Netherlands, at para 4.71.

<sup>190</sup> Urgenda Foundation v. The Netherlands, at paras 4.12, 4.14, 4.65, 4.84, 4.93.

<sup>191</sup> Article 21 of the Dutch Constitution states that "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment." The Constitution of the Kingdom of the Netherlands available at <https://perma.cc/AK8G-YC4V>.

<sup>192</sup> Urgenda Foundation v. The Netherlands, at paras 2.69, 4.35, 4.74. Article 17 of the Dutch Constitution states the following: "No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law".

<sup>193</sup> R. M. Egea, State Responsibility for Environmental Harm, "Revisited" Within the Climate Change Regime, in S. M. Dubois and L. Rajamani. *Implementation of International Environmental Law*. Nijhoff, 2011 pp 389-90. See D Hunter et al. *International Environmental Law and Policy* (5<sup>th</sup> ed). West Academic, 2015, p 433.

In the end, the Dutch government did not agree with the court decision and appealed the decision, but regardless the appeal the government is implementing the decision while the appeal is pending.<sup>194</sup> Notwithstanding outcome of the appeal, this Urgenda decision is significant. Despite the fact that the Urgenda case was in a Dutch court, where applicable law is Dutch law, it has already inspired civil society from other jurisdictions.<sup>195</sup> Roger Cox, counsel for the Urgenda Foundation, has even gone so far as to propose that Urgenda's legal principles are transportable to other jurisdictions.<sup>196</sup> Also, this case is not standing alone anymore, it was rejoined by a judgment in Pakistan, Belgium, the New Zealand. For examples the Pakistani continues Urgenda's strategy of connecting international climate change norms developed through the UNFCCC and IPCC to national laws and policies. Belgian NGO has filed an action similar to the Netherlands case.<sup>197</sup> In the New Zealand, a recent law graduate, inspired by the Urgenda case, filed an action against the New Zealand government for its INDC pledges, claiming that they were "unreasonable and irrational" under domestic law.<sup>198</sup> The suit specifically argues that the Minister for Climate Change Issue did not follow the process stipulated by New Zealand's Climate Change Response Act 2002 when setting emissions reduction targets.<sup>199</sup> Under the Act, the minister must review the government's emissions reduction targets when the IPCC updates its scientific reports, to ensure that they are in line with current scientific consensus on mitigation pathways.<sup>200</sup> As a result, it is very likely expected to see more NGOs in other countries with similar legal system and tradition to start bringing climate claims for inadequate action of their governments.<sup>201</sup>

### **3.3. Climate change litigation to protect human rights against climate change and its consequences in Pakistan**

Ashgar Leghari, a Pakistani farmer, brought a case against the Pakistani government, accusing the latter of abridging his fundamental right to life under article 9 of the Pakistani Constitution by failing

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<sup>194</sup> The Dutch government has started applying the ruling, but has filed the appeal. Available at website of the Government of the Netherlands <https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-wiU-file-appeal>; see also Urgenda website, available at <http://www.urgenda.nl/en/climate-case/>.

<sup>195</sup> Urgenda is currently providing support for a number of groups looking to file similar claims in other countries.

<sup>196</sup> R. Cox. Climate Change and Rule of Law, 2015. Available at Center for International Governance Innovation website <https://www.cigionline.org/videos/climate-change-and-rule-of-law>.

<sup>197</sup> See Bach, 2016, p 455.

<sup>198</sup> See Government Sued for "Unreasonable and Irrational" Emissions Target, Human Rights Foundation, 2015. Available at <https://humanrightsfoundation.wordpress.com/2015/11/12/government-sued-for-unreasonable-and-irrational-emissions-target>.

<sup>199</sup> Id.

<sup>200</sup> Id.

<sup>201</sup> K. J. de Graaf and J. H. Jans, The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change. *Journal of Environmental Law*, Volume 23, 2015, at 517, 527.

to address the adverse impacts of climate change, and in order to oblige the Pakistani government to protect its citizens from climate change.<sup>202</sup> The plaintiff claimed that “climate change is a serious threat to water, food and energy security of Pakistan”.<sup>203</sup> The plaintiff was concerned that despite the Pakistani government’s efforts to set in place the National Climate Change Policy (NCCP) and the relative Framework for Implementation of Climate Change Policy for the period 2014-2030, these documents had not been implemented. The Green Bench of the Lahore High Court ruled on the case in favor of the plaintiff stating that Pakistani officials had done little to implement adaptation measures to address a changing climate, especially concerning threats to food, water and energy security.

