

**AN ANALYSIS OF THE HUMAN RIGHTS APPROACH TO CLIMATE CHANGE:  
THE RIGHT TO A HEALTHY ENVIRONMENT, INTERGENERATIONAL EQUITY &  
CLIMATE LITIGATION**

by

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## **Dedication**

This thesis is dedicated to:

- God who made it possible for me to complete this work.
  
- To all the children in the world for the vital role they play in maintaining our planet.

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## **Abstract**

Climate change litigation is a viable tool in the fight against climate change. For the past 2 decades, climate litigation has largely been based on torts and administrative law. However, courts have recently been quite receptive to human rights arguments in climate cases, thereby necessitating recognition of the human rights approach as an important facet of climate litigation. It is important for intergenerational equity to be integrated into the human rights approach to climate change. One of the major benefits of intergenerational equity to the human rights approach is its potential to catalyze the recognition of the right to a healthy environment. The conclusion in this thesis is that the right to a healthy environment and intergenerational equity are two vital components of the human rights approach to climate change and are necessary to advance the human rights approach to climate litigation.

## **List of Abbreviations Used**

CHR	Commission of the Human Rights of the Philippines
CIGI	Centre for International Governance Innovation
CJWL	Canadian Journal of Women and the Law
COP	Conference of the Parties
CQLR	Civil Code of Québec
CRC	United Nations Convention on the Rights of the Child
CRE	Mexico’s Energy Regulatory Commission
DETEC	Swiss Federal Department of the Environment, Transport, Energy and Communications
ECtHR	European Court on Human Rights
ENJEU	ENvironnement JEUnesse
ENNHRI	European Network of National Human Rights Institutions
EP	European Parliament
EUCO	European Council
FAO	United Nations Food and Agriculture Organization
GHG	Greenhouse gases
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IEHC	Irish High Court Judgments
IISD	International Institute for Sustainable Development
IPCC	Intergovernmental Panel on Climate Change
JQ	Jugements du Quebec
LRWC	Lawyers’ Rights Watch Canada
NDC	Nationally Determined Contributions
NGT	India’s National Green Tribunal
NWLR	Nigerian Weekly Law Report
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPIC	Optional Protocol to the CRC on a Communications Procedure



PANEL	Participation, accountability, non-discrimination & equality, empowerment and legality
QCCS	Superior Court of Quebec
SCRA	Philippines' Supreme Court Reports Annotated
SDG	United Nations Sustainable Development Goals
SIDS	Small Island Developing States
SLAPP	Strategic Lawsuits Against Public Participation
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations' Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNGPBHR	UN Guiding Principles on Business and Human Rights
UNSDG	United Nations Sustainable Development Goals
UNTS	United Nations Treaty Series
WCED	World Commission on Environment and Development

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## Chapter One: Introduction

### 1.1. Background

This research evaluates the human rights approach to climate change vis-à-vis litigation and determines the extent to which the approach embodies the concept of intergenerational equity. The thesis examines theoretical issues in the human rights and intergenerational perspectives to climate change and how these issues translate to practical challenges for the human rights approach to climate litigation.

Climate litigation is important because it is viewed as a tool, not just to compel climate action, but also to influence policy outcomes, corporate behaviour and public opinion.<sup>1</sup> Climate litigation in a very broad sense is litigation aimed at achieving the three components of climate action<sup>2</sup> – mitigation, adaptation, and compensation for climate-associated loss and damage.<sup>3</sup> The claims in climate lawsuits are framed in different ways including claims for damages in torts, injunctions against climate-unfriendly activities, judicial review of climate-unfriendly acts or omissions by States, disclosure of climate risks, reckoning climate risks in investments, and violation of fundamental human rights. These cases are mostly instituted by individuals and advocacy groups before domestic, regional and international courts and tribunals, and are typically brought against governments as well as private corporations. Climate litigation has largely been based on torts and administrative law i.e. statutory law regulating governments' decision-making processes affecting climate change.<sup>4</sup> However, courts have recently been quite receptive to human

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<sup>1</sup> J Setzer & R Byrnes, *Global trends in climate change litigation: 2019 snapshot* (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2019) at 1 [Setzer & Byrnes].

<sup>2</sup> See SDG Goal 13 for meaning of climate action in *Transforming our world: the 2030 Agenda for Sustainable Development*, UNGAOR, 70<sup>th</sup> Sess, UN Doc A/RES/70/1 (2015) at p 14, [UNSDGs].

<sup>3</sup> Setzer & Byrnes, *supra* note 1 at 2.

<sup>4</sup> Jacqueline Peel & Hari M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 *Transnational Environmental Law* 37 at 39 [Peel & Osofsky].

rights arguments in climate cases, which has led to the need for identification of the human rights approach as a new trajectory of climate litigation which some have termed a “rights turn in climate litigation”<sup>5</sup> i.e. rights-based climate litigation. These rights-based climate lawsuits involve the framing of climate-unfriendly acts and omissions as violations of fundamental human rights such as the right to a healthy environment, the right to life, the right to health, the rights to self-determination, the rights of indigenous and minority groups, and the rights of future generations.<sup>6</sup>

A focal point of the discussion on the human rights approach is the recognition of the right to a healthy environment, which is also the focus of this thesis. In the following pages, this thesis will explore the relevance of the right to a healthy environment in the human rights approach to climate change litigation. This thesis also critiques the rights-based approach to climate litigation and examines how the approach can be used to protect the rights of future generations. Incorporating intergenerational elements could also have positive effect on the rights-based approach by enhancing rights-based arguments. The research notes that in spite of the importance of the rights of future generations to a healthy environment, intergenerational arguments are either included peripherally or not included at all as part of the arguments put forward in these rights-based cases. The research therefore posits that the rights-based approach in climate litigation presents an excellent opportunity for the rights of future generations to become part of the climate litigation jurisprudence.

It is important to note that rights-based climate cases essentially face the same setbacks as those faced by the conventional forms of climate litigation such as difficulty in proving causation, remoteness of damage, standing, and justiciability.<sup>7</sup> Rights-based climate cases may face

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> United Nations Environment Programme, *The Status of Climate Change Litigation – A Global Review*, (Kenya: UNEP, 2017).

additional obstacles such as the lack of the right to a healthy environment, or a restrictive interpretation of the right to a healthy environment which would reject the link between climate change and human rights violations and would exclude climate rights, as well as the absence of laws recognizing intergenerational climate rights. This thesis examines the extent to which rights-based climate cases have been plagued by these challenges and how the right to a healthy environment and the rights of future generations could address some of these challenges.

This thesis undertakes a case by case analysis of select rights-based climate cases that have already been decided by the court with a view to determining the extent to which the courts recognize the right to a healthy environment as well as the rights of future generations.

Another relevant issue is the possibility of employing the human rights approach to climate litigation to hold private actors accountable for climate change. The rights approach to climate litigation has been largely limited to enforcing the role of government in tackling climate change, since the role of government is usually permissive rather than being actively involved i.e. by allowing private corporations to operate in a manner inimical to the climate system. The research explores ways of addressing this, one of which is the possibility of initiating human rights climate lawsuits against private actors directly responsible for GHG emissions.

The research is propelled by views that the human rights approach to climate change can address intergenerational injustices of climate change by incorporating an enhanced consideration of the needs of future generations. The research is also driven by the recent wave of climate cases by children and young persons in form of lawsuits, petitions and complaints being filed against several governments across the globe. This movement is significant because children and young persons are key actors in climate litigation and are the bridge between the present and future generations. This is very much reflective of suggestions by the United Nations that children and

young persons play an active role in the fight against climate change,<sup>8</sup> since they are the ones who will inherit the responsibility to protect the planet, while fighting the complex scientific problems and social quandaries presented by climate change.<sup>9</sup>

## 1.2. Literature Review

Climate change litigation scholars have identified a new trajectory in climate change litigation – the human rights trajectory. Peel & Osofsky identify two ways in which rights-based climate lawsuits have informed favourable judicial decisions on the subject.<sup>10</sup> The first is the recognition of human right violation related to climate change as a cause of action in its own right, while the second way is the use of human rights as an interpretative tool for determining whether defendants are in breach of certain statutory obligation imposed on them.<sup>11</sup>

Scholars have identified the role of human rights law in addressing climate change and the potentials of a rights-based approach to climate change from various perspectives.<sup>12</sup> Gaps identified by climate litigation scholars in existing literature include the absence of interdisciplinary literature on climate change litigation and the selection bias in favour of the more high profile cases against the seemingly mundane “everyday” lawsuits which do not get as much attention as the former i.e. the neglect of seemingly ordinary litigation cases and the preoccupation with popular high-profile cases by climate litigation scholars.<sup>13</sup>

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<sup>8</sup> United Nations, “Young people should have active role in combating climate change – Ban”, *UN News* (12 August 2008), online: <[news.un.org/en/story/2008/08/269182-young-people-should-have-active-role-combating-climate-change-ban](https://news.un.org/en/story/2008/08/269182-young-people-should-have-active-role-combating-climate-change-ban)>.

<sup>9</sup> Harshal T. Pandve *et al*, “Role of youth in combating climate change” (2009) 13:2 *Indian J Occupational & Environmental Medicine* 105, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2847326/>>.

<sup>10</sup> Peel & Osofsky, *supra* note 4.

<sup>11</sup> *Ibid*.

<sup>12</sup> Bridget Lewis, “Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice” (2016) 34:3 *Netherlands Quarterly of Human Rights* 206 at 207 [*Bridget Lewis, “Human Rights Duties”*].

<sup>13</sup> Joana Setzer & Lisa C Vanhala, “Climate change litigation: A review of research on courts and litigants in climate governance” (2019) 10:3 *WIREs Clim Change* 1, online: <<https://doi.org/10.1002/wcc.580>> [*Setzer & Vanhala*].

There is a lot of scholarship on the human rights approach to climate litigation. However, there are scant references to intergenerational elements in rights-based climate litigation i.e. scholarship that approaches intergenerational rights from a litigation perspective vis-à-vis the rights-based approach. There is very little work done on the relationship between the human rights approach and intergenerational equity. This forms part of what I perceive to be a gap in existing scholarship.

### 1.3. Research Methodology

This thesis employs a number of research methodologies, the foremost being doctrinal research. According to Hutchinson & Duncan, doctrinal research “...provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments.”<sup>14</sup> The research undertaken in this thesis is largely doctrinal as it will involve the analysis of laws, treaties, customary international law,<sup>15</sup> judicial decisions and opinions, court processes, law texts, reports of international/government organisations, and opinions of legal scholars, and other relevant sources. In addition to treaties and customary international law, this thesis relies extensively on

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<sup>14</sup> Terry Hutchinson & Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research.” (2012) 17:1 *Deakin L Rev* 83 at 101, online: <<https://ojs.deakin.edu.au/index.php/dlr/article/view/70>>.

<sup>15</sup> Customary international law “consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.” See Shabtai Rosenne, *Practice and Methods of International Law* (New York: Oceana Publications, 1984) at p 55. The elements of Customary international are “(1) widespread repetition by States of similar international acts over time (State practice); (2) the requirement that the acts must occur out of a sense of obligation (*opinio juris*); and (3) that the acts are taken by a significant number of States and not rejected by a significant number of States.” See Marci Hoffman & Mary Rumsey, *International and Foreign Legal Research: A Coursebook* (Leiden; Boston : Martinus Nijhoff Publishers, 2007) at p 112. There are certain general principles of international environmental law that have arguably attained the status of customary international law and could be applicable to protection of the environment. Such principles include prevention, no-harm principle, polluter pays principle, precautionary principle. See Max Valverde Soto, “General Principles of International Environmental Law” (1996) 3:1 *ILSA J Intl & Comp L* 193.

several resolutions of the United Nations (UN) especially the UN General Assembly and the UN Human Rights Council.<sup>16</sup>

The research draws on climate lawsuits involving human rights and intergenerational arguments to determine how these cases have advanced the human rights approach to climate litigation.

An important aspect of the doctrinal research is that it attempts, as much as possible, to expand its focus beyond the high-profile cases to include the routine cases. A focus on high-profile cases without examining other cases creates the impression that rights-based climate lawsuits have had overwhelming acceptance in court, whereas the uncelebrated cases, which constitute a significant majority of rights-based climate cases, have not been accepted in courts overall.<sup>17</sup>

The thesis also involves some form of empirical research as I employ content analysis in arriving at some of the conclusions in this thesis. According to Hall & Wright, content analysis involves selecting cases, coding cases and analyzing the coded information.<sup>18</sup> Content analysis is used to determine the extent to which rights-based arguments in climate litigation have been accepted by courts, the proportion of cases in which the courts recognise the right to a healthy environment and the rights of future generations. The cases analysed in this thesis are cases in

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<sup>16</sup> These resolutions generally do not have binding effects on UN member states but “are regarded as recommendations to member states of the UN.” See Stephen M Schwebel, “The Effect of Resolutions of the U.N. General Assembly on Customary International Law”, (1979) 73 *Proceedings of the Annual Meeting (American Society of International Law)* 301 at 306; Marko Divac Öberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ”, (2005) 16:5 *European J of International L*, 879; See also decision of the International Court of Justice – *South West Africa (Ethiopia v S Africa; Liberia v S Africa) (Second Phase)* [1966] ICJ Rep 6 at 50–51, para 98. The resolutions are however useful as they could crystallize certain customary international law principles and could also impact treaty making process as they often times are preliminary steps towards negotiation of treaties. See Christopher Greenwood, “Sources of International Law: An Introduction”, (United Nations Audiovisual Library Lecture Series, delivered in 2008) online: *United Nations* <<http://webtv.un.org/watch/judge-greenwood-icj-on-the-sources-of-international-law/2622924798001/?term=&lan=english>>.

<sup>17</sup> Annalisa Savaresi & Juan Auz, “Climate Change Litigation and Human Rights: Pushing the Boundaries” (2019) 9:3 *Climate Law*, online (pdf): <<https://ssrn.com/abstract=3374730>>, [Savaresi & Auz].

<sup>18</sup> Mark A Hall and Ronald F Wright, “Systematic Content Analysis of Judicial Opinions” (2008) 96 *Calif L Rev* 63 at 79.



which human rights and/or intergenerational arguments are used by plaintiffs as the basis for compelling climate action such as measures for the reduction of GHG emissions.<sup>19</sup> Due to the global nature of the intergenerational climate rights movement, lawsuits are instituted in several jurisdictions, and in some instances with the causes of action crisscrossing jurisdictions. Therefore, cases analysed over the course of this research were drawn from different jurisdictions, rather than from a specific country, region or adjudicatory body.

An underlying theoretical assumption in this thesis is that litigation can influence social change and therefore falls within the sphere of law and social change theory which postulates that law influences social change.<sup>20</sup> Law as a tool of social engineering involves the use of “any type of process by which individual or collective actors invoke legal norms, discourse or symbols to influence policy or behaviour”<sup>21</sup> i.e. the “use of the law and legal techniques as an instrument for obtaining wider collective objectives.”<sup>22</sup> In this thesis, litigation is understood as a tool which can drive climate action and the ideas in this thesis proceed on that assumption.

The thesis also discusses human rights theories in an attempt to seek theoretical justification for the human rights approach to climate change and more specifically the right to a healthy environment. John Rawls’ theory of justice is also relevant theory to this research.<sup>23</sup> The Rawlsian theory of justice highlights the injustice occasioned by climate change. Another relevant theory in this thesis is the theory of intergenerational equity which highlights the need for recognition of the

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<sup>19</sup> Although the framing of cases to render elements of climate change invisible (what Bouwer refers to as “inadvertent” climate change litigation) have been criticized by some scholars, these cases are still very much worth considering as far as the rights-based approach and the entire climate change litigation jurisprudence are concerned. See Kim Bouwer, “The Unsexy Future of Climate Change Litigation”, (2018) 30:3 *J of Environmental L* 483 [Bouwer].

<sup>20</sup> C Harlow & R Rawlings, *Pressure through law* (London: Routledge, 1992).

<sup>21</sup> Lisa Vanhala & Jacqui Kinghan, “Literature Review on the Use and Impact of Litigation” (2018) Lankelly Chase/Public Law Project Research Paper at 5, online: <[publiclawproject.org.uk/wp-content/uploads/2018/04/Literature-Review.pdf](http://publiclawproject.org.uk/wp-content/uploads/2018/04/Literature-Review.pdf)> [Vanhala & Kinghan]

<sup>22</sup> C Harlow & R Rawlings, *Pressure through law* (London: Routledge, 1992).

<sup>23</sup> See John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Harvard University Press, 1999) at 15 [Rawls’ Theory].

rights of future generations. The feminist theory of relational autonomy is also a key theory discussed in this thesis.

#### 1.4. What is a Human Rights Approach to Climate Change?

Human rights are rights essential to all human beings, without discrimination on ground of race, colour, ethnicity, nationality, sex, language, religion, birth or any other status.<sup>24</sup> Human rights include the right to life and liberty, the right to property, freedom from discrimination, freedom of opinion and expression, the right to work and education, and many more.<sup>25</sup> The creation and enforcement of these rights are governed by human rights law. Human rights law operates at the international level as well as at the domestic level of individual states. At the international level, “human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law.”<sup>26</sup> Human rights are understood within the context of international human rights law to be “universal, interdependent and interrelated”<sup>27</sup> meaning that all human rights are the same across the globe, they are of equal importance and dependent on one another since “none can be fully enjoyed without the others.”<sup>28</sup> International human rights law sets out obligations of States to act in a certain manner and the obligation not to undertake certain actions in order to respect, protect and fulfil the fundamental

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<sup>24</sup> *Universal Declaration of Human Rights*, 217A (III), UNGAOR, 3<sup>rd</sup> Sess, Supp No 13, UN Doc A/810 (1948) articles 2 & 3, online: <<https://www.refworld.org/docid/3ae6b3712c.html>> [UDHR]; United Nations, Human Rights: “What are Human Rights?”, online: <<https://www.un.org/en/sections/issues-depth/human-rights/>>, [UN, “What are Human Rights?”].

<sup>25</sup> UN, “What are Human Rights?”, *ibid*.

<sup>26</sup> OHCHR, “What are Human Rights?”, online: <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> [OHCHR, “What are Human Rights?”].

<sup>27</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, (12 July 1993), para 5.

<sup>28</sup> UNFPA, “Human Right Principles”, 2005, online: < <https://www.unfpa.org/resources/human-rights-principles>>; Priscila Neves-Silva, Giselle Isabele Martins & Léo Heller, “Human rights’ interdependence and indivisibility: a glance over the human rights to water and sanitation”, (2019) 19:4 *BMC International Health and Human Rights* at 2.

human rights of its citizens.<sup>29</sup> At the domestic level, the sources of human rights law include statutes, regional and international law instruments. States are obligated to “refrain from interfering with or curtailing the enjoyment of human right... and to protect individuals and groups against human rights abuses.”<sup>30</sup> Failure by a State to adhere to these obligations often gives rise to a cause of action against the State by its citizens as well as other affected States.

A human rights-based approach is “a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.”<sup>31</sup> The purpose of the approach is to analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights.<sup>32</sup> Within the human rights-based approach, plans, “policies and programmes are anchored in a system of rights and corresponding obligations established by international law.”<sup>33</sup> This approach promotes sustainability and empowers people entitled to the rights (“right-holders”), particularly those who are the most vulnerable, to partake in policy-making and hold responsible those who have an obligation to protect human rights (“duty-bearers” e.g. States and private entities).<sup>34</sup> The essential attributes of a human rights-based approach include the following as essential objectives – fulfilling human rights; identifying rights-holders, their entitlements, and corresponding duty-bearers and their obligations; striving to strengthen the

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<sup>29</sup> *Ibid.*

<sup>30</sup> OHCHR, “What are Human Rights?”, *supra* note 26.

<sup>31</sup> UNICEF, *Introduction to the Human Rights Based Approach: A Guide for Finnish NGOs and their Partners*, (Finland, Finnish Committee for UNICEF, 2015) at 8 [*UNICEF HRBA*]; OHCHR, *Applying a Human Rights-Based Approach to Climate Change Negotiations, Policies and Measures*, online: <<http://hrbaportal.org/wp-content/files/InfoNoteHRBA1.pdf>>.

<sup>32</sup> UNICEF, *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

capacities of rights-holders to assert their claims and of duty-bearers to meet their obligations; and should be guided by principles and standards derived from international human rights treaties.<sup>35</sup>

According to UNICEF, the human rights approach embodies the following principles – “universality & inalienability, indivisibility, interdependence & inter-relatedness, equality & non-discrimination, participation & inclusion, and accountability and rule of law.”<sup>36</sup> These principles are also reflected in the principles of the European Network of National Human Rights Institutions (ENNHRI),<sup>37</sup> which are participation,<sup>38</sup> accountability,<sup>39</sup> non-discrimination & equality,<sup>40</sup> empowerment<sup>41</sup> and legality<sup>42</sup> (PANEL).<sup>43</sup> The human-rights based approach and principles outlined above have been adopted globally and domestically in a number of initiatives in relation to education,<sup>44</sup> development,<sup>45</sup> social protection,<sup>46</sup> poverty,<sup>47</sup> conservation,<sup>48</sup> among many other areas.

With regard to protection of the environment generally, the human rights approach has been employed in three ways: (1) the greening of existing human rights – imbuing existing human rights such as rights to life, health, dignity with environmental rights dimensions (as opposed to

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<sup>35</sup> Ibid.

<sup>36</sup> UNICEF HRBA, *supra* note 31 at 15.

<sup>37</sup> ENNHRI, Human Right-Based Approach, online: <<http://ennhri.org/about-nhris/human-rights-based-approach/>

<sup>38</sup> Everyone is entitled to active participation in decision-making processes which affect the enjoyment of their rights.

<sup>39</sup> Duty-bearers are held accountable for failing to fulfil their obligations towards rights-holders, with effective remedies in place for breaches.

<sup>40</sup> All individuals are entitled to their rights without discrimination of any kind.

<sup>41</sup> Everyone is entitled to claim and exercise their rights.

<sup>42</sup> Approaches should be in line with the legal rights set out in domestic and international laws.

<sup>43</sup> PANEL is adopted in this thesis as the acronym for the human rights-based principle.

<sup>44</sup> UN Children’s Fund/UNESCO, *A Human Rights-Based Approach to Education for All*, (New York, UNCF/UNESCO, 2007).

<sup>45</sup> Celestine Nyamu-Musembi & Andrea Cornwall, “What is the “rights-based approach” all about? Perspectives from international development agencies,” (2004) Institute of Development Studies Working Paper No 234.

<sup>46</sup> UN Research Institute for Social Protection, “The Human Rights-Based Approach to Social Protection”, (2016) UNRISP Issue Brief 02, online: < <https://socialprotection-humanrights.org/wp-content/uploads/2016/09/IB2-Human-rights-based-approach.pdf>>.

<sup>47</sup> OHCHR, *Principles and guidelines for a human rights approach to poverty reduction strategies*, (Geneva: OHCHR, 2006).

<sup>48</sup> Jessica Campese et al (eds), *Rights-based approaches Exploring issues and opportunities for conservation*, (Indonesia: Center for Int’l Forestry Research, 2009).

creating separate environmental rights); (2) ensuring procedural guarantees enabling affected citizens to participate in decision-making respecting their environment;<sup>49</sup> (3) the creation of substantive environmental rights distinct from existing human rights.<sup>50</sup> There is an unending debate as to whether environmental rights should be “greened” or whether a distinct environmental right should be created,<sup>51</sup> but the view taken in this thesis is the latter.

Within the climate context, a human rights approach to climate change therefore determines the human rights and obligations related to climate change, how climate change impedes human rights, and how human rights violations can be redressed. The questions arising from the human rights approach with regard to the greening of existing human rights, the creation of substantive environmental rights and procedural guarantees are still relevant to the climate change discourse.

According to the UN Office of the High Commissioner for Human Rights (OHCHR), climate change has a major impact on a wide range of human rights, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. The OHCHR notes that there is an intrinsic link between climate change and the realization of a range of fundamental human rights.<sup>52</sup> The human rights being threatened and violated by climate change include the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of

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<sup>49</sup> “Procedural rights are the same as those found under international human rights law: right to information, the right to participate in the decision-making process and the right to remedies.” See Sumudu Atapattu, *Human Rights Approaches to Climate Change*, (London/New York: Routledge Taylor & Francis Group) at 47 [Atapattu, “*Human Rights Approaches*”];

<sup>50</sup> Anna Grear, “Human Rights and the Environment: a tale of ambivalence and hope” Douglas Fisher, ed, *Research Handbook on Fundamental Concepts of Environmental Law* (UK/USA: Edward Elgar, 2016) 146 at 152 & 153 [Grear].

<sup>51</sup> See Atapattu, “Human Rights Approaches”, *supra* note 49 at 48.

<sup>52</sup> OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, UN Doc A/HRC/10/61, 15 Jan. 2009, para 18. [OHCHR Report 2009].

living, housing, property, self-determination, development and culture.<sup>53</sup> Climate change also exacerbates poverty and equality in poor countries and populations.<sup>54</sup>

### 1.5. The Meaning of Intergenerational Equity

According to the principle of intergenerational equity, the present generation inherits the planet from past generations for their benefit, to hold for and to bequeath to future generations in a condition of no less quality than they themselves inherited. The principle embodies an understanding that “the present generation holds natural resources in trust for future generations”<sup>55</sup> and must ensure the quality and availability of natural resources for the future generations.<sup>56</sup> Weiss puts it thus:

We, the human species, hold the natural environment of our planet in common with all members of our species: past generations, the present generation, and future generations. As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.”<sup>57</sup>

Human society is characterised as a partnership between past, present and future generations.<sup>58</sup> Intergenerational equity posits that present generations are under an obligation to maintain the planet, leave it in the same or no worse condition than they received it, and ensure that posterity has equitable access to the planet’s resources.<sup>59</sup> Each generation has a responsibility

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<sup>53</sup> OHCHR, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Safe Climate Report, UNGAOR A/74/161 (15 July 2019), para 26, [OHCHR Report 2019].

<sup>54</sup> Report of the Special Rapporteur on extreme poverty and human rights, UN Doc A/HRC/41/39, UNHRCOR, 41<sup>st</sup> sess, (2019), at para 11.

<sup>55</sup> Max Valverde Soto, “General Principles of International Environmental Law”, (1996) 3:1 *ILSA J Intl & Comp L* 193 at 206 [Soto].

<sup>56</sup> Pierre-Marie Dupuy & Jorge E Viñuales, *International environmental law* (Cambridge: Cambridge University Press, 2018), at 77 [Dupuy].

<sup>57</sup> Edith Brown Weiss, “Our Rights and Obligations to Future Generations for the Environment”, (1990) 84:1 *The American Journal of International Law* 198 at 198 & 199 [Weiss, “Our Rights and Obligations”].

<sup>58</sup> *Ibid* at 199 & 200.

<sup>59</sup> Edith Brown Weiss, *In fairness to future generations: international law, common patrimony, and intergenerational equity*. (Dobbs Ferry, New York: Transnational Publishers, 1989) at 21 [Weiss, “In Fairness to Future Generations”]; Soto, *supra* note 55.

to bequeath a planet of no less quality than they themselves inherited as the future generations “would want to inherit the common patrimony of the planet in as good condition as it has been for any previous generation, and to have as good access to it as previous.”<sup>60</sup> Since intergenerational equity places on the present generation a minimum obligation of not leaving the planet in a condition worse off than they received it, it invariably means that the planet should be bequeathed in either the same condition or in a better condition than it was received.<sup>61</sup>

It is important to note that there are two capacities in which the present generation holds the planet – as beneficiaries and as custodians. In their capacity as beneficiaries, the present generation has the right to enjoy the planet, and therefore can enforce this right amongst themselves.<sup>62</sup> In their capacity as custodians, members of the present generation act as a check to one another in ensuring that the planet is handed over to future generations in no worse condition than it was received. This raises a question as to what it means to leave the planet in no worse condition or in a better shape. An argument could be made that the numerous developments made overtime – especially technological ones – have improved the conditions of life on the planet and should therefore be considered in determining whether the planet has been improved by way of a cost-benefit analysis.<sup>63</sup>

Intergenerational equity is one of the principles of international environmental law and is considered as one of the foundational principles for the concept of sustainable development.<sup>64</sup>

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<sup>60</sup> Weiss, “In Fairness to Future Generations”, *supra* note 59 at 24.

<sup>61</sup> Weiss, “Our Rights and Obligations”, *supra* note 57 at 200.

<sup>62</sup> *Ibid* at 201.

<sup>63</sup> Although it has been argued that the current cost-benefit analysis for intergenerational equity is not transparent as it ought to and does not evaluate choices that it ought to. See Jean-François Mertens & Anna Rubinchik, “Intergenerational Equity and the Discount Rate for Cost-Benefit Analysis” (2006) *Université catholique de Louvain - Center for Operations Research and Econometrics Discussion Papers* 2006091, online: <<http://www2.ku.edu/~nber/econ/papers/papers2/mertens.pdf>>; Robert C Lind, “Intergenerational equity, discounting, and the role of cost-benefit analysis in evaluating global climate policy”, (1995) 23:4 *Energy Policy* 379-389.

<sup>64</sup> Dupuy, *supra* note 56.

## 1.6. Climate Change and Future Generations

Article 2.1 of the Paris Agreement seeks to limit global warming by “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change [emphasis supplied]”<sup>65</sup>. In a 2018 report, the Intergovernmental Panel on Climate Change (IPCC)<sup>66</sup> analysed the emissions in the pre-industrial era and came to the conclusion that this target under the Paris Agreement translates to limiting global warming to a temperature of 1.5°C.<sup>67</sup> The IPCC projects that “[g]lobal warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate” unless there is drastic reduction in GHG emissions by 45% from 2010 levels by 2030, and net zero emissions by 2050.<sup>68</sup> It therefore follows that a safe climate would be one which at the very least maintains a global temperature of less than 1.5°C. For intergenerational equity, this means that merely handing over the planet under 1.5°C does not suffice. The present generation is saddled with the responsibility of not only ensuring that future generations do not inherit a planet with a temperature of up to 1.5°C, but ensuring that there is a clear pathway laid down for

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<sup>65</sup> *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, Treaty Reg No 54113 (entered into force 4 November 2016), art 2.1(a) [*Paris Agreement*].

<sup>66</sup> ‘Established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) in 1988...the Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change. The IPCC was created to provide policymakers with regular scientific assessments on climate change, its implications and potential future risks, as well as to put forward adaptation and mitigation options.’ See *Protection of Global Climate for present and future generations*, UN Res 43/53, UNGAOR, 70<sup>th</sup> Sess, (1988). See also IPCC, “History of the IPCC”, online: < <https://www.ipcc.ch/about/history/>>.

<sup>67</sup> IPCC, *Global Warming of 1.5°C: Summary for Policymakers*, In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (Switzerland: IPCC, 2018) at 4, [IPCC, “Global Warming Report”].

<sup>68</sup> *Ibid* at 5 & 11.



succeeding generations to follow in order to guarantee the continuous maintenance of the global temperature and to keep the responsibility cycle going.

Within the climate change regime, several scientific studies have been carried out to determine the impacts of climate change on future generations. The intergenerational implication of climate change is grounded by scientific studies which reveal that the effect of global warming will last for centuries and millennia. According to the IPCC, “global warming from anthropogenic emissions from the pre-industrial period to the present will persist for centuries to millennia and will continue to cause further long-term changes in the climate system, such as sea level rise, with associated impacts.”<sup>69</sup> The IPCC confirms that sea level will continue to rise well beyond 2100 even if global warming is limited to 1.5°C within the 21st century.<sup>70</sup> Other impacts include increases in mean temperature in most land and ocean regions, hot extremes in most inhabited regions, heavy precipitation in some regions, as well as drought and precipitation deficits in other regions.<sup>71</sup> It is also projected that “climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth are projected to increase with global warming of 1.5°C and increase further with [warming of] 2°C over [the next few]centuries.”<sup>72</sup>

Another scientific study indicates that “even though the majority of CO<sub>2</sub> emitted from burning a single tonne of coal or oil today will be absorbed over a few centuries by the oceans and vegetation, approximately 25% of it will still be lingering in the atmosphere in 1,000 years, and 10% still remaining and impacting the climate in 100,000 years time.”<sup>73</sup> Yet another study by a group of 26 leading climate scientists supports this by stating that “[e]ven after emissions stop

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<sup>69</sup> *Ibid* at 7.

<sup>70</sup> *Ibid* at 9.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid* at 11.

<sup>73</sup> Gregory Trencher, “Climate Change: What Happens after 2100?”, *Our World United Nations University* (16 November 2011), online: < <https://ourworld.unu.edu/en/climate-change-what-happens-after-2100>> [Trencher] referring to David Archer, “Checking the thermostat”, (2008) 1 *Nature Geoscience* 289.

completely, atmospheric temperatures are not expected to decline much for many centuries to millennia because of the long lifetime of CO<sub>2</sub> in the atmosphere.”<sup>74</sup> The study further emphasizes the impacts on future generations:

While global warming can be stopped, it cannot easily be reversed due to the long lifetime of carbon dioxide in the atmosphere. Even a thousand years after reaching a zero-emission society, temperatures will remain elevated, likely cooling down by only a few tenths of a degree below their peak values. Therefore, decisions taken now have profound and practically irreversible consequences for many generations to come, unless affordable ways to extract CO<sub>2</sub> from the atmosphere in massive amounts can be found in the future. The chances of this do not appear to be promising.<sup>75</sup>

It is clear that future generations will suffer the impacts of climate change for which the present generation is responsible. Eventually, the present generation will pass away, leaving future generations to deal with the problem. There is, therefore, a need for intergenerational justice.

## **1.7. The Structure of the Thesis**

This thesis is divided into seven chapters. Chapter one is the introduction. Chapter two provides an overview of the human rights approach to climate change. Chapter three examines the relationship between the right to a healthy environment and climate change. Chapter four discusses the concept of intergenerational equity. Chapter five analyses each of the human rights-based climate decisions by providing a summary of each case and identifying the right to a healthy environment and intergenerational equity components. Chapter six examines the challenges to the human rights and intergenerational approaches to climate litigation and how these challenges can be surmounted. Chapter seven summarises all the discussions and recommendations in this thesis.

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<sup>74</sup> I Allison, N L Bindoff, R A Bindshadler et al, *The Copenhagen Diagnosis, 2009: Updating the World on the Latest Climate Science* (Sydney, Australia: The Univ of New South Wales Climate Change Research Centre, 2009) at 49, online: <[http://www.crc.unsw.edu.au/sites/default/files/Copenhagen\\_Diagnosis\\_LOW.pdf](http://www.crc.unsw.edu.au/sites/default/files/Copenhagen_Diagnosis_LOW.pdf)>.

<sup>75</sup> *Ibid* at 50.

## Chapter Two: Understanding the Human Rights Approach to Climate Change

This chapter provides an overview of the human rights approach to tackling climate change. The chapter examines the legal framework for the human rights approach to climate change, the evolution of the approach, and identifies specific human rights with linkages to climate change.

### 2.1. An Overview of the Legal Framework for the Human Rights Approach to Climate Change

This section provides an overview of the laws and instruments that support the human rights approach to climate change. These laws include international human rights instruments, international environmental law instruments, international climate law instruments, regional human right instruments, national constitutions and other domestic laws.<sup>76</sup> It is also pertinent to note that these instruments are referred to in climate litigation cases that adopt a human rights approach.<sup>77</sup> In addition to treaties, the human rights approach draws from other sources of international law including customary international law principles such as the prevention principle, no-harm principle, precautionary principle, among other principles.<sup>78</sup>

The instruments in this section are analysed using a positivist state-centric approach. However, there are alternate ways of theorizing the binding nature of international legal instruments.

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<sup>76</sup> International Bar Association, “Achieving Justice and Human Rights in an Era of Climate Disruption”, (London: IBA, 2014) at 61 et seq [IBA, “*Achieving Justice*”].

