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Conclusion

The Future of Climate Litigation

Margaretha Wewerinke-Singh and Sarah Mead[*]

The preceding chapters have offered an extensive exploration of the rapidly evolving landscape of climate change litigation. The analysis across themes and issues shows how litigation has become a pivotal strategy for climate action, addressing the sluggish pace of policy development and minimal ambition of climate commitments within the legislative and executive branches of government. The Handbook as a whole also shows the snowball effect of climate litigation, with judicial dialogue spurring innovation in litigation strategies and judicial reasoning. Often drawing on landmark decisions in cases such as *State of the Netherlands v Urgenda Foundation*,[1] *Milieudefensie v Shell*,[2] *Neubauer et al v Germany*,[3] *Leghari v Pakistan*,[4] and *Billy et al v Australia*,[5] an ever-growing number of rulings from judicial and quasi-judicial bodies around the world now underscores the potency of litigation in driving more ambitious and equitable climate policy and action. This trend has reached new heights with the groundbreaking decisions discussed in Chapter 19: the European Court of Human Rights (ECtHR) judgement in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*[6] and the Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS) on climate change and marine protection.[7]

[*] Margaretha Wewerinke-Singh is Associate Professor of Sustainability Law at the University of Amsterdam and an attorney at Blue Ocean Law. Sarah Mead is Co-Director of the Climate Litigation Network.

[1] *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands).

[2] *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL: RBDHA:2021:5339 (District Court of the Hague).

[3] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*).

[4] *Asghar Leghari v Federation of Pakistan etc* PLD 2018 Lahore 364.

[5] UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 3624/2019', 21 July 2022, UN Doc CCPR/C/135/D/3624/2019 (*Billy*).

[6] *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR).

[7] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International* Law *(Request for Advisory Opinion submitted to the Tribunal)*, ITLOS Case No 31 (Advisory Opinion of 21 May 2024).

Through meticulous analysis of the emerging case law, each of the chapters has illustrated how climate lawsuits have cumulatively broken new legal ground and contributed to the evolution of legal systems worldwide, underscoring the resilience and adaptability of these systems in the face of climate change. Courts around the world have shown a particularly high degree of ingenuity through innovative applications of human rights and constitutional provisions, tort law, and principles such as public trust, as well as in grappling with questions of procedure and evidence.[8] They have generally done so with an eye to how other courts have approached similar questions. The *Urgenda* decision, for example, has served as guidance for courts not just in other European jurisdictions[9] but also further afield[10] and at the international level.[11] The ECtHR decision in *KlimaSeniorinnen* further underscores the potential of strategic climate litigation to recalibrate institutional and policy responses to the climate crisis, with a distinct role for international bodies. Similarly, the ITLOS Advisory Opinion clarifies states' obligations under the law of the sea in relation to climate change and, in doing so, advances many of the themes explored throughout this Handbook.

As Eckes, Nedevska, and Setzer show in their chapter, climate litigation has also pushed conceptual boundaries on justiciability. Courts around the world are increasingly assuming a more proactive role in safeguarding rights in the face of insufficient government action on climate change. These developments reveal the versatility of litigation as a strategy to break political inertia and ensure climate justice. The ECtHR and ITLOS decisions further reinforce this trend, with both judicial bodies demonstrating a willingness to engage with complex climate issues and enhance accountability for climate change and its consequences.

However, the transformative potential of climate litigation is far from being fully realised. With climate impacts exacerbating while legal landscapes evolve, new frontiers for strategic litigation are emerging. Realising the full potential of litigation as a catalyst for climate action will require persistent innovation in legal strategies coupled with collaboration across jurisdictions, social movements, scientific disciplines, and legal practitioners worldwide. This Handbook offers insights and perspectives to inform these continued efforts to further develop climate litigation as a force for climate justice.

[8] See also Brian J. Preston, 'The Evolving Role of Environmental Rights in Climate Change Litigation' (2018) 2(2) CJEL 131.

[9] For example *Neubauer* (n 3); *VZW Klimaatzaak v Kingdom of Belgium and Others* [2023] 2022/AR/891 (Cour d'appel de Bruxelles); *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) Case no 20-051052SIV-HRET (Norwegian Supreme Court) (*People v Arctic Oil*); *Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General* [2020] Appeal no 205/19 (Supreme Court of Ireland).