The court, in its decision, specifically pointed to fundamental rights, which includes the right to life, right to a healthy and clean environment and right to human dignity. The court states, that “environment and its protection has taken a center stage in the scheme of Pakistani constitutional rights”.<sup>204</sup> Thus, relying on the right to life and the right to dignity under the Pakistani Constitution and international principles such as the right to intergenerational equity and the precautionary principle, the court confirmed the plaintiff’s concerns. First, the court acknowledged climate change: “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 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”.<sup>205</sup>

After acknowledging climate change and its impact on Pakistan, the court stated that the Pakistani government's 'delay and lethargy' to implement country's relevant policy infringes the fundamental rights of Pakistani people, which have to be safeguarded as it is enshrined in the Pakistani Constitution.<sup>206</sup> The court ordered the Pakistani government to nominate 'a climate change focal person' to help ensure the implementation of the policy, and to prepare a list of adaptation measures from the policy, which have to be by the end of 2015.<sup>207</sup> Secondly, the court ordered to create a Climate Change Commission with representatives of key ministries, NGOs and technical experts to

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<sup>202</sup> Leghari v. Federation of Pakistan, W.P. No. 25501, Lahore High Court, 2015), available at <http://edigest.elaw.org/sites/default/files/pk.leghari.090415.pdf>. Leghari v. Federation of Pakistan, W.P. No. 25501 at 4 (Lahore High Court, 2015), available at <http://edigest.elaw.org/sites/default/files/pk.leghari.091415.pdf>.

<sup>203</sup> Leghari v. Federation of Pakistan, at para 4.

<sup>204</sup> Leghari v. Federation of Pakistan, at paras 5-6.

<sup>205</sup> Leghari v. Federation of Pakistan, at paras 6.

<sup>206</sup> Articles 9, 14, 19 and 23 of the Pakistan Constitution, which provide the right to life, to a healthy and clean environment, the right to human dignity, to property, to information.

<sup>207</sup> Leghari v. Federation of Pakistan, at paras 6-7.



monitor progress on the Framework and report it to the Court, non-government organizations, and technical experts.<sup>208</sup> After giving its first ruling on 14 September, the court issued a second order naming 21 individuals to the Commission and empowered it to help the court with reports from representatives regarding progress.<sup>209</sup>

The breakthrough of this decision is that it was possible to use a judicial enforcement mechanism to require the executive branch to enforce climate change policies. Notwithstanding the lack of reference to either the IPCC or the UNFCCC, the Pakistani judge used a number of principles of international environmental law as interpretive standards in the reading of the Pakistani Constitution. The Pakistani court ordered to start implementation of the 2012 National Climate Change Policy and the framework, which are direct outcomes of the country's UNFCCC Party commitments. Thus, when the Lahore High Court ordered the government to take concrete steps to implement them domestically, it was also enforcing compliance with these international commitments. Like the *Urgenda* case, the *Leghari* case outcome relies on a blend of international law and domestic constitutional norms that the Court viewed as supporting one another. Likewise, *Leghari* has a firm footing in protecting human rights against climate change at national level relying on a mix of international environmental and national by making international law with regard to climate change justiciable by domestic courts.

The *Leghari* case importance in relation to climate change and the protection of human rights could be found in acknowledgment by the court for the first time of the existence of climate justice. The court stated, that: 'The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., Climate Change. From Environmental Justice .... We need to move to Climate Change Justice. Fundamental rights lay at the foundation of these two overlapping justice systems. Right to life, right to human dignity, right to property and right to information ... 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'.<sup>210</sup>

This ruling provides support for the view that climate justice is an emerging principle of law that applies to governments and the private sector. The decision aims to “steer Pakistan towards climate resilient development”. In comparison to the Dutch case, the Pakistani Court did not examine the “no harm” principle; however, the court gave specific emphasis to the equity principle. The court did examine the “no harm” principle, because Pakistan is not a major contributor to global warming. In

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<sup>208</sup> *Leghari v. Federation of Pakistan*, at para 7.

<sup>209</sup> *Leghari v. Federation of Pakistan*, at paras 11-14.

<sup>210</sup> *Leghari v. Federation of Pakistan*, at para 8.

the with Pakistan and the relevance of the “no harm” principles, one might say, that actually Pakistan is a “victim of climate change and requires immediate remedial adaptation measures to cope with the disruptive climatic patterns”.<sup>211</sup> However, even this case does not stand alone anymore, since there is another successful order in Pakistan against the state for failing to implement climate policies.<sup>212</sup>

#### **3.4. Assessing the impact of climate change litigation on enforcing climate change instruments to protect human rights**