<sup>77</sup> *Ibid.*

<sup>78</sup> Florentina Simlinger & Benoit Mayer, “Legal Responses to Climate Change Induced Loss and Damage” in Reinhard Mechler et al, eds, *Loss and Damage from Climate Change Concepts, Methods and Policy Options*, (Cham, Switzerland: Springer, 2019) at 179; It is important to mention that the status of some of these principles such as the precautionary principle are debatable. Some do not agree that the principle has attained status of customary law. See Ole Pedersen, “From Abundance to Indeterminacy: The Precautionary Principle and Its Two Camps of Custom” (2014) 3:2 *Transnational Environmental Law* 323 [Pederson]. Other sources of international law are general principles of law, judicial decisions. See David Kennedy, “The Sources of International Law”, (1987) 2:1 *American University Int’l L Rev* 1.

Such theories include the interactional theory,<sup>79</sup> Third World Approaches to International Law (TWAAIL),<sup>80</sup> and theories that consider the role of non-state actors.<sup>81</sup>

### 2.1.1. International Human Rights Law

The Universal Declaration of Human Rights (UDHR) – The UDHR is an international instrument embodying human rights, which was ratified in 1948.<sup>82</sup> The UDHR is generally understood to be the foundation of international human rights law.<sup>83</sup> It contains rights which are affected by climate change such as the rights to life, liberty, security of the human person, health, equality, property, among other rights. Although the UDHR was not originally intended to be a binding instrument, some of the principles laid down therein may have attained the status of customary international law (which is binding)<sup>84</sup> and these principles are usually invoked by litigants and petitioners in support of complaints against human rights violations occasioned by climate change.<sup>85</sup>

The International Covenant on Economic, Social and Cultural Rights (ICESCR) – The ICESCR is another instrument under international human rights law that embodies human rights

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<sup>79</sup> See Jutta Brunnée and Stephen J Toope, “Interactional international law: An Introduction”, (2011) 3:2 *International Theory*, 307–318.

<sup>80</sup> Sara Seck. “Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?.” (2008) 46:3 *Osgoode Hall Law Journal* 565-603.

<sup>81</sup> Sara L Seck, “Relational Law and the Reimagining of Tools for Environmental and Climate Justice” (2019) 31:1 *CJWL* 151.; see also for example, the role of non-state corporations in protection of human rights under international law in Sara L Seck and Penelope Simons, “Resource Extraction and the Human Rights of Women and Girls”, (2019) 31:1 *CJWL*.

<sup>82</sup> UDHR, *supra* note 24.

<sup>83</sup> UN, “Human Rights Law”, online: <<https://www.un.org/en/sections/universal-declaration/human-rights-law/index.html>>.

<sup>84</sup> Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law”, (1995/1996) 25 *Georgia J Int'l & Comparative L* 287. The parts of the UDHR that can be said to have attained the status of customary international law, include the right to life, the prohibitions against slavery and torture, prolonged arbitrary imprisonment, and systematic racial discrimination. See LRWC, “International Human Rights Law: Non-Treaty Standards”, *LWRC*, online: <<https://www.lrwc.org/education/international-law/non-treaty-standards/>>.

<sup>85</sup> IBA, ‘Achieving Justice’, *supra* note 76.

affected by climate change such as the right to self-determination, equality, food, health, adequate standard of living, a means of livelihood, the utilization of natural resources, among other rights.<sup>86</sup> The ICESCR came into force in 1976. It expounded the rights under the UDHR and is legally binding on the 170 party states (through ratification, accession and succession).<sup>87</sup> The ICESCR is one of the instruments that forms the basis of the human rights approach to climate change, and has been relied upon by litigants in human rights-based climate litigation cases.

The International Covenant on Civil and Political Rights (ICCPR) – The ICCPR mandates parties to respect the civil and political rights of individuals, such as the right to life, equality, among other rights.<sup>88</sup> The ICCPR came into force in 1976 and is legally binding on its 171 party states.<sup>89</sup> The ICCPR has been relied on by litigants in a number of human rights-based climate litigation cases. The UDHR, the ICESCR and the ICCPR collectively constitute what is known as “the International Bill of Human Rights.”<sup>90</sup>

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – The UNDRIP was adopted by the UN General Assembly on 13 September 2007. The UNDRIP creates a “framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.”<sup>91</sup> Although the UNDRIP is not expressed to be binding, the jury is still out as to whether the UNDRIP has attained the status of customary

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<sup>86</sup> *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3.

<sup>87</sup> UN, “United Nations Treaty Series – International Covenant on Economic, Social and Cultural Rights”, online: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>>.

<sup>88</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), online: <[https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf)>.

<sup>89</sup> UN, “United Nations Treaty Series – International Covenant on Civil and Political Rights”, online: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>>.

<sup>90</sup> OHCHR, “International Bill of Human Rights”, online: <<https://www.ohchr.org/documents/publications/factsheet2rev.1en.pdf>>.

<sup>91</sup> UN Department of Economic and Social Affairs, “UN Declaration on the Rights of Indigenous People”, online: <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>.

international law so as to render it binding.<sup>92</sup> The rights of indigenous people protected by the UNDRIP include the right to life, self-determination, and so on.<sup>93</sup> The human rights cases brought by indigenous peoples have often relied on the UNDRIP among other instruments.

The United Nations Convention on the Rights of the Child (CRC) – The CRC is an instrument protecting the human rights of the child. The CRC mandates State parties to protect the right of the child to life, family, health, and other rights.<sup>94</sup> The CRC is legally binding on the 196 State parties who have ratified (and acceded to) it.<sup>95</sup> The CRC has been one of the instruments relied on in human rights-based climate litigation cases commenced by or on behalf of children. There are several other treaties within the international human rights framework relevant to human rights-based climate litigation such as women’s rights, rights against racial discrimination, rights of migrant workers, rights of the disabled, among other rights.

### **2.1.2. International Environmental Law**

The instrument discussed hereunder are non-binding documents within the framework of international environmental law that have shaped (and are still shaping) conversations around the human rights approach to climate change. These instruments, though not legally binding, have formed the basis of some of the human rights litigation cases and complaints. They are important sources of customary international environmental law principles such as the prevention principle,

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<sup>92</sup> Sylvanus Gbendazhi Barnabas, “The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law”, (2017) 6 Int’l Human Rights L 242.

<sup>93</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR 61<sup>st</sup> Sess, A/RES/61/295, online: <<https://undocs.org/A/RES/61/295>>.

<sup>94</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) [CRC].

<sup>95</sup> UN, “United Nations Treaty Series – International Covenant on Civil and Political Rights”, online: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>>.

no-harm principle, precautionary principle and others.<sup>96</sup> The concept of sustainable development has played a vital role in “spawning” or at least “popularizing” these principles.<sup>97</sup> The precautionary principle in particular is very central to the concept of sustainable development as well as other principles of customary international law.<sup>98</sup>

The Declaration at the United Nations Conference on the Human Environment 1972 (Stockholm Declaration) – The Stockholm Declaration contains principles for “the preservation and enhancement of the human environment.”<sup>99</sup> Its purpose is to coordinate global efforts to promote sustainability and safeguard the natural environment. Although the Stockholm Declaration is not formally binding, its provisions reflect customary international law and continue to shape future normative expectations with respect to protection of the environment.<sup>100</sup>

Rio Declaration on Environment and Development 1992 (Rio Declaration) – The Rio Declaration is a set of principles that recognize the importance of preserving the environment and set forth international guidelines for doing so. Just like the Stockholm Declaration, the Rio Declaration is not formally binding but its provisions reflect principles of customary international law and continue to shape future normative expectations with respect to protection of the environment.<sup>101</sup> The Rio Declaration was re-endorsed at Johannesburg in Rio +20.<sup>102</sup>

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<sup>96</sup> Dupuy, *supra* note 56. As earlier stated, there are arguments that some of these principles are yet to attain status of customary international law. See note 78 above.

<sup>97</sup> David Vanderzwaag, “The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides,” (2010) 33:2 *Ocean Development & International L* 165 at 173.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Stockholm Declaration*, Introductory paragraph.

<sup>100</sup> Günther Handl, “Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration On Environment And Development, 1992”, (2010) United Nations Audiovisual Library of International Law, at 3, online: < [https://legal.un.org/avl/pdf/ha/dunche/dunche\\_e.pdf](https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf)>.

<sup>101</sup> Günther Handl, “Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992”, (2010) United Nations Audiovisual Library of International Law, at 3, online: < [https://legal.un.org/avl/pdf/ha/dunche/dunche\\_e.pdf](https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf)>.

<sup>102</sup> *The Future we want*, UN Doc A/RES/66/288, UNGAOR, 66<sup>th</sup> Sess, (2012).

United Nations Sustainable Development Goals (SDGs) – The SDGs are the established model for achieving a better and more sustainable future for all.<sup>103</sup> The SDGs are aimed at tackling “the global challenges we face, including those related to poverty, inequality, climate change, environmental degradation, peace and justice.”<sup>104</sup> Particularly, Goal 13 of the SDGs is to “take urgent action to combat climate change and its impacts.”<sup>105</sup> Goal 13 is aimed at implementing the objectives of the UNFCCC.<sup>106</sup> The SDGs are not binding, rather they are soft law instrument and play an important role in the advancing the principle of sustainable development.<sup>107</sup> Sustainable development however is arguably a principle of customary international law, and could therefore have some binding status.<sup>108</sup> However, even if it is agreed that the principle has attained the status of customary law, the fluidity and imprecision of the principle inhibits its bindingness.

### 2.1.3. International Climate Change Law

There are instruments within the framework of international climate change law that form the basis of the human rights approach to climate change and have been relied on by litigants in human-rights based climate litigation cases.<sup>109</sup> The acts or omissions constituting human rights violations are usually measured against the substantial provisions of these instruments, that is to say, where acts and/or omissions of a State contravene these instruments, litigants argue that such acts/omissions amount to human rights violations.<sup>110</sup> The human-rights based cases typically

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<sup>103</sup> UN, “About the Sustainable Development Goals”, online: <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>>.

<sup>104</sup> *Ibid.*

<sup>105</sup> UNSDGs, *supra* note 2 at p 14.

<sup>106</sup> *Ibid* at 23.

<sup>107</sup> Riccardo Pavoni & Dario Piselli, “The sustainable development goals and international environmental law: normative value and challenges for implementation”, (2016) 13:26 *Veredas do Direito*, 13–60.

<sup>108</sup> Virginie Barral, “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm”, (2012) 23:2 *EU J of Int'l L* 377.

<sup>109</sup> The history and current role of international human rights law is discussed in more detail subsequently.

<sup>110</sup> Peel & Osofsky, *supra* note 4.



contain arguments that States have failed to meet their international commitments towards reducing GHG emissions, made at the 1988 International Conference on the Changing Atmosphere, under the UNFCCC,<sup>111</sup> the Kyoto Protocol,<sup>112</sup> the 2009 Copenhagen Accord,<sup>113</sup> the 2010 Cancun Agreement<sup>114</sup> and the Paris Agreement 2015. These cases measure the acts, omissions, laws and policies of States against the aforementioned commitments and argue that States are in breach of these international commitments.

The United Nations Framework Convention on Climate Change (UNFCCC) – The purpose of the UNFCCC is to promote agreements that “stabilize greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system, in a time frame which allows ecosystems to adapt naturally and enables sustainable development.”<sup>115</sup>

The Kyoto Protocol 1995 – The Kyoto Protocol operationalizes the UNFCCC by committing industrialized countries to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets.<sup>116</sup> The Protocol itself only asks those countries to adopt policies and measures on mitigation and to report periodically. Notably, despite signing the Protocol, the United States did not ratify it, while Canada which ratified it in 2002 withdrew from the Protocol in 2011.<sup>117</sup>

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<sup>111</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, (21 March 1994), preamble to the UNFCCC [UNFCCC].

<sup>112</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, (1997) 2303 UNTS 162 adopted at COP3 in Kyoto, Japan, on 11 December 1997.

<sup>113</sup> *Copenhagen Accord*, Dec 2/CP. 15, UNFCCCOR, 2009, FCCC/CP/2009/11/Add. 1, online: <[http://unfccc.int/files/meetings/cop\\_15/application/pdf/cop15\\_cph\\_auv.pdf](http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf)>.

<sup>114</sup> *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Dec. 1/CP.16, UNFCCCOR, 2010, FCCC/CP/2010/7/Add.1,

<sup>115</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107, (21 March 1994), preamble to the UNFCCC [UNFCCC]; UNFCCC, “About the Secretariat”, online: <<https://newsroom.unfccc.int/about-us/about-the-secretariat>>.

<sup>116</sup> *Supra* note 112.

<sup>117</sup> United Nations Treaty Collection, Chapter XXVII: Environment (7a).

The Paris Agreement – This is an agreement within the UNFCCC limiting greenhouse gas emissions, mitigation, adaptation, and loss & damage, and its long-term temperature goal is to keep “the increase in global average temperature to well below 2 °C above pre-industrial levels; and to pursue efforts to limit the increase to 1.5 °C, recognizing that this would substantially reduce the risks and impacts of climate change.”<sup>118</sup>

#### **2.1.4. Regional Instruments**

There are several regional instruments that form the basis of the human rights approach to climate change. These regional instruments include the American Convention on Human Rights (1969),<sup>119</sup> the African Charter on Human and Peoples’ Rights (1981),<sup>120</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950),<sup>121</sup> and Protocols made thereunder. These various instruments have been relied upon in human rights-based climate litigation cases. In the respective regions, plaintiffs argue that acts and omissions of States adverse to the climate system contravene the human rights guaranteed under these regional instruments.<sup>122</sup>

#### **2.1.5. National Constitutions and Laws**

Constitutions and other laws protecting human rights have formed the basis of human rights-based climate change litigation cases. Plaintiffs typically argue that these domestic human rights

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<sup>118</sup> *Paris Agreement*, article 2.1(a).

<sup>119</sup> (1969) 1144 UNTS 123.

<sup>120</sup> (1989) 1520 UNTS 217.

<sup>121</sup> (1950) 213 UNTS 221.

<sup>122</sup> IBA, ‘Achieving Justice’, *supra* note 76; For detailed discussion of regional cases on human rights although without a specific focus on climate change, see Donald McCrimmon, “Regional Human Rights Regimes and Environmental Protection: A Comparison of European and American Human Rights Regimes’ Histories, Current Law, and Opportunities for Development”, PhD Thesis, (Dalhousie University, 2017), online: <<https://dalspace.library.dal.ca/handle/10222/72765>>.

laws as well as international human right law have been breached when laws, policies and actions of States do not align with international climate law. The countries where the constitution and human rights laws have been invoked in climate litigation cases include Canada, the United States, the Netherlands, Germany, Canada, South Africa, Nigeria, Argentina, Austria, Pakistan, France, Ireland, Colombia, Norway, Switzerland, Belgium.<sup>123</sup>

## 2.2. The Evolution of the Human Rights Approach to Climate Change

Human rights linkages to climate change are rooted in the discourse on the relationship between human rights and the environment.<sup>124</sup> It would therefore be beneficial to examine how the relationship between human rights and the environment came to be recognised in order to better understand the evolution of the human rights approach to climate change. The sources considered for the purpose of examining the evolution of the human rights approach include international legal instruments with respect to human rights, the environment, climate change, and sustainable development, as introduced above.

The right to a healthy environment is generally considered to have first gained recognition internationally at the UN Conference on the Human Environment, held in Stockholm in 1972 (Stockholm Declaration). Principle 1 of the Stockholm Declaration provides as follows:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears

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<sup>123</sup> Sabin Center for Climate Change Law, “Climate Change Litigation Databases”, online: <<http://climatecasechart.com/>>. For discussions on Stats with constitutional provisions in relation to environment, see David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012), [David Boyd]; David R Boyd, *PAPER #4: The Status of Constitutional Protection for the Environment in Other Nations*, (David Suzuki Foundation, 2013) at 6, online: <<https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf>>, [Boyd Paper 4].

<sup>124</sup> Michael Burger & Jessie Wentz, *Climate Change and Human Rights* (UNEP/Sabin Center for Climate change Law, 2015), p. 11, online: <<http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf>>, [Burger].

a solemn responsibility to protect and improve the environment for present and future generations.

The Stockholm Declaration, although not legally binding, has nonetheless been influential in articulating the relationship between human rights and the environment.<sup>125</sup> Prior to the Stockholm declaration, Switzerland was the only country to include the right to a healthy environment in its constitution in 1971.<sup>126</sup> It was only after the Stockholm Declaration that other States began to incorporate the right to a healthy environment into their constitutions. Another stride in the recognition of the right to a healthy environment was the UN's adoption of the report by the World Commission on Environment and Development (WCED) in 1990 declaring that "all individuals are entitled to live in an environment adequate for their health and well-being."<sup>127</sup> In 1992, the United Nations Conference on Environment and Development was convened in Rio de Janeiro in 1992, and it was there that the Rio Declaration was adopted by the UN General Assembly. Principle 1 of the Rio Declaration states that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".<sup>128</sup> The Rio conference of 1992 also led to the adoption of Agenda 21,<sup>129</sup> an implementation plan for sustainable development, which recognised the fundamental connections between the environment and human well-being, and acknowledged the essential need to respect human rights especially those of women and indigenous peoples, in formulating and implementing sustainable

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<sup>125</sup> Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Singapore: Springer, 2018) at 79 [Lewis, "Human Rights and Climate Change"].

<sup>126</sup> Boyd Paper 4, *supra* note 123 at 4 & 13; David Boyd, *supra* note 123 at 6.

<sup>127</sup> *Need to ensure a healthy environment for the well-being of individuals*, GA Res 45/94, UNGAOR, 45<sup>th</sup> Sess, UN Doc A/RES/45/94 (1990), online: < <https://undocs.org/en/A/RES/45/94>>.

<sup>128</sup> *Report of the United Nations Conference on Environment and Development: Rio Declaration*, UNGAOR, A/CONF151/26 (Vol I) (1992), online: < [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)> [*Rio Declaration*].

<sup>129</sup> *United Nations Conference on Environment and Development: Agenda 21*, UNSD (1992), online: <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>>.

development practices.<sup>130</sup> Neither the Rio Declaration nor Agenda 21 conceptualised the environment as a human right. For this reason, it has been argued by some that both instruments cannot be seen as progress for the environment - human rights discourse.<sup>131</sup> However, it is worth noting that 1992 was the peak year for the incorporation of environmental rights and responsibilities into national constitutions, as new environmental provisions were included in 18 national constitutions in that year alone (in the Global North and Global South).<sup>132</sup>

Also, one of the earliest judicial decisions acknowledging the relationship between the environment and human rights was delivered around this period in 1993 by the Supreme Court of the Philippines in the case of *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*<sup>133</sup> wherein it was recognised that the destruction of rain forests in the Philippines violated the right of the people to a balanced and healthful ecology and the right to self-preservation and self-perpetuation, which was enshrined in the 1987 Constitution of the Philippines. This case also had intergenerational equity as a major component as the Court held that the duty to protect the environment is owed not just to the present generations, but also to future generations.

The next major step came in 1994, with the publication of the UN Draft Principles on Human Rights and Environment, which proclaimed that “all persons have the right to a secure, healthy and ecologically sound environment [and that] this right and other human rights, including

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<sup>130</sup> Lewis, “Human Rights and Climate Change”, *supra* note 125 at 80.

<sup>131</sup> *Ibid.*

<sup>132</sup> Boyd Paper 4, *supra* note 123 at 6.

<sup>133</sup> 30 July 1993, 224 Supreme Court Reports Annotated (SCRA) 792.

civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.”<sup>134</sup> However, the principles were never adopted by the UN.<sup>135</sup>

Another instrument worth mentioning is the Johannesburg Declaration for Sustainable Development which was endorsed by the UNGA in 2003.<sup>136</sup> Although the Declaration does not speak of human rights, it speaks of the connections between the environment and human well-being, recognising the “interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection” and confirming responsibility of individual states to advance and strengthen these at local, national, regional and global levels.<sup>137</sup>

Although links were being established between human rights and the environment, there seemed to be no linkage between human rights and climate change. The climate change dimension of the human rights and environment conversation came into the picture in 2005 when a group of Inuit people submitted a petition to the Inter-American Commission on Human Rights (IACHR) requesting relief for human rights violations resulting from the impacts of global warming and climate change.<sup>138</sup> The petition specifically alleged that the United States was in violation of the human rights of the Inuits by failing to adequately regulate GHG emissions because the emissions had occasioned widespread environmental changes. Although the IACHR never issued a decision

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<sup>134</sup> Fatma Zohra Ksentini, *Report of the Special Rapporteur on Human Rights and the Environment*, UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994), art 2. The Special Rapporteur’s mandate was to prepare a study on the relationship between the preservation of the environment and promotion of human rights. See para 8.

<sup>135</sup> Adriana Fabra Aguilar & Neil A F Popović, “Lawmaking in the United Nations: The UN Study on Human Rights and the Environment”, (1994) 3:4 *Rev of European Community & International Environmental L*, p 197.

<sup>136</sup> *World Summit on Sustainable Development*, UNGAOR, UN Doc Res 57/253, 55<sup>th</sup> Sess, (2003). The *Rio Declaration* was also re-endorsed in this summit.

<sup>137</sup> *Ibid*, preamble at 2.

<sup>138</sup> Re: *Petition by Sheila Watt-Cloutier et al 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* (7 Dec 2005) Petition No P-1413-05 [*Inuit Petition*].

on the merits,<sup>139</sup> the petition did succeed in drawing public attention to the severe effects of global warming on the Inuit and sparking further dialogue about the human rights implications of climate change.<sup>140</sup>

The second landmark in the linkage between human rights and climate change was in November 2007 when the Small Island Developing States (SIDS) adopted the Male' Declaration on the Human Dimension of Global Climate Change, which was the first international agreement to explicitly recognize that "climate change has clear and immediate implications for the full enjoyment of human rights."<sup>141</sup> The Male Declaration also called upon the Conference of the Parties (COP) to the UNFCCC and the UN human rights bodies to launch a collaborative process for assessing the human rights implications of climate change.<sup>142</sup> That same month, the OHCHR issued a public statement for the Bali Climate Change Conference (COP13) acknowledging that "climate change can adversely affect the fundamental human rights of present and future generations" and reminding the COP that governments have both a moral and legal obligation to protect and promote basic human rights when tackling climate change.<sup>143</sup> The OHCHR subsequently released a report in 2009 detailing the implications of climate change for the enjoyment of human rights and for the obligations of states under international human rights

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<sup>139</sup> Because according to the IAHR, the "information provided does not enable us to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration". See *Decision of the IAHR on Sheila Watt-Cloutier et al, Petition No P-1413-05* (16 November 2006) by Ariel E Dulitaky - Assistant Executive Secretary.

<sup>140</sup> Se'bastien Jodoin, Shannon Snow & Arielle Corobow "Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming", (2020) 54:1 *Law & Society Review* 168–200 at 171 & 195 [Jodoin]; Bratspies, *supra* note 197 at 15; Lewis, "Human Rights and Climate Change", *supra* note 125 at 155.

<sup>141</sup> "Male' Declaration on the Human Dimension of Global Climate Change", in: *International Law & World Order: Weston's & Carlson's Basic Documents*, Weston & Carlson, online: <[http://dx.doi.org/10.1163/2211-4394\\_rwilwo\\_SIM\\_032888](http://dx.doi.org/10.1163/2211-4394_rwilwo_SIM_032888)>, preamble; Rowena Maguire & Xiaoyi Jiang, "Emerging Powerful Southern Voices: Role of BASIC Nations in Shaping Climate Change Mitigation Commitments", 214 in Shawkat Alam, Sumudu A Atapattu, Carmen G Gonzalez, Jona Razzaque, *International Environmental Law and the Global South* (New York: Cambridge University Press, 2016).

<sup>142</sup> Burger, *supra* note 124 at 12 & 13.

<sup>143</sup> *Ibid.*

law.<sup>144</sup> Similarly, UNHRC resolutions made at about the same time laid emphasis on the relationship between the human rights, the environment and climate change.<sup>145</sup> This increasing recognition of the relationship between human rights and the environment as well as climate change informed the Human Rights Council's creation of a special mandate "on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment."<sup>146</sup> Under this mandate, John Knox was appointed as an Independent Expert in 2012 and was given the task of articulating the human rights obligations which relate to the enjoyment of a safe, clean, healthy and sustainable environment.<sup>147</sup> In his final report, Knox included a draft of the Framework Principles on Human Rights and the Environment. The Framework Principles on Human Rights and the Environment highlights the interdependence of human rights and a good environment by mandating states to ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights; and to respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.<sup>148</sup> According to the OHCHR:

States have obligations to protect human rights from environmental harm and obligations to fulfil their international commitments. The foreseeable and potentially catastrophic adverse effects of climate change on the enjoyment of a wide range of human rights give rise to extensive duties of States to take immediate actions to prevent those harms. To comply with their international human rights obligations, States should apply a rights-based approach to all aspects of climate change and climate action. Applying a rights-based approach clarifies the obligations of States and businesses; catalyses ambitious action; highlights the plight of the poorest and most

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<sup>144</sup> OHCHR Report 2009, *supra* note 52.

<sup>145</sup> Human rights and the environment, A/HRC/RES/16/11, UNHRCOR, 16<sup>th</sup> Sess, (2011); *Human Rights and Climate Change*, Res 7/23, UNHRCOR, 41<sup>st</sup> meeting (2008); *Human Rights and Climate Change*, Res 10/4, UNHRCOR, 10<sup>th</sup> Sess, (2009); *Human Rights and Climate Change*, A/RES/RES/18/22, UNHRCOR, 18<sup>th</sup> Sess, (2011).

<sup>146</sup> *Human rights and the environment*, UN Doc A/HRC/RES/19/10, UNHRCOR, 19<sup>th</sup> Sess, (2012), para 2.

<sup>147</sup> *Ibid.*

<sup>148</sup> OHCHR, Framework Principles on Human Rights and the Environment, UN Doc A/HRC/37/59, 24 January 2018, principles 1 & 2 [*OHCHR Framework*].



vulnerable; and empowers people to become involved in designing and implementing solutions.<sup>149</sup>

Another major development in the environment and human rights discourse is the Inter-American Court of Human Rights (IACHR) Advisory Opinion on the Environment and Human Rights in 2017.<sup>150</sup> In this opinion, the IACHR “recognized the existence of an irrefutable relationship between the protection of the environment and the realization of other human rights, due to the fact that environmental degradation affects the effective enjoyment of other human rights.”<sup>151</sup> In addition, “the Court emphasized the interdependence and indivisibility between human rights, the environment and sustainable development,” since the full enjoyment of all human rights depends on a favorable environment.<sup>152</sup>

It is equally important to note that discussions on the relationship between human rights and climate change are gaining traction in the international context under the auspices of the UN Framework Convention on Climate Change (UNFCCC).<sup>153</sup> In COP 16 held in 2010, in Cancún, Mexico, it was noted that the adverse effects of climate change have implications for the effective enjoyment of human rights, that the effects will be felt most acutely by those segments of the population that are already vulnerable, and that States parties should, in all climate change-related actions, fully respect human rights.<sup>154</sup> Also, the relationship between human rights and the environment is also acknowledged in the Paris Agreement.<sup>155</sup> While the main body of the Paris

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<sup>149</sup> “Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment”, UN Doc A/74/161, OHCHR, 74<sup>th</sup> sess (2019) at para 62.

<sup>150</sup> IACHR, *Advisory Opinion OC-23/17 of November 15, 2017*, Requested by the Republic of Colombia, para 47, online: <[http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf)>, [*IACHR opinion*].

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> Peel & Osofsky *supra* note 4 at 45.

<sup>154</sup> OHCHR Report 2019 *supra* note 53 at para 53.

<sup>155</sup> *Paris Agreement*, *supra* note 65.

Agreement does not mention human rights in its operative provisions as many had hoped, it included the following reference to human rights in its preamble:

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.

Over the years, the link between human rights and the environment have come to be recognised internationally. Although an internationally binding instrument clearly establishing this link or recognising the right to a healthy environment has not yet been created, there has been overwhelming recognition of this link regionally and nationally.

### **2.3. Human Rights with Linkages to Climate Change**

Climate change impacts a number of rights and some of these rights as highlighted by the OHCHR are briefly summarized below.

#### **2.3.1. The Right to Life**

The right to life is a fundamental human right.<sup>156</sup> The protection of the right to life places an obligation on states to refrain from intentionally causing the death of any person, and to take appropriate measures in order to ensure the effective protection of the life of every human being.<sup>157</sup> Climate-related deaths are caused by extreme weather events, heat waves, floods, droughts, wildfires, water-borne and vector-borne diseases, malnutrition and air pollution. Globally, at least

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<sup>156</sup> UDHR, *supra* note 24.

<sup>157</sup> Luminita Dragne & Cristina Teodora Balaceanu, The Right to Life – A Fundamental Human Right (March 14, 2014). Social Economic Debates, Vol. 2, No. 2, December 2013, online: <<https://ssrn.com/abstract=2408937>>.

150,000 premature deaths annually are linked to climate change.<sup>158</sup> For example, the heat wave that struck western Europe in 2003 caused approximately 70,000 premature deaths.<sup>159</sup> The World Health Organisation, using an optimistic case scenario, projects a highly conservative estimate of 250,000 additional deaths each year due to climate change between 2030 and 2050, resulting from heatwaves, diarrhoea, malaria and childhood undernutrition.<sup>160</sup>

### **2.3.2. The Right to Health**

The right to health protects the right of everyone to a standard of living necessary for their health and well-being.<sup>161</sup> The adverse health impacts of climate change include premature deaths, increased incidences of respiratory disease, cardiovascular disease, malnutrition, stunting, wasting, allergies, heat stroke, injuries, water and vector-borne diseases and mental illness.<sup>162</sup> Hundreds of millions of people are exposed to extreme weather events annually, resulting in injuries, illnesses and mental health issues. Additionally, climate change “erodes many of the key social and environmental determinants of health, including access to adequate food and water, clean air, culture and livelihoods.”<sup>163</sup>

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<sup>158</sup> OHCHR Report 2019 *supra* note 53 at para 29.

<sup>159</sup> *Ibid.*

<sup>160</sup> World Health Organisation, *COP 24 Special Report: Health and Climate Change* (Geneva: WHO, 2018) at 24.

<sup>161</sup> UDHR, *supra* note 24, art 25.

<sup>162</sup> OHCHR Report 2019 *supra* note 53 at para 31.

<sup>163</sup> *Ibid.*

### 2.3.3. The Right to Food

The right to food denotes the right of everyone to an adequate standard of living as it relates to the entitlement to adequate food<sup>164</sup> and the right to be free from hunger.<sup>165</sup> The United Nations Food and Agriculture Organization (FAO) identifies climate variability and extremes as “some of the key drivers behind the recent uptick in global hunger and one of the leading causes of severe food crises, and the cumulative effect of changes in climate undermines all dimensions of food security – food availability, access, utilization and stability”.<sup>166</sup> According to an estimate by the World Bank, “a 2°C increase in the average global temperature would put between 100 million and 400 million more people at risk of hunger and could result in over 3 million additional deaths from malnutrition each year.”<sup>167</sup>

### 2.3.4. The Right to Water and Sanitation

The United Nations recognizes the human right to water and sanitation and also acknowledges “that clean drinking water and sanitation are essential to the realisation of all human rights.”<sup>168</sup> As a result of this recognition, the UN has continually urged “States and international organisations to provide financial resources, help capacity-building and technology transfer to help countries, in particular developing countries, to provide safe, clean, accessible and affordable drinking water and sanitation for all.”<sup>169</sup> Climate change affects precipitation patterns all over the

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<sup>164</sup> UDHR, *supra* note 24, art 25.

<sup>165</sup> ICESCR, *supra* note 86.

<sup>166</sup> FAO, IFAD, UNICEF, WFP & WHO, 2018 – *The State of Food Security and Nutrition in the World: Building Climate Resilience for food security and nutrition* (Rome: FAO, 2018).

<sup>167</sup> Rosina M Bierbaum, Marianne Fay & Bruce Ross-Larson [ed], *World Development Report 2010: Development and Climate Change (English)*, (Washington, DC: World Bank Group, 2010) at 5, online: <<http://documents.worldbank.org/curated/en/201001468159913657/World-development-report-2010-development-and-climate-change>>.

<sup>168</sup> *The human right to water and sanitation*, GA Res 64/292, UNGAOR, 64<sup>th</sup> Sess, (2010).

<sup>169</sup> *Ibid.*

world especially in developing countries, with some dry areas receiving less precipitation and wet areas receiving more frequent and intense precipitation.<sup>170</sup> Climate change adversely affects water supplies, grazing opportunities and livestock herds, and increasing competition, conflict and insecurity, which in turn adversely affect indigenous pastoralists in certain areas.

### **2.3.5. The Rights of the Child**

Article 24(c) of the CRC recognizes the right of the child to the enjoyment of the highest attainable standard of health, and therefore mandates states to ensure that they consider the dangers and risks of environmental pollution among the factors in protecting this right.<sup>171</sup> Climate change is one of the dangers and risks of environmental pollution and therefore interferes with this right of the child.

According to the OHCHR, climate change exacerbates the vulnerability of children to health problems, such as vector-borne diseases, malnutrition, acute respiratory infections, diarrhoea and other water-borne illnesses.<sup>172</sup> Extreme weather events pose unique threats to the health and well-being of young bodies and minds.<sup>173</sup> Globally, over 500 million children live in extremely high-risk flood zones; 160 million live in high or extremely high drought severity zones; and 115 million are at high risk because of tropical cyclones.<sup>174</sup> It is estimated that by 2040, almost 600 million children will live in regions without sufficient water resources.<sup>175</sup> The United Nations Children’s Fund warns that “climate change will harm the poorest and most vulnerable children

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<sup>170</sup> OHCHR Report 2019, *supra* note 53 at para 37.

<sup>171</sup> *Convention on the Rights of the Child*, GA Res 44/45, UNGAOR, UN Doc A/74/161 (1989).

<sup>172</sup> OHCHR Report 2019, *supra* note 53 at para 44.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> UNICEF, *Unless We Act Now: The Impact of Climate Change on Children* (New York, UNICEF, 2015) at 8, online: <[https://www.unicef.org/publications/files/Unless\\_we\\_act\\_now\\_The\\_impact\\_of\\_climate\\_change\\_on\\_children.pdf](https://www.unicef.org/publications/files/Unless_we_act_now_The_impact_of_climate_change_on_children.pdf)>.

first, hardest and longest”.<sup>176</sup> This right of the child also forms part of the discourse on intergenerational equity which is discussed in fuller detail in chapter four.

### **2.3.6. The Rights of Vulnerable Populations**

The impact of climate change is felt disproportionately among different groups depending on social, economic, cultural, political and geographic circumstances.<sup>177</sup> These circumstances render certain population more vulnerable to climate change than others. Such vulnerable groups include indigenous people, low island states, developing countries, women and children in low-income countries, elderly persons, persons with disabilities, and so on. These groups contribute the least to climate change, yet, they are the most impacted. These groups must be able to seek remedies notwithstanding their disadvantaged position, in line with the PANEL principles outlined earlier.

### **2.3.7. The Right to a Healthy Environment**

The right to a healthy environment denotes the right to a safe, clean, healthy and sustainable environment.<sup>178</sup> The substantive elements of this right include a safe climate, clean air, clean water and adequate sanitation, healthy and sustainably produced food, non-toxic environments in which to live, work, study and play, and healthy biodiversity and ecosystems.<sup>179</sup> It therefore follows that the right to a healthy climate is a subset of the right to a healthy environment, until such a time as the right to a healthy climate is recognised as a standalone right.

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<sup>176</sup> *Ibid.*

<sup>177</sup> OHCHR Report 2019, *supra* note 53 at para 45.

<sup>178</sup> OHCHR Report 2019, *supra* note 53 at para 43.