[10] For example, *Thomson v Minister for Climate Change Issues* [2017] NZHC 733; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *Lawyers for Climate Action NZ v The Climate Change Commission* [2022] NZHC 3064.

[11] *Billy* (n 5).

20.1 EMERGING FRONTIERS IN CLIMATE LITIGATION

20.1.1 *Loss and Damage Litigation*

One rapidly developing frontier is litigation focused on addressing climate change-induced loss and damage. Loss and damage encompasses the adverse impacts of climate change that occur despite mitigation and adaptation efforts.[12] These impacts span economic and non-economic losses, from loss of income and property damage to loss of cultural heritage, indigenous knowledge, biodiversity, and ecosystem services.[13] A growing body of scholarship and practice highlights the human rights dimensions of these losses and damages, underscoring the need for global responses capable of preventing and minimising interferences with rights and redressing violations. Currently, the financial burden of addressing loss and damage lies almost exclusively with those affected.[14] This inequity compounds existing vulnerabilities, perpetuating a cycle of poverty and susceptibility to climate impacts.[15]

The imperative of addressing loss and damage has gained increasing recognition, reflected most prominently in the inclusion of a standalone provision on loss and damage in the Paris Agreement, namely Article 8 (untitled).[16] At the same time, however, progress towards a coordinated global response to address loss and damage remains minimal. While the 27th Conference of the Parties to the UNFCCC (COP27) held in 2022 culminated in an in-principle agreement to establish a new Loss and Damage Finance Facility,[17] critical questions about the precise arrangements of this new fund remain unanswered. Moreover, the exclusion of liability and compensation from the scope of the Paris Agreement's Article 8 arguably render this

[12] Hans O. Pörtner and others, 'IPCC 2022: Summary for Policymakers' in Hans O. Pörtner and others (eds), *Climate Change 2022: Impacts, Adaptation and Vulnerability* (Cambridge University Press 2022) 9.

[13] Morten Broberg, 'The Third Pillar of International Climate Change Law: Explaining "Loss and Damage" After the Paris Agreement' (2020) 10(2) Climate Law 211, 217. See also Paris Agreement (entered into force 4 November 2016) 3156 UNTS 79 (Paris Agreement) art 8(4)(g).

[14] See e.g. Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, UNHRC Res 48/14 (13 Oct 2021) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/285/48/PDF/G2128548.pdf?OpenElement> accessed 10 March 2024;

Human Rights and Climate Change, UNHRC Res 44/7 (23 July 2020) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/189/33/PDF/G2018933.pdf?OpenElement> accessed 10 March 2024; Patrick Toussaint and Adrian Martínez Blanco, 'A Human Rights-based Approach to Loss and Damage under the Climate Change Regime' (2019) 20(6) Climate Policy 743; Karen E. McNamara and Guy Jackson, 'Loss and Damage: A Review of the Literature and Directions for Future Research' (2018) 10(2) WIREs Climate Change e564; Meinhard Doelle and Sara Seck, 'Loss & Damage from Climate Change: From Concept to Remedy?' (2019) 20(6) Climate Policy 669.

[15] Sam Adelman, 'Human Rights in Pursuit of Climate Justice' (2021) 38(2) WILJ 171, 176.

[16] Paris Agreement (n 13) art 8(4)(g).

[17] Draft Decision -/CP.27 -/CMA.4, Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage, UN Doc FCCC/CP/2022/L.18–FCCC/PA/CMA/2022/L.20 (19 Nov 2022).

provision, as Broberg puts it, 'without bite', thus necessitating resort to 'domestic as well as international legal regimes' to rectify this shortfall.[18]

Against this backdrop, litigation is emerging as a pathway to enhance action and support for climate-vulnerable countries and communities grappling with compensable damages and/or irreversible climate impacts. As most cases focused on loss and damage are still pending, the potential of this type of litigation has not been fully revealed in this Handbook. However, it is clear from the broader body of climate caselaw that litigation – both domestically and internationally – does hold promise as a strategy for confronting loss and damage. For example, Mead and Doelle's chapter suggests that potential cases could seek reparations for climate-related loss and damage based on primary rules such as the polluter pays principle, with Savaresi's chapter setting out how such claims would be underpinned by secondary rules of state responsibility. Invoking human rights frameworks could also bolster claims for redress and compensation, as demonstrated by Wewerinke-Singh and Maxwell in their chapter on human rights.