Climate change litigation is not a new phenomenon in the world, but only recently climate change litigation has become a successful tool in addressing climate change and decisions ruling in favour of the arguments of human rights and environmental groups. The overall situation with the climate change regime suggest that it is a trend that will only continue to grow in the future. Taking into account far-reaching political obstruction, that has so far slowed down or obstructed taking effective steps to mitigate climate change, and also vague and non-binding commitments by the parties to the Paris Agreement could only be considered as to be encouraging civil society to bring climate change lawsuits against governments to build political will to tackle the impacts, which humankind faces from climate change.<sup>213</sup>

The climate change cases analyzed in this chapter show two significant features of climate change litigation nowadays. The Urgenda and Leghari cases analysis demonstrates that climate change litigation has probably matured into a more established phase, climate change and environmental principles appear strong enough to be recognized and applied in courts of both developed and developing countries, as the cases at hand show.<sup>214</sup> The Urgenda and Leghari cases illustrate domestic courts could be a tool, which is available for the protection of human rights against climate change. The Urgenda and Leghari cases are the first two decisions worldwide, where civil society through domestic courts was successful to held its government responsible for not taking action on climate change on the grounds of international climate change law, rather than national law only. Despite different systems of law presented in the Urgenda and Leghari cases, the courts in both cases applied domestic law supporting it with indirectly applied international law to promote and ensure human

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<sup>211</sup> Leghari v. Federation of Pakistan, at para 4.

<sup>212</sup> See Rabab Ali v Federation of Pakistan and Another, filed 6 April 2016, Supreme Court of Pakistan.

<sup>213</sup> D. M. Goldberg and M. Wagner, CIEL and Earthjustice, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System* (2002), Available at [http://www.ciel.org/Publications/Petitioning\\_GlobalWarming\\_IAHR.pdf](http://www.ciel.org/Publications/Petitioning_GlobalWarming_IAHR.pdf).

<sup>214</sup> See J. R. May and E. Daly, 2014, at 271-72. See D. J. Bederman. *Globalization and International Law*. Palgrave Macmillan US, 2008, p 180.

rights affected by dangerous climate change.

Both cases present groundbreaking approach towards greater climate mitigation. In the Urgenda case the court found it had the authority to review the state's GhG emissions policy, developed a duty of care to regarding climate change emissions standards, applied national, international and regional law together to interpret and develop the standard of care for climate change within the Netherlands. By relying on soft law documents and the UNFCCC and Kyoto Protocol, the court ordered the government to reduce the GHG emissions. On the other hand, the Lahore High Court ordered the government to take concrete steps to implement climate change policies, what was also enforcing compliance with the country's international commitments.

Both cases rely on climate science and norms about the importance of GHG mitigation and adaptation actions elaborated at the international level. Urgenda case, the Leghari case outcome relies on a blend of international law and domestic norms that the courts considered ad supporting each other. The use of such approach in domestic courts could lead to a process by which more domestic courts will start to use such approach and more international courts will apply to domestic decisions to provide evidence of the existence of international environmental customary rules.

From the viewpoint of prospective litigation, both cases serve as an evidence, that scientific reports, especially when authored by the IPCC, are likely to become an effective tool in climate litigation. Analyzed cases suggest a growing awareness of the adverse effects of global warming and affected human rights amongst the judiciary and its willingness rule on this matter. Yet it would be a mistake to leap from the human rights protecting results in the analyzed cases to a general conclusion that climate change litigation will succeed in all other cases, where government has been apparently reluctance to mitigate climate change. However, the implementation of climate change law and international environmental law in domestic courts could be as one of the possible tools to force governments to take effective measures against climate change and its consequences to protect and ensure human rights affected by it. Conclusively, if the state parties to the Paris Agreement do not live up to the Paris Agreement objectives and civil society's expectations, more cases similar to Urgenda and Leghari cases could be expected to be ruled in the future.

## CONCLUSION

The climate change impacts that have long been predicted are now increasingly being experienced around the world. The impact of climate change on human rights are and will be profound, wide-ranging and overwhelmingly negative. Many of the broadly recognized human rights (for examples rights to life, food, health, housing and water) contained in the UDHR and other international human rights instruments will be significantly threatened by the impacts of climate change. However, human rights affected by climate change are generally the subjects of obligations under treaties signed by the vast majority of countries, and which State Parties have obligations to respect, protect and fulfil and therefore have a positive duty to respond to the impacts of climate change.

In order to protect human rights from dangerous climate change and its consequences, states have obligations to adopt appropriate policies to control, limit and reduce climate change that interferes with the enjoyment of human rights. It is relatively clear that states have to protect their people from the adverse impacts of climate change on the enjoyment of human rights, and it is possible only with meaningful GHG mitigation. Likewise, climate change poses an enormous threat to human rights of vulnerable communities. Climate change is indifferent to national borders, and therefore countries like Small Island States emit together less than 1% of global GHG, they already suffer disproportionately from the climate change that global GHG cause. Already, the Solomon Archipelago lost its islands and people had to abandon their land. Thus, climate change triggers not only the first and second generation human rights, but also the third generation human rights, which are sometimes called 'solidarity rights'. However, despite the progress in assessing climate change and its impacts on human rights, there still is no global human rights agreement that effectively addresses climate change, explicitly protects human rights from dangerous climate change and its consequences as well as enhances solidarity rights.