<sup>179</sup> *Ibid.*

The right to a healthy environment is recognized in law by at least 155 Member States of the UN.<sup>180</sup> These Member States are legally obligated, through treaties, constitutions, and legislation, to respect, protect, and fulfil the right to a healthy environment.<sup>181</sup> This may seem an overwhelming number. However, when one considers the fact that human rights are meant to be universal as expressed in the preamble to the UDHR which recognises that human rights principles are to apply to “all peoples and all nations”<sup>182</sup>, the remaining nations yet to recognise this right would seem a more significant number.<sup>183</sup> It is important to mention that some scholars have advocated expanding existing human rights to include environmental rights dimensions (“greening” of human rights) rather than recognising an independent right to a healthy environment.<sup>184</sup>

Notwithstanding the wide recognition and importance of the right to a healthy environment, the right is yet to be recognized at the international level, as there is no international instrument that establishes and/or explicitly recognizes this right.<sup>185</sup> This non-recognition of the right to a healthy environment seems to question the universality of this right and its status under

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<sup>180</sup> *Ibid.*

<sup>181</sup> David R Boyd, *Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UNHRCOR, 40<sup>th</sup> Sess, UN Doc A/HRC/40/55 (2019), para 16, online: <<https://undocs.org/en/A/HRC/40/55>>, [*Boyd Report 2019*].

<sup>182</sup> UDHR, *supra* note 24; Navanethem Pillay, “Are Human Rights Universal?”, *UN Chronicle*, online: <<https://www.un.org/en/chronicle/article/are-human-rights-universal>>.

<sup>183</sup> Countries yet to recognise the right to a healthy environment include Canada, Australia, United States, United Kingdom, and majority of small island states. Boyd Paper 4, *supra* note 123 at 9. It therefore raises a question regarding why the small islands states in particular are yet to recognise this right constitutionally given their status as some of the groups most vulnerable to climate change. This query is of course without prejudice to the attribution of larger chunk of responsibility for climate change to developed countries.

<sup>184</sup> This was noted by John H Knox in his 2010 report to the UNHRC. See John Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UNHRCOR, 23<sup>rd</sup> Sess, UN Doc A/HRC/22/43 (2010), para 16; Alan Boyle, “Human Rights and the Environment: Where Next?” (2012) 23:3 *EU J of Int’l L* 613 at 616.

<sup>185</sup> *Ibid.*

international human rights law.<sup>186</sup> The right to a healthy environment is discussed in more detail in the next chapter.

## 2.4. Summary

The conclusion in this chapter is that the legal frameworks under international human rights law, international environmental law, international climate law as well as domestic constitutions support the human rights approach to climate change. Notably, international climate law instruments do not contain strong references to human right. Similarly, the human rights law instruments do not reference climate change. However, there is sufficient evidence that climate change violates human rights and that the human right approach is valuable in combatting climate change. A major challenge identified in this chapter is the absence of recognition of the right to a healthy environment in the international instruments in spite of an overwhelming recognition of the right among States.

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<sup>186</sup> John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UN Doc A/73/188, UNGAOR, 73<sup>rd</sup> Sess (2018) at paras 49, 52, 54 & 59; John Knox, “Constructing the Human Right to a Healthy Environment”, (2020) *Annual Rev of L & Social Science* (forthcoming publication), online (pdf): <<https://ssrn.com/abstract=3542591>>.



## **Chapter Three: The Relationship between the Right to a Healthy Environment and Climate Change**

The chapter highlights the right to a healthy environment as one of the key components of the human rights approach. The chapter examines the need for a right to a healthy environment and theoretical justifications of the right. The chapter thereafter examine the benefits of adopting the human rights approach and the arguments against the approach.

### **3.1. The Case for Recognition of the Right to a Healthy Environment**

There have been divided opinions on the establishment of a distinct right to a healthy environment. Some scholars against the recognition of the right have contended that recognizing the right to a healthy environment would amount to endorsing an anthropocentric approach to environmental protection.<sup>187</sup> The response to this concern would be that the human rights approach can be remodelled to protect other species and unborn generations and can be employed alongside other approaches. Others have argued that the right to a healthy environment should not be recognized due to the difficulty in defining the right.<sup>188</sup> The response to this is that the difficulty in defining the right is not a sufficient reason for rejecting the right, especially since there are other rights that are recognized despite the difficulty defining them.<sup>189</sup> Also, the difficulty in delineating human rights has been observed to be exaggerated.<sup>190</sup> Moreover, the courts and tribunals are there to delineate the scope of the rights.<sup>191</sup> There are also arguments against the recognition of the right

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<sup>187</sup> Atapattu, “Human Right Approaches”, *supra* note 49 at 50.

<sup>188</sup> *Ibid.*, at 51.

<sup>189</sup> *Ibid.* Atapattu gives the example of the rights against torture and discrimination in respect of which there exists certain difficulties in recognising what constitutes ‘torture’ and ‘discrimination’. Another example of a vague right is the right to dignity of human persons. See Conor O’Mahony, “There is no such thing as a right to dignity”, (2012) 10:2 *International Journal of Constitutional Law*, 551.

<sup>190</sup> Burns H Weston & David Bollier, “Toward a recalibrated human right to a clean and healthy environment: making the conceptual transition”, (2013) 4:2 *J of Human Rights and the Environment*, 116 at 129.

<sup>191</sup> *Ibid.*

on the basis that the proliferation of human rights would trivialise the significance of the human rights framework in its entirety.<sup>192</sup> The discussions on the justification of the right to a healthy environment in the next section is therefore instructive, as they shed light on the need for recognition of the right.

It has been suggested that not only should the right to a healthy environment be recognised and codified, but it should be constitutionalised. Boyd observes that the inclusion of environmental rights in the constitution is “catalytic for stronger environmental laws/regulation and the enforcement thereof” and that “nations with green constitutions have smaller ecological footprints and have reduced air pollution up to 10 times faster than nations without environmental provisions in their constitutions.”<sup>193</sup> According to Boyd, the existence of provisions suggestive of environmental rights in laws other than the constitution does not suffice because “they are far weaker legally, politically and symbolically than constitutional recognition of the right to a healthy environment would be.”<sup>194</sup> On the other hand, there are also concerns that constitutionalizing environmental rights leaves decision-making on environmental matters (which is largely a policy issue) to the interpretation of the court, thereby undermining executive discretion.<sup>195</sup> The view in this thesis is that mere recognition of the right under domestic laws (other than the constitution) by states does not suffice. An important point to keep in mind is that acts that threaten a healthy environment are not necessarily illegal as they are oftentimes backed by law. It is therefore somewhat difficult to contradict express provisions of the law with rights implied from the rights

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<sup>192</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 129.

<sup>193</sup> John R Boyd, “Should Environmental rights be in the constitution? – Enshrine our right to clear air and water in the Constitution”, *Policy Options* (3 March 2014), online: <<https://policyoptions.irpp.org/fr/magazines/second-regard/boyd-macfarlane/>>, [Boyd, “*Environmental Right in Constitution*”].

<sup>194</sup> *Ibid.*

<sup>195</sup> Emmet Macfarlane, “Should Environmental rights be in the constitution? – Parliament, not the courts should decide”, *Policy Options* (3 March 2014), online: <<https://policyoptions.irpp.org/fr/magazines/second-regard/boyd-macfarlane/>>, [Macfarlane].

to life, health, among other rights. Thus, constitutional recognition of the right could bring more clarity and potentially elevate the protection of the right above contradictory provisions of other laws that directly or indirectly empower environment-unfriendly acts. However, it must be noted that some constitutions only apply to actions by States and cannot be applied directly to acts by non-state actors.<sup>196</sup> In such jurisdictions, it is important for the constitutions to be amended to apply to non-state actors. In the meantime however, the right has to be enshrined in the human rights legislation governing the acts of private entities.

With respect to international recognition of the right, there are those who take the view that the recognition of the right to a healthy environment under international law is not essential to its existence.<sup>197</sup> Bratspies notes that rights are established in a bottom-up process i.e. by victims seeking redress for violation of their rights domestically before international recognition.<sup>198</sup> However, there are also opposing views that the bottom-up process is not the only approach to the establishment of rights considering the fact that rights enshrined in international law instruments could serve as catalysts for domestic human rights legislation and action.<sup>199</sup>

The need for establishment of the right to a healthy environment internationally has become apparent given the larger responsibility of developed countries for climate change, the transboundary impacts of which are suffered more by some of the developing states including small island states. While it benefits citizens within a country, the recognition of the right to a healthy environment under domestic legislation is not likely to place an obligation on states to

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<sup>196</sup> Aoife Nolan, "Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland", (2014) 12:1 *International J of Constitutional L*, Volume 12, Issue 1, January 2014

<sup>197</sup> Rebecca Bratspies, "Claimed Not Granted: Finding a Human Right to a Healthy Environment", (2016-2017) 26 *Transnat'l L & Contemporary Problems* 263, [Bratspies].

<sup>198</sup> *Ibid.*

<sup>199</sup> Roland Wilson, "The Domestic Impact of International Human Rights Law" (1993) 19:3 *Commonwealth L Bull* 1246.

protect environmental rights beyond the territorial borders of the state since such domestic legislation does not confer rights on persons outside the country. Consequently, both the previous and current Special Rapporteurs on human rights and the environment have consistently recommended the recognition of this right at the international level.

In the Framework Principles on Human Rights and the Environment, the OHCHR highlights the interdependence of human rights and the existence of a good environment by mandating states to ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights; and to respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.<sup>200</sup> This provides a compelling basis for the United Nations to move expeditiously to provide global recognition of the right to a healthy and sustainable environment, as recommended both by the previous and current Special Rapporteurs on human rights and the environment. Since the right to a healthy environment is understood to include the right to a safe climate, it therefore appears that the recognition of the right to a healthy environment internationally would invariably protect the right to a safe climate under international law.

A key point regarding the right to a healthy environment is that the right has been very central to the acceptance of human right framing of climate change lawsuits in courts. As will be discussed in subsequent chapters, virtually all the cases where the court has accepted human rights framing of climate change have hinged on the violation of the right to a healthy environment whether as a separate substantive right or as a derivative of other human rights. These decisions highlight the importance of the recognition of the right to a healthy environment.

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<sup>200</sup> OHCHR Framework, *supra* note 148, principles 1 & 2.

### 3.2. Theoretical Justifications for the Right to a Healthy Environment

It is important to note that the recognition of the right to a healthy environment does not imply severance of climate change's linkages with other human rights, rather it provides a more direct tool for the human rights approach to climate change, such that the right to a healthy environment can be enforced alongside other rights. The importance of the recognition of the right to a healthy environment lies in the fact that it is a more direct right under which human rights violations can be redressed. The recognition of the right to a healthy environment also provides a foundation for the right to a safe climate system. According to the OHCHR, "a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being."<sup>201</sup> As earlier discussed, there is no express recognition of the right to a healthy environment under international law.<sup>202</sup> Since the right to a safe climate system is a subset of the right to a healthy environment, the non-recognition of the right to a healthy environment invariably means non-recognition of the right to a safe climate system. However, from a theoretical point of view, the right to a safe climate could also be seen as having a wider scope than (or as being entirely distinct from) the right to a healthy environment. Nevertheless, since the right to a safe climate appears to be a budding discourse, it may be safer for the time being to think of it as it is defined within the OHCHR framework i.e. as a subset of the right to a healthy environment. The frontiers of the right to a safe climate can be further expanded when the right to a healthy environment has been recognised internationally (if need be).

The non-recognition of the right to a healthy environment has been attributed to the absence of a theoretical justification for the existence of such a right.<sup>203</sup> There are several theories that can

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<sup>201</sup> OHCHR Report 2019 *supra* note 53 at para 43.

<sup>202</sup> Boyd Report 2019, *supra* note 181 at para 16.

<sup>203</sup> Lewis, "Human Rights and Climate Change," *supra* note 125 at 95.

provide some bases for discussions on how the right to a healthy environment can be justified. Some of these theories are discussed in this section and include liberal theories of human rights (natural rights theory, will theory and interest theory) and the feminist theory of relational autonomy.

### 3.2.1. Liberal Theories of Human Rights

Since Western liberal theories of human rights have had a significant impact on the development of international human rights law and appear to be the most widely relied on theories in evaluating the notion of human rights,<sup>204</sup> we will first examine some of these Western liberal theories – the natural rights theory, the will theory and the interest theory.

The position of the natural rights theory is “that each individual person is entitled to a number of fundamental claims which derive from their inherent human dignity, [i.e.] things that are essential to the protection of human nature and dignity, those things necessary for the maintenance of a life worthy of a human being.”<sup>205</sup> For a right to qualify as a human right within the definition of the natural rights theory, it must be necessary to advance human dignity (dignity),<sup>206</sup> must be justifiable without reference to other human rights (independence),<sup>207</sup> and must be an individual right as opposed to a collective right (individuality).<sup>208</sup> Regarding the indispensability to dignity, the theory posits that “only interests that are essential to one’s standing as a moral person [and] one’s status as a fully human being are human rights.”<sup>209</sup> With respect to

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<sup>204</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 98.

<sup>205</sup> *Ibid* at 96.

<sup>206</sup> John Finnis, *Natural law and natural rights*, 2<sup>nd</sup> ed (New York: Oxford University Press) at 210, 225, 272 & 273.

<sup>207</sup> Jack Donnelly, “In search of the unicorn: the jurisprudence and politics of the right to development”, (1985) 15 *Calif West Int’l Law J* 474 at 484. [*Donnelly*, “*Right to Development*”].

<sup>208</sup> *Ibid* at 497.

<sup>209</sup> Jack Donnelly, “Human rights as natural rights”, (1982) 4:3 *Human Rights Q* 391 at 404 [*Donnelly*, “*Human Rights*”].

independence, it is understood that the right must be “independently justifiable, and not merely instrumental to fulfilment of other rights.”<sup>210</sup> *Individuality* denotes that the right must be held by individuals and not by groups.<sup>211</sup> It is noted that the fact that members of a particular class each possess the same set of rights does not mean that the rights are possessed by the group as a collective, but rather individually by the members of that group.<sup>212</sup> To justify the right to a healthy environment as a human right under the natural rights theory may be problematic due to the formulation of the right to a healthy environment as a collective right enjoyed by all and sundry, and due to its lack of *independence*. That is to say the right to a good environment is seen as important merely because it is incidental or instrumental to the enjoyment of other rights such as the right to life, the right to health, the right to self-determination, and the rights of indigenous and minority groups, among other rights.<sup>213</sup> Again, the right cannot be said to be advancing human dignity as the environment is seen as different from the human being under this theory.<sup>214</sup> This conclusion however is based on a narrowed view of what constitutes human dignity, as there is a strong argument that the right to human dignity encompasses the right to a healthy environment which will be explored below.<sup>215</sup> While it may be concluded that the right to a healthy environment may not find adequate justification using the natural rights theory, it is possible that an expansive interpretation of these requirements could support the right to a healthy environment.

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<sup>210</sup> *Ibid* at 96. The view in this thesis however is that the requirement of *independence* does not seem to reflect the intent of human rights instruments, which in practice are not treated in silos but are seen as interdependent on one another as evident in preambular statements of human rights instruments. There are no strong indications in the instruments which are suggestive of the independence of each right from others. This criterion therefore seems rather redundant.

<sup>211</sup> Donnelly, “Right to Development”, *supra* note 209 at 497.

<sup>212</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 102.

<sup>213</sup> *Ibid* at 104.

<sup>214</sup> *Ibid*.

<sup>215</sup> Erin Daly & James R May, "Bridging Constitutional Dignity and Environmental Rights Jurisprudence" (2016) 7:2 *J of Human Rights & the Environment* 218 at 229 [Daly].

With particular reference to intergenerational equity, it will be difficult to justify the rights of future generations using the will theory due to the inability of members of future generations to exercise free will or waive their rights<sup>216</sup> and due to the lack of individuality. The will theory of human rights is premised on the assumption “that rights flow from each individual’s ability to choose and exercise free will.”<sup>217</sup> For a right to be justifiable using the will theory, the holder of the right would need to have power and control over the right e.g. have the power to waive the right and to pursue goals different from those of the state.<sup>218</sup> Furthermore, the right would likely have to meet the individuality criterion since the “will” is to be exercised individually rather than collectively.<sup>219</sup> The right to a healthy environment is not likely to be justifiable using the will theory primarily because “the shared nature of the environment would make it difficult to conceive of a way for one individual to waive their right to a good environment without impacting on the equivalent right of other right-holders.”<sup>220</sup> With respect to intergenerational equity, the rights of future generations are not individual in nature but collective,<sup>221</sup> and there is doubt whether future generations are considered “humans” yet so as to be entitled to human dignity. Thus, it is difficult to justify the rights of future generations using the will theory.

The interest theory posits that “rights are those claims that human beings are entitled to make by reason of necessity for their well-being or to further their interests.”<sup>222</sup> The interest theory deemphasizes individuality while emphasizing the need to protect fundamental interests. According to the interest theory, “x has a right if...an aspect of x’s well-being (his interest) is a

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<sup>216</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 108 & 109.

<sup>217</sup> *Ibid* at 105.

<sup>218</sup> *Ibid* at 107.

<sup>219</sup> *Ibid* at 106.

<sup>220</sup> *Ibid* at 107.

<sup>221</sup> Sumudu Atapattu, “The right to a healthy life or the right to die polluted? The emergence of a Human Right to a healthy environment under international law”, (2002–2003) 16:1 *Tulane Environmental L J* 65 at 71.

<sup>222</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 110.



sufficient reason for holding some other person(s) to be under a duty.”<sup>223</sup> In other words, interests are said to be fundamental when they are substantial enough to impose obligations on others.<sup>224</sup> The interest theory seems to provide a conceptual justification for the right to a healthy environment since a healthy environment is largely accepted as being necessary for the wellbeing of humans.<sup>225</sup> Unsurprisingly, natural rights theorists are skeptical about justifying the right to a healthy environment using the interest theory, since in their view the theory does not explain the need for a stand alone right, other than its instrumentality in protecting other human interests (human rights), and thereby failing the independence test.<sup>226</sup> An argument can therefore be made (on the basis of the interest theory) for intergenerational equity that future generations have an interest in their well-being and as such a duty is imposed on the present generation to ensure that the climate system is protected.

### 3.2.2. Dignity Rights Constitutionalism

It has been suggested that a broader understanding of the human right to dignity of the human person could provide some justification for the right to a healthy environment.<sup>227</sup> As mentioned above, there is a strong argument that the right to a healthy environment can be justified using the need for dignity. The right to human dignity is arguably the core foundation of all human rights as evident from the preambular and substantive provisions of the international and domestic human right instruments.<sup>228</sup> However, the nexus between human dignity and the environment is

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<sup>223</sup> Joseph Raz, “On the Nature of Rights”, (1984) 93:370 *Mind* 194 at 195.

<sup>224</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 110.

<sup>225</sup> *Ibid.* at 111.

<sup>226</sup> *Ibid.*

<sup>227</sup> Daly, *supra* note 215.

<sup>228</sup> Miguel Vatter, “Dignity and the Foundation of Human Rights: Toward an Averroist Genealogy”, (2020) 13:2 *Politics and Religion*, 304–332. There are arguments against this assertion. See Paweł Łuków, “A Difficult Legacy:

often neglected by rights theorists.<sup>229</sup> Also, the guidelines for developing human rights laid down by the UN General Assembly mentions that every right ought to derive from the dignity and worth of the human person.<sup>230</sup> According to Daly, dignity defines interrelationships among people as well as between individuals and their surroundings.<sup>231</sup> Human dignity is “impaired when the surrounding natural environment is compromised.”<sup>232</sup> Thus, the right to a healthy environment, if seen through the lens of human dignity (“dignifying” environmental rights<sup>233</sup>), can be justified. This becomes even more apparent considering the fact that in some jurisdictions including jurisdictions without provisions of law expressly establishing the right to a healthy environment, the courts have recognised the right to a healthy environment on the basis of the need to maintain the dignity of the human person. The dignifying of environmental rights has the potential to advance climate litigation by defining the cause of action (i.e. providing definition to the seeming vagueness of the right to a healthy environment), aiding the identification of persons with standing, and providing remedies to victims of violation.<sup>234</sup>

While it can be concluded that the right to a healthy environment may not find adequate justification using the Western Liberal theories, it is possible that an expansive interpretation of these requirements could support the right to a healthy environment.

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Human Dignity as the Founding Value of Human Rights”, 19 *Human Rights Review* 313; Gan Shaoping & Zhang Lin, “Human Dignity as a Right”, (2009) 4:3 *Frontiers of Philosophy in China* 370.

<sup>229</sup> *Ibid.*

<sup>230</sup> UN Commission on Human Rights, *Setting international standards in the field of human rights*, Res 14/121, UN Doc A/RES/41/120, UNGAOR, 41<sup>st</sup> Sess, Suppl no 53 (1986), para 4. Other criterion are – “be consistent with existing body of international human rights law; be sufficiently precise to give rise to identifiable and practicable rights and obligations; provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and attract broad international support.”

<sup>231</sup> Daly, *supra* note 215 at 232.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*, at 253.

<sup>234</sup> *Ibid* at 236.

### 3.2.3. The Feminist Theory of Relational Autonomy and Corporeal Citizenship

A viable alternative to the individualist approach in the aforementioned liberal theories could lie in the feminist theory of relational autonomy of the human person. This theory sees humans as relational beings, and as such they cannot always be treated individually. This theory takes a “joint-and-several” view of the human being. In other words, it must be understood that humans are individuals as much as they are groups and collective units. This relational theory posits that “[i]t is the very nature of human selves to be in interaction with others...[and] they do not exist apart from these relations.”<sup>235</sup> Thus, human beings cannot be “seen as essentially separate from one another” as is the view of the liberal theories, a view termed “the individualism of traditional liberalism.”<sup>236</sup> A relational approach therefore “treats human beings as constitutively interconnected and interdependent.”<sup>237</sup>

Drawing from this theory, the concept of “corporeal citizenship” has been posited. Corporeal citizenship denotes the inseparability of humans from the environment.<sup>238</sup> Corporeal citizenship emphasizes “humans’ inescapable embeddedness in both social and natural contexts and...emphasises the dynamic connectivity and co-constitutive interactions between human bodies and the nonhuman natural world.”<sup>239</sup> Corporeal citizenship not only emphasizes interconnection and interdependence among humans, but also emphasizes the relationship between humans and non-humans. The implication of this interconnection between humans and the environment is that protection of humans will necessarily involve protection of the environment,

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<sup>235</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011), 55.

<sup>236</sup> *Ibid* at 7.

<sup>237</sup> Marilyn Friedman, “Relational Autonomy and Individuality”, (2013) 63:2 *University of Toronto L J* 327.

<sup>238</sup> Teena Gabrielson & Katelyn Parady, “Corporeal citizenship: Rethinking Green Citizenship through the Body,” (2010) 19:3 *Environmental Politics* 374 at 382.

<sup>239</sup> *Ibid* at 383.

and vice versa. Thus, the responsibility of States “to manage and protect the health of its population is inseparable from its responsibility to care for the health of the environment.”<sup>240</sup>

The theory of corporeal citizenship can prove to be a key theory in the justification of the right to a healthy environment and in the human rights approach to the environment more broadly. This is because it erases the divide between the human being and the environment such that the right to a healthy environment cannot be perceived to be external to humans. This theory obviates the need for the *dignity, independence, individuality, unwaivability* questions posed by the liberal theorists, since the human being is being viewed holistically with the environment being an essential element of humanity. Due to the wide scope of rights recognised within the concept of corporeal citizenship, it is likely that the rights of future generations can be justified within this relational autonomy school of thought.

The Opinion of the IACHR on human rights and the environment seems to reverberate with this concept of corporeal citizenship. In this decision, the IACHR acknowledged the inseparability of humans from the environment, the individual and collective connotations of the right to a healthy environment, the intergenerational implications of the rights, and the interrelationship with other rights, by emphasizing “the interdependence and indivisibility between human rights, the environment and sustainable development, since the full enjoyment of all human rights depends on a favorable environment.”<sup>241</sup> The IACHR further stated as follows:

The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the

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<sup>240</sup> Dayna Nadine Scott, Jennie Haw & Robyn Lee, “ ‘Wannabe Toxic-Free?’ From Precautionary Consumption to Corporeal Citizenship”, (2016) 26:2 *Environmental Politics* 334.

<sup>241</sup> IACHR, *Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: Official Summary Issued by the Inter-American Court, at 2*, online: <[https://www.corteidh.or.cr/docs/opiniones/resumen\\_seriea\\_23\\_eng.pdf](https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf)>. [*IACHR opinion summary*]

individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.<sup>242</sup>

Thus, a healthy environment must necessarily be seen as part and parcel of the human being (individually and collectively), an entitlement of future generations, and inseparable from the other elements protected by other human rights.

### **3.3. The Benefits of Adopting a Human Rights Approach to Climate Change**

The human rights approach to climate change has a number of benefits to the climate change movement. A number of these benefits are highlighted in this section.

#### **3.3.1. The Focus on Humans as Victims**

According to John Knox, when climate change first began to be linked to human rights, the effects of climate change were generally often treated as primarily harming future generations or endangered species.<sup>243</sup> Knox notes that “a polar bear on a shrinking ice floe was perhaps the paradigmatic image, and is still very popular: a search on Google images for “climate change” finds four pictures of polar bears on ice floes in the first 17 images returned, compared to just one of a human being.”<sup>244</sup> By emphasizing specific threats posed by climate change to human rights, the human rights approach to climate change propels an expansion of the climate change discourse from a focus on the impacts of climate change on nonhumans, endangered species and future

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<sup>242</sup> *IACHR Advisory opinion OC-23/17 of 15 November 2017 Requested by the Republic of Columbia*, at para 59.

<sup>243</sup> John Knox, “Climate Change and Human Rights: Three Benefits of a Human Rights Perspective on Climate Change” *Global Policy* (15 November 2015), online: <<https://www.globalpolicyjournal.com/blog/15/11/2015/climate-change-and-human-rights-three-benefits-human-rights-perspective-climate-chan>>, [John Knox, “Climate Change and Human Rights”].

<sup>244</sup> *Ibid.*

generations to include discussions on people who are alive today and already suffering the impacts of climate change.<sup>245</sup> The human rights approach emphasizes the point that climate change is an existing and prevalent issue and not a futuristic issue, thereby creating a sense of urgency and forcing relevant actors to act more urgently than they would if emphasis were placed solely on non-human elements.<sup>246</sup> It has been suggested that “a human rights-based approach places the individual at the centre of our enquiry, helping to put a human face on the problem and tell the stories of those [affected and] likely to be affected, thereby serving as a tool for advocacy and promoting public awareness of the injustices inherent in the problem.”<sup>247</sup> An example of the effect of this focus on humans is highlighted by the compelling narrative in the Inuit petition which empowered the Inuit communities to tell their stories themselves.<sup>248</sup>

### 3.3.2. The Moral Force of Human Rights Concepts

The moral force of human rights concepts is another factor likely to spur action to address climate change because “rights are inherent attributes of human beings that must be respected in any well-ordered society” and “the moral weight this concept affords exercises an important compliance pull.”<sup>249</sup> In other words, there is a likelihood that states would be more willing to take action to address climate change when the issue is characterised as a violation of human rights. A human rights-based approach therefore imbues climate change with a sense of moral urgency.<sup>250</sup>

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<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*

<sup>247</sup> Atapattu, “Human Rights Approaches”, *supra* note 49 at 8 & 49; Lewis, “Human Rights and Climate Change”, *supra* note 125 at 193.

<sup>248</sup> Jodoin, *supra* note 140 at 173

<sup>249</sup> Alexandre Kiss & Dinah Shelton, Guide to international environmental law. (Leiden: Martinus Nijhoff, 2007) at 238 [*Kiss*], *cited in* Lewis, “Human Rights and Climate Change”, *supra* note 125 at 189.

<sup>250</sup> Daniel Bodansky, “Introduction: Climate Change and Human Rights: Unpacking the Issues”, (2010) 38:3 *Georgia J of Int’l & Comparative L* 511 [*Bodansky*].

It is important to note however that there are some who hold a view that the human rights approach does not have the moral pull it is believed to possess.<sup>251</sup> For example, it is observed that morality is an insufficient motivation because the connection between moral judgment and motivation is a contingent fact; and because people are more likely to act in self-interest than on the basis of morality.<sup>252</sup> This contrary view notwithstanding, there is overwhelming acceptance of human rights as having a moral effect on states. Thus, it is an important perspective to incorporate within the climate change discourse.

### 3.3.3. The Provision of Innovative Legal Mechanisms for addressing climate change

Another benefit of the human rights approach to climate change is that a human rights framework provides new forums and innovative legal arguments to influence and assist States as well as other responsible actors to comply with their human rights obligations, persuade courts to hold States and other responsible actors accountable, and provide remedies for victims of climate change.<sup>253</sup> For instance, climate change ordinarily seems to fall within the scope of international environmental law due to the fact that it is an environmental issue. However, procedures within the international environmental law framework are insufficient to address climate change. It has been suggested that since existing mechanisms for the enforcement of human rights at the international level are more developed for the purpose of protecting environmental human rights

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<sup>251</sup> Posner believes that the reason for the ineffectiveness of the morality argument is the lack of universality of human rights contrary to popular belief. See Eric Posner, “The Case against Human Rights”, *The Guardian* (4 December 2014), online: <[www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights](http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights)>; also noted in Conor Gearty, “Do human rights help or hinder environmental protection?”, (2010) 1:1 *J of Human Rights & the Environment* 7.

<sup>252</sup> Wouter Peeters, Lisa Diependaele & Sigrid Sterckx, “Moral Disengagement and the Motivational Gap in Climate Change”, (2019) 22 *Ethic Theory Moral Prac*, 425 at 428. See also Sara Seck, “A relational analysis of enterprise obligations and carbon majors for climate justice” *Oñati Socio-Legal Series: Climate Justice in the Anthropocene* [forthcoming in 2020], online: <[https://digitalcommons.schulichlaw.dal.ca/scholarly\\_works/479/](https://digitalcommons.schulichlaw.dal.ca/scholarly_works/479/)> [Seck, “Relational Analysis”].

<sup>253</sup> Lewis, “Human Rights and Climate Change”, *supra* note 125 at 189.

than the procedures of international environmental law (for example, the availability of individual complaints procedure, and availability of more forums<sup>254</sup>), a human rights approach presents a viable additional avenue for pursuing climate actions.<sup>255</sup> However, it has to be noted that there is sparse reference to the environment in international human right instruments perhaps due to the fact that these instruments were drafted at a time when environmental protection had not become (significantly) a matter of international concern.<sup>256</sup> Thus, the relationship between international environmental law and international human rights law ought to be one of complementarity and interdependence rather than mutual exclusivity.

Attempts to codify the right to a healthy environment have generally recorded little progress in international law due to several debates about its theoretical basis and practical underpinnings. The human rights approach avoids these debates by drawing on several existing rights instruments, conventions, and internationally-agreed-upon norms and standards that have been recognized and ratified by many countries.<sup>257</sup> A human rights-based approach would also provide a means for positive action and advocacy by groups who lack other avenues under international law. The human rights language talks about climate change not in terms of economic impacts or future targets, but in terms of current obligations and existing illegality.<sup>258</sup> The human rights approach does not seek to create entirely new rights or call for the adoption of new principles. Rather, it outlines normative guidelines that would assist international regimes and

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<sup>254</sup> Bodansky, *supra* note 250 at 517.

<sup>255</sup> *Ibid*; Gear, *supra* note 50 at 153.

<sup>256</sup> Gear, *ibid*.

<sup>257</sup> Damilola S Olawuyi, “Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach” (2015) 11:1 Florida A & M U L Rev at 115 & 116, online: <<http://commons.law.famu.edu/famulawreview/vol11/iss1/3>>. [Olawuyi].

<sup>258</sup> Lewis, “Human Rights and Climate Change”, *supra* note 125 at 192.



national authorities in translating existing human rights goals and standards into practical and achievable results.<sup>259</sup>

This benefit (provision of innovative legal mechanism) as discussed in this subsection, is however without prejudice to the importance of the recognition of the right to a healthy environment (in addition to existing rights) as discussed later in this chapter.

#### **3.3.4. Filling the Gap in International Climate Change Agreements**

Human rights are barely mentioned in international climate change agreements. However, since States are already obliged under international law to respect, protect and fulfil human rights<sup>260</sup> and a human rights-based approach merely emphasizes these long-standing commitments, the human rights approach has the potential to effectively integrate human rights into the international climate change regime, once there is an overwhelming acceptance of the human rights linkages to climate change.<sup>261</sup> The widespread participation of States in international human rights law allows for climate change issues to be brought within the monitoring and complaints mechanisms of specific human right treaties. This is already a language well understood by States. Since the provisions of international climate instruments do not include express provisions on justiciability, a human rights approach creates an avenue for justiciability of these international climate law instruments.<sup>262</sup>

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<sup>259</sup> Olawuyi, *supra* note 257 at 115 & 116.

<sup>260</sup> John H Knox, "Climate Change and Human Rights Law", (2009) 50 *VA J Int'l L* 163.

<sup>261</sup> Lewis, "Human Rights and Climate Change", *supra* note 125 at 189 & 190.

<sup>262</sup> Bodansky, *supra* note 250 at 517.

### 3.3.5. Highlights Issues of Vulnerability and Inequity

Another benefit of the human rights approach is that human rights can help bring issues of equity and vulnerability to the foreground of the climate change debate.<sup>263</sup> It has been noted that traditional international environmental law does not consider “specific vulnerabilities of individuals and communities”, and there is therefore a need for this perspectives to be part of the climate change conversation.<sup>264</sup> A possible solution to this issue lies in the human rights approach. Since protection of vulnerable groups is one of the objectives of the human rights approach, the approach provides the most vulnerable with a framework to seek adequate protection against the impacts of climate change, and provides avenues for them to seek and obtain remedies in line with the PANEL principles. Since these principles emphasize the requirements for participation and consultation with affected groups, and non-discrimination, equality and respect for the rule of law, the principles (if properly implemented) will improve the standards for the decision-making and negotiation processes, limit corruption, build accountability and enhance the legitimacy and sustainability of overall policy outcomes. Further, the human rights-based approach is useful in assessing the relative capacity of States to address climate change and arrive at equitable outcomes for burden sharing.<sup>265</sup> It has also been opined that human rights framing of environmental issues such as climate change redirects “the focus of inquiry away from experts, technical specifications and legal categories... and focuses on questions of equality and fundamental justice.”<sup>266</sup>

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<sup>263</sup> Lewis, “Human Rights and Climate Change”, *supra* note 125 at 193.

<sup>264</sup> Philippe Cullet, (2010) ‘The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions’ in Stephen Humphreys, (ed.) Human Rights and Climate Change, Cambridge: Cambridge University Press, p 183 cited in Atapattu, “Human Right Approaches”, *supra* note 49 at 23.

<sup>265</sup> *Ibid.*

<sup>266</sup> Bratspies, *supra* note 197 at 14.

### 3.4. Arguments against the Human Rights Approach to Climate Change

While this thesis advocates for the rights-based approach to tackling climate change, it is helpful to note that there are arguments against a rights-based framework. There are doubts as to whether the human rights approach has indeed had or will have any significant impact on the fight against climate change.<sup>267</sup>

A major concern regarding the adoption of a human rights approach to climate change is its anthropocentric focus i.e. the predominant focus on human to the detriment of other species within the ecosystem as well as future generations.<sup>268</sup> It has been suggested that the rights-based approach raises a legitimacy question with respect to the power of the courts to delve into climate policy issues. As will be discussed subsequently, while some courts agree that the issue of climate change is a policy issue which the court cannot delve into, other courts have taken a contrary view to this position and have held that the issue of climate change is justiciable regardless of its policy aspects insofar as it affects human rights.<sup>269</sup> This legitimacy concern is due to the fact that climate change is an issue which transcends the legal framework as it involves a lot of non-legal considerations such as political, economic and fiscal interests at local, national and international levels. The balancing of these interests is a policy issue better resolved in democratic forums than legal forums.<sup>270</sup> It has also been suggested that “a rights framework limits our capacity for meaningful political debate and compromise.”<sup>271</sup>

Certain critics of the human rights approach to environmental protection are of the view that the approach creates “unrealistic expectations” because the results are usually not positive, and

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<sup>267</sup> Atapattu, “Human Right Approaches”, *supra* note 49 at 49.