For loss and damage litigation to deliver climate justice, the underpinning legal principles and remedies must integrate considerations of ethics, fairness, and equity.[19] Liability and compensation frameworks emerging from litigation should reflect differential levels of responsibility for climate change so that the burden of addressing it is not inadvertently shifted to those who contributed only minimally to its causes. Overall, intelligently designed loss and damage litigation could significantly advance climate justice and provide legal pathways for those experiencing losses and damages to seek redress.

20.1.2 *Litigation against Private Polluters*

Strategic litigation against major corporate greenhouse gas emitters is another promising frontier, with the *Milieudefensie v Shell* ruling of the Hague District Court as a pioneering example of emerging best practice. Cases in this emerging frontier seek to hold private entities directly accountable for their significant contributions to climate change, unlike cases against governments which indirectly target corporate polluters through regulation. As scholars have noted, early lawsuits against private entities failed in part due to difficulties in attributing specific climate impacts to individual corporate actions.[20] However, as discussed by Phillips et al and Minnerop in their respective chapters, attribution science is progressing rapidly, enhancing prospects for successful polluter litigation. The enactment of laws establishing a due

[18] Broberg (n 13) 223.

[19] Mizan R. Khan and others, 'Is Equity Out of the Window in Warsaw Loss and Damage Debate?' (2015) 4(3) International Journal of Global Warming 344.

[20] Geetanjali Ganguly, Joana Setzer, and Veerle Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2018) 38(4) OJLS 841.

diligence standard for private actors in several parts of the world, both at the domestic and regional levels, further enhances these prospects.[21]

Another emerging strategy is pursuing polluters for deceptive practices obscuring the climate impacts of their products. This approach has already yielded some success in recent cases against fossil fuel companies.[22] The deceptive practices of fossil fuel companies, including their intentional misleading of investors, regulators, and the public about climate science, were authoritatively established as fact by the Commission on Human Rights of the Philippines in its national inquiry on the responsibility of the world's largest investor-owned fossil fuel companies for climate change-induced human rights violations in the Philippines.[23] Creative applications of litigation frameworks such as securities law, consumer protection law, and human rights law could expand avenues for private polluter accountability for climate change and its consequences.[24] Ambitious, coordinated lawsuits in multiple jurisdictions may overwhelm polluters' legal defences and resources, thus potentially accelerating the transition to sustainable energy sources. Given the unparalleled contributions of major corporate polluters to the global climate crisis, further developing private polluter litigation is a climate justice imperative.[25] Moreover, such litigation seems indispensable for driving systemic shifts in corporate behaviour to curtail emissions, disincentivising climate misinformation campaigns, and encouraging economic practices that help rather than hinder the transition to just and sustainable societies.

20.1.3 *More Diverse Litigation against Governments*

As highlighted in the chapter by Connors et al, governments' mitigation targets are 'woefully insufficient' to achieve the long-term temperature goal agreed by all States in the Paris Agreement.[26] The Global Stocktake in 2023 highlighted

[21] See e.g. Adriana Espinosa González and others (eds), *Debating Mandatory Human Rights Due Diligence Legislation* (European Coalition for Corporate Justice and the Corporate Responsibility Coalition 2020) <http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf> accessed 10 March 2024; Loi de Vigilance, LAW No 2017-39 27 Relating to the Duty of Vigilance of Parent Companies and Ordering Companies (France); Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz, LkSG) (Germany); European Commission, Corporate Sustainability Due Diligence Directive (negotiations ongoing) <https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en> accessed 10 March 2024.

[22] ibid.

[23] *In re Greenpeace Southeast Asia and Others* [2022] Case No CHR-NI-2016-0001 (Commission on Human Rights of the Philippines).

[24] ibid.

[25] See also Damilola S. Olawuyi, 'Climate Justice and Corporate Responsibility: Taking Human Rights Seriously in Climate Actions and Projects' (2016) 34(1) Journal of Energy and Natural Resources Law 27.

[26] UNEP, 'The Emissions