Despite the fact, that there is still no global human rights agreement that effectively addresses climate change and explicitly protects human rights from dangerous climate change, in 1992, UNFCCC declared climate change a common concern of mankind and committed 166 countries to tackle it through mitigation and adaptation as well as through providing technological and financial assistance for mitigation, adaptation, information exchange, and capacity building for most vulnerable. Unfortunately, as a framework convention, the UNFCCC does not contain any concrete obligations. Therefore, the progress of UNFCCC has been slow and ineffective, so fifteen years later, in 2007, the leadership took the form of the UNFCCC's Kyoto Protocol, which placed clear GHG emission limits to mitigate climate change to preserve, protect, and enhance the health of our shared climate system,

in accordance with science, for the benefit of all present and future generations. However, the Kyoto Protocol also was not able to provide any effective protection to human rights through reducing emissions.

In 2011 new negotiations for a new agreement led to the adoption of the Paris Agreement in 2015. The Paris Agreement is taking over the leading role in the climate change regime after 2020, when the Second Commitment Period of the Kyoto Protocol ends. However, the experience of the international climate regime has proved that actions undertaken by international community under the UNFCCC have not been impressive and helpful in combating dangerous climate change and its adverse impacts on human rights so far. However, the Paris Agreement could be as an historic climate change agreement, which for the first time within the climate change regime has a clear reference to human rights and climate justice, an agreement, which establishes three significant pillars (adaptation, mitigation and loss and damage) for protecting human rights against climate change and supporting the poorest and most vulnerable communities.

Taking all these abovementioned components of the Paris Agreement together, and also the Paris Agreement's bottom-up approach, the Paris Agreement could have the potential to produce better results than the UNFCCC and the Kyoto Protocol has been delivered so far. However, even if one could name the Paris Agreement as a historical, the agreement is also condemned for being vague and with non-binding pledges by the parties to the agreement. In addition, despite the Paris Agreement's main objective, set forth in article 2, to keep the increase in the global average temperature to well below 2°C, the scientific community is already arguing that these efforts derived from article 2 will be not enough to tackle effectively climate change. In 2015, the UNFCCC Secretariat concluded that even if the state's pledges are fulfilled, then it would only slow down the global rate of GHG emissions, but not keep the global temperature below 2°C. NGOs, like Climate Action Tracker and Climate Interactive, have also arrived at the same conclusion. CAT calculated that if the pledges are fulfilled then the temperature will still have a 2.7°C increase, while Climate Interactive estimated a 3.5°C increase.<sup>215</sup>

This, the need to keep warming very low and the non-binding and inadequate pledges agreed in Paris, as well as the history of more than two decades of the COP meetings, the UNFCCC and the 2007 Kyoto Protocol indicates, that the inaction, delay and lack of seriousness on the part of governments

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<sup>215</sup> See Climate Pledges Will Bring 2.7° of Warming, Potential for More Action, CLIMATE ACTION TRACKER (Dec. 8, 2015). Available at <http://climateactiontracker.org/news/253/Climate-pledges-will-bring-2.7C-of-warming-potential-for-more-action.html>.

at the international and national levels, points out on a more urgent situation and more proactive as well as binding measures and actions. Climate change lawsuits against governments could be one of potential ways to address climate change though building political will to tackle the impacts humankind faces from climate change.

To date, climate litigation has spread around the world throughout Asia, the Pacific and Europe. Citizens, environmental organizations, including children, are increasingly bringing climate litigation against their governments and are achieving successes. Thus, in the analyzed Dutch case, the court decided that the Dutch government was not doing enough to address climate change, and the court ordered the Dutch government to take deep cuts in GHG. In the Pakistani case, a Pakistani judge has declared the government's inaction on climate change offends the fundamental rights of its citizens, including constitutional and human rights. In all these cases, the plaintiffs successfully relied on international climate change instruments in domestic courts. Climate change litigation in domestic courts could be one of the possible enforcement strategies for GHG mitigation and thereby through mitigating GHG to promote and ensure human rights affected by climate change. Thus, even if the commitments under the Paris Agreement are vague, the analyzed cases propose that one of the possible viable enforcement mechanism to enforce the Paris Agreement could be the domestic implementation in domestic courts.

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## **ANNEXES**

1. A declaration against plagiarism.