<sup>268</sup> *Ibid.*

<sup>269</sup> For example, *Environnement Jeunesse c Procureur général du Canada* [2019] JQ no 5940, 2019 QCCS 2885 (CanLII) [*EnJeu*]. It must be noted however that the Court in this case held that the Plaintiffs lack standing for reasons provided more elaborately in chapter four of this thesis.

<sup>270</sup> Macfarlane, *supra* note 195.

<sup>271</sup> *Ibid.*

even when they are, a lack of implementation and enforcement of the results poses another significant hurdle.<sup>272</sup> Concerns have also been expressed about the “universality” of human rights in view of their origins in Western culture. In other words, the human rights approach may not be suitable for all legal systems.<sup>273</sup>

Another concern regarding the adoption of a human rights framework to tackle climate change is the difficulty for victims “to establish a causal link between an established right and the environmental issue in question.”<sup>274</sup> However, the recognition of the right to a healthy environment could possibly address this problem as there would be a direct environmental right, and damage or threatened damage to the environment could constitute a violation of the right without the need to prove violation of other human rights.

### **3.5. Summary**

This chapter concludes that the right to a healthy environment ought to be an integral part of the human rights approach to climate change. However, the right to a healthy environment is plagued with theoretical issues especially the lack of theoretical justification of the right. This chapter concludes that the feminist theory of relational autonomy and the concept of corporeal citizenship provides the necessary theoretical justification for the recognition of the right to a healthy environment. The chapter also concludes that the human rights approach offers significant benefits to climate action.

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<sup>272</sup> Bratspies, *supra* note 197 at 12 & 13.

<sup>273</sup> *Ibid.*

<sup>274</sup> Atapattu, “Human Right Approaches”, *supra* note 49 at 49.

## **Chapter Four: The Principle of Intergenerational Equity: Meaning, Recognition and Importance**

This chapter takes a look at the meaning of the principle of intergenerational equity and situates this principle within the context of climate change. As stated in the preceding chapter, the principle is found in the *Rio Declaration* as well as other international instruments. The aim of this chapter is to examine the recognition of this principle within international human rights, climate and environmental law and to examine its intersection with the human rights approach. A significant portion of the discussions on the meaning of intergenerational equity is drawn from the work of Edith Brown Weiss whose works are very instructive on intergenerational equity. The United Nations recognise Weiss as a thought leader on intergenerational equity and environmental law.<sup>275</sup>

It is contended in this chapter that intergenerational equity is integral to the human rights approach to climate change. The chapter begins by defining the concept of intergenerational equity as well as its components and nuances. This examines the recognition of the concept in international law, reviews some of the theoretical discussions on the rights of future generations, highlights the interrelationship between the principle and the human rights approach, and concludes by providing an overview of the intergenerational equity approach to climate litigation.

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<sup>275</sup> UN, “Ms Edith Brown Weiss”, *United Nations Audiovisual Library of International Law*, online: <[https://legal.un.org/avl/pdf/ls/Brown-Weiss\\_bio.pdf](https://legal.un.org/avl/pdf/ls/Brown-Weiss_bio.pdf)>.

## 4.1. Understanding the Concept of Intergenerational Equity

### 4.1.1. Elements of Intergenerational Equity

Weiss outlines four criteria behind the theory of intergenerational equity. For any principle to be in line with intergenerational equity, the following criteria must be met.

1. Equitability among generations: such principle should be equitable among generations such that it would neither authorize “the present generation to exploit resources to the exclusion of future generations,” nor impose “unreasonable burdens on the present generation to meet indeterminate future needs.”<sup>276</sup>
2. Value-Neutrality: principles of intergenerational equity “must give future generations the flexibility to achieve their own goals according to their own values.”<sup>277</sup>
3. Clarity: principles of intergenerational equity “should be reasonably clear in application to foreseeable situations.”<sup>278</sup>
4. Acceptability: principles of intergenerational equity “must be generally shared by different cultural traditions and be generally acceptable to different economic and political systems.”<sup>279</sup>

Weis summarises intergenerational equity into three basic principles which mirror elements of the planet to be conserved for future generations – conservation of quality, conservation of options, conservation of access.<sup>280</sup> The standards of the quality, options and access to be conserved

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<sup>276</sup> Weiss, “In Fairness to Future Generations”, *supra* note 59 at 38.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid* at 201 & 202.

for future generations are those enjoyed by previous generations.<sup>281</sup> The three principles are explained below:

1. Conservation of quality denotes the responsibility on each generation to maintain the quality of the planet and to leave same to the future generations in no worse state than it was received.<sup>282</sup>
2. Conservation of options denotes the duty of each generation to conserve the diversity of the natural and cultural resources, in order not to unduly restrict the options available to future generations in solving their problems and satisfying their own values as they wish.<sup>283</sup>
3. Conservation of access denotes the responsibility of each generation to ensure that its members have equitable rights of access to the legacy of past generations and should conserve this access for future generations.<sup>284</sup>

These three principles translate to three planetary rights for future generations – the right to quality, the right to diversity and the right to access.<sup>285</sup>

According to Weiss, the above three principles give rise to five obligations on the present generation. The first duty is to conserve renewable and non-renewable natural resources.<sup>286</sup> The second duty is to ensure “reasonable, non-discriminatory access to the legacy [i.e. equitable access to the planet]” – this includes an obligation not to infringe on the access rights of other beneficiaries and an obligation to “assist those who would otherwise be too poor to have reasonable access and use.”<sup>287</sup> The third duty is to avoid adverse impacts on the environment.<sup>288</sup> The fourth duty is the

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<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid* at 95.

<sup>286</sup> *Ibid* at 50.

<sup>287</sup> *Ibid* at 55.

<sup>288</sup> *Ibid* at 59.

duty to curtail damage, prevent disasters, and ensure availability of emergency aid.<sup>289</sup> The fifth duty is to compensate for any damage caused to the environment.<sup>290</sup> These five duties, though owed by all members of the present generation, are to be guaranteed by the State.<sup>291</sup> The principle of intergenerational equity has been critiqued by several scholars as will be discussed subsequently in this chapter.

#### **4.1.2. The Temporal Scope of Intergenerational Equity Obligations**

It is important to mention that the responsibility to hand over the planet in no worse state than it was received is not only owed to the immediate succeeding future generation, that is to say, this responsibility is owed to several successive generations. Although Weiss takes the view that obligations within the context of intergenerational equity are owed to “all generations” and inures in perpetuity, there is a different view that each generation does not owe this responsibility to every future generations in perpetuity. This responsibility to conserve resources for the benefit of future generations is understood to cover up to the seventh generation, that is to say, each generation is to ensure that the steps taken to protect future generations consider up to at least seven successive generations following theirs. In other words, the planet ought to be handed over to each succeeding generation in a condition that would be fit for seven successive generations. This principle has been referred to as the “seventh-generation principle”.<sup>292</sup> This seventh-generation principle has its roots in the traditions of certain indigenous peoples of North America. The seventh-generation

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<sup>289</sup> *Ibid* at 70 & 71.

<sup>290</sup> *Ibid* at 50.

<sup>291</sup> *Ibid* at 26.

<sup>292</sup> Indigenous Corporate Training Inc, “What is the seventh Generation Principle?” *ICT Inc* (29 May 2012), online: <<https://www.ictinc.ca/blog/seventh-generation-principle>> [*ICT Inc*].



principle dates back to the writings of the Iroquois Confederacy<sup>293</sup> between 1142 to 1500 AD.<sup>294</sup>

In 1992, the International Institute for Sustainable Development (IISD) summarized this principle as follows:

The original law passed down from their ancestors crystallizes the sacred responsibility of Indigenous people to be the caretaker of all that is on Mother Earth and therefore that each generation is responsible to ensure the survival for the seventh generation... The way in which we interact with the earth, how we utilize the plants, animals and the mineral gifts, should be carried out with the seventh generation in mind. We cannot simply think of ourselves and our survival; each generation has a responsibility to ensure the survival for the seventh generation.<sup>295</sup>

This principle has been acknowledged in a UN Secretary General report on intergenerational solidarity and the needs of future generations, in an attempt to delineate the scope of “future generations.”<sup>296</sup> The report identifies the promotion of intergenerational solidarity (equity) as an important piece for achieving sustainable development and examines the extent to which intergenerational equity is reflected in the sustainable development framework.

The view taken in this thesis however is that in view of the fact that climate change could span centuries and even millenniums (as is discussed previously), there ought not be future generations “too remote” to be protected by each generation. This view, however, is from a theoretical perspective, as the practical implementation may require placing some temporal limit on the obligations of each generation.

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<sup>293</sup> A native confederacy comprising six Native North American peoples – the Mohawk, Oneida, Seneca, Onondaga, Cayuga, and Tuscarora. See Peter G Ramsden, “Haudenosaunee (Iroquois)”, *The Canadian Encyclopedia* (14 December 2006), online: < <https://www.thecanadianencyclopedia.ca/en/article/iroquois>>.

<sup>294</sup> Oren Lyons, “Looking Toward the Seventh Generation” (Presentation delivered at the American Indian Studies Program, University of Arizona. Tucson, Arizona, 17 April 2008), online: < <https://nnigovernance.arizona.edu/oren-lyons-looking-toward-seventh-generation>>; ICT Inc, *supra* note 292.

<sup>295</sup> Linda Clarkson, Vern Morrissette & Gabriel Règallet, *Our Responsibility to The Seventh Generation*, (Winnipeg: Indigenous Peoples and Sustainable Development International Institute for Sustainable Development, 1992) at 12.

<sup>296</sup> Intergenerational solidarity and the needs of future generations, UNGAOR, 68<sup>th</sup> Sess, UN Doc A/68/100 (2013), para 13, online: < <https://sustainabledevelopment.un.org/content/documents/2006future.pdf>>.

#### 4.1.3. Intergenerational Equity and the Concept of Justice<sup>297</sup>

The justification for intergenerational equity is the concept of justice between generations. Intergenerational equity can be justified within John Rawls' theory of justice, particularly John Rawls' theory of justice as fairness which comprises two principles of justice summarised and ranked as follows:

First, each person is to have an equal right to the most extensive basic liberty compatible with a similar system of liberty for others [greatest equal liberty principle]. Second, social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, [difference principle & just saving principle] and (b) attached to offices and positions open to all under conditions of fair equality of opportunity [equal opportunity principle].<sup>298</sup>

The implication of the greatest equal liberty principle for the rights-based approach to climate change is that everyone has the right to a healthy environment. For future generations, equal liberty means the maintenance of a certain level of environmental capital by the present generation while undertaking economic development.<sup>299</sup> The *difference principle* emphasizes the need to acknowledge the vulnerability of groups disproportionately affected by climate change such as populations living in low elevation coastal zones, economically disadvantaged states, women and children, with a view to protecting their interests. The *just savings principle* is an addition to the difference principle and is designed to provide a constraint on the impact of the greatest equal liberty and difference principles on future generations, to ensure that the interests of future generations are not compromised while protecting interests of the least advantaged in the present generation. In the absence of the just savings principle, the least advantaged of future

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<sup>297</sup> This segment is, in part, adapted from methodological prospectus for this thesis submitted in the Graduate Seminar class at the Schulich School of Law.

<sup>298</sup> John Rawls, *A Theory of Justice*, revised ed (Cambridge, MA: Harvard University Press, 1999) at 15.

<sup>299</sup> Hendrik Ph Visser 't Hooft, *Justice to Future Generations and the Environment* (Dordrecht, NL: Kluwer Academic Publishers, 1999).

generations may be exploited for the benefit of the least advantaged in the present generation.<sup>300</sup> The *equal opportunity principle* implies the just distribution of natural resources and environmental services between current and future generations in a manner that ensures that future generations are afforded “fair equality of opportunity” to benefit from the natural environment and are able to enjoy the resources based on their own conceptions and not on conceptions circumscribed by present-day understandings of economic development.<sup>301</sup>

Intergenerational equity draws on the Rawlsian theory of justice to conclude that intergenerational injustice of climate change is two-dimensional. Firstly, future generations will suffer the consequences of current and past greenhouse gas (GHG) emissions for which they are not responsible. Secondly, future generations will not enjoy the benefits from GHG emissions, at least not directly.<sup>302</sup> Climate injustice therefore lies in the discrepancy between historical responsibility for GHG emissions and future impacts of these emissions, and intergenerational equity seeks to balance out this injustice.

## **4.2. The Recognition of Intergenerational Equity under International Law**

### **4.2.1. Intergenerational Equity under International Environmental Law**

Intergenerational equity is embodied in a number of international environmental law instruments. One of the earliest instruments recognizing intergenerational equity is the 1946 International Convention for the Regulation of Whaling, which in its preamble recognizes the

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<sup>300</sup> Kristina Diprose et al “Contrasting Theories of Intergenerational Justice: Just Savings or Capabilities”, in Samantha Punch, Robert Vanderbeck, Tracey Skelton (eds), *Families, Intergenerationality, and Peer Group Relations. Geographies of Children and Young People*, vol 5. (Singapore: Springer, 2017).

<sup>301</sup> Gail E Henderson, “Rawls & Sustainable Development” (2011) 7:1 *McGill J of Sustainable Development L* at 4-5, online: < [https://www.mcgill.ca/mjsdl/files/mjsdl/7\\_1\\_1\\_henderson.pdf](https://www.mcgill.ca/mjsdl/files/mjsdl/7_1_1_henderson.pdf) >.

<sup>302</sup> Lewis, “Human Rights Duties” *supra* note 12 at 208, 211.

interest of States in safeguarding natural resources – particularly whales.<sup>303</sup> Another instrument is the Stockholm Declaration which states that man has the duties to “protect and improve the environment for present and future generations,” to safeguard natural resources for the benefit of present and future generations, to maintain, restore and improve “the capacity of the earth to produce vital renewable resources,”<sup>304</sup> to prevent future depletion of non-renewable resources, and to prevent serious or irreversible damage occasioned by pollution.<sup>305</sup> The Stockholm Declaration further states that environmental policies must not adversely affect present and future development of developing countries.<sup>306</sup>

Similarly, the Convention on the Conservation of Migratory Species of Wild Animals, 1979 recognises the obligation of States to future generations in its preamble wherein it states that “each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilised, is used wisely.”<sup>307</sup> In its preamble, the Convention for the Protection of the Mediterranean Sea Against Pollution, 1976 also mentions the need for Parties to “preserve the marine environment of the Mediterranean Sea Area for the benefit and enjoyment of present and future generations.”<sup>308</sup> The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 in its preamble

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<sup>303</sup> *International Convention for the Regulation of Whaling*, 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948), preamble.

<sup>304</sup> *Ibid*, principle 3.

<sup>305</sup> *Stockholm Declaration*, principles 1, 2, 3, 5, 6.

<sup>306</sup> *Ibid*, principle 11.

<sup>307</sup> *Convention on the conservation of migratory species of wild animals*, 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983), online: <<https://www.cms.int/en/convention-text>>.

<sup>308</sup> *Convention for the Protection of the Mediterranean Sea Against Pollution*, 16 February 1976, 1102 UNTS 27 (entered into force 12 February 1978), online: <<https://treaties.un.org/doc/Publication/UNTS/Volume%201102/v1102.pdf>>.

recognizes the need to protect wild fauna and flora as an irreplaceable part of nature which must be safeguarded for the present generation and “generations to come.”<sup>309</sup>

Intergenerational equity is one of the principles behind the concept of sustainable development as evident in the Report of the World Commission on Environment and Development (Brundtland Report) which officially introduced the concept of sustainable development in 1987.<sup>310</sup> The Brundtland Report is replete with several references to intergenerational equity.<sup>311</sup> Intergenerational equity is expressly mentioned as one of the legal principles for environmental protection and sustainable development: “States shall conserve and use the environment and natural resources for the benefit of present and future generations.”<sup>312</sup>

The principle of intergenerational equity was again expressed at the 1992 Rio Earth Summit in the Rio Declaration, which states that “[t]he natural resources of the earth...must be safeguarded for the benefit of present and future generations”<sup>313</sup> and “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”<sup>314</sup> It has been suggested that the decision made at the Rio Earth Summit was a significant step towards “cementing” the principle of intergenerational equity in international law. This is because the Summit culminated in the Rio Declaration, the Convention on Biological Diversity and the Convention on Climate Change, all of which embody the principle of intergenerational equity.<sup>315</sup>

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<sup>309</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975), online: <<https://www.cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf>>.

<sup>310</sup> Gro Harlem Brundtland, *Report of the World Commission on Environment and Development: Our Common Future*, UNGAOR, 42<sup>nd</sup> Sess, Supp No 25, UN Doc. A/42/427 (1987), online: <<http://www.un-documents.net/our-common-future.pdf>>. [*Brundtland Report*].

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.* Annexe 1, page 339, para. 2.

<sup>313</sup> *Rio Declaration*, principle 2.

<sup>314</sup> *Rio Declaration*, principle 3.

<sup>315</sup> Sumudu Atapattu, “Intergenerational Equity and Children’s Rights: The Role of Sustainable Development and Justice”, in Claire Fenton-Glynn (ed), *Children’s Rights and Sustainable Development: Interpreting the UNCRC for*

However, it is important to note that references to future generations appear mostly in the preambular parts of international law instruments and “that there is no legally binding instrument at international level that commits States to the protection of the rights of future generations.”<sup>316</sup> This is because the preamble of a treaty is generally understood not to be binding, but is rather used as an interpretation tool.<sup>317</sup> In addition, it would appear that the principle of intergenerational equity is yet to be confirmed as a principle of customary international law, and therefore yet to achieve the status of bindingness.<sup>318</sup> It has also been suggested that other principles (which are arguably customary international law principles) such as sustainable development, the precautionary principle and the common but differentiated responsibility embody the principle of intergenerational equity.<sup>319</sup> The principle of intergenerational equity, being an underlying principle of sustainable development, has also been identified as an integral component of the rights of the child as evidenced by the 2015 Children’s Declaration on the World’s Sustainable Development Goals.<sup>320</sup>

The principle of intergenerational equity has also been referenced in certain judicial decisions that are not directly climate change cases but are environmental law decisions. One of the earliest known judicial decisions on intergenerational equity is the 1993 decision by the Supreme Court of the Philippines in *Minors Oposa v. Secretary of the Department of*

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*Future Generations* (Cambridge University Press, 2019) at p 177 [Atapattu, ‘Intergenerational Equity and Children’s Rights’].

<sup>316</sup> Mary Robinson, “Climate Justice: An Intergenerational Approach” online: <<https://www.mrfcj.org/wp-content/uploads/2015/09/Intergenerational-Equity-Position-Paper-2013-11-16.pdf>>.

<sup>317</sup> Jan Klabbers, “Treaties and their Preambles”, in Michael J Bowman & Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, (UK: Cambridge University Press, 2018) at p182; Max H Hulme, “Preambles in Treaty Interpretation”, (2016) 164 *University of Pennsylvania L Rev* 1281; Nadia Bernaz, “The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism”, online: <<https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism>>.

<sup>318</sup> Atapattu, ‘Intergenerational Equity and Children’s Rights’, *supra* note 315 at p 177.

<sup>319</sup> *Ibid.*

<sup>320</sup> Voice of Future Generations and Children’s Declaration on the World’s Sustainable Development Goals, (2015), online: <[https://cisdl.org/public/VOFG/Final\\_VoFG\\_Childrens\\_Summit\\_Declaration\\_21\\_September.pdf](https://cisdl.org/public/VOFG/Final_VoFG_Childrens_Summit_Declaration_21_September.pdf)>.

*Environmental and Natural Resources*.<sup>321</sup> In this case, a group of children brought this lawsuit to stop the destruction of the fast disappearing rain forests in the Philippines on the basis of the right of the people to a balanced and healthful ecology and the right to self-preservation and self-perpetuation. Arguments on the basis of intergenerational equity were made before the court, i.e. “that natural resources belong to people of all ages and that if adults were to harvest all of a country’s resources, they would be stealing from their children, their children’s children, and all future generations.”<sup>322</sup> The Supreme Court, ruling in favor of the children, recognised that the right to a healthy environment and the right to provide for future generations are fundamental. On the question of standing, the Court held that since there is an intergenerational responsibility to maintain a healthy environment i.e. each generation has a responsibility to the next to take steps to preserve the environment, children may sue to enforce that right for themselves and for future generations.<sup>323</sup> The Court stated thus:

This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound

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<sup>321</sup> 30 July 1993, 224 *Supreme Court Reports Annotated (SCRA)* 792.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid* at 7 & 8.

environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.<sup>324</sup>

Furthermore, in a dispute between Hungary and Slovakia at the ICJ, Hungary stopped an ongoing construction of dams – a project that was being carried out pursuant to a treaty – on grounds of environmental concerns among other concerns.<sup>325</sup> The ICJ while emphasizing the importance of examining the project’s impact on the environment, acknowledged that damage to the environment poses risks to present and future generations.<sup>326</sup>

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed.<sup>327</sup>

The opinion of Judge Weeramantry in the *Gabcikovo-Nagymaros Project Case* also relied extensively on the principle of sustainable development in concurring with the judgment of the court.<sup>328</sup> Also, in *Denmark v Norway*,<sup>329</sup> a dispute between Denmark and Norway regarding maritime delimitation between Greenland and Jan Mayen, Judge Weeramantry recognized the principle of intergenerational equity while stating thus:

A search of global traditions of equity in this fashion can yield perspectives of far-reaching importance in developing the law of the sea. Among such perspectives deeply ingrained therein, which international law has not yet tapped, are concepts of a higher trust of earth resources, an equitable use thereof which extends intertemporally, the ‘sui generis’ status accorded to such planetary resources as land, lakes and rivers, the

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<sup>324</sup> *Ibid.*

<sup>325</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7, at 25 para 28, online: <<https://www.icj-cij.org/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>>.

<sup>326</sup> *Ibid* at 78, para 140.

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid* at 88.

<sup>329</sup> *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)* [1993] ICJ Report 38, [*Denmark v Norway*]. Notably, Justice Weeramantry endorsed Weiss, ‘In fairness to future generations’ in his opinion. See p 277.



concept of wise stewardship thereof, and their conservation for the benefit of future generations. Their potential for the development of the law of the sea is self-evident.<sup>330</sup>

Also, in a dissenting opinion on a dispute between France and New Zealand with respect to nuclear testing by France, Justice Weeramantry<sup>331</sup> again espoused the principle of intergenerational equity while noting the adverse health and environmental impacts of nuclear warfare.<sup>332</sup> Justice Weeramantry stated the following:

The rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations. Among treaties may be mentioned, the 1979 London Ocean Dumping Convention, the 1973 Convention on International Trade in Endangered Species, and the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. All these expressly incorporate the principle of protecting the natural environment for future generations and elevate the concept to the level of binding State obligation.<sup>333</sup>

The foregoing indicates that the principle of intergenerational equity is a principle that has been recognised by some courts with respect to environmental protection generally and therefore, the principle can be applied by the courts (not as binding precedent, but persuasive) within the context of climate change.

#### **4.2.2. Intergenerational Equity within the Climate Change Regime**

Intergenerational equity is also recognised in international climate change instruments. In 1988, the UN General Assembly passed a resolution for the protection of the global climate for

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<sup>330</sup> *Ibid* at para 235.

<sup>331</sup> While dissenting from the rest of the judges.

<sup>332</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Test (New Zealand v. France)*, Order of 22 September 1995, [1995] ICJ 288 at 317, online: < [www.icj-cij.org/files/case-related/97/097-19950922-ORD-01-05-EN.pdf](http://www.icj-cij.org/files/case-related/97/097-19950922-ORD-01-05-EN.pdf)>.

<sup>333</sup> *Ibid* at 455.

present and future generations.<sup>334</sup> The resolution expressed concerns regarding the increase in GHG emissions, the attendant effect on the global climate, and the economic and social implications for present and future generations. Thus, the resolution emphasized the need for further scientific research on the causes and consequences of climate change, and therefore recognised the IPCC.<sup>335</sup>

The United Nations General Assembly (UNGA) passed another resolution recognizing the need for a scientific study on the possible adverse effects of climate change such as the rise in sea levels on islands and in coastal areas, especially low-lying coastal areas.<sup>336</sup>

An important instrument within the international climate change regime is the UNFCCC which was adopted around the same time as the Rio Summit in 1992. Intergenerational equity is one of the guiding principles in the UNFCCC<sup>337</sup> as evident in the preambular provisions which state that State Parties are “determined to protect the climate system for present and future generations.”<sup>338</sup> The UNFCCC provides as follows:

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. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.<sup>339</sup> [Emphasis added]

Similarly, the inclusion of sustainable development as a guiding principle in the UNFCCC further buttresses its intergenerational equity component.<sup>340</sup> Although the UNFCCC is by its nature

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<sup>334</sup> *Protection of Global Climate for present and future generations*, UN Res A/43/53, UNGAOR, 70<sup>th</sup> Sess, (1988). The resolution was again reaffirmed by UN Res A/44/207 in 1989, 45/212 in 1990, 46/169 in 1991.

<sup>335</sup> *Ibid* at para 5.

<sup>336</sup> *Possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas*, UN Doc A/RES/44/206, 44<sup>th</sup> Sess, (1989).

<sup>337</sup> Alice Venn, “Social justice and climate change”, in Trevor M Letcher, *Managing Global Warming: An Interface of Technology and Human Issues* (London/San Diego: Elsevier, 2019) at 711.

<sup>338</sup> UNFCCC, *supra* note 115.

<sup>339</sup> *Ibid*, article 3.1.

<sup>340</sup> *Ibid*, article 3.4.

a legally binding document,<sup>341</sup> it would appear that the certain provisions of the UNFCCC are however non-binding especially in view of the absence of specific mandatory climate targets.<sup>342</sup> Notably, the provision requiring the protection of the climate system for future generations (cited above)<sup>343</sup> is not couched in mandatory wording – the word used is ‘should’ not ‘shall’.<sup>344</sup>

Furthermore, in its preamble, the Paris Agreement acknowledges that intergenerational equity is one of the considerations for climate action. It states as follows:

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>345</sup> [*Emphasis added*]

The Paris Agreement is understood to be a “historic breakthrough”<sup>346</sup> due to the fact that “it is the first multilateral environmental agreement to incorporate references to human rights, the rights of particular groups, gender equality, and inter-generational equity.”<sup>347</sup> However, the banishment of this principle to the preamble without inclusion in the operative part of the Paris Agreement vitiates the bindingness of the principle since preambular provisions are usually not

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<sup>341</sup> ‘A framework convention is a legally binding treaty of international law which is not different in its legal effect from other treaties.’ See Economic Commission for Europe, *Framework Convention Concept*, 72<sup>nd</sup> Session, (2011), online: <[www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf](http://www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf)>.

<sup>342</sup> The treaty however provides for future negotiations to set emissions limits. The first principal revision is the Kyoto Protocol which included legally binding emissions targets for developed country Parties. See *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, (1997) 2303 UNTS 162 adopted at COP3 in Kyoto, Japan, on 11 December 1997.

<sup>343</sup> UNFCCC, article 3.1.

<sup>344</sup> Atapattu, ‘Intergenerational Equity and Children’s Rights’, *supra* note 315 at p 176. Contrast provisions of article 3 with the provisions of article 4 which employs the word ‘shall’ in respect of the commitments of Parties.

<sup>345</sup> Preamble to the Paris Agreement.

<sup>346</sup> Meinhard Doelle, “The Paris Climate Agreement: Historic Breakthrough in Spite of Shortcomings” (13 December 2015), online (blog): *Meinhard Doelle* <[blogs.dal.ca/melaw/2015/12/13/the-paris-climate-agreement-historic-breakthrough-in-spite-of-shortcomings/](http://blogs.dal.ca/melaw/2015/12/13/the-paris-climate-agreement-historic-breakthrough-in-spite-of-shortcomings/)>.

<sup>347</sup> María Pía Carazo, “Contextual Provisions (Preamble and Article 1)” in Daniel Klein et al, eds, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford, UK: Oxford University Press, 2017) 107 [Carazo].

binding.<sup>348</sup> It is worth noting that initial negotiation drafts of the Paris Agreement included direct references to the interests of future generations.<sup>349</sup> As evident from the draft text of the Paris Agreement, some of the options for wording the *preamble* and *article 2* specified that Parties protect the climate system “for the benefit of present and future generations” (similar wordings to article 3.1 of the UNFCCC).<sup>350</sup> It was understood however that the phrase “for the benefit of future generations” be replaced with “intergenerational equity” in the course of negotiations.<sup>351</sup> It has been suggested that the reason for the change in term was the difficulty in determining who has standing for future generations.<sup>352</sup> Ultimately, even the principle of intergenerational equity agreed on as the preferred phrase was abandoned with respect to *article 2* and only retained in the preamble.<sup>353</sup> There are indications that intergenerational equity was included in the Paris Agreement to resolve the impasse between parties who wanted the inclusion of the principles versus those who opposed its inclusion.<sup>354</sup> The exclusion of intergenerational equity from the operative part of the Paris Agreement renders “full integration [of the principle] into the implementation of the [climate] regime less certain.”<sup>355</sup> The non-inclusion of intergenerational equity in the operative part of the Paris Agreement could explain why the principle appears to play a marginal role in conversations on climate change.<sup>356</sup>

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<sup>348</sup> Bridget Lewis, “The Rights of Future Generations within the Post-Paris Climate Regime”, (2018) 7:1 *Transnational Environmental L*, 69 at 74, [Lewis, “*Rights of Future Generations Post-Paris*”].

<sup>349</sup> *Ibid*, at 73.

<sup>350</sup> *Ibid*; Ad Hoc Working Group on the Durban Platform for Enhanced Action, Work of the Contact Group on Item 3, Negotiating Text, Geneva (Switzerland), 12 Feb 2015, online: <[https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf)>. [Geneva Negotiating Text].

<sup>351</sup> Lewis, “Rights of Future Generations Post-Paris”, *supra* note 348.

<sup>352</sup> Carazo, *supra* note 347.

<sup>353</sup> *Ibid*.

<sup>354</sup> Meinhard Doelle, “Assessments of Strengths and Weaknesses”, in Daniel Klein et al, eds, *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford, UK: Oxford University Press, 2017) 375 at 377 [Doelle].

<sup>355</sup> *Ibid*, at 284.

<sup>356</sup> Unlike other principles and concepts in the operative part of the Paris Agreement such as the common but differentiated responsibility/respective capacities, and loss and damage, which (just like intergenerational equity) are evolving and fluid concepts. See *Ibid*.

An important point to note regarding the Paris Agreement is that the 1.5°C/2°C targets with respect to the global temperature represent the standard of the planet to be bequeathed to future generations by the present generation.

#### 4.2.3. Intergenerational Equity within the Human Rights Framework

There is notable absence of intergenerational equity from human right instruments. However, it has been suggested that the protection of human dignity and equality of rights afforded to every human being under international human rights instruments do extend to future generations.<sup>357</sup> These instruments include the United Nations Charter,<sup>358</sup> UDHR,<sup>359</sup> ICCPR,<sup>360</sup> ICESCR,<sup>361</sup> CRC<sup>362</sup> and other instruments.<sup>363</sup> In its preamble, the UDHR emphasises that “recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world”. It has been suggested that the reference to “all members of the human family” has elements of temporality such that it “brings all generations within its scope;”<sup>364</sup> and that the mention of “equal and inalienable rights” alludes to “the basic equality of these generations in the human family.”<sup>365</sup> In this regard, Weston notes that “the future” is a temporal space without outer limits.<sup>366</sup>

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<sup>357</sup> Weiss, “Our Rights and Obligations”, *supra* note 57 at 201; Anna Coote, *Intergenerational equity briefing Review of social determinants of health and the health divide in the WHO European Region*, (Copenhagen: WHO, 2015), [Coote].

<sup>358</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>359</sup> *Supra* note 24.

<sup>360</sup> *Supra* note 88.

<sup>361</sup> *Supra* note 86.

<sup>362</sup> *Supra* note 94.

<sup>363</sup> See CIEL, Submission to the UN Special Rapporteur on Human Rights and the Environment, (31 October 2017), online: <[www.ohchr.org/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf](http://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf)>.

<sup>364</sup> Coote, *ibid*.

<sup>365</sup> *Ibid*.

<sup>366</sup> Burns H Weston, “The Theoretical Foundations of Intergenerational Ecological Justice: An Overview”, (2012) 34:1 *Human Rights Quarterly* 251 at 253.

The United Nations Educational, Scientific, and Cultural Organization (UNESCO) passed the Declaration on the Responsibilities of the Present Generations toward Future Generations which provides that “[t]he present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.”<sup>367</sup> The Declaration of the Principles of International Cultural Co-operation provides that “each culture has a dignity and value which must be respected and preserved” and that “all cultures form part of the common heritage belonging to mankind.”<sup>368</sup> As noted by Weiss, if current generations assume the right to exploit natural and cultural resources at the expense of the wellbeing of future generations, they will be contradicting the purposes of the United Nations Charter and the spirit of other international human rights documents.<sup>369</sup> It is important to state, however, that the recognition of the duty to reckon the interests of future generations in the above instruments merely creates a normative or guiding principle and is therefore unlikely to form a basis of enforceable rights for future generations.

It is equally worthy of note that in its opinion, the Inter-American Court on Human Rights (IACHR) recognised the environmental obligations to future generations by stating that “the right to a healthy environment ...constitutes a universal value that is owed to both present and future generations.”<sup>370</sup> This opinion was issued following a petition by the Republic of Columbia requesting that the IACHR determine the obligation of states towards protecting the environment and thereby guaranteeing the rights to life and to personal integrity under the articles 4 and 5 of

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<sup>367</sup> *Declaration on the Responsibilities of the Present Generations toward Future Generations*, UNESCOOR, 29<sup>th</sup> Sess, UN Doc 29C/Res 44, (1997), art 1, online: < <https://unesdoc.unesco.org/ark:/48223/pf0000110220.page=75>>.

<sup>368</sup> *Declaration on the Principles of International Cultural Co-operation*, UNESCOOR, 14<sup>th</sup> Sess (1966), Un Doc 14C/Res CFS.67/VII.4/A/F/S/R 82, online: < <https://unesdoc.unesco.org/ark:/48223/pf0000114048.page=82>>, art 1.

<sup>369</sup> Weiss, “Our Rights and Obligations”, *supra* note 57 at 201.

<sup>370</sup> *IACHR Advisory opinion OC-23/17 of 15 November 2017 Requested by the Republic of Columbia*, at para 59.

the American Convention on Human Rights.<sup>371</sup> As stated in chapter two of this thesis, the IACHR also held that the right to a healthy environment is owed to future generations in its collective connotation.<sup>372</sup>

Human rights obligations are tripartite in nature. They include the duty to (1) respect, (2) protect and (3) fulfil human rights.<sup>373</sup> Each of these duties would impose an obligation on a State with respect to future generations. Firstly, with respect to future generations, the duty to respect human rights would entail a duty on the duty bearers (the State) not to act in a manner that compromises the rights of future generations.<sup>374</sup> Secondly, the duty to protect human rights of future generations implies a duty on the State to prevent other entities such as private actors and other States from violating the rights of future generations.<sup>375</sup> Thirdly, the duty to fulfil human rights denotes a duty on the State “to take positive steps to address the future consequences of climate change, which is arguably the most significant responsibility vis-à-vis future generations.”<sup>376</sup>

From the impacts of climate change on future generations examined previously, it is clear that the rights of future generations need to be protected. However, there have been arguments against granting human rights to future generations. Arguments in this regard range from

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<sup>371</sup> *American Convention on Human Rights: Pact of San Jose*, (1969) 1114 UNTS 144. The central question raised by the Republic of Columbia is “how the Pact of San José should be interpreted when there is a danger that the construction and operation of major new infrastructure projects may have severe effects on the marine environment in the Wider Caribbean Region and, consequently, on the human habitat that is essential for the full enjoyment and exercise of the rights of the inhabitants of the coasts and/or islands of a State Party to the Pact, in light of the environmental standards recognized in international customary law and the treaties applicable among the respective States.” See *IACHR Opinion*, para 59.

<sup>372</sup> The IACHR identified two senses in which the right to a healthy environment can be understood – individual and collective. While the collective connotation of the right implies a universal duty owed to both present and future generations, the individual connotation speaks of the the right of individuals and the interconnectivity with other rights. See *IACHR Opinion*, para 59.

<sup>373</sup> John Knox, *Framework Principles on Human Rights and the Environment*, UN Doc A/HRC/37/59, UNHRCOR, 37<sup>th</sup> Sess, (2018).

<sup>374</sup> Lewis, “Rights of Future Generations Post-Paris”, *supra* note 348 at p 80.

<sup>375</sup> *Ibid* at pp 80 & 81.

<sup>376</sup> *Ibid* at p 81.

theoretical arguments to practical challenges. While some of the theoretical arguments are examined in the next section of this chapter, the practical arguments are discussed alongside the litigation cases in subsequent chapters of this thesis. Regardless of these debates, this view adopted in this thesis is that the tripartite duty of the state to respect, protect and fulfil human rights translates into a duty (at the very least in principle) to ensure that the rights of future generations are respected, protected and fulfilled.<sup>377</sup>

### **4.3. Overview of the Theoretical Discussions on the Rights of Future Generations**

Our discussions so far indicate that the theory of intergenerational equity seeks to achieve the recognition of the rights of future generations. Although the aim of this thesis is not to interrogate the many theories on the granting of rights to future generations, a few theories are worthy of mention in order to appreciate the practical difficulties in litigating the rights of future generations as will be examined in subsequent chapters of this thesis.

There have been arguments against granting rights to future generations on the basis that future generations do not have the capacity to hold any rights. A major argument against granting rights to future generations is that there is uncertainty as to the identity of future generations since our present-day choices will affect not only future generations “but also determine which people will exist in future”<sup>378</sup> (*identity problem*). Gosseries gives an instance of this problem by stating that “our actions and policy choices in fields such as transportation or energy production without any direct connection with procreation choices will still have an impact on the identity of our children,

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<sup>377</sup> Lewis “Human Rights and Climate Change” *supra* note 125 at 216 & 217.

<sup>378</sup> *Ibid.*, at 214.



through modifying the timing of our daily activities, including procreative ones.”<sup>379</sup> A counter argument in response to this identity problem is that the inability to ascertain the identity of members of future generations does not defeat the accrual of their rights.<sup>380</sup> If the actions of the present generation are capable of impacting future generation, it necessarily follows that such actions can impinge on the enjoyment of rights, especially since there is certainty that these persons will be born at some point in the future.<sup>381</sup>

Another argument against granting rights to future generations stems from the understanding that members of future generations are not yet born and as such cannot hold rights in the present generation (non-existence argument).<sup>382</sup> In response to this argument, it has been argued that existing is not a necessary condition for holding rights.<sup>383</sup> Unruh illustrates the flaw in the non-existence argument thus:

Caroline, in the present moment (in 2016), is 10 years old. In 2096, she will, as we assume, become a nursing case. The same is true for Bert, who will be born in 2018. Let us assume, as seems reasonable from a rights-based perspective, that there is a general right for nursing if it is needed. In 2096, undoubtedly both 90-year old Caroline

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<sup>379</sup> Gosseries illustrates this thus: “If I take a car every day to go to my job, this will have two types of relevant consequences. It will have a negative impact on the present and future state of the atmosphere, given that it will increase emissions. Here, we assume that this impact will be such as to lead to a significant impact on health for present and future persons. However, it will also have an impact on the token identity of my future child, if any. This is so for the following reason: coming back home earlier or later than if I had taken a bike will also affect the timing of my sexual intercourse. Hence, given the very large number of competing spermatozoa, it is highly likely to affect the very identity of the child I will conceive together with my beloved... The reader might react to all this with a smile. But there is no reason not to take this problem seriously. Imagine then a father having to face his daughter. At 17 years of age she has become a green activist and asks him: “why did you not choose the bike rather than the car? The atmosphere would be much cleaner today! And given your circumstances at that time, you had no special reason not to take the bike!” The father may want to answer: “True. Still, had I done so, you would not be here. Since your life in such a polluted environment is still worth living, why blame me? I certainly did not harm you. Which one of your rights did I violate then?” See Axel Gosseries, “On Future Generations’ Future Rights”, (2008) 16:4 *The Journal of Political Philosophy* 446–474 at 460 [Gosseries].

<sup>380</sup> Lewis, “Human Rights and Climate Change”, *supra* note 125 at 214 citing Joel Feinberg, “The Rights of Animals and Unborn Generations” in Ernest Partridge (ed), *Responsibilities to Future Generations: Environmental Ethics* (Prometheus 1981) 139; Robert Elliot, “The Rights of Future People” (1989) 6 *J of Applied Phil* 159, 162; Simon Caney, “Cosmopolitan Justice, Rights and Global Climate Change” (2006) 19 *Can J of Int’l L & Juris* 255, 267; Derek Bell, “Does Anthropogenic Climate Change Violate Human Rights” (2011) 14 *Critical Rev of Int’l Social & Political Phil* 99.

<sup>381</sup> *Ibid*; this view is more in line with the interest theory as described in *chapter 2 of this thesis*.

<sup>382</sup> This view particularly stems from the will theory which attributes rights on the basis of ability to exercise ‘will’.

<sup>383</sup> Charlotte Unruh, “Present Rights for Future Generations”, (2016), 30:3 *Kriterion Journal of Philosophy* 77 at 82.

and 78-year old Bert will have the right to be nursed. This is so although neither 90-year old Caroline nor 78-year old Bert exist yet. It seems absurd to argue that 90-year old Caroline, at the present moment, has a right to be nursed, but 78-year old Bert doesn't. So either we concede that both of them have a right to be nursed (which could yield obligations for us now, for example, to build nursing homes), or we deny present rights to both future Caroline and Bert. Each way, there is no reason why we should consider future Caroline's rights to be different from future Bert's rights, nor does this seem intuitively plausible. The upshot is that future persons – at least those of whom we know that they will exist – have the same rights status as our own future selves.<sup>384</sup>

Unruh therefore takes the view that since certain rights held by the present generation do not inure (and as a matter of fact may not inure at any point) but can be protected even before they do, the rights of future generations can be placed in the same category such that the right can be protected even before the holders are ready to take benefit. This is why Unruh further argues that rights should be attached to place holders rather than human beings. Unruh defines “place holder” to mean “a set of actual individuals whose existence and/or identity is unknown or indeterminate.”

Again, an illustration is useful:

Bob is going for a walk at night along the riverside. He discovers that the fence of a nearby playground is rusty. While it is still stable at the present moment, in a few years' time, it might not be stable enough to prevent children from breaking through the fence and falling into the river. The fence poses a danger to a child that might or might not exist today. If Bob has an obligation to repair the fence, he has that obligation with regard to a place holder that is indeterminate both in terms of existence and exact identity.<sup>385</sup>

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<sup>384</sup> *Ibid* at 84.

<sup>385</sup> *Ibid* at 85. Similar illustration is made by Gosseries thus: “Arguably, they are actually embodied in actual legislation. A good example is baby food regulation. Imagine a can of baby food with a remote expiry date. At the time it is bottled, its future consumer is neither born, nor even conceived. It seems to me that the best account to justify legal restrictions on the type of food that can be bottled in such cans, as well as the legal option to sue for ex post damages imposed on the food producer in case of inappropriate content (e.g. bacteria or pieces of glass), is a reference to the future rights of the baby as a consumer.” See Gosseries, *supra* note 379 at 457.

By this token, future generations are somewhat placed in the same bracket as present generations such that the same rights held by present generations are also at the same time being held by future generations since the rights attach to the “place” and not the human being.

Another argument against granting rights to future generations is that the present generation is unable to determine the preferences of future generations since “we do not know what the future wants”, “the future cannot speak” and even if it could, all members of the “future would not speak with one voice.”<sup>386</sup> It has even been suggested that future generations might not prefer the environment in the state it would be but for the actions of the present generation e.g. the pre-industrial environment. However, Gaba who takes this view concedes that life and health are the only preferences that could be uniform and universal among future generations. This concession in itself tends to defeat the argument that future generations should not be granted rights since we do not know their preferences. Our knowledge of certain standards, that must be maintained (to achieve the fundamental wellbeing of the human being) suffices for the purpose of inferring the preferences of future generations. Barry’s statement is instructive in this regard:

We don't know what the precise tastes of our remote descendants will be... [but] they are unlikely to include a desire for skin cancer, soil erosion, or the inundation of all low-lying areas as a result of the melting of the ice-caps. And, other things being equal, the interests of future generations cannot be harmed by our leaving them more choices rather than fewer.<sup>387</sup>

This goes back to the intergenerational equity duty to conserve the quality of the planet and not to leave the planet to future generations in a condition worse off than it was inherited.

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<sup>386</sup> Jeffrey M Gaba, “Environmental Ethics and Our Moral Relationship to Future Generations”, (1999) 24 Colum J Envtl L 249 at 260, 264.

<sup>387</sup> Lynda Collins, “The Doctrine of Intergenerational Equity in Global Environmental Governance”, LLM Thesis, University of British Columbia, 2006), online: <<https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0077603>> at 78 [Collins] citing k Brian Barry, “Justice Between Generations” in PMS Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977) at 274 & 275.

In view of some of the theoretical arguments above, it can be concluded that there are theoretical arguments that support the acceptance of human rights obligations towards future persons. The suggestion in this thesis (as mentioned in the preceding chapter) is that the right of future generations can be justified using the relational autonomy understanding of the human being in order to ensure that intertemporal dichotomies between generations are blurred. It is also important to bear in mind that theoretical justifications cannot be without counter arguments. Thus, there is need for translation of this right into practical terms. Unfortunately, this seems to be where the most difficulty lies.<sup>388</sup> It must be noted that the difficulties associated with protecting the right of future generations may not be as unsurmountable since some countries like Argentina, Norway, Qatar, Dominican Republic have started including provisions protecting future generations in their constitutions – thereby dispelling the notion that protecting the rights of future generations is a rather utopian idea.<sup>389</sup> In Africa, 22 out of the 54 countries have constitutional provisions protecting interests of future generations.<sup>390</sup> The practical difficulties associated with the granting of rights to future generations are examined in subsequent chapters of this thesis.

#### **4.4. The Importance of the Intergenerational Approach to the Human Rights Approach**

Climate change, human rights and international law regimes treat intergenerational equity as a guiding principle or at least as an aspirational principle forming the basis of the respective frameworks. It also appears that there is no conscious effort to recognise the intergenerational equity trajectory as an integral part of the human rights approach to climate change. The approach

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<sup>388</sup> Lewis, “Human Rights and Climate Change”, *supra* note 125 at 215.

<sup>389</sup> Inigo Gonzalez-Ricoy & Felipe Rey, “Enfranchising the future: Climate justice and the representation of future generations”, (2019) 10:5 *Wiley Interdisciplinary Reviews: Climate Change* 598 at 4.

<sup>390</sup> I undertook an examination of the constitutions in all 54 African Countries to arrive at this conclusion. The countries with constitutional provisions protecting the interests of future generations are South Africa, Kenya, Uganda, Algeria, Sudan, Angola, Mozambique, Madagascar, Cameroon, Niger, Malawi, Zimbabwe, Burundi, Tunisia, Egypt, South Sudan, Eritrea, Namibia, The Gambia, Lesotho, Eswatini, Ethiopia.

seems to detach both approaches. This is also evident from the dearth of literature addressing the interrelationship between both approaches. i.e. the human rights approach and intergenerational approach. The reason for this severance could be attributable to an understanding that human right norms are not suitable for intergenerational equity. John Knox, for instance, suggests that focusing on the right of the child and sustainable developments is a more practicable approach.<sup>391</sup> This study posits that there is a strong relationship between intergenerational equity and the human rights approaches to climate change, and that the relationship is one of complementarity and interdependence rather than mutual exclusivity. This part of the thesis therefore makes a case for a conscious recognition of intergenerational equity as part of the human rights approach by highlighting the benefits of the intergenerational equity perspective to the human rights approach and vice versa.

#### **4.4.1. Compatibility of Intergenerational Equity with the Human Rights Approach**

As indicated in the previous chapter, one of the elements of the human rights approach to climate change is its focus on protecting the human rights of vulnerable groups. The impact of climate change is not borne equally or fairly between the rich and the poor; women and men; the young, old, and future generations.<sup>392</sup> The discourse on the vulnerability of these groups therefore exposes the injustice of climate change impacts as well as the need for climate justice.<sup>393</sup> For future generations, climate injustice lies in the fact that they will bear the brunt of the impacts of current and past greenhouse gas emissions climate change despite not being responsible for such

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<sup>391</sup> John Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, UNHRCOR, 37<sup>th</sup> Sess, UN Doc A/HRC/37/58 (24 January 2018), para 67 [*Knox, Report 2018 No. 1*].

<sup>392</sup> UN, “Climate Action”, *UNSDG Blog* (31 May 2019), online: < <https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/>>.

<sup>393</sup> *Ibid.*

emissions.<sup>394</sup> Furthermore, “future generations will not enjoy the benefits which were generated by those greenhouse gas emissions, at least not directly.”<sup>395</sup>

As indicated by scientific studies, climate change will continue to negatively impact rights linked to climate change such as “the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self -determination, development and culture.”<sup>396</sup> This injustice to future generations is the intergenerational injustice dimension of climate injustice. Therefore, “there has been a growing focus on climate justice, which looks at the climate crisis through a human rights lens and on the belief that by working together we can create a better future for present and future generations.”<sup>397</sup> Climate justice adopts a human-rights approach in protecting the rights of the most vulnerable and to sharing the burdens and benefits of climate change equitably and fairly.<sup>398</sup> The human rights approach to climate change therefore presents a framework for the inclusion of intergenerational equity within the climate justice discourse. Essentially, the human rights approach proffers an answer to the question of how injustice to future generations “ought to be addressed and corrected by present generations.”<sup>399</sup> Conversely, since intergenerational equity sees the protection of intragenerational rights as a *sine qua non* for adequate protection of intergenerational rights, intergenerational equity provides an additional reason for the protection of the rights of the present generation.

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<sup>394</sup> Lewis, “Human Rights Duties” *supra* note 12 at 211.

<sup>395</sup> *Ibid.*

<sup>396</sup> OHCHR, “Our addiction to fossil fuels causes climate emergency, say human rights experts”, *OHCHR News* (17 September 2019), online: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25003&LangID=E>>.

<sup>397</sup> *Ibid.*

<sup>398</sup> Mary Robinson Foundation for Climate Justice, *Principles of Climate Justice* (MRFJ, 2018), online: <<https://www.mrfcj.org/wp-content/uploads/2015/09/Principles-of-Climate-Justice.pdf>>.

<sup>399</sup> Lewis, “Human Rights Duties”, *supra* note 12 at 207.

#### 4.4.2. Intergenerational Equity Deemphasizes Presentism

Within the context of the rights of future generations, presentism<sup>400</sup> is the view that the preferences of the present generation should play a dominant role in the formulation and evaluation of public policies.<sup>401</sup> It involves decision-making without considering the effects of such decisions on future generations. The human rights framework typically involves identification of violations, perpetrators and victims, and therefore has an overarching focus on the rights of the people who are in existence.<sup>402</sup> The human rights regime is largely premised on presentism. This bias towards presentism is also evident in the traditional human rights theories (earlier discussed in chapter three) and in climate action policies, science, and projections which “generally go only as far as the year 2100.”<sup>403</sup> It is important to note however the philosophy behind presentism does not preclude the consideration of the rights of future generations – the emphasis is that such consideration must be on the basis of altruism and goodwill, rather than on the basis of obligation.<sup>404</sup>

An emphasis on the human right approach without the intergenerational component tends to limit the focus of climate action to specific instances and threats of human rights violations to persons already suffering or likely to suffer harm from climate change, while neglecting the human rights implications of climate change for future generation – it is easier to demonstrate human rights violations where loss from climate change has occurred or is imminent to a certain

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<sup>400</sup> Presentism here is used in the sense of ‘political presentism,’ and not ‘historical presentism.’ See Dennis F Thompson, “Representing future generations: political presentism and democratic trusteeship”, (2010) 13:1 *Critical Review of International and Political Philosophy* 17; contrast with discussions on historical presentism in Alexandra Walsham, “Introduction: Past and ... Presentism” (2017) 234:1 *Past & Present* 213–217.

<sup>401</sup> Richard B Howarth, “Intergenerational Justice” in John S Dryzek, Richard B Norgaard & David Schlosberg, eds, *The Oxford Handbook of Climate Change and Society* (New York: Oxford, 2011) at 338 [Howarth].

<sup>402</sup> Marcus Düwell & Gerhard Bos, “Human rights and future people – Possibilities of argumentation”, (2016) 15:2 *J of Human Rights*, 231-250 at 232 [Düwell].

<sup>403</sup> Trencher, *supra* note 73.

<sup>404</sup> Howarth, *supra* note 401 at 340.

population, than with respect to unborn persons whose identities and numbers are indefinite. Therefore, the human rights narrative of climate change does not on its own “convey the full enormity of the climate crisis”<sup>405</sup> since it does not look at the rights of future generations, hence the need for intergenerational equity.

The intergenerational equity approach therefore transcends the existence or likelihood of a human right violation since it focuses on the rights of future generations who will bear the brunt of climate change. Intergenerational equity adopts a utilitarianist approach in the sense that it posits “that equal weight be attached to the welfare or rights of both present and future human beings.”<sup>406</sup>

#### **4.4.3. The Importance of the Rights-Based Children and Youth Perspectives**

As discussed in the previous chapter, children are one of the groups disproportionately affected by climate change, hence the relevance of the children and young persons narrative within the human rights approach to climate change.<sup>407</sup> The point has also been made that there is a presentist approach within the human rights regime which has occasioned a seeming dichotomy between the rights of the present generation and those of future generations. The perspective of children and youth within the human rights approach can be of immense importance in blurring the lines between the rights of present generations and the rights of future generations, since children and young persons are the bridge between the present generations and future generations.

As Knox puts it:

Many people that will be living in 2100 are not yet born, and in that sense truly belong to future generations. But many people who will be living then are already alive

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<sup>405</sup> Nicole Rogers, *Law, Fiction and Activism in a time of Climate Change*, (New York/Oxford: Routledge, 2020) at 33 [Rogers].

<sup>406</sup> Howarth, *supra* note 401 at 338.

<sup>407</sup> Fabian Schuppert, “Climate change and intergenerational justice” in UNICEF Office of Research, *The Challenges of Climate Change: Children on the front line*, (Florence, Italy: UNICEF Office of Research, 2014) online:<[https://www.unicef-irc.org/publications/pdf/ccc\\_final\\_2014.pdf](https://www.unicef-irc.org/publications/pdf/ccc_final_2014.pdf)> at 56 & 57.



today...[T]he line between future generations and today's children shifts every time another baby arrives and inherits their full entitlement of human rights. It is critical, therefore, that discussions of future generations take into account the rights of the children who are constantly arriving, or have already arrived, on this planet. We do not need to look far to see the people whose future lives will be affected by our actions today. They are already here.<sup>408</sup>

Although Knox acknowledges the difficulty in protecting the rights of future generations,<sup>409</sup> he highlights the fact that the rights of future generations may not be as 'futuristic' as many perceive them to be, thereby strengthening the view that the rights of future generations ought to be protected alongside the rights of the present generation. The rights of the child perspective is therefore an important part of the conversation on intergenerational equity as highlighted by Knox.

The importance of the children and youth perspective has been highlighted by the growing number of rights-based climate lawsuits instituted by or on behalf of children and young persons. These lawsuits are typically not only based on human rights violations but also on intergenerational equity. The framing of climate change is integral to the way it is perceived, which perspective can be influenced by the narrative put forward.<sup>410</sup> It has been suggested that litigation presents an excellent medium for reframing climate change and overcoming "some of the public's cognitive hurdles to perceiving the true dangers of climate change."<sup>411</sup> According to Rogers, "[i]n the climate lawsuits instituted by children and youth, we hear the authentic voices of the children as they turn to adult forums to safeguard their own future."<sup>412</sup> The fact that children and young persons are rising to the challenge of fighting for their own rights highlights the failure by adults to protect the rights of children, who are not only fighting for themselves but for future generations. The young

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<sup>408</sup> Knox, Report 2018 No 1, *supra* note 391 para 68.

<sup>409</sup> *Ibid.*, para 67.

<sup>410</sup> Grace Nosek, "Climate change litigation and narrative: how to use litigation to tell compelling climate stories", (2018) 42:3 *William & Mary Env'tl L & Pol'y Rev* 733.

<sup>411</sup> *Ibid.*

<sup>412</sup> Rogers, *supra* note 405 at 64.

ages of children and young climate litigants particularly have a strong potential to make for more compelling cases.<sup>413</sup> Since intergenerational equity finds expression within these human rights climate cases by children and young persons, these cases are viable avenues for protecting the rights of future generations. Intergenerational equity therefore stands to benefit from the children and youth perspectives of the human rights approach to climate change.

#### **4.4.4. Provision of Justification for the Right to a Healthy Environment**

As indicated in the previous chapter, there are questions regarding the justification of the right to a healthy environment for reasons other than its instrumentality to ensuring the full enjoyment of other human rights such as the rights to life, health, and other rights. These queries are borne out of the traditional understanding of the human rights regime. The answer to these queries may, on some level, lie within the principle of intergenerational equity, which may provide some justification for the recognition of the right to a healthy environment.

Lewis identifies the potential of justifying the right to a healthy environment on the basis that future generations have an interest in “having the environment preserved for them, so that they might enjoy the same benefits of access and use that we have enjoyed.”<sup>414</sup> Lewis acknowledges that there is a duty by the present generations to protect the environment for the benefit of future generations,<sup>415</sup> but concludes that the justification of the right to a healthy environment using the rights of future generations is impossible because the rights of future generations to a healthy environment “do not create a new right to a good environment for future generations, any more

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<sup>413</sup> *Ibid.*

<sup>414</sup> Lewis “Human Rights and Climate Change”, *supra* note 125 at 114 & 115.

<sup>415</sup> *Ibid* at 115; Lewis, “Human Right Duties”, *supra* note 12 at 218.

than our present interests in enjoying clean water, adequate food and good health create that right for people living today.”<sup>416</sup>

The view in this thesis is that Lewis’ conclusion (on the impossibility of employing the rights of future generations as a justification for the right to a healthy environment), if examined with an intergenerational equity lens, seems like an oversimplified notion of the rights of future generations. Lewis’ view does not seem to consider the three principles that give rise to the duties and rights within the intergenerational equity theory i.e. conservation of options, conservation of access and conservation of quality. While *conservation of quality* may involve references to other human rights such as life, health, housing, and other rights, obligations arising from *conservation of options* and access cannot, to a large extent, be said to be dependent on or instrumental to achieving other rights. An argument that may arise with respect to *options and access* is that both principles seek to achieve equality between generations and can therefore be said to be aimed at achieving the right to equality. However, this is merely coincidental with the very essence of intergenerational equity which is to achieve equality between generations.

Again, a relational account of intergenerational justice based on the feminist theory of relational autonomy becomes important in addressing theoretical questions regarding the lack of individuality among future generations and their inability to exercise control i.e. make direct input to the decisions made for their benefit. This relational perspective on intergenerational equity “demands that we solicit diverse past and contemporary perspectives on futurity, and take these seriously in defining our obligations to future persons and communities.”<sup>417</sup> On the question of individuality, the relational theory posits “that interests, aspirations, and capacities are both forged

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<sup>416</sup> *Ibid.*

<sup>417</sup> Jessica Eisen, Roxanne Mykitiuk, & Dayna Scott, “Constituting Bodies into the Future: Toward a Relational Theory of Intergenerational Justice” (2018) 51:1 *UBC L Rev*, online (PDF): <[http://digitalcommons.osgoode.yorku.ca/scholarly\\_works/2694](http://digitalcommons.osgoode.yorku.ca/scholarly_works/2694)> at 37.

in relation to other persons, and realized through relations with other persons;”<sup>418</sup> thereby obviating the need to establish the individuality of future generations, especially since their interests can be realized through other people.

Although the above theories are subject to critique, there is no doubt that intergenerational equity provides a valuable theoretical perspective regarding the need for the right to a healthy environment.

#### **4.4.5. A Solution to the Imprecision and Fluidity of the Concept of Sustainable Development**

Sustainable development is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>419</sup> This definition is demonstrative of the fact that intergenerational equity is one of the underlying principles of sustainable development. Sustainable development should therefore be a tool for achieving intergenerational equity. However, the concept of sustainability has been found to be too “vague”<sup>420</sup> and “polysemous”,<sup>421</sup> and as a result has been interpreted in different ways: as a set of guiding criteria for human action, as a goal of humankind, and it has even been interpreted as permitting exploitation and the production of fossil fuels.<sup>422</sup> This ambiguity is occasioned by the

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<sup>418</sup> *Ibid* at 26.

<sup>419</sup> Brundtland Report, *supra* note 310, chapter 2 para 1.

<sup>420</sup> Alhaji B.M. Marong, "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development" (2003) 16 *Geo. Int'l Env'tl. L. Rev.* 21 at 44.

<sup>421</sup> Salas-Zapata, Walter Alfredo A., and Sara Milena M. Ortiz-Muñoz. "Analysis of Meanings of the Concept of Sustainability." (2019) 27:1 *Sustainable Development* 153.

<sup>422</sup> Lynda Collins, *The Doctrine of Intergenerational Equity in Global Environmental Governance*, LLM Thesis, University of British Columbia, (2006), online: <<https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0077603>> at 78 *citing* Ismail Serageldin, “Sustainability and the Wealth of Nations: First Steps in an Ongoing Journey, Draft Paper Sept. 30, 1995” at 9-10, *World Bank's Third Annual Conference on Environmentally Sustainable Development, Washington, D.C., Oct. 1995* (Washington, D.C.: World Bank, 1996).

goal of sustainable development which is to strike a balance between maintaining “economic advancement and progress” and “protecting the long-term value of the environment.”<sup>423</sup>

Although the UN recognized the importance of human rights to sustainable development through the adoption of the 2030 Agenda for Sustainable Development,<sup>424</sup> there is still a lot of ambiguity. Questions with regard to intergenerational equity such as questions regarding the meaning of future generations, the nature of the relationship between present and future generations, the duties and obligations of the present generation, and the specific rights of future generations, still remain unanswered. As a matter of fact, references to future generations are very sparse within the 2030 Agenda.<sup>425</sup> Furthermore, the sustainable development framework is not framed in rights and obligations language and is devoid of enforcement mechanisms. Even the reference to “rights and equity” as the basis for the sustainable development goals speaks exclusively to the rights of the present generation.<sup>426</sup> Thus, the sustainable development framework does not sufficiently cater for the interests of future generations. While it is understood that the sustainable development principle is in the realm of soft law, the human rights framework has been identified as a tool through which the SDGs could be achieved. The SDGs themselves reference international human right law.<sup>427</sup> However, the human rights framework answers questions regarding the nuances of protecting the interests of future generations. For the human rights framework to be effective as a tool for sustainable development, intergenerational equity has to

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<sup>423</sup> Rachel Emas, “The Concept of Sustainable Development: Definition and Defining Principles”, Brief for Global Sustainable Development Report 2015 Florida International University, online: [https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015\\_SD\\_concept\\_definiton\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definiton_rev.pdf).

<sup>424</sup> *UNSDGs*, *supra* note 2.

<sup>425</sup> While there is no mention of “intergenerational equity” in the document, the term “future generations” is used only thrice in the document. Although references to these terms need not be, it is the view in this thesis that there are not sufficient references generally whether express or implied. Explicit. *See* Otto Spijkers, “Intergenerational Equity and the Sustainable Development Goals”, (2018) 10:11 *Sustainability MDPI* 3836-3848 at 3845.

<sup>426</sup> *Ibid* at 3846.

<sup>427</sup> *UNSDGs*, *supra* note 2. The concept of sustainable development should integrate human rights. *See* David VanderZwaag, “The Concept and Principles of Sustainable Development: ‘rio-formulating’ Common Law Doctrines and Environmental Laws.” (1993) 12 *Windsor Yearbook of Access to Justice* 80.

form an integral part because it will bring clarity to the ambiguities regarding the interests of future generation within the sustainable development framework.

#### **4.5. Summary**

There are references to intergenerational equity in international law instruments, albeit in preambular provisions. There are several theoretical questions on the grant of rights to future generations. However, these theoretical questions are not unanswerable. The principle of intergenerational equity is an important piece for the advancement of the human rights approach to climate change.

## Chapter Five: Analysis of Decisions of Courts on Human Rights-Based Climate Cases

This chapter undertakes a case-by-case analysis of the human rights-based decisions by examining the arguments put forward in each of these cases and the decisions of the courts in the cases. The chapter highlights the components and roles of the right to a healthy environment and intergenerational equity in each of these cases. The chapter first examines the cases where the plaintiffs' claims are granted, and thereafter those where the court refused the claims of the plaintiffs.

There appears not to be generally accepted criteria to determine if a climate case qualifies as a human rights climate change case. For the purpose of the thesis, cases categorised as human rights cases were found in the Sabin Center for Climate Change Law database.<sup>428</sup> These cases classified as human rights-based cases in the Sabin Centre database are cases where plaintiffs argue that failure of government to reduce GHG emissions violates their human rights. Thus, this thesis relies on the cases classified as human rights-based climate cases by the Sabin Center.<sup>429</sup> The cases examined in this chapter are those available in the database as of June 2020. Thus, some of the cases are still pending while other could still be appealed. Some of the decisions are unavailable in English, thus reliance is placed on unofficial translations. The focus of the analysis of these cases is on the decision of the court, and in some cases, arguments put forward by plaintiffs and defendants. Cases which are filed but are yet to be decided are not discussed in this chapter but are mentioned in chapter six.<sup>430</sup>

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<sup>428</sup> For cases, see Sabin Center for Climate Change Law, "Climate Change Litigation Databases", online: <[climatecasechart.com/non-us-case-category/human-rights/](http://climatecasechart.com/non-us-case-category/human-rights/)>.

<sup>429</sup> *Ibid.*

<sup>430</sup> See footnote 569 below.

## 5.1. Decisions where Plaintiffs' claims were granted

### 5.1.1. Urgenda Foundation v. State of the Netherlands<sup>431</sup>

Urgenda, a foundation established to stimulate and accelerate the transition processes to a more sustainable society, instituted this suit for itself and on behalf of 886 citizens alleging that the Netherlands climate policy target of reducing GHG emissions to 14 - 17% below 1990 levels by 2020 is insufficient to meet its commitment to a 30% GHG emissions reduction by 2020 compared to 1990 levels,<sup>432</sup> insufficient to maintain global temperature below 2°C, and will lead to catastrophic consequences. Urgenda argued that the failure by the Netherlands to adequately limit GHG emissions violates the Dutch citizens' rights to life as well as respect for private and family life under the ECHR,<sup>433</sup> and amounts to a breach of its duty to "keep the country habitable and to protect and improve the environment."<sup>434</sup> Urgenda sought to protect the rights of both current and future generations of Dutch citizens as well as globally. The Netherlands argued that Urgenda has no cause of action since it seeks to defend rights and interests of citizens of other countries, and that there is no real threat of unlawful acts by the Netherlands against Urgenda. The Netherlands further argued that it is on course to achieve the global goal of limiting the temperature to 2°C but has no legal obligations to take measures to achieve the targets stated by Urgenda; and

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<sup>431</sup> *Urgenda Foundation v State of the Netherlands*, [2015] HAZA 13-1396, ECLI: NL: RBDHA: 2015: 7196 (Hague District Court), C/09/00456689; *State of the Netherlands v Urgenda Foundation*, 200.178.245/01, ECLI:NL:GHDHA:2018:2610 (Court of Appeal); *State of the Netherlands v Urgenda Foundation*, 19/00135, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands). English translations of decisions available online: <<http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>>.

<sup>432</sup> The commitment is in line with the EU's global commitment towards GHG emissions reduction, and was stated in the Netherlands government policy "New energy for the climate Work Programme of the Clean and Sustainable Project", see Government of the Netherlands, "Nieuwe energie voor het klimaat: Werkprogramma Schoon En Zuinig", (2007), online (pdf): < <https://europadecentraal.nl/wp-content/uploads/2013/01/Werkprogramma-Schoon-en-Zuinig.pdf>>.

<sup>433</sup> ECHR, art 2 and art 8.

<sup>434</sup> Art 21, *The Constitution of the Kingdom of the Netherlands*.



that the suit was asking the court to interfere with the State's discretionary power contrary to the doctrine of separation of powers.

**Decision of the Court:** The Hague District Court found that the reduction target of 14-17% is below the standard necessary for keeping global temperature below 2°C as established by international science as well as international climate policy, and therefore ordered the Netherlands to “reduce greenhouse gas emissions by 25-40% by 2020 to realise the 2°C target.”<sup>435</sup> The Court also found that the Netherlands is in breach of its constitutional duty to protect the environment.<sup>436</sup> With respect to the argument on separation of powers, the court stated that Urgenda's claims if allowed will not interfere with the State's power to take legislative or policy measures to determine how to comply with the order, especially since the State was not arguing that it is incapable of executing the order.<sup>437</sup> While the Court held that Urgenda could bring the action on its own behalf, the question of Urgenda's standing in respect of the 886 principals was left unanswered, since Urgenda's capacity was enough to maintain the suit.<sup>438</sup>

The Court also noted that although Urgenda could not directly rely on international climate instruments as the obligation arising therefrom is between states, Urgenda could rely on the national standards set by the Netherlands. The Court held that the concept of sustainability has intergenerational dimensions and criss-crosses territorial boundaries, as such Urgenda could sue on behalf of future generations of Dutch citizens. The Court however took the view that it is unnecessary to allude to the rights of current and future generations of other countries since Urgenda's standing in respect of current and future generations of Dutch citizens suffices to sustain

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<sup>435</sup> *Urgenda (Hague District Court)*, para 4.31.]

<sup>436</sup> *Ibid.*, para 4.83 & 4.84.

<sup>437</sup> *Ibid.*, para 4.101.

<sup>438</sup> *Ibid.*, para 4.109.

the suit.<sup>439</sup> The Netherlands appealed the decision to the Court of Appeal, while Urgenda cross appealed the portion of the decision by the lower Court that Urgenda could not claim breach of the rights to life and private/family life. The Court of Appeal dismissed the appeal, allowed Urgenda's cross-appeal and upheld the rest of the decision of the Hague District Court.<sup>440</sup>

**Intergenerational equity:** Urgenda sought to protect the interests of current and future generations of Dutch citizens as well as those of other countries. While conceding that Urgenda has standing to act on behalf of the current generations of Dutch citizens, the Netherlands deferred to the Court's opinion on the question of Urgenda's standing on behalf of future generations of Dutch citizens. The Court held that interests of future generations could be defended in line with the principle of sustainable development which Urgenda seeks to protect as one of its objectives as an organisation.<sup>441</sup> The Court therefore stated that the Netherlands has a duty towards addressing the climate injustice between current and future generations.<sup>442</sup> Although foundations such as Urgenda are permitted to commence law suits under Dutch Law, it would seem that the Court may not have granted Urgenda standing in respect of future generations if protection of the rights of future generations could not be inferred from the objectives in Urgenda's articles of association.<sup>443</sup> This is because under Dutch law, foundations can only bring a legal claims by way of collective action in respect of specific interests the foundation seeks to protect as stated in its articles of association.

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<sup>439</sup> *Ibid*, para 4.92.

<sup>440</sup> *Urgenda, (Court of Appeal)*, para 36.

<sup>441</sup> *Urgenda (Hague District Court)*, paras 4.7 – 4.8.

<sup>442</sup> *Ibid*, para 4.76.

<sup>443</sup> *Dutch Civil Code*, book 3, section 305a; See Roger Cox, "A Climate Change Litigation Precident: Urgenda Foundation v The State of the Netherlands", (2015) Centre for International Governance Innovation Papers No 79, online (pdf): <[https://www.cigionline.org/sites/default/files/cigi\\_paper\\_79.pdf](https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf)>.

**The right to a healthy environment:** The Court agreed with the submissions by Urgenda that the failure by the Netherlands to adequately reduce GHG emissions is a violation of its constitutional duty to protect the environment and ensure that the country is in habitable condition. In the absence of an express right to a healthy environment in the ECHR, the Court also decided that the right to life is violated where “certain activities endangering the environment are so dangerous that they also endanger human life.”<sup>444</sup> The lower Court also took the view that environmental degradation violates the right to respect for private and family life (articles 2 & 8).<sup>445</sup> However, the lower Court decided that Urgenda, not being a natural person, cannot allege breach of its rights to life and to respect of private and family life as “a legal person’s physical integrity cannot be violated nor can a legal person’s privacy be interfered with.”<sup>446</sup> This decision of the Court regarding the inability of Urgenda to claim a violation of the rights to life and family life was overturned by the Court of Appeal, which decided that Urgenda can rely on Articles 2 & 8 because the restriction by article 34 ECHR<sup>447</sup> only applies to the ECtHR and not domestic courts and tribunals.<sup>448</sup> This decision was also upheld by the Supreme Court of the Netherlands in 2019.<sup>449</sup>

### **5.1.2. Leghari v. Federation of Pakistan<sup>450</sup>**

This action was instituted at the Lahore High Court by a Pakistani farmer against the government of Pakistan alleging that the Government has failed to implement the national climate

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<sup>444</sup> *Ibid*, para 4.49.

<sup>445</sup> *Ibid*, para 4.50.

<sup>446</sup> *Ibid*, para 4.45.

<sup>447</sup> By article 4 of the ECHR, public interest actions cannot be brought as individuals must show violation peculiar to them.

<sup>448</sup> The Court of Appeal relied on the provision of Book 3: Art 305a, Dutch Civil Code which vests foundations and associations with the capacity to protect individual interests through class actions.

<sup>449</sup> *Urgenda, Supreme Court, supra* note 431.

<sup>450</sup> (2015) W.P. No. 25501/2015, Lahore High Court, Pakistan [*Leghari*]

policies,<sup>451</sup> and that this failure amounts to a violation of his fundamental rights to life and to dignity of the human person.<sup>452</sup> The petitioner argued that “international environmental principles [just] like the doctrine of public trust, sustainable development, precautionary principle and intergenerational equity form part of the abovementioned fundamental rights [life and dignity] also stand offended.”<sup>453</sup> According to the petitioner, the most urgent threat of climate change in Pakistan is unavailability of water, food and energy security.<sup>454</sup>

**Decision of the Court:** The Court agreed with the submissions of the petitioner and constituted a standing committee on climate change which will ensure that the national policies are implemented and to provide the court with periodic updates. In 2018, a report was submitted to the Court which indicated that between the time of the decision<sup>455</sup> to January 2017, 66 percent of the measures contained in the national policy had been implemented. The Court acknowledged a shift in environmental protection paradigm from *environmental justice* to *climate justice*. While the former involves issues such as air pollution, urban planning, water scarcity, deforestation;<sup>456</sup> the latter “links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly.”<sup>457</sup>

**Intergenerational equity:** Apart from general comments by the court to the effect that intergenerational equity is an interpretative aid to the constitutional provisions protecting the rights

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<sup>451</sup> Government of Pakistan, Ministry of Climate Change, “National Climate Change Policy” (2012); and Government of Pakistan, Climate Change Division, “Framework for Implementation of Climate Change Policy: (2014-2030)” (2013).

<sup>452</sup> *Pakistani Constitution*, articles 9 & 14.

<sup>453</sup> *Leghari*, para 3.

<sup>454</sup> *Ibid*, para 10.

<sup>455</sup> September 2015

<sup>456</sup> *Leghari*, para 20.

<sup>457</sup> *Ibid*, para 21.

to life and human dignity,<sup>458</sup> the court made no comments on intergenerational equity or the rights of future generations.

**Right to a healthy environment:** The Court held that the rights to life includes the right to a healthy and clean environment. The entirety of the suit was treated by the Court as a writ of *kalikasan* (a legal remedy designed for the protection of one's constitutional right to a healthy environment).<sup>459</sup> The court held that the right to water is inextricably linked to the environment, land and other ecosystems.

### 5.1.3. In re Court on its own motion v. State of Himachal Pradesh<sup>460</sup>

India's National Green Tribunal (NGT)<sup>461</sup> on its own motion<sup>462</sup> petitioned the State of Himachal Pradesh in India over black carbon emissions caused by a surge in vehicular activities around the *Rohtang Pass* (an extremely busy mountain pass for tourists), which resulted in rapid melting of glaciers, blackening and browning of snow cover in mountains, emissions of unburnt hydrocarbon/carbon soot and other damage to the environment, biodiversity and the climate.

**Decision:** The NGT further made a finding that this damage to the environment violates the right to a clean and decent environment as well as the right to life. Ultimately, the NGT ordered the State Government of Himachal Pradesh to take steps to address the pollution issue including

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<sup>458</sup> *Ibid*, para 12.

<sup>459</sup> *Leghari*, para 4.

<sup>460</sup> In re Court on its own motion v. State of Himachal Pradesh and others, 2013 (CWPIIL No. 15 of 2010) [*Himachal Pradesh*].

<sup>461</sup> An environmental tribunal vested with jurisdiction to hear environmental cases arising from several environmental statutes in India to the exclusion of the high courts & other courts of first instance. See *The National Green Tribunal Act, 2010*, (India) Act No 19 of 2010, s 14, online: <[https://greentribunal.gov.in/sites/default/files/act\\_rules/National\\_Green\\_Tribunal\\_Act,\\_2010.pdf](https://greentribunal.gov.in/sites/default/files/act_rules/National_Green_Tribunal_Act,_2010.pdf)>.

<sup>462</sup> The NGT has been known to initiate *suo motu* proceedings in several instances, although this power is not expressly stated in *NGT Act*. See Gitanjali Nain Gill, "Environmental Justice in India: The National Green Tribunal and Expert Members", (2016) 5:1 *Transnational Environmental Law* 175 at 197&198, online: <[https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2E26B50742FFB8BB743557132DC7DD66/S2047102515000278a.pdf/environmental\\_justice\\_in\\_india\\_the\\_national\\_green\\_tribunal\\_and\\_expert\\_members.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2E26B50742FFB8BB743557132DC7DD66/S2047102515000278a.pdf/environmental_justice_in_india_the_national_green_tribunal_and_expert_members.pdf)>.

embarking on massive reforestation programs, application of Green Tax Funds sourced from tourists and travellers<sup>463</sup> towards pollution control and development of an ecologically friendly market, regular pollution checks, restriction of transport means in certain areas to green transport (such as electric vehicles), banning of vehicles older than 15 years old, and providing periodic updates to the NGT, among other directives.

**Right to a Healthy Environment:** the court had found that although the obligation of the state to protect the environment<sup>464</sup> is not justiciable as it forms part of the Directive Principles of State Policy,<sup>465</sup> the NGT interpreted the right to a clean and decent environment to be an essential component of the right to life by stating that “the right to life is a right to live with dignity, safety and in a clean environment.”<sup>466</sup>

**Intergenerational Equity:** The NGT made some sparse reference to intergenerational equity by stating that government development agencies while reaching decisions ought to consider “the obligation of the present generation to preserve natural resource and pass on to future generations an environment as intact as the one we inherited from the previous generation;”<sup>467</sup> and that the principle of intergenerational equity is an integral part of the right to life. It is important to observe that the references to intergenerational equity do not form part of the NGT’s *ratio decidendi*,<sup>468</sup> but are mere *obiter dicta*.

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<sup>463</sup> In line with the polluter pays principle.

<sup>464</sup> *Constitution of India, 1949*, Art 48A

<sup>465</sup> *Constitution of India, 1949*, s 37.

<sup>466</sup> *Himachal Pradesh*, para 16.

<sup>467</sup> *Himachal Pradesh*, para 16.

<sup>468</sup> The reason(s) for a court/tribunal’s decision.

#### 5.1.4. Supreme Court of Mexico Ruling on Modification to Ethanol Fuel Rule<sup>469</sup>

In 2017, Mexico's Energy Regulatory Commission (CRE) amended the specifications for the components of petroleum products to permit a maximum 10% ethanol in gasoline,<sup>470</sup> thereby increasing the pre-existing 5.8% blend level nationwide, excluding the three most populous cities. However, an environmentalist<sup>471</sup> sued the CRE, arguing that the increase in the amount of ethanol in gasoline is harmful to air quality and the environment.

**Decision:** The Supreme Court of Mexico declared the regulation, which permitted an increase in ethanol content in gasoline, invalid on the basis that the CRE failed to evaluate the environmental and scientific impact of increasing ethanol in gasoline (precautionary principle); to engage the public in reaching the decision to increase ethanol; to analyse the standards against Mexico's international climate commitments under the Paris Agreement; and to consider the effects of the increased ethanol on the human right to a healthy environment. The court however gave producers, who produce or sell 10% ethanol blends, 180 days to sell their products before the ruling comes into effect. Thus, the ruling banning gasoline containing above 5.8% ethanol takes effect in July 2020. The Court relied on several international instruments including the Paris Agreement, Rio Declaration, the Stockholm declaration, the Bali Guidelines, and Special Rapporteur reports linking climate change to human rights violations. The Court acknowledged the impacts of climate change to the rights to life, well-being, health, food, water and the right to a healthy environment all guaranteed in the Mexican Constitution.

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<sup>469</sup> *Ruling of the Supreme Court of Mexico on Modification to Ethanol in Fuel*, amparo in revision 610/2019 (delivered on 22 January 2020). Summary adapted from unofficial google translation of the original summary written in Spanish available online: < [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200122\\_6102019\\_opinion-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200122_6102019_opinion-1.pdf)>.

<sup>470</sup> Although ethanol is understood to be environment-friendly, the argument in this case was that higher levels of ethanol would increase potential for higher levels of pollution and increased greenhouse gas emissions.

<sup>471</sup> Gabriel Quadri, a former presidential candidate in Mexico. See Edgard Gariddo, "Mexico court temporarily blocks higher ethanol in gasoline -activist", (9 February 2017) *Reuters*, online: <[www.reuters.com/article/us-mexico-ethanol/mexico-court-temporarily-blocks-higher-ethanol-in-gasoline-activist-idUSKCN1BP0DI](http://www.reuters.com/article/us-mexico-ethanol/mexico-court-temporarily-blocks-higher-ethanol-in-gasoline-activist-idUSKCN1BP0DI)>.

**Right to a healthy environment:** The Court interpreted the right to a healthy environment which is guaranteed by Mexico's Constitution<sup>472</sup> as embodying the duties to consider the precautionary principle and the right of public participation in environmental decision-making.

**Intergenerational equity component:** Although intergenerational equity does not form the core basis of the decision, the court acknowledged the intergenerational dimensions of the right to a healthy environment as well as the precautionary principle. The Court stated that both concepts do not only encompass consideration of short-term and/or medium-term environmental problems, but also include long-term issues and are linked to the well-being of future generations, hence the need for protection of the environment for present and future generations.

#### **5.1.5. Future Generations v Ministry of the Environment<sup>473</sup>**

A group of 25 children and young persons between the ages of 7 and 25 filed this action against the government of Colombia alongside municipalities and government corporations alleging that the government has failed in its commitment under the Paris Agreement and domestic law<sup>474</sup> to reduce GHG emissions and “to reduce the net deforestation to zero in the Colombian Amazon by 2020.”<sup>475</sup> The plaintiffs argued that despite these obligations on the government, deforestation has continued to be on the rise<sup>476</sup> and that the failure by the government to adopt

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<sup>472</sup> Mexico, *Constitution of the United Mexican States, 1917 (as amended)*, (Washington: Pan American Union, 1961), art 4.

<sup>473</sup> STC4360-2018 Number: 11001-22-03-000-2018-00319-01 (original decision in Spanish). What is used in this thesis is the “Unofficial Translation of Excerpts from the Supreme Court Decision” provided by Climate Case Chart, online: < <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>>. [*Future Generations*]; The lower court had ruled against the plaintiffs before this action was filed by way of an appeal before the Supreme Court of Columbia.

<sup>474</sup> *Colombia: Law 1753 of 2015 by which the National Development Plan 2014-2018 "All for a new country" is issued* [Colombia], 9 June 2015, online: <<https://www.refworld.org/docid/5a8411d4317.html>>.

<sup>475</sup> *Future Generations*, at 1.

<sup>476</sup> Deforestation increased by 44% in 2016 from the figure reported in 2015, out of which more than one-third occurred in the Amazon. See *ibid*, para 2.3.



appropriate measures to reduce deforestation has severe implications for the Amazon as well as the country as a whole, and constitutes a violation of their rights as well as those of future generations. The plaintiffs submitted that the absence of “appropriate measures to deal with... [the situation] has dire consequences for the places of their residence, alternating [i.e. affecting] their living conditions, and cutting off the possibility of enjoying a healthy environment.”<sup>477</sup>

**Decision:** The Court in its decision agreed with the plaintiffs and found that the deforestation of the Amazon would increase GHG emissions and the global warming impacts thereof, damage/limit the water resources of the populace, and ultimately violate the plaintiffs’ rights to life, health and a healthy environment. Consequently, the Court ordered the federal government, the other tiers of government as well as the public corporations to respectively develop strategies, action plans, and policies towards reducing deforestation rate to zero and tackling climate change more broadly.

**Intergenerational equity component:** The Court undertook a full-on analysis of the principle of intergenerational equity and this formed the *ratio decidendi* of the court in this case. The Court took the view that a healthy environment is a sine qua non for the protection of the rights of not just children, but of future generations.<sup>478</sup> The Court held that protection of fundamental rights entails protection of not just the individual but of non-human species as well as future generations. The Court further stated that the scientific climate forecasts indicate that future generations will be directly affected unless the deforestation rate is reduced to zero. According to the Court, “the environmental rights of future generations are based on the (i) ethical duty of the solidarity of the species and (ii) on the intrinsic value of nature.” With respect to the ethical duty, the Court referred to future generations as “tributaries, recipients and owners” of the

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<sup>477</sup> *Ibid.*, at para 2.5.

<sup>478</sup> *Ibid.*, at 13.

planet “who do not yet have physical hold of [it].”<sup>479</sup> Notably the court ordered “the construction of an intergenerational pact for the life of the Colombian Amazon to adopt measures[,] aimed at reducing deforestation to zero and greenhouse gas emissions [and which] has national, regional, and local implementation strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation.”<sup>480</sup>

**The right to a healthy environment:** The Supreme Court recognized that “that the fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem”.<sup>481</sup> Regarding the intrinsic value of nature, the court takes an ‘ecocentric-anthropic’<sup>482</sup> view of the human being which sees the environment as part and parcel of the human being as opposed to the traditional anthropocentric system which sees the human being as different from the environment.<sup>483</sup> This approach by the court is somewhat in line with the relational feminist theory discussed in the preceding chapters of this thesis. The Court acknowledged the existence of “a binding relationship regarding the environmental rights of future generations”.<sup>484</sup> The Supreme Court therefore declared that the Colombian Amazon accordingly was entitled to protection, conservation, maintenance, and restoration.

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<sup>479</sup> *Ibid*, at p 20.

<sup>480</sup> *Ibid*, at p 49.

<sup>481</sup> *Ibid*, at p 13.

<sup>482</sup> *Ibid*, at p 20.

<sup>483</sup> It is important to note that the ecocentric-anthropic perspective to understanding the environment forms part of the environmental law jurisprudence in Columbia, as the court made references to several earlier decisions in which this ecocentric-anthropic approach was endorsed. See *Ibid*, para 5.1.

<sup>484</sup> *Ibid*, at p 21.

### 5.1.6. **Gbemre v. Shell Petroleum Development Company of Nigeria Ltd.**<sup>485</sup>

This is the decision of the Federal High Court of Nigeria where the Applicant challenged the continuous gas flaring by a multinational petroleum company (Shell) in the course of the latter's oil exploration and production activities in the Applicant's community on the ground that the activities amounted to a gross violation of the constitutionally guaranteed rights to life and dignity of the human person<sup>486</sup> and the rights to health, to a general satisfactory environment favourable for development, and to respect for life and integrity protected by the African Charter.<sup>487</sup> The applicant argued that the aforementioned rights necessarily include the right to a clean, poison-free, pollution-free and healthy environment. The applicant argued that the gas flaring by Shell occasions many hazards including pollution of the environment and contribution to climate change.<sup>488</sup>

The Court in its judgment agreed with the applicant and held that the continued flaring of gas by Shell constitutes a violation of the rights of the applicant's community to life (which includes the right to a healthy environment) and to dignity of the human person.

**Right to a healthy environment:** The Court decided that the rights to life and dignity of the human person inevitably include the rights to a clean, poison-free, pollution-free healthy environment. The part of the Nigerian Constitution containing environmental obligations of the government is not justiciable. The Nigerian Constitution directs the government to "*protect and improve the environment and safeguard the water, air and land, forest and wildlife in Nigeria*" in *Chapter II: Fundamental Objectives and Directive Principles of State Policy*. However, the

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<sup>485</sup> Suit No. FHC/B/CS/53/05, Judgment Delivered on 14 November 2005, at the Federal High Court, Port Harcourt, Nigeria [*Gbemre*].

<sup>486</sup> *Constitution of the Federal Republic of Nigeria, 1999 (as amended)*, cap C23, Laws of the Federation of Nigeria, 2004, ss 33 & 34.

<sup>487</sup> *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, cap A9, Laws of the Federation of Nigeria, 2004, articles 4, 16 & 24 – this is the law by which the African Charter is enacted into Nigerian law.

<sup>488</sup> *Gbemre*, at 4 & 5.

Constitution itself provides that the provisions in this chapter II are not justiciable, and as such no legal action can arise upon contravention of the said chapter.<sup>489</sup> Consequently, the environmental rights created by section 20 of the Constitution are not enforceable. This is the likely explanation for why the applicant did not as much as refer to this provision, but rather relied on the rights to life and human dignity.

**Intergenerational equity:** there is no mention of intergenerational equity or the rights of future generations in this case.

It is however important to note that the same court faced with a similar case *Opara vs. The Shell Petroleum Development Company of Nigeria*,<sup>490</sup> took a different approach. The plaintiffs complained of pollution from gas flaring as a violation of their fundamental right to a healthy environment, and ultimately their rights to life and dignity of the human person (albeit without reference to climate change as one of the effects of the gas flaring). In its decision, the Court refused to recognize the right to a healthy environment as a fundamental right, the reason being that the right is not within the contemplation of the fundamental rights created under the Constitution. Notably, the decision was given by the Federal High Court, just like the *Gbemre case*. However, the *Opara case* proceeded to the Court of Appeal.<sup>491</sup> The Court of Appeal affirmed the decision of the Federal High Court on the ground that the main claim in the suit is pollution generated from gas flaring and as such, cannot be clothed as a fundamental right enforceable under the Constitution or the African Charter. For avoidance of doubt, the Court of Appeal stated thus:

The issue of gas flaring, oil exploration and environmental impact assessment which are the substantive complaint of the appellants in this case, are not issues of fundamental right. There is no legal craftsmanship found in this case that can weave

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<sup>489</sup> Section 6(6)(c) of the Nigerian Constitution.

<sup>490</sup> Suit No. FHC/PH/CS/518/2005

<sup>491</sup> *Opara vs. The Shell Petroleum Development Company of Nigeria* [2015] 14 NWLR, part 1479, at 307.

them into fundamental rights to life and dignity of human persons under Chapter IV of the Constitution or under the African Charter of Human and Peoples' Rights.

This pronouncement appears to significantly whittle down the enforceability of the environmental rights provisions contained in the African Charter and the Constitution. There is no doubt that the approach of recognizing the right to a healthy environment as one of the incidents of the right to life and dignity of human persons would advance climate change rights, as such climate change rights could be enforced as fundamental rights. However, by the doctrine of judicial precedents<sup>1</sup>, the position of the Federal High Court in the *Gbemre case* has been overridden by the decision of the Court of Appeal on the *Opara case*, the latter being a superior court.

## **5.2. Cases resolved against the Plaintiffs**

### **5.2.1. ENvironnement JEUnesse v. Procureur General du Canada<sup>492</sup>**

Environnement Jeunesse (ENJEU), a non-profit organisation, sought leave to institute a class action before the Quebec Superior Court on behalf of all Québec residents aged 35 and below<sup>493</sup> against the Federal Government of Canada. The action for which the ENJEU applied for leave sought a declaration that Canada's failure to put in place measures to curb global warming amounts to a violation of the fundamental rights of children and young persons guaranteed under the Canadian Charter of Rights and Freedoms and the Québec Charter of Human Rights and Freedoms.<sup>494</sup> The rights alleged to have been violated are "the right to life, integrity and security; right to a healthful environment in which biodiversity is preserved; and the right to equality."<sup>495</sup> ENJEU argues that the targets adopted by Canada in the face of international agreements are not

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<sup>492</sup> *Environnement Jeunesse c Procureur général du Canada* [2019] JQ no 5940, 2019 QCCS 2885 (CanLII) [ENJEU].

<sup>493</sup> That is those who were aged 35 and below as of 26 November 2018 when the suit was filed.

<sup>494</sup> *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec charter*].

<sup>495</sup> ENJEU, para 104.

sufficient, yet Canada is not even able to meet those targets; that Canada has so far missed its two previous GHG emissions reductions targets and is off course for its 2020 target. In view of the human rights violations occasioned by this failure to limit global warming, ENJEU seeks authorization for its class action. In response, Canada argued that a class action is not necessary given the nature of the reliefs sought, hence an application by one person would have sufficed as an order in respect of one person would benefit all Quebeckers of the represented class. Canada further argued that the matter is not justiciable because it is of a political nature and any order made by the court would be a contravention of the doctrine of “separation of powers and parliamentary sovereignty.”<sup>496</sup> Canada for these reasons among others prayed the court to dismiss the application for authorization to institute a class action.

**Decision:** The Court in its decision rejected the contention that the suit was not justiciable and held that the requirement of justiciability does not rob the suit of competence since “all government power must be exercised in accordance with the Constitution.”<sup>497</sup> However, the Court refused the application for authorization on the ground that ENJEU failed to proffer “a factual or rational explanation” for its choice of restricting the class it represents to persons 35 years and under.<sup>498</sup> The relevance of this restriction is that the facts alleged by ENJEU indicate that persons not within the class sought to be represented (but having the same interest)<sup>499</sup> have been arbitrarily excluded, which exclusion is contrary to the procedure for class actions. The Court further noted that the class as delineated by ENJEU is also problematic because it includes minors who did not yet possess the capacity to exercise all civil rights, thereby compelling minors to be parties to the suit and conferring ENJEU with power to impose an obligation on parents to take steps to exclude

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<sup>496</sup> *ENJEU*, para 18.

<sup>497</sup> *Ibid.*, para 59.

<sup>498</sup> *Ibid.*, para 117.

<sup>499</sup> According to the Court the alleged human violations would extend to persons who are above 35 years.

their children from the suit – ENJEU is not statutorily empowered (i.e. empowered by a special statute) to protect children and cannot be allowed such power. In conclusion, the Court stated that a class action is not the appropriate vehicle for the nature of the claims by ENJEU and agreed with the submissions by Canada that the suit even if brought by one person “without the need to proceed as a class action” would have an “*erga omnes* effect.”<sup>500</sup> In other words, the suit ought to have been brought by one person. ENJEU has filed an appeal against the dismissal by the court.<sup>501</sup>

**The right to a healthy environment:** Although there is no right to a healthy environment under the Canadian Charter, ENJEU relied on the Quebec charter which states that “[e]very person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.”<sup>502</sup> The Court agreed with the submission by ENJEU that the Quebec Charter binds the Federal Government and is applicable.<sup>503</sup> ENJEU further argued that the “protection of human beings is inseparable from the protection of the environment”<sup>504</sup> and therefore forms part of the rights to life, inviolability and security of the human person. The Court made no pronouncement on the inseparability of humans from the environment, perhaps due to the fact that the court did not go into the merits of the case.

**Intergenerational Equity component:** The suit is not brought on behalf of future generations as evident from the limit of the class to those 35 years and below as of the given date. However, ENJEU alluded to a duty owed to future generations while highlighting the failure by

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<sup>500</sup> *Ibid*, para 117.

<sup>501</sup> Appeal documents available online: <<http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/>>.

<sup>502</sup> *Quebec charter*, art 46.1. With respect to the phrase “...standards provided by law”, ENJEU cited provisions of the *Canadian Environmental Protection Act* which imposes duties on the Government of Canada to protect the environment and the quality thereof. See *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 (CanLII), s 2.

<sup>503</sup> *ENJEU*, para 77 & 78.

<sup>504</sup> *ENvironnement JEUnesse c Procureur General du Canada* (26 November 2018), Montreal, Que SC, 500-06-000955-183 (Motion for authorization to institute class action), para 2.82, .

Canada to set adequate GHG reduction goals.<sup>505</sup> There is no concrete attribution of right to future generations by ENJEU.

### 5.2.2. Armando Carvalho v European Parliament and the Council<sup>506</sup>

Thirty seven plaintiffs comprising youths, children alongside their parents from France, Fiji, Germany, Italy, Kenya, Portugal, Romania and an association (an NGO) of young indigenous Sami people instituted this action against the European Parliament (EP) and the European Council (EUCO) before the European Union General Court arguing that the 2030 GHG emissions reduction target<sup>507</sup> set by the EU is insufficient and therefore threatens the fundamental human rights of the plaintiffs. The plaintiffs sought annulment of the provisions of three separate EU legislative acts<sup>508</sup> which embody the said EU GHG emission reductions target.<sup>509</sup> The plaintiffs argued that the insufficient emissions policy as contained in these legislative acts violate their rights to life, health, occupation and property under the EU Charter of Fundamental Rights and violates the Treaty on the Functioning of the European Union (TFEU), UNFCCC and the Paris Agreement. The Defendants contended by way of a preliminary objection that the court should dismiss the action as inadmissible because the plaintiffs are not sufficiently, directly and individually affected by these legislative acts. This contention was based on the TFEU, which

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<sup>505</sup> *Ibid*, at p 11 – 16.

<sup>506</sup> Order of the General Court (Second Chamber) of 8 May 2019 – Case T-330/18 [*Carvalho*].

<sup>507</sup> 40 percent GHG emissions reduction from 1990 levels by 2030.

<sup>508</sup> Legislative acts are legal acts adopted by the European Parliament and the Council through legislative procedure e.g. regulation, directive or decision on a proposal. See *Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 326, 26/10/2012, 47 – 390, art 289 [TFEU].

<sup>509</sup> EC, *Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030*, [2018] OJ, L 156/26; EC, *Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814*, [2018] OJ, L 76/3; and EC, *Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework*, [2018], OJ, L 156/1.



provides “any natural or legal person may institute proceedings against an act addressed to that person or **that is of direct and individual concern to them**, and against a regulatory act that is of direct concern to them and does not entail implementing measures.”<sup>510</sup> The Defendants argued that the provisions of the contested legislative acts are of general application to an indeterminate number of persons and the infringements alleged by the plaintiffs do not distinguish them individually.

**Decision:** The Court in its decision held that for the contested legislative act to be said to affect the plaintiffs’ individual rights, it must “affect them by reason of certain attributes that are peculiar to them or by reason of circumstances in which they are differentiated from all other persons.”<sup>511</sup> The Court concluded that “[t]he applicants have not established that the contested provisions of the legislative package infringed their fundamental rights and distinguished them individually from all other natural or legal persons concerned by those provisions.”<sup>512</sup> The Court therefore dismissed the suit without considering the merits. The plaintiffs have appealed against this decision.<sup>513</sup>

**The right to a healthy environment:** the court made no pronouncement on the rights to a healthy environment. However, the plaintiffs had mentioned in one of its paragraphs that the right to life and health are dependent on the existence of an environment which allows human life to exist.<sup>514</sup>

**Intergenerational equity:** The court made no pronouncement on the rights of future generations since it did not delve into the merits of the case. However, it is observed that the

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<sup>510</sup> Article 263 [emphasis added].

<sup>511</sup> *Carvalho*, para 45.

<sup>512</sup> *Ibid*, para 49.

<sup>513</sup> Appeal documents available online: <<http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/>>.

<sup>514</sup> *Armando Ferrão Carvalho v. The European Parliament*, application for annulment of 25 May 2018, paras 171.

plaintiffs merely alluded to intergenerational justice and the rights of future generations while expounding the inequality occasioned by climate change in violation of the right against discrimination on grounds of age.<sup>515</sup> The right of future generations does not form the core of their claim.

### **5.2.3. Friends of the Irish Environment v. Ireland<sup>516</sup>**

Friends of the Irish Environment, an environmental NGO, filed an application for judicial review against the government of Ireland challenging the approval of the National Mitigation Plan<sup>517</sup> on the basis that the Plan is unconstitutional, in breach of the rights to life and an environment consistent with human dignity,<sup>518</sup> and is not consistent with the provisions of the Climate Action and Low Carbon Development Act which requires the Plan to (1) specify adequate measures to reduce GHG emissions for the purpose of attaining emission levels appropriate with the national transition goals; and (2) take into account existing obligations under international law.<sup>519</sup> The applicant contends that the Plan is not sufficient to reduce GHG emissions at levels undertaken in international agreements by Ireland.

In response, Ireland argued that the claim is therefore not justiciable because the Plan neither confers rights nor imposes any obligations, and the court is precluded from interfering with

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<sup>515</sup> *Armando Ferrão Carvalho v. The European Parliament*, application for annulment of 25 May 2018, paras 191 – 197.

<sup>516</sup> *Friends of the Irish Environment CLG v Ireland* [2019] IEHC 747 [*FIE*].

<sup>517</sup> Ireland, Department of Communications, Climate Action & Environment, “National Mitigation Plan”, (July 2017), online:< <https://www.dccae.gov.ie/documents/National%20Mitigation%20Plan%202017.pdf>>.

<sup>518</sup> And a host of other rights including the right to liberty and security, the right to the integrity of the person, the right to respect for family and private life and home, the right to property, the rights of the child, the rights of the elderly, equality between men and women, all enshrined in the *Irish Constitution* and the *European Convention on Human Rights Act 2003*. See *FIE*, para 26.

<sup>519</sup> *Climate Action and Low Carbon Development Act* (Ireland), Act No 46 of 2015, s 4(2) [*Climate Act*].

government policies by virtue of separation of powers. Ireland further argued that the applicants lack *locus standi* as the claim for human right breaches is made on behalf of third parties.

**Decision:** The Court in its judgment concluded that while the applicant had standing to bring the rights-based claims given the constitutional and public-interest nature of the claims, the Plan does not contravene the Climate Act and the national transition objectives, neither does it violate human rights since the Plan is merely an initial step taken by the government towards achieving its GHG reduction targets. According to the court, the provisions of the Plan are not justiciable because the plan itself is the product of a discretionary exercise of power by the government – the government had considerable discretion in preparing and approving the Plan.<sup>520</sup> In other words, “the Plan is but one, albeit extremely important, piece of the jigsaw.”<sup>521</sup> The Court took the view that if the Plan is perceived to be an inadequate response, such inadequacy is not a legal deficiency but a matter of policy with respect to which the courts cannot interfere. The decision of the court has been appealed to the Supreme Court of Ireland.<sup>522</sup>

**The right to a healthy environment:** Although there is no express provision for the right to a healthy environment in Ireland’s Constitution, the applicants place reliance on case law to submit that there is a constitutional right to an environment consistent with human dignity.<sup>523</sup> The court hypothetically assumed (not necessarily agreeing with the plaintiffs) that the right to an environment consistent with human dignity exists and went ahead to conclude that the Plan does not place this right at risk.

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<sup>520</sup> *FIE*, para 112.

<sup>521</sup> *FIE*, para 133.

<sup>522</sup> Appeal documents available online: <[climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/](http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/)>.

<sup>523</sup> *Ibid*, para 73.

**Intergenerational equity:** Part of the applicant’s case is the claim that the Plan is insufficient to “protect the world’s climate and environment for not only the current but importantly future generations.”<sup>524</sup> The applicants also argue that the lacunae in the plan breaches the constitutional commitment to intergenerational solidarity and the unenumerated constitutional obligation to vigilantly and effectively protect the environment.

#### 5.2.4. Greenpeace Germany and Family Farmers v. Germany<sup>525</sup>

Greenpeace Germany filed a lawsuit alongside three families of farmers before the Administrative Court of Berlin seeking to compel the German government to curb emissions in line with its 2007 commitment to reduce its emissions by 40 percent below 1990 levels by 2020.<sup>526</sup> The suit followed an admission by the German government that it will be unable to meet this 2020 target but would instead focus on meeting its 2030 target – reducing emissions by 55 percent below 1990 levels. The farmers alleged that their livelihoods as organic farmers are negatively impacted by climate change. The plaintiffs therefore argued that the 2020 target is still binding and that failure by the government to meet this 2020 target violates their constitutional rights to life & physical integrity,<sup>527</sup> property<sup>528</sup> and occupational freedom.<sup>529</sup>

Germany argued that the action is not justiciable as it asks the court to interfere with the political powers of the federal government and the exercise of executive discretion contrary to the principle

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<sup>524</sup> *FIE*, para 13.

<sup>525</sup> *Greenpeace Germany v The Federal Republic of Germany*, 00271/17/R/SP (Berlin Administrative Court) [*Greenpeace Germany*].

<sup>526</sup> Germany, Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, “Climate Action Program 2020”, online: <https://www.bmu.de/en/topics/climate-energy/climate/national-climate-policy/climate-action-programme/>, [*Climate Action Program*].

<sup>527</sup> Basic Law for the Republic of Germany, 1949 (as amended in 2019), Art 2(2) [*German Constitution*].

<sup>528</sup> Art 14(1).

<sup>529</sup> Art 12(1).

of separation of powers. Germany further argued that no cause of action could arise from the Climate Action Program as it is a mere executive decision for internal use.

**Decision:** The Court dismissed the claim on the basis that the plaintiffs lack standing because the Climate Action Program does not impose any legal obligation on the government such as would confer a right on any citizen - moreover, the plaintiffs failed to show actual or threatened human rights violations peculiar to their individual selves as opposed to the general populace. In other words, Greenpeace could not represent others since individual harm is required. The Court also held that the plaintiffs failed to prove that their rights were violated and/or were in danger of being violated since they were unable to show that Germany has fallen below the required minimum level of climate protection required by law, especially since Germany was on course to achieve 32% reduction by 2020.<sup>530</sup> The Court however stated that the subject matter of the claim is justiciable since it raised constitutional and public interest issues. The Court acknowledged that there is a duty on the Government to protect fundamental human rights from the impacts of climate change. Thus, the Court accepted that the complaint seeking climate protection is of an admissible nature, but could not be admissible in the instant case because the plaintiffs lacked standing and the rights of the plaintiffs are not yet compromised.<sup>531</sup> The positive from this case seems to be that the court for the first time in Germany accepted that fundamental rights can be violated by climate change.<sup>532</sup>

**The right to a healthy environment:** the right to a healthy environment was not raised in this case.

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<sup>530</sup> Especially since the 2030 target set by the EU is 40 percent reduction.

<sup>531</sup> *Greenpeace Germany*, at p 12.

<sup>532</sup> Greenpeace International, "Berlin court agrees climate lawsuits are admissible in principle", *Greenpeace* (31 October 2019), online:< <https://www.greenpeace.org/international/press-release/25667/berlin-court-agrees-climate-lawsuits-are-admissible-in-principle/>>.

**Intergenerational equity:** although issues regarding the rights of future generations were not canvassed before the Court, the Court mentioned that the state has a duty to protect the environment for future generations under the Constitution<sup>533</sup> and as such climate protection is not only legally required but would be anchored on fundamental rights.

#### **5.2.5. Greenpeace Nordic Association v. The Government of Norway<sup>534</sup>**

A group of environmental organisations sued the government of Norway seeking the invalidation of ten licenses for petroleum production on the basis that the grant of these licences violates the right to “an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained” (a healthy environment) guaranteed by the Norwegian Constitution.<sup>535</sup> The plaintiffs alleged that the licences permit the exploration of undeveloped petroleum deposits thereby increasing GHG emissions, and are in a vulnerable area adjacent to “the moveable ice edge and the polar front.”<sup>536</sup> The Plaintiffs argued that Norway’s international obligations under the UNFCCC, Kyoto Protocol, the Paris Agreement and the ECHR must be considered in determining if the right to a healthy environment has been violated. Thus, Norwegian authorities must take measures to curb emissions not just of GHG emission within Norway, but of emissions stemming from the export of oil and gas from Norway. The Defendants argued that the rights provision relied on by the plaintiffs protects collective interests and is not a

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<sup>533</sup> *Greenpeace Germany*, at p 22. See *German Constitution*, art 20a.

<sup>534</sup> Case no 16-166674TVI-OTIR/06 (4 January 2018 in Oslo District Court) [*Greenpeace Nordic I*].

<sup>535</sup> “Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the state shall take measures for the implementation of these principles.” See *The Constitution of the Kingdom of Norway*, LOV-1814-05-17, FOR-2020-05-14, art 112 [*Norway Constitution*].

<sup>536</sup> *Greenpeace Nordic I*, page 7 of unofficial translation.

substantive provision that imbues any individual with any rights, and cannot be interpreted with reference to Norway's international obligations. Norway denies that it has any duty to curb emissions abroad.

**Decision:** The Court dismissed the suit on the following grounds: (1) that emissions of CO<sub>2</sub> abroad from oil and gas exported from Norway are irrelevant when assessing whether the Decision violated Article 112; (2) that Norway has fulfilled the duty to take measures under Article 112; (3) that the question of the adequacy of Norway's climate policy is a political one and cannot be determined by the courts; and (4) that the possible impacts from the carbon activities are too remote.<sup>537</sup> The plaintiffs appealed against the decision to the Court of Appeal who dismissed the appeal and affirmed the decision of the lower Court, but however differed from the lower Court by deciding that the emissions from petroleum products exported abroad are relevant in assessing whether Norway has violated the right to a healthy environment.<sup>538</sup>

**The right to a healthy environment:** this right formed the core of the plaintiff's argument. The Court rejected the contention of Norway and held that article 112 is a rights provision and as such is justiciable, even though the plaintiffs failed to prove actual or threatened violation of the right because, in the opinion of the court, the possible impacts of GHG emissions on human rights were too remote. The expansion of the obligations arising from this right to include prevention of GHG emissions abroad is quite instructive.

**Intergenerational equity:** the Plaintiffs submitted that the rights of future generations to a healthy environment had been violated, although not framed as an issue which the courts should pronounce on.<sup>539</sup> The provision for the right to a healthy environment relied on by the plaintiffs

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<sup>537</sup> *Ibid*, at p 28.

<sup>538</sup> *Greenpeace Nordic Association v. The Government of Norway*, 18-060499ASD-BORG/03, 23 January 2020 [*Greenpeace Nordic Appeal*].

<sup>539</sup> *Greenpeace Nordic I*, writ of summons, 18 October 2016, paras 1 & 9.22.

(as stated in their writ of summons) acknowledges that natural resources are to “be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.”<sup>540</sup> However, the Court of Appeal opined that the intergenerational nature of the right to a healthy environment under Article 112 “has an aspect of the concern for democracy, in that future generations cannot influence today’s political processes,”<sup>541</sup> thereby highlighting the need for representation of future generations in today’s political processes. The Court of Appeal also stated that “the need for comprehensive consideration out of concern for future generations...supports the application of Article 112 to the CO2 emissions from the combustion after export as well.”<sup>542</sup> Notably, these comments by the Court of Appeal on the interests of future generations did not form part of the *ratio decidendi* of the Court of Appeal.

### **5.2.6. Union of Swiss Senior Women for Climate Protection v. Swiss Federal Department of the Environment, Transport, Energy and Communications (DETEC)<sup>543</sup>**

A climate organisation (an NGO) alongside four women filed a petition to DETEC<sup>544</sup> alleging that Switzerland is not taking sufficient action to reduce its GHG emissions in view of its

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<sup>540</sup> *Ibid*; See *Norway Constitution*, art 112.

<sup>541</sup> *Greenpeace Nordic Appeal*, at 18.

<sup>542</sup> *Ibid*.

<sup>543</sup> This summary considers the three tiers of decisions on the matter – the decisions of DETEC, the Federal Administrative Court and the Supreme Court. DETEC decision – *Order on Petition of the Union of Swiss Senior Women for Climate Protection*, 26 April 2017, online: <[http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170426\\_No.-A-29922017\\_order.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170426_No.-A-29922017_order.pdf)> [*DETEC order*]; Federal Administrative Court decision - *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council*, Judgment A-2992/2017 of 27 November 2018 [*DETEC Federal Court Decision*]; Supreme Court - *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council*, 1C37/2019, Judgment of 5 May 2020, online: <[climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/](http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/)> [*DETEC Supreme Court Decision*].

<sup>544</sup> This is the department of the Swiss government responsible for infrastructure and environment matter. The petition to the DETEC was in its administrative decision-making capacity pursuant to the Administrative Procedure Act which provides as follows – “any person who has an interest that is worthy of protection may request from the authority that is responsible for acts that are based on federal public law and which affect rights or obligations that it (a) refrains from, discontinues or revokes unlawful acts; (b) rectifies the consequences of unlawful acts; or (c) confirms the



commitments under national legislation and international law to limit global temperature to at most 2°C. Whereas Switzerland set a 20 and 30% CO<sub>2</sub> emissions reduction by 2020 and by 2030 respectively compared to 1990 levels,<sup>545</sup> what is required to be within the global climate budget is for Switzerland to reduce CO<sub>2</sub> emissions by 25-40% and 50% by 2020 and 2030 respectively in comparison to 1990 levels. The applicants highlighted the injustice of climate change to older women, arguing that the following rights of these women were violated:<sup>546</sup> the right to life,<sup>547</sup> the sustainability principle,<sup>548</sup> the precautionary principle,<sup>549</sup> and their rights to life, to health, and to physical integrity under the ECHR.<sup>550</sup>

**Decision:** The petition to DETEC was dismissed on the ground that the fundamental rights of the applicants were not affected individually.<sup>551</sup> According to DETEC, the purport of the applicants' petition was not to protect their individual rights but to regulate CO<sub>2</sub> emissions and influence the lawmaking process. DETEC further stated that the applicants do not qualify as "victims"<sup>552</sup> for the purpose of alleging violation of the ECHR since no "sufficiently direct connection exists between the applicant[s] and the disadvantage which has occurred or is impending and which brought about the alleged violation, [and] persons pursuing a public interest are excluded by this criterion."<sup>553</sup> The decision was upheld by the Federal Administrative Court as

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illegality of such acts. The authority shall decide by way of a ruling." See art 25a (1), Federal Act on Administrative, 1968 (Switzerland), cc172.021 (Administrative Procedure Act), [APA].

<sup>545</sup> Switzerland, *Federal Act on the Reduction of CO<sub>2</sub> Emissions*, SR 641.71, art 3 (1), [CO<sub>2</sub> Act].

<sup>546</sup> Request to stop omissions in climate protection pursuant to Art. 25(a) APA and Art. 6 Ziff. 1 and 13 ECHR, 25 October 2016,

<sup>547</sup> Art 10, Federal Constitution of the Swiss Confederation, 1999 (Switzerland).

<sup>548</sup> *Ibid*, art 73.

<sup>549</sup> *Ibid*, art 74.2.

<sup>550</sup> Art 2 and Art 8 of the ECHR.

<sup>551</sup> DETEC cited a Federal Supreme Court case law that states that "a legal dispute exists in the case of disputes in connection with an individual legal position worthy of protection." See *DETEC order*, para 1.2.

<sup>552</sup> Article 34 of the ECHR can only be brought in individual capacity by a "person claiming to be the victim of a [rights] violation". The view in this thesis is that this reasoning by the DETEC as upheld by the appellate courts seems erroneous since the purpose of article 34 ECHR is to determine cases that can be brought before the ECtHR, and not domestic courts or tribunals.

<sup>553</sup> *Ibid*, para 2.1.

well as the Supreme Court. The Supreme Court, in addition to upholding DETEC's position, stated that the Paris Agreement cannot be said to be breached, as there is still time for the long-term goal to be met.<sup>554</sup>

**Intergenerational equity:** The purpose of the Union of Swiss Senior Women for Climate Protection is not just to protect older women but to also protect future generations.<sup>555</sup> However, the petition did not rely on intergenerational equity arguments. The applicants while explaining the sustainability principle merely cited a case where the court held that a proposed gravel mining would make drinking water impossible for future generation among other reasons.<sup>556</sup> None of the courts made any pronouncement on intergenerational equity.

**The right to a healthy environment:** The applicants stated although the ECHR does not guarantee the right to a healthy environment, there is an obligation to protect from environmental damage which is capable of negating the right to life, health, physical integrity.<sup>557</sup> The applicants mentioned that the Swiss constitution protects the "natural environment" as well as "people".<sup>558</sup> However, the court did not pronounce on the right to a healthy environment, having dismissed the claims preliminarily.

### 5.2.7. *Juliana v United States*<sup>559</sup>

This is an action by a group of young plaintiffs (ages 8 – 19) for themselves and on behalf of future generations against the United States seeking an order compelling the United States to

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<sup>554</sup> *DETEC Supreme Court Decision*, paras 5.3 & 5.4.

<sup>555</sup> *Request to stop omissions in climate protection pursuant to Art. 25(a) APA and Art. 6 Ziff. 1 and 13 ECHR*, 25 October 2016, at 14.

<sup>556</sup> *Ibid.*, at 60.

<sup>557</sup> *Ibid.*, at 82.

<sup>558</sup> *Ibid.*, at 123. See Swiss Constitution, art 74.

<sup>559</sup> *Juliana v USA*, No. 18-36082 D.C. No. 6:15-cv-01517- AA, Ninth Circuit.

take measures to reduce CO<sub>2</sub> emissions to prevent increase in atmospheric CO<sub>2</sub> beyond 350 parts per million by 2100. According to the plaintiffs, the US has known for decades that CO<sub>2</sub> pollution is causing catastrophic climate change and that massive emission reductions and a nationwide transition away from fossil fuels was needed to protect plaintiffs' constitutional rights, yet the US keeps allowing excessive fossil fuel production on federal public lands, subsidizing the fossil fuel production and consumption, and supporting interstate and international transport of fossil fuels.<sup>560</sup> The plaintiffs argue that the climate system of the United States is crucial to fulfilment of their rights to life, liberty, property, equal protection under the law and that the United States violates these rights as well as the public trust doctrine by permitting fossil fuel production, consumption and combustion at dangerous levels as evidenced by several laws and policies.<sup>561</sup>

The US argued that the plaintiffs did not possess standing to maintain the suit because they had failed to allege any particular harm attributable to acts by the US; that the plaintiffs' claim asks the court to interfere with the power of the federal government in violation of the doctrine of separation of powers and the political question doctrine; and that there is no constitutional right to be free from CO<sub>2</sub> emissions.<sup>562</sup>

**Decision:** The Oregon Federal District Court held that the issue raised by the suit was not a non-justiciable political question since the plaintiffs were asking the court to make a pronouncement of whether or not the US by its actions has violated the plaintiffs' constitutional rights, a question falling "squarely within the purview of the judiciary."<sup>563</sup> The court concluded that the plaintiffs had standing to sue. On further appeal to the Ninth Circuit, it was determined that the plaintiffs did not have standing because the relief sought by the plaintiffs on its own cannot

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<sup>560</sup> *Ibid* at pp 11 & 12.

<sup>561</sup> *Ibid*.

<sup>562</sup> *Ibid* at 18.

<sup>563</sup> *Juliana v USA*, Case No. 6:15-cv-01517-TC, Federal District Court Oregon, at 16.

solve global climate change and is unlikely to redress the injuries alleged by the plaintiffs. The Court also held that the reliefs sought by the plaintiffs fall within the purview of political questions and are therefore not justiciable by the court. The decision was a 2-1 split decision as the dissenting judge found that the plaintiffs have raised salient constitutional issues, shown that there is sufficient evidence to be presented at trial and therefore possess standing to challenge the actions of government. The plaintiffs have filed an application for rehearing of the Ninth Circuit determination that they lacked standing. That application is pending.<sup>564</sup>

**Right to a healthy environment:** The District Court stated that the plaintiffs claim for infringement of the right to a “climate system capable of sustaining human life”<sup>565</sup> defined “[the] right as one to be free from catastrophic climate change that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet’s ecosystem.”<sup>566</sup>

**Intergenerational equity:** The rights of future generations are an integral part of the plaintiffs’ claim. The plaintiffs institute this action on behalf of themselves as well as future generations. The plaintiffs argued that the harm caused by the US has denied them the same protection of fundamental rights afforded to prior and present generations of adult citizens and the US has failed to preserve a habitable climate system for present and future generations.

The dissenting judge in the Ninth Circuit stated that notwithstanding the denial of the plaintiffs’ claims by the majority, there is hope for future generations because justice will always be done someday; and hopefully, it will not be too late to act by the time the courts decide to accept the injustice of climate change.<sup>567</sup> The dissenting judge stated:

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<sup>564</sup> Application documents available online: <http://climatecasechart.com/case/juliana-v-united-states/>.

<sup>565</sup> *Juliana, Ninth Circuit* at 12.

<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*, at 64.

Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's own studies, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?<sup>568</sup>

In other words, the dissenting judge decried the majority decision because it was, among other reasons, detrimental to the rights of future generations. The dissenting judge did not despair with regard to the likelihood that the rights of future generations will be recognised, but rather expressed optimism that the rights of future generations will be recognised in the nearest future.

### **5.3. Summary**

The major challenges to the human rights-based climate suits are establishing standing and justiciability, and proving violation of human rights. It is observed the theoretical question of *individuality* discussed in chapter two of this thesis is also an integral question in these cases. An observation with respect to the intergenerational equity components in these cases is that plaintiffs and courts seem to mostly employ the principle as an interpretative aid and do not attribute rights to future generations. It is also observed that most of the cases are against the State and not private corporations. These issues are addressed in the next chapter of this thesis.

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<sup>568</sup> *Ibid.*

## **Chapter Six: Challenges to the Human Rights Approach and the Rights of Future Generations in Climate Litigation**

This chapter examines the challenges to the human rights approach to climate litigation. It also examines the challenges to recognition of the rights of future generations in climate cases. The chapter begins with an overview of the human rights and intergenerational equity approaches to climate litigation. Thereafter, the issues arising from standing, proving violation, rights-based climate cases against private corporations, and measuring the success of rights-based climate litigation are examined.

### **6.1. Overview of the Human Rights and Intergenerational Equity Approaches to Climate Change Litigation**

Human rights, even if recognized, are not self-enforcing and therefore constitute the basis of special categories of possible court cases.<sup>569</sup> As evident from the preceding chapter, where States have failed to address human rights concerns arising from climate change, a movement of human rights cases in multiple courts world-wide has been initiated as an alternative in order to balance the power of the legislative and executive.<sup>570</sup> The human rights approach to climate litigation consists of cases where climate-unfriendly acts and omissions are framed as violations of fundamental human rights such as the right to a good environment, right to life, the right to health, the right to dignity of human person. These cases are mostly instituted by individuals and advocacy groups before domestic courts, with a few being instituted in a regional court (ECtHR). The cases are typically brought against governments, although there seems to be an emerging trajectory of

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<sup>569</sup> Joyeeta Gupta, "Litigation, Human Rights and Climate Change", *Global Policy* (25 November 2015), online: <<https://www.globalpolicyjournal.com/blog/25/11/2015/litigation-human-rights-and-climate-change>>, [Gupta].

<sup>570</sup> *Ibid.*

human right cases against corporations.<sup>571</sup> Human rights-based arguments in climate litigation have been used in two ways – the first is the recognition of human right violations related to climate change as a cause of action in its own right, while the second way is the use of human rights as an interpretative tool for determining whether defendants are in breach of certain statutory obligations imposed on them.<sup>572</sup>

The intergenerational equity approach to climate litigation involves putting forward arguments that the rights of future generations have been violated by climate change. The decision in *Urgenda v Netherlands* in 2015 did not only signify the advent of the human rights approach to climate litigation but also the intergenerational equity approach. Following the *Urgenda case*, there has been a wave of climate cases by and on behalf of children, youth, future generations and other citizens in the form of lawsuits, petitions and complaints against several governments across the globe.<sup>573</sup> These cases bring intergenerational equity perspectives into the human rights approach to climate litigation by arguing that climate change affects the rights of not just the present generations, but also the rights of future generations. These cases highlight the injustice of climate change to children, young persons and future generations since they are more fragile, largely do not participate in the decision-making process, have a longer period of time to be on the

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<sup>571</sup> Lewis, “Human Rights & Climate Change”, *supra* note 125 at 242.

<sup>572</sup> Peel & Osofsky, *supra* note 4 at 57.

<sup>573</sup> In addition to the cases discussed in the previous chapter, there are cases yet to be decided by the court in several countries such as **Canada** (*Lho'imggin v Her Majesty the Queen in the Right of Canada*, only statement of claim available online: < <http://climatecasechart.com/non-us-case/gagnon-et-al-v-her-majesty-the-queen/>>; *La Rose v Her Majesty the Queen*, 25 October 2019, Vancouver, FC No T-1750-19, statement of claim and statement of defence available online: < <http://climatecasechart.com/non-us-case/la-rose-v-her-majesty-the-queen/>>; *Mathur v Her Majesty the Queen in Right of Ontario*, 25 November 2019, Toronto, ONSC, CV-19-00631627-0000, Notice of Application, and Motion to Dismiss, online: < <http://climatecasechart.com/non-us-case/mathur-et-al-v-her-majesty-the-queen-in-right-of-ontario/>>), **Pakistan** (*Maria Khan v Federation of Pakistan*, 14 February 2019, Pakistan, Lahore High Court, writ petition no 8960 of 2019, online: < <http://climatecasechart.com/non-us-case/maria-khan-et-al-v-federation-of-pakistan-et-al/>>), **France** (*Notre Affaire à Tous v. France*, unofficial translation of Brief provided by Climate Case Chart, online: < <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/>>), and before the **United Nations Committee on the Rights of the Child** (*Sacchi v Argentina*, petition pending before the United Nations Committee on the Rights of the Child, online: < <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/>>)

planet, and bear the responsibility of repairing the damage done by the present generation. The young litigants in these cases challenge government (in)actions and policies on climate change on the basis that such actions and policies violate international climate agreements and human rights obligations. The litigants in these cases attribute human rights to future generations such as the right to life, right to health, right to a healthy environment and other rights typically impacted by climate change. The courts have in some of these cases accepted arguments attributing rights to future generations, while rejecting such arguments in other cases. The practical challenges to enforcing the right of future generations through litigation include standing (who would bring the cases on behalf of future generations), difficulty in proving violation, the transboundary nature of climate change, and the absence of a legal framework for recognizing the rights of future generations.

## **6.2. The Problem of Standing**

Human rights-based climate lawsuits have often been brought by NGOs, civil societies, and individuals. One of the most significant challenges faced by plaintiffs in the climate lawsuits is establishing standing. The standing of the plaintiffs has always been in contention in virtually all the human right-based climate cases. There are two grounds on which standing of the plaintiffs is usually challenged – firstly, that the nature of the subject matter renders it nonjusticiable; and secondly, that plaintiffs do not possess the capacity to maintain the suit (regardless of the fact that the claims are justiciable in nature).

The major argument of defendants with respect to non-justiciability of the subject matter in rights-based climate lawsuits is that climate change is a policy issue requiring the exercise of discretion by the government and any interference by the judiciary is a violation of the doctrine of



separation of powers. The reason for this argument is that the policy documents containing governments' plans to address climate change are often not justiciable.<sup>574</sup> From the cases examined, a majority of the courts seem to agree that the plaintiffs do not have standing on this ground. There are also courts that decide otherwise. The decisions of the courts in *ENJEU*<sup>575</sup> and *Greenpeace Germany*<sup>576</sup> are quite instructive in this regard. The court in both cases examined the justiciability issue using a constitutional lens. While the court in *ENJEU* found that the suit was justiciable since all government powers must be exercised in line with the constitution, the court in *Greenpeace Germany* similarly found that the plaintiffs' claim was justiciable because it raised constitutional and public interest issue. Thus, the use of a constitutional lens can be very helpful for the courts to determine whether an action is justiciable.<sup>577</sup> The fact that a claim raises political questions should not in itself defeat the competence of that action. The relevant test here ought to be – whether the plaintiff's claims affect constitutional rights or raise public interest issues?. If the courts in *Greenpeace Nordic, Juliana, FIE*, had adopted this test, they likely would have reached a conclusion that the plaintiffs had standing. It is worthy of note that the dissenting judge raised this test in *Juliana*, resolved it in the affirmative and reached a conclusion that the plaintiffs had standing.<sup>578</sup> Regrettably, the grant of standing to the plaintiffs did not suffice to sustain the *ENJEU* and *Greenpeace Germany* lawsuits as the courts dismissed them on other grounds – the arbitrariness of the class represented; and that the rights were yet to be compromised respectively.

An issue arising with respect to capacity of the plaintiffs is the requirement for proof of individual interest as opposed to collective interests. In a number of the rights-based cases

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<sup>574</sup> *Greenpeace Nordic, Juliana, FIE*.

<sup>575</sup> *Supra* note 492.

<sup>576</sup> *Supra* note 525.

<sup>577</sup> See the dissenting judgment in *Juliana*, *supra* note 559.

<sup>578</sup> *Ibid*.

discussed in this thesis, the courts have held that plaintiffs must show that the claims put forward peculiarly affect them in their individual capacities rather than merely showing the claims affect them generally as well as many others (and even everyone). It is therefore evident that the individuality argument is not just a theoretical issue but translates into a practical issue. This requirement of individuality is particularly raised by defendants in rights-based climate cases in EU courts, because of the provisions of the ECHR<sup>579</sup> permitting the ECtHR to receive applications only from individuals, as well as the provisions of the TFEU<sup>580</sup> permitting individual actions by natural persons only in cases where legislative acts are of “direct and individual concern to them.”<sup>581</sup> The courts in *Carvalho*<sup>582</sup> and *DETEC*<sup>583</sup> relied on these provisions to arrive at a decision that the plaintiffs lacked standing, having failed to show that the actions of government being challenged affected them individually over and above other citizens. The court in *Greenpeace Germany* also reached a similar conclusion while rejecting the plaintiffs’ standing. However, the courts in *Urgenda* and *Future Generations* rejected the defendants’ arguments that the plaintiffs were not affected individually. While the court in *Urgenda* rejected the individuality argument on the basis that the provision of article 34 of the ECHR only applies to the ECtHR and not domestic courts, the court in *Future Generations* rejected it on the basis of an expansive interpretation of human rights to include protection of non-human species and future generations. The decision of the court in *Future Generations*, which was based on an ecocentric-anthropocentric view of the

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<sup>579</sup> Article 34, ECHR.

<sup>580</sup> Article 263, TFEU.

<sup>581</sup> *Ibid.* Due to the difficulty in proving individuality, the TFEU seems to be more suitable for cases instituted by States. See for example *EU Biomass Plaintiffs v. European Union* where Plaintiffs from six countries (A coalition of individuals and civil society organizations from Estonia, Ireland, France, Romania, Slovakia, and the United States) have sued the EU at the European General Court in Luxembourg challenging the EU’s 2018 Renewable Energy Directive on the basis that the said Directive will result in massive deforestation and increase in GHG emissions. The Plaintiffs argue that the Directive violates the EU Charter on Fundamental Rights and the environmental principles embodied in the Treaty on the Functioning of the European Union. (Summary culled from press release made available by plaintiffs, online: < <http://climatecasechart.com/non-us-case/eu-biomass-plaintiffs-v-european-union/>>).

<sup>582</sup> *Supra* note 506.

<sup>583</sup> *Supra* note 543.

environment, aligns with the feminist relational theory. This decision is therefore an indication that the feminist relational theory provides an answer not just to the theoretical questions, but also provides a practical answer to the individuality question in rights-based climate cases. It is therefore important for climate litigants to put forward this argument in court, and for the courts to accept this reconceptualization of human rights.

An issue on standing specifically touching on the rights of future generations is the question of who can bring an action on behalf of future generations. Defendants often argue against the grant of standing to future generations on the ground that future generations do not possess rights since they are not in existence, for example, the government of Ontario in *Marthur* (which is pending) is arguing against the standing of the plaintiffs to represent the rights of future generations.<sup>584</sup> Generally, the courts often seem to make implicit references to rights of future generations in human-rights based cases by way of *obiter dicta*. There is therefore a dearth of binding pronouncements on the issue of standing on behalf of future generations. Perhaps this is due to the fact that the plaintiffs seldom frame the interests of future generations as a right in itself or make the rights of future generations an integral issue in these cases. It is therefore important for climate litigants to canvass the rights of future generations more directly, especially as the courts appear to be receptive to the concept of intergenerational equity, albeit on a peripheral scale. Although a majority of the rights-based cases are not framed with the rights of future generations as a key issue, the few cases with such framing seem to have had mixed outcomes. In *Urgenda*, the court took the view that the plaintiffs possess standing to defend interests of future generations due to the principle of sustainable development, while the court in *Juliana* (with the exception of the dissent) found that the plaintiffs do not have standing to bring the action on behalf of future

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<sup>584</sup> *Marthur*, Motion to dismiss.

generations. Another instructive point on standing can be found in the decision of the court in *Minors Oposa* (discussed in chapter 3).<sup>585</sup> The court in *Minors Oposa* found that the plaintiffs possessed standing to maintain the case on behalf of future generations on the basis of intergenerational equity. The court in *Minors Oposa* stated thus:

We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned... Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.<sup>586</sup>

Thus, the grant of standing to future generations by the court can be based on the concept of intergenerational equity and the principle of sustainable development. The court therefore plays a key role in the recognition of standing for future generations.

Apart from the courts, there are other mechanisms for protecting the rights of future generations which can be pivotal to the recognition of standing for future generations. The court in *Greenpeace Nordic* highlighted the need for future generations to be represented in today's democratic process.<sup>587</sup> This representation could be achieved by the appointment of ombudsmen to protect the rights of future generations. The establishment of ombudsmen (or commissioners) for rights of future generations could address the issue of standing.<sup>588</sup> Ombudsmen are typically appointed by the government to protect the interests of particular groups by advising the government, evaluating policies, serving as liaisons between the government and the groups, and

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<sup>585</sup> *Minors Oposa*, at 7 & 8.

<sup>586</sup> *Minors Oposa*, at 7 & 8.

<sup>587</sup> *Greenpeace Nordic Appeal*, at 18.

<sup>588</sup> Carilyn Raffensperger, Tyler Giannini, Bonnie Docherty, "Models for Protecting the Environment for Future Generations", (2008) Science and Environmental Health Network/The International Human Rights Clinic at Harvard Law School, online (PDF): <[hrp.law.harvard.edu/wp-content/uploads/2013/02/Models\\_Future\\_Generations.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2013/02/Models_Future_Generations.pdf)>, [Raffensperger].

taking other steps necessary for protection of the group such as commencing legal actions to protect the group.<sup>589</sup> Examples of ombudsmen dealing with sustainable development include the U.K. Sustainable Development Commission, Canadian Commissioner of the Environment and Sustainable Development, and environmental ombudsmen in some states in the US.<sup>590</sup> It has been suggested that this ombudsman model could be useful for future generations. Also, there are examples of committees that serve as ombudsmen such as the Inter-ministerial Committee on the Sustainable Development Goals in Nigeria; the Parliamentary Advisory Council on Sustainable Development in Germany, the inter-ministerial committee on Sustainable Consumption and Production in Chile.<sup>591</sup> It is important to mention that some countries have already established ombudsmen specifically for the purpose of protecting the rights of future generations. Examples include Hungary's Parliamentary Commissioner for Future Generations, the Committee for the Future in Finland, and the Commissioner for Future Generations in Wales.<sup>592</sup>

Yet another innovative solution (perhaps an interim one) to the problem of lack of standing could be using the rights of the child as a medium for enforcing the rights of future generations. This is the strategy adopted by the youth and children petitioners in *Sacchi v Argentina & others*<sup>593</sup>. This is a petition brought before the United Nations Committee on the Rights of the Child by sixteen children from different countries against Argentina, Brazil, France, Germany and Turkey, which are some of the countries that have ratified the Optional Protocol to the Child Rights Convention.<sup>594</sup>

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<sup>589</sup> *Ibid* at 15.

<sup>590</sup> *Ibid*.

<sup>591</sup> NIFG, "Acting Today for a Better Tomorrow: Network of Institutions for Future Generations 2018 Report", (2018) online (pdf): *NIFG* <futureroundtable.org>.

<sup>592</sup> The establishment of these ombudsmen are motivated by environmental and sustainable development objectives. See *ibid*.

<sup>593</sup> *Sacchi v Argentina*, petition pending before the United Nations Committee on the Rights of the Child, online: <<http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/>> [*Sacchi*].

<sup>594</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, GA RES/66/138, UNGAOR, 66<sup>th</sup> Sess, UN Doc 27531 (2011) (entered into force on 14 April 2014), art 7(e), [*OPIC*].

The petitioners argue that these countries have knowingly caused the current climate crisis by their refusal to reduce emissions at the “highest possible ambition”<sup>595</sup> consistent with keeping global warming under the 1.5°C and 2.0° targets – i.e. if all nations of the world were to adopt the similar proportion of emissions as these countries. The petitioners also argue that these countries have condoned the pollution by other major GHG emitting countries in spite of legal, diplomatic and economic tools available to ensure reduction in global emissions that aligns with the global emissions reduction requirements under international climate law. The petitioners therefore submit that these countries are not living up to their obligation to respect, protect and fulfill the rights of the child, as climate has adversely affected and continues to affect children’s rights to life, health, culture, and development – the action by these countries indicate that the best interests of the child are not of paramount consideration in their climate actions and strategies as required by the CRC.<sup>596</sup> The petitioners argue that this petition constitutes an exception to the requirement under the Optional Protocol to the CRC on a Communications Procedure (OPIC) that all domestic remedies must be exhausted before a petition is brought to the CRC<sup>597</sup> due to the transnational nature of the human right violations, the impracticability of separate suits by the respective petitioners, and the non-justiciability of the issues raised in the case in their respective domestic dispute resolution forums. The petitioners emphasize the impacts of climate change not just on children but on future generations. The same rights of the child (allegedly breached by these governments) are attributed to future generations. The petitioners distil a “duty to ensure intergenerational equity for children and future generations” from the human rights obligations

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<sup>595</sup> para 20.

<sup>596</sup> Art 3.

<sup>597</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, GA RES/66/138, UNGAOR, 66<sup>th</sup> Sess, UN Doc 27531 (2011) (entered into force on 14 April 2014), art 7(e), [OPIC].

under international environmental and climate law.<sup>598</sup> It is important to note however that the right to a healthy environment was not canvassed in this case. This is perhaps due to the absence of an express right to a healthy environment under the CRC as well as under international law more broadly. The petitioners however referenced the IACHR opinion stating that all human rights depend on the existence of a healthy environment.<sup>599</sup> Brazil, France and Germany objected to the petition, stating that it was inadmissible on three grounds: (1) the CRC lacks jurisdiction; (2) the petition is manifestly ill-founded or unsubstantiated; and 3) petitioners have not exhausted domestic remedies. Although the petition is still pending before the CRC, the lesson from this petition is that the legal framework for rights of the child holds some potential for climate litigation on behalf of future generations. The OHCHR suggests this approach in one of its reports.<sup>600</sup>

### **6.3. The Challenge of Proving Violation**

A major hurdle for plaintiffs in rights-based litigation is the difficulty in proving violation of the rights. In most of the cases where courts granted the plaintiffs standing or held that a claim is justiciable, the courts have gone on to decide that the plaintiffs are unable to prove violation of their human rights. An example is *FIE* where the court found that although the plaintiffs had standing to maintain the suit, they were unable to show that the climate policies put in place by government violated their human rights.<sup>601</sup> Other examples are *Greenpeace Germany*<sup>602</sup> and *Greenpeace Nordic*<sup>603</sup> wherein the courts upheld the justiciability of the claims, but dismissed the claims on the basis that the plaintiffs' rights were yet to be violated. The Court in *DETEC* took a

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<sup>598</sup> *Sacchi*, Petition, para 193.

<sup>599</sup> *Ibid*, at para 248.

<sup>600</sup> Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, UN Doc A/HRC/35/13, UNHRCOR, 35<sup>th</sup> Sess, (2017), at p 13.

<sup>601</sup> *Supra* note 516.

<sup>602</sup> *Supra* note 525.

<sup>603</sup> *Supra* note 534.

similar position by stating that the Paris Agreement cannot be argued to have been breached since there is still time for the long-term targets therein to be achieved.<sup>604</sup>

One reason for the challenge in proving violation in rights-based climate cases is because human right violations are more easily established after harm has occurred, whereas the adverse impacts of climate change are mostly futuristic projections.<sup>605</sup> It has been observed that “courts are generally not equipped to deal with predictions of future injuries, except where the harm is expected to be quite imminent.”<sup>606</sup> As discussed in chapter four of this thesis, this approach represents the presentist approach of the human rights framework. This futuristic nature of climate change could be addressed by an intergenerational perspective whereby future generations are granted human rights. Since the rights sought to be protected would include those of future generations, the problem of the injuries and violations being too futuristic will not arise.

Another reason for the difficulty in proving violation is the challenge in determining the standards against which to decide whether or not climate action or inaction violates human rights, i.e. what exactly does a State need to do (or not do) in order not to be in violation of the human rights of the citizens? Since States are usually already executing climate action plans and implementing climate action policies, the question then becomes whether such steps taken by a State are adequate. One way of measuring the adequacy of steps is to look at the national plans and policies themselves to determine if the States are implementing them to the fullest extent. However, this method of determining standards may not be useful where the court is unwilling to test the adequacy of the policy but rather decides to leave the determination of the standard to the discretion of the government.<sup>607</sup> Another way to determine the standards is to look at commitments

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<sup>604</sup> *Supra* note 543.

<sup>605</sup> Savaresi & Auz, *supra* note 17 at 4.

<sup>606</sup> *Ibid.*

<sup>607</sup> *FIE, Greenpeace Germany, DETEC.*



a State has made under international climate agreements, particularly the NDCs under the Paris Agreement. Where a State is found not to meet its targets under these agreements, some courts have held that the State is not doing enough to curb climate change.<sup>608</sup> Some other courts have taken the view that individuals cannot take the benefit of these agreements as the agreements are between States.<sup>609</sup> Another issue arising is that a State may enter into an agreement which cannot realistically meet the global temperature targets of 1.5°C/2°C, since the NDCs are voluntary. In such instances, plaintiffs have resorted to scientific reports stipulating the ideal contributions each State ought to make if the global goal is to be achieved.<sup>610</sup> Climate science is therefore very key towards measuring the adequacy of commitment by States.<sup>611</sup> It must be noted however that it is easier to establish causation in respect of failure of government to take adaptation measures than for failure to mitigate.<sup>612</sup>

The difficulty in proving violation of rights also arises in cases alleging transboundary violation of human rights. Proving transboundary violation of human rights is problematic because of the challenge of linking a particular harm to climate change, attributing particular emissions to particular emitters, and linking particular emitters and victims.<sup>613</sup> While there is concrete scientific evidence apportioning responsibility for climate change, these scientific studies are yet to attribute particular impacts of climate change to particular States. Scientific studies only go as far as attributing collective responsibility for climate change impacts to the emitting States and Carbon

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<sup>608</sup> See *Supreme Court of Mexico Ruling; Future Generations*; and *Urgenda*.

<sup>609</sup> See *Greenpeace Germany*; Interestingly, the Court in *Urgenda* also made this point, but however stated that the plaintiffs could rely on the national standards set by the Netherlands.

<sup>610</sup> See for instance *Urgenda* where the courts determined the standards to be met by the Netherlands using the scientific reports by the UNEP, IPCC and other scientific bodies. The plaintiffs in *Lho'imggin* also made similar arguments with respect to the inadequacy of Canada's NDC.

<sup>611</sup> Cordelia Christiane Bähr et al, "KlimaSeniorinnen: lessons from the Swiss senior women's case for future climate litigation", (2018) 9:2 *J of Human Rights & Environment* 194 at 214.

<sup>612</sup> Peel & Osofsky, *supra* note 4 at 63.

<sup>613</sup> Lewis, "Human Rights and Climate Change", *supra* note 125 at 186.

Majors. This is one of the reasons the IACHR refused the 2005 petition.<sup>614</sup> This problem could be addressed using Knox’s suggestion that responsibility should be apportioned to States on the basis of their emissions, rather than on the basis of harm.<sup>615</sup> Knox states that “it is not necessary to link the emissions of a particular state to a particular harm in order to assign responsibility for the harm”<sup>616</sup> and therefore suggests that “since all greenhouse gases contribute to climate change, wherever they are released, responsibility could be allocated according to states’ shares of global emissions of greenhouse gases.”<sup>617</sup> This is without prejudice to the climate justice principle of Common But Differentiated Responsibility under which a State “with GHG emissions close to the permissible quantum” may be permitted to emit GHG within the “permissible quantum” if doing so would avert “undue hardship, considering, in particular, the country’s historical GHG contributions, its capabilities in terms of its wealth, its needs, its dependence on fossil fuel, and its access to renewable energy.”<sup>618</sup>

As mentioned in chapters two and three of this thesis, the recognition of the right to a healthy environment will to a large extent relieve the plaintiffs of the burden of proving causation since any harm done to the environment itself will suffice. It does not seem merely coincidental that courts tend not to accept inadequate climate action as a violation of human rights in cases where

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<sup>614</sup> Franziska Knur, “The United Nations Human Rights-Based Approach to Climate Change – Introducing a Human Dimension to International Climate Law”, in Sabine von Schorlemer & Sylvia Maus (eds), *Climate Change as a Threat to Peace Impacts on Cultural Heritage and Cultural Diversity*, (Frankfurt: Dresden Papers on Law and Policy of the United Nations, 2015).

<sup>615</sup> John Knox, “Linking Human Rights and Climate Change at the United Nations”, (2009) 33 *Harvard Env’t L Rev* 477 at 489, [Knox, ‘Linking Human Rights’].

<sup>616</sup> *Ibid.*

<sup>617</sup> *Ibid.*

<sup>618</sup> For more details, see Antonio Benjamin et al “Oslo Principles on global climate change obligations”, online (pdf): < <https://globaljustice.yale.edu/sites/default/files/files/OsloPrinciples.pdf> > [Oslo Principles]. See also the follow-up principles to the Oslo Principles i.e. Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises* (The Hague: Eleven International Publishing, 2018) online: <<https://climateprinciplesforenterprises.org>> [Enterprises Principles]. For a discussion on application of an ecologically embedded relational analysis to both the UNGPBHR, the Oslo Principles and the Enterprises principles, see Seck, “Relational Analysis”, *supra* note 252.

the right to a healthy environment is not accepted or not considered by the court,<sup>619</sup> while the courts seem more disposed to accept inadequate climate action as a violation or threat to human rights human rights of the plaintiffs where they accept the right to a healthy environment. This is not to say that the acceptance of the right to a healthy environment by the court automatically translates to acceptance of violation of rights<sup>620</sup> – for instance, the court in *Greenpeace Nordic*<sup>621</sup> accepted the existence of the right to a healthy environment but found that there was no actual or threatened violation of the plaintiffs’ human rights.<sup>622</sup> The important thing to note here is that a common denominator in all cases where the court accepted human-rights violation arguments in rights-based climate suits is the acceptance of the right to a healthy environment by the courts.<sup>623</sup> In fact, in cases where the right is not recognised as a substantive right, the court drew out the right from other human rights such as the rights to life, health, property, and equality.<sup>624</sup> Therefore, an important factor for the success of rights-based climate cases is the progressive interpretation by the courts towards accepting the rights to a healthy environment.

It should be noted that rights-based climate litigation has been more successful in the Global South than it has been in the Global North. For example, five out of the six cases<sup>625</sup> resolved in favour of the plaintiffs are all decisions in the Global South. Setzer and Benjamin note that this success in the Global South could possibly be due to the presence of express constitutional provisions protecting the environment in these jurisdictions, as well as the willingness of the courts

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<sup>619</sup> *Greenpeace Germany, FIE, Detec.*

<sup>620</sup> Peel & Osofsky, “Rights Turn”, *supra* note 4 at p 62.

<sup>621</sup> *Supra* note 534.

<sup>622</sup> Since the plaintiffs were asking the court to find that the emissions from oil & gas exported abroad by Norway was harmful to foreigners as well as Norwegians, the question of proof of causation arose. One therefore wonders if the court may have reached a different outcome but for the argument on transboundary violation of human rights.

<sup>623</sup> *Supreme Court of Mexico Ruling, Future Generations, Urgenda, Gbemre.*

<sup>624</sup> *Himachal Pradesh, Leghari*

<sup>625</sup> As examined in the previous chapter of this thesis.

to accept rights framing of climate cases.<sup>626</sup> Apart from the existence of the right to a healthy environment, other factors relevant to acceptance of rights-based climate cases include the existence of substantive and procedural law for enhancing rights claims and judicial receptivity to these rights framing.<sup>627</sup>

#### **6.4. Possibility of Rights-Based Actions against Private corporations**

There have been climate cases against private corporations. However, most of these cases have been on the basis of tort law, with almost no rights-based climate cases. This dearth of rights-based climate cases against private corporations has attracted commentary from climate law scholars and practitioners. Targeting private corporations with climate suits is important due to the significant contribution by these corporations to GHG emissions.<sup>628</sup> Also, actions against private corporations would obviate the questions of standing in relation to separation of powers and political discretion typically raised by governments in climate cases. The commencement of climate actions against private corporations has been identified as a remarkable development that would be valuable to the human rights approach to climate change.<sup>629</sup> It has also been observed that the role of private law in climate litigation has been neglected, in spite of the potential of regulation of conducts of non-state actors and climate litigation against private corporations to shape climate policies.<sup>630</sup> Sadly, there remains a dearth of rights-based cases against private corporation. Virtually all the rights-based climate cases are against the government, and not private corporations. Only one out of the thirteen cases examined in the preceding chapter is against a

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<sup>626</sup> Setzer & Benjamin, *supra* note 1 at 23.

<sup>627</sup> Peel & Osfosky, “Rights Turn”, *supra* note 4 at p 62.

<sup>628</sup> Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’, (2018) 38:4 *Oxford Journal of Legal Studies* 841 at 842 [Ganguly].

<sup>629</sup> Savaresi & Auz, *supra* note 17.

<sup>630</sup> Bouwer, *supra* note 19.

private corporation – the case of *Gbemre* against Shell Nigeria. It is also worthy of mention that Milieudefensie, Greenpeace, Friends of the Earth alongside other environmental NGOs have sued Shell before the Hague District in the Netherlands arguing that Shell’s contributions to GHG emissions violates the human rights to life and dignity of human person protected under the Dutch Civil Code and the ECHR.<sup>631</sup> The plaintiffs seek to compel Shell to reduce its GHG emissions in line with the global temperature target within the climate regime.<sup>632</sup> The arguments in the case are reminiscent of the arguments put forward by the plaintiffs in *Urgenda* – except that this time the arguments are directly against a private corporation, rather than the government.

This dearth of cases against private corporations has been attributed to the preoccupation of international human rights regime with regulation of states (not corporations or individuals), issues of sovereignty in apportioning transboundary responsibility<sup>633</sup> and the fact that private corporations are not parties to international agreements.<sup>634</sup> However, the duty of States to “protect” human rights at the domestic level entails an obligation on States not to permit private actors within their jurisdiction to carry out activities that would violate human rights of individuals and groups, and to provide remedies for such violations.<sup>635</sup> Within the scope of this duty, one of the mechanisms through which the State protects human rights and provides remedies to victims of breach is through the courts (effective adjudication)<sup>636</sup>. Thus, individuals are able to hold private corporations accountable for breaches of human rights on the basis of domestic human rights

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<sup>631</sup> Sabin Center for Climate Change Law, “Milieudefensie et al. v. Royal Dutch Shell plc.”, online: <<http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/#:~:text=Summary%3A,law%20and%20human%20rights%20obligations.>>

<sup>632</sup> *Ibid.*

<sup>633</sup> Marilyn Averill, “Linking Climate Litigation and Human Rightsreel”, (2009) 18:2 *Review of European, Comparative and International Environmental L* 139.at 141.

<sup>634</sup> *Ibid.*

<sup>635</sup> Lewis, ‘Human Rights & Climate Change’, *supra* note 125 at 177.

<sup>636</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31 (2011), at para I(A)(1), [UNGPBHR].

instruments. Additionally, there is an increasing recognition of obligations of private corporations towards human rights within the international human rights framework as evident in the UN Guiding Principles on Business and Human Rights, 2011 (UNGPHR).<sup>637</sup> The UNGPHR has three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights and access to remedies. Although the UNGPHR is a soft law instrument, it is increasingly being relied on by individuals in an attempt to hold private corporations accountable for breach of human rights vis-à-vis climate change. For example, the plaintiffs in *Milieudefensie* rely on the UNGPHR as well as other legal instruments to argue that Shell has an obligation to respect human rights.<sup>638</sup> Another remarkable development with respect to the UNGPHR is a petition to the Commission of the Human Rights of the Philippines (CHR) by Greenpeace Southeast Asia alongside other civil societies against 50 companies (mostly carbon majors), in which the CHR was asked to investigate the responsibility of the carbon majors for human rights violations and for threats of violations resulting from the impacts of climate change in the Philippines.<sup>639</sup> The petitioners heavily relied on the provisions of the UNGPHR to establish the obligations on the Carbon Majors. One of the key facts relied on by the petitioners is scientific research reports apportioning responsibility for anthropogenic GHG emissions to each of the Carbon Majors since 1751.<sup>640</sup> The CHR after thorough investigations and a series of hearings, reached a conclusion that the carbon majors are “legally and morally liable for human rights harms to Filipinos resulting from climate change.”<sup>641</sup> Although the decision of the CHR is not binding, it represents a major

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<sup>637</sup> OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31 (2011), [UNGPHR].

<sup>638</sup> *Milieudefensie (summons)*, at para 710 – 715.

<sup>639</sup> Greenpeace Philippines, “The Climate Change and Human Rights Petition”, (9 December 2019), online: <[www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/](http://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition/)>.

<sup>640</sup> Citation for report - Richard Heede, “Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010”, (2014) 122 *Climatic Change* 229.

<sup>641</sup> *Ibid.*

stride in the private law trajectory of rights-based climate litigation and could influence similar actions in other States.<sup>642</sup> It is therefore important for climate litigants to start bringing suits against private corporations relying on both domestic and international human rights instruments applicable to non-state entities.

It must be noted however that the use of a human rights approach in climate litigation against private corporations may face challenges similar to the tortious approach, for example, the use of Strategic Lawsuits Against Public Participation (SLAPPs) to intimidate and silence climate organizations and activists, in regions where there are no anti-SLAPP laws.<sup>643</sup> There are also concerns that climate litigation targeted at carbon major multinational corporations could compel the corporations to close up shop in States or could cause the States to start granting corporations some sort of immunity.<sup>644</sup>

## **6.5. Measuring the success of Rights-based Climate Litigation**

An important issue to be considered with respect to rights-based climate litigation is how to measure the success rate of the cases in order to ascertain whether or not litigation is indeed an effective tool for compelling climate action. In other words, what are the parameters for determining whether a climate case is successful? This importance of this question is underlined by the fact that cases with judgment awarded in favour of plaintiffs may not be enforced, while cases decided against the plaintiffs could still compel climate action. According to Bower,

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<sup>642</sup> Savaresi & Auz, *supra* note 17 at 14; Business & Human Rights Resource Centre, “Turning up the heat: Corporate legal accountability for climate change”, (2018), online (pdf): <[www.business-humanrights.org/sites/default/files/CLA\\_AB\\_2018\\_Full.pdf](http://www.business-humanrights.org/sites/default/files/CLA_AB_2018_Full.pdf)> at 12 [BHRRC].

<sup>643</sup> Elodie Aba, “Lawsuits by companies seek to silence accountability advocates”, [last visited 18 June 2018] BHRRC, online: <<https://www.business-humanrights.org/en/lawsuits-by-companies-seek-to-silence-accountability-advocates>>.

<sup>644</sup> Eric Posner, “Climate Change and International Human Rights Litigation: A Critical Appraisal”, (2007) 155:6 *University of Pennsylvania Law Review* 1925 at 1941, [Posner].

“success in these [climate] cases requires a nuanced understanding of victory and defeat, and more careful thinking about the character, aims, and effect of these pieces of litigation.”<sup>645</sup> More generally, law and social change scholars have observed that whether litigation “works” or not cannot be assessed solely by the court’s pronouncement and compliance thereto - for instance, litigation that receives widespread attention (whether resolved in favour of the plaintiffs or not) has the potential to raise public consciousness, put an issue on the political agenda, stimulate political activity by revealing the vulnerability of structural arrangements that seem impervious to change, and amplify the threat of litigation costs being imposed if decision makers fail to find political solutions.<sup>646</sup> Therefore, one has to look beyond the legalese in the court pronouncements to see the real impact these cases are having on climate action.<sup>647</sup> For example, the court in *Leghari* (which is one of the celebrated rights-based cases) in post-judgment proceedings confirmed that government had complied with the *Leghari* decision at least until January 2017. However, the Pakistani government appears to have slacked in its efforts as another case has recently been filed by a group of women on behalf of themselves and future generations on the ground that the Pakistani Government has failed to take necessary steps in protecting the climate since December 2017.<sup>648</sup> Another example is the decision of the Colombian Supreme Court in *Future Generations* with which the Colombian government is yet to comply.<sup>649</sup> Example of cases resolved against the

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<sup>645</sup> Kim Bouwer, “Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation”, (2020) *Transnational Env’t L* [Bouwer, ‘Holy Grail’].

<sup>646</sup> Scott L Cummings & Deborah L Rhode “Public Interest Litigation: Insights from Theory and Practice” (2009) 36:4 *Fordham Urban L J* at 609.

<sup>647</sup> Vaughn Rajah, “The Changing Nature Of Climate Litigation”, *Human Rights Pulse* (8 December 2019), online: <<https://www.humanrightspulse.com/mastercontentblog/the-changing-nature-of-climate-litigation>>.

<sup>648</sup> *Maria Khan v Federation of Pakistan* (pending) petition No. 8960 of 2019 (Lahore High Court), online: <<http://climatecasechart.com/non-us-case/maria-khan-et-al-v-federation-of-pakistan-et-al/>>.

<sup>649</sup> Santiago Ardila Sierra, “The Colombian government has failed to fulfill the Supreme Court’s landmark order to protect the Amazon”, *Dejusticia* (5 April 2019), online: <[www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/](http://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/)>; Jennifer Hijazi, “Climate lawyering can be deadly in the global south”, *E&E News*, (12 June 2020), online: <[www.eenews.net/stories/1063371389](http://www.eenews.net/stories/1063371389)>; Yale Climate Connections, “Colombian youth push their government to address deforestation”, (29 April 2020), online: <[www.yaleclimateconnections.org/2020/04/colombian-youth-push-their-government-to-address-deforestation/](http://www.yaleclimateconnections.org/2020/04/colombian-youth-push-their-government-to-address-deforestation/)>.



plaintiffs but which could be said to bear favourable outcomes include *ENJEU* where the court agreed with the plaintiffs that the human right violation claims put forward by the plaintiffs were justiciable in spite of dismissing the suit on grounds that the plaintiffs failed to meet the procedural requirement for maintaining the claims by way of a class action. The court's pronouncement that the plaintiffs did not have to bring the claims by way of a class action implies that the court is likely to accept the plaintiffs' claims if the claim is brought for themselves. The insight from this case would be impactful for plaintiffs if they decide to refile the suit and for subsequent rights-based climate cases in Canada. Similarly, the impacts of the Inuit petition are very far-reaching despite the dismissal of the petition by the IACHR.<sup>650</sup> The petition was the earliest case seeking to establish a link between climate change and human rights, and therefore sparked global interest in the nexus between climate change and human rights.<sup>651</sup> Bratspies notes that "if success is measured by legal outcome, the Inuit petition was a failure, [however] to dismiss it as a failed litigation strategy would be to miss the pivotal role this petition played in elucidating the connection between human rights and climate change."<sup>652</sup> Thus, even cases resolved by the courts against plaintiffs may provide guidance for "climate change responsive adjudication in the longer term."<sup>653</sup> Peel and Osofsky's view on the impact of rights-based climate litigation is worthy of note:

Of course, court victories are not the only measure of 'success' for litigation brought with the strategic purpose of promoting social and policy change with through the ways in which they shape public dialogue, business attitudes and government action. Although alleging rights violations in climate cases may not result in formally successful judgments, they may nevertheless garner media and public attention that elevate political discussions about climate change, highlight the plight of particular communities, bring to light mitigation or adaptation failures, and ultimately illuminate the 'human face' of climate disaster. In the final analysis, the strongest benefit from a turn towards rights arguments in climate change litigation may stem from these

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<sup>650</sup> Jodoin, *supra* note 140.

<sup>651</sup> *Ibid.*

<sup>652</sup> Bratspies, *supra* note 197 at 15.

<sup>653</sup> Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change', (2018) 38:4 *Oxford Journal of Legal Studies* 841 at 842.

informal effects and the role they play in re-orienting and reframing the climate debate to one that emphasizes impacts on people. Such framing may ultimately prove to be more publicly and politically salient than scientific and technical arguments in motivating strong action to address the problem.<sup>654</sup>

This is not to say that there are no cases where the decision of the court was implemented. An example is the *Himachal Pradesh* case where (following the decision of the NGT), the State government of Himachal began to put measures in place to curb the black carbon emission including introduction of eco-friendly buses,<sup>655</sup> banning of vehicles older than 15 years old,<sup>656</sup> among other measures. The State Government has been providing periodic updates to the NGT, although the NGT had on an occasion expressed dissatisfaction with the progress made so far.<sup>657</sup> Another issue arising from examining the impact of rights-based climate cases is the predominant focus on the high-profile cases<sup>658</sup> such as *Urgenda*, *Leghari*, *Future Generations*, *Juliana*. The focus on the high-profile cases seems to present a narrative that there is an overwhelming acceptance of rights-based arguments by the court, whereas the contrary can be said to be the case. Out of the thirteen cases examined in the previous chapter, six cases were resolved in favour of the plaintiffs, while the remaining seven were dismissed. Savaresi notes that only about a quarter of the climate cases involving human right arguments have been successful.<sup>659</sup> Admittedly, the high-profile cases have propelled the recent rights-based approach to climate litigation. However, the focus on the high-profile successful cases does not tell the full story of the success of rights-

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<sup>654</sup> Peel & Osfosky, “Rights Turn”, *supra* note 4 at pp 66-67.

<sup>655</sup> “Himachal introduces eco-friendly electric buses to keep Manali-Rohtang pass clean”, *Outlook: The News Scroll* (21 September 2017), online: <<https://www.outlookindia.com/newsscroll/himachal-introduces-ecofriendly-electric-buses-to-keep-manalirohtang-pass-clean/1152401>>.

<sup>656</sup> Ashwani Sharma, “Himachal Pradesh govt prepares to ban vehicles older than 15 years at Rohtang Pass”, *The Indian Express* (4 February 2015), online: <<https://indianexpress.com/article/india/india-others/himachal-pradesh-govt-prepares-to-ban-vehicles-older-than-15-years-at-rohtang-pass/>>.

<sup>657</sup> “NGT hauls up Himachal Pradesh over status report on pollution at Rohtang Pass”, *India Times* (6 July 2018), online: <<https://timesofindia.indiatimes.com/city/shimla/ngt-hauls-up-state-over-status-report-on-pollution-at-rohtang-pass/articleshow/64876726.cms>>.

<sup>658</sup> Or ‘holy grail cases’ as Bouwer refers to them. See Bouwer, ‘Holy Grail’, *supra* note 645.

<sup>659</sup> Savaresi & Auz, *supra* note 17 at 2.

based climate cases. A wholistic analysis of the rights-based cases is therefore imperative so as to identify the areas of weaknesses. Examining the outcomes of climate litigation has been identified as a new trajectory for scholarship on climate litigation.<sup>660</sup>

## **6.6. Summary**

It is important for the courts to adopt a constitutional test in determining whether an action falls outside the scope of justiciability. The relevant question ought to be whether the claims raise constitutional issues and threaten human rights. It ought not to matter whether the claims involve matters in respect of which the State has discretion. Also, the feminist relational theory provides a way of reconceptualising human rights to the effect that the question of existence of individual harm would become insignificant. With respect to future generations, the challenge of standing with respect to future generations can be addressed by creation of ombudsmen for future generations. Recognition of the right of future generations to a healthy environment and attribution of responsibility for GHG emissions to States on basis of emissions (historical and present), could address the problem of proving violation. This chapter has highlighted the potential for commencement of human rights-based climate suits against private corporations for violation of human rights, and the need for establishment of standards to measure the success of rights-based climate litigation.

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<sup>660</sup> Setzer & Byrnes, *supra* note 1 at 5-6; Bouwer, 'Holy Grail', *supra* note 645.

## **Chapter Seven: Conclusion**

This chapter provides a summary of the discussions in preceding chapters and ultimately highlights recommendations for addressing issues arising from the human rights approach to climate change as it relates to intergenerational equity and climate litigation.

### **7.1. Summary**

The focus of this thesis is to appraise the human rights approach to climate change litigation, particularly as it relates to intergenerational equity and the right to a healthy environment. The thesis examines how the concept of intergenerational equity fits within the human rights approach to climate change litigation. The thesis begins by examining the human rights approach to climate change. It undertakes an overview of the legal framework for the human rights approach to climate change in order to determine the laws and instruments forming the basis of the human rights approach under international environmental, human rights and climate law. The UDHR, ICCPR, ICESCR, UNDRIP, UNCRC are some of the major international human rights instruments supporting the human rights approach to climate litigation. An important point to note regarding the international human law instruments is the absence of an express right to a healthy environment. The thesis recognises that the regional human rights instruments and national constitutions are essential to the human rights approach to climate litigation, especially as the right to a healthy environment are recognised in some of the regional instruments and national constitutions. The Stockholm Declaration, Rio Declaration and the UNSDGs are identified as some of the key international environmental law instruments relevant to the human rights approach to climate change. It is observed that these international environmental law instruments are soft law instruments which in themselves are not binding, but could become binding once they

unarguably attain the status of customary international law.<sup>661</sup> Within the international climate law framework, the UNFCCC, the Kyoto Protocol, the 2009 Copenhagen Accord, the 2010 Cancun Agreement and the Paris Agreement are the main instruments relevant to the human rights approach to climate change. However, these international law instruments do not emphasize a human rights approach to climate change.

The OHCHR has contributed significantly towards the clarifying the relationship between human rights and climate change. Following the work of the OHCHR, this thesis has outlined a number of human rights affected by climate change. Such rights include the rights to life, health, food, water, a healthy environment as well as the rights of the child and other vulnerable groups. The right to a healthy environment is essential to the human rights approach to climate change due to the fact that this right presents the most direct linkages (compared to other human rights) between climate change and human rights. However, this right is yet to be recognised under international law and by some States (although the majority of States recognise this right). The reasons for the non-recognition of the right to a healthy environment are to a large extent theoretical. The thesis therefore attempts to provide theoretical justifications for the right to a healthy environment using existing human right theories. The Western Liberal theories namely the natural law theory, will theory and interest theory, which are the traditional human right theories, lay down the criteria to be met for a right to qualify as a human right. These criteria are individuality, independence and dignity. The right to a healthy environment does not meet the criteria for recognition of human rights laid down by these theories.<sup>662</sup> It is therefore concluded that these theories do not provide justifications for the recognition of the right to a healthy

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<sup>661</sup> See pages 22, 23 and 69 above.

<sup>662</sup> It must be necessary to advance human dignity (*dignity*),<sup>662</sup> must be justifiable without reference to other human rights (*independence*),<sup>662</sup> and must be an individual right as opposed to a collective right (individuality). See Chapter 3.2.1 above.

environment. The thesis proposes the feminist theory of relational autonomy and the corporeal citizenship theory as alternative theories that provide justification for recognition of the right to a healthy environment. The relational autonomy theory and the corporeal citizenship theory emphasize the need to examine the human rights and the environment as being one and the same. In other words, the human being is not seen as being detached from the environment. Thus, any harm to the environment constitutes simultaneous harm to the human person. This thesis emphasizes the need for recognition of the right to a healthy environment and the benefits of such recognition to the human rights approach to climate change. The benefits of the human rights approach to climate change are its focus on humans as victims, the moral force of human rights, its ability to provide innovative legal mechanisms to address climate change, its emphasis on vulnerable groups such as children, future generations, indigenous people and women. The thesis also critiques arguments against recognition of the right to a healthy environment. Overall, the thesis concludes that the right to a healthy environment is vital to the success of the human rights approach to tackling climate change, and is important for rights-based climate cases.

The thesis examines the concept of intergenerational equity and identifies its status within the human rights approach to climate change. The thesis examines the extent to which intergenerational equity is recognised under international law i.e. under international environmental law, climate change law, human rights law. The conclusion is that intergenerational equity is mostly contained in preambular provisions of international law instruments as an aspirational or guiding principle. It is observed that framings of interests of future generation within these instruments are not rights-focused. In other words, the instruments do not expressly attribute human rights to future generations. The theoretical difficulties in recognizing the rights of future generations are discussed. It is however concluded that these difficulties are not

unsurmountable as States have started granting rights to future generations in their national constitutions. The importance of the intergenerational equity approach to the human rights approach to climate change includes its compatibility with the human rights approach which emphasizes protection of rights of vulnerable groups, its de-emphasis on presentism,<sup>663</sup> its contribution to the protection of the rights of the child against climate change, its potential to define the concept of sustainable development and to provide a justification for the right to a healthy environment.

An examination of the decisions of the courts on human rights-based cases reveals that the arguments of plaintiffs in a preponderance of human rights-based climate cases have been rejected by the courts. It also reveals that the interests of future generation are not framed in rights language, rather intergenerational equity serves an explanatory function for the plaintiffs and is used as an interpretative aid by the courts. Upon a case-by-case analysis of the human rights climate cases, the conclusion is that the theoretical problems associated with the human rights approach to climate change and protection of interests of future generations also exist in various forms in climate litigation. These theoretical problems translate to issues such as difficulty in establishing standing, justiciability and violation in climate litigation. This is the reason it is important that these questions be approached both theoretically and practically. If the issues can be addressed theoretically, they are unlikely to pose as much problems practically, and *vice versa*. Another observation is that the human rights-based cases are mostly against States, and not private corporations. It has also been noted in this thesis that there is little or no discourse on how to measure the success of human rights-based climate litigation.

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<sup>663</sup> The preoccupation with rights of present generation without consideration of the rights of future generation. See chapter 4.4.2, *above*.

## 7.2. Recommendations

In light of the issues identified in this thesis, the following recommendations are made:

### 7.2.1. International Recognition of the Right to a Healthy Environment

It is clear that one of the issues identified in the human rights approach to climate change is the absence of a right to a healthy environment.<sup>664</sup> The absence of this right also makes it difficult for plaintiffs to establish violation of their rights in human rights-based climate litigation. Thus, one of the first steps towards advancing the human rights approach to climate litigation is the recognition of the right to a healthy environment. This right should be included in international law instruments and fully recognized as customary international law. The draft of the Global Pact for the Environment (draft GPE) is an example of an international law instrument that contains a characterization of the right to a healthy environment — “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.”<sup>665</sup> The draft GPE is currently under consideration at the UNGA and is being discussed between States.<sup>666</sup> The absence of the right to a healthy environment can also be addressed at future earth summits.<sup>667</sup>

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<sup>664</sup> Boyd Report 2019, *supra* note 123.

<sup>665</sup> Global Pact for the Environment, “Preliminary Draft Global Pact for the Environment”, online: <<https://globalpactenvironment.org/uploads/EN.pdf>>, article 1. The purpose of the draft GPE is to strengthen “the effectiveness of international environmental law by combining its most fundamental principles into a single overarching, legally binding document.” See Géraud de Lassus Saint-Geniès, “Not All that Glitters Is Gold: An Analysis of the Global Pact for the Environment Project”, (17 May 2019) *CIGI Papers No. 215*, online: <<https://www.cigionline.org/publications/not-all-glitters-gold-analysis-global-pact-environment-project>>, [*Saint-Geniès*]. The GPE will apply to environmental protection as a whole regardless of the area (climate, biodiversity, pollution, and others). It has been argued however that the importance of the GPE may be exaggerated and could be counter-productive. See Saint-Geniès, *ibid*.

<sup>666</sup> *Towards a Global Pact for the Environment*, UN Doc A/RES/71/277, UNGAOR, 72<sup>nd</sup> session (2018).

<sup>667</sup> Past summits include the Rio Summit 1992, and the Rio+20 Conference 2012.



### **7.2.2. Constitutionalizing the Right to a Healthy Environment in National Laws**

Due to the superiority of the constitution to other laws in a State, it is important that the right to a healthy environment is constitutionalised. In jurisdictions where human rights provisions in the constitution are applied to human right violations by private entities, this will not only address inaction by the State but also acts of violation by private entities. For jurisdictions where human rights provisions in the constitution do not apply to non-state entities, it is important that the right is enshrined in human right laws that apply to non-state entities.

### **7.2.3. Direct Inclusion of Human Rights in Climate Law Instruments.**

It is important for climate law instruments to go beyond mere inclusion of human rights linkages to climate change in preambular provisions. The duties of States to respect, protect and fulfil human rights have to be part of the substantive provisions in climate law instruments, so that climate action can be undertaken with these duties as paramount considerations. However, it is unlikely that the Paris Agreement or the UNFCCC can be amended due to controversies with including human rights provisions during the negotiations in climate instruments as evidenced for instance by the Paris Agreement negotiations.<sup>668</sup> Another option may be to create a further climate change document at international level to address the human rights concerns – this option is however hampered by the controversy that has trailed the human rights provisions of the Paris Agreements.

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<sup>668</sup> See Geneva Negotiating Text, *supra* note 350; Benoit Mayer, “Human Rights in the Paris Agreement”, (2016) 6 *Climate Law* 109-117.

#### **7.2.4. Reconceptualization of Human Rights using the Feminist Theory of Relational Autonomy**

One of the recurring themes in this thesis is the lack of theoretical framework supporting the human rights approach to climate change. The feminist theory of relational autonomy presents a way of reconceptualizing the theoretical underpinning of human rights to accommodate climate change as a violation of human rights not just of the present generations, but also of future generations. This approach can be adopted by litigants, judges, policy makers, scholars, and other stakeholders. Bodies like the IUCN's Global Judicial Institute on Environment (GJIE)<sup>669</sup>, which comprises of judges from around the world, could play a vital role in integrating this perspective into judicial decision-making system. Some of the key activities of the GJIE are information exchange and sharing between judges, as well as education and training of judges.

#### **7.2.5. Using the Child Rights Approach to advance Intergenerational Equity**

The framework for protection of the rights of the child presents a framework that is easily adaptable for protection of the rights of future generations, since children represent the bridge between the present and future generations. The UN and States need to expand the frontiers of the child rights to expressly cover the rights of future generations. It is equally important for climate plaintiffs to adopt this approach as part of their litigation strategy while advancing the rights of future generations and human rights arguments more broadly. This approach could address some of the problems associated with protection of the rights of future generations.

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<sup>669</sup> The GJIE is a body under the auspices of the IUCN, UNEP, OAS, and other partners seeking “to develop and enhance the capacity of judges, courts, and tribunals across the world to exercise their role in environmental matters through the effective implementation, compliance, and enforcement of the law.” See IUCN, “Global Judicial Institute on the Environment”, online: < <https://www.iucn.org/commissions/world-commission-environmental-law/our-work-wcel/global-judicial-institute-environment>>.

### **7.2.6. Rights’ Framing of Intergenerational Equity/Creation of rights for future generations**

The interests of future generations have to be framed using the language of rights, beyond mere inclusion in preambular provisions of climate instrument as an aspirational principle and beyond merely referencing the interests for explanatory purposes in climate cases. The framing of the interests of future generations as rights creates a sense of responsibility and accountability on duty-bearers to ensure that actions inimical to the rights of future generations are not taken. Human rights have already been attributed to future generations within the legal regime of some States. This can be replicated at international level as well as by other States. An important development with respect to the interests of future generations at international level is the GPE. The GPE provides that “intergenerational equity shall guide decisions that may have an impact on the environment, [and that] present generations shall ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs.”<sup>670</sup>

### **7.2.7. Commencement of more Rights-based cases**

There is no doubt that the rights-based approach to climate litigation is a recent development. It is however important that the climate plaintiffs keep instituting these cases, as these cases ensure that the jurisprudence of the human rights approach to climate litigation continues to develop both at international level and domestic level. As seen in the course of this thesis, the success and impact of these cases go beyond the outcomes in court. This is not to say that the traditional forms of climate litigation should be abandoned, as the human rights approach

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cannot possibly address all the issues in climate change. It has to be employed alongside other forms of climate litigation.

#### **7.2.8. Human Rights Climate Cases against Private corporations**

Plaintiffs need to consider commencing rights-based cases against private corporations responsible for GHG emissions in addition to suing the government. Apart from the advantage of not having the challenge of political question that plagues the cases against the States, the possibility of getting sued could compel climate action by private actors. One of the major challenges with instituting human rights-based climate cases against private corporations is the challenge of proving violation and attribution of causation. The suggestion of Knox with respect to addressing attribution of harm to respective states — allocation of responsibility according to quantum of GHG emissions — could also be applied to hold private corporations accountable. That is to say, private corporations could be held accountable for violation and threats to human on the basis the quantum of GHG emissions. At international level, there is no binding instrument that holds private corporations accountable for GHG emissions. It would therefore be challenging to hold private entities accountable for climate-related human rights violations under the international human rights framework. It is worthy of mention however that the draft GPE places the duty to take care of the environment on not only States but “every... international institution, every person, natural or legal, public or private.”<sup>671</sup> Thus, the GPE if adopted will place a duty on private entities to protect the environment.

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<sup>671</sup> *Draft GPE*, article 2.

### **7.2.9. Human Rights Climate Litigation Stock-taking**

It is important that climate scholars, lawyers, judges and other stakeholders in climate litigation devise a means by which to determine the impact of the climate cases. This is important in order to measure the progress of the human rights approach, especially against other forms of climate litigation. In addition to the work being done by academics, organisations such as the IUCN and the Sabin Center for Climate Law could potentially contribute by tracking the impacts of judicial decisions on climate change. The major challenge to determining the impacts of these cases remains the pervasiveness and remoteness of the impacts of the decisions.

### **7.3. Conclusion**

The human rights approach and intergenerational equity approach to climate litigation has largely changed the climate change discourse in a positive way and has the potential to do even more. However, there are several setbacks that must be addressed for these perspectives to not only be fully integrated into the climate change, but to effectively address climate change. The intergenerational equity and human rights perspectives are complementary to each other, and ought to be treated as such. These two perspectives hold a lot of promise towards addressing climate change. It is therefore important that both approaches are properly harnessed to effectively address climate change.

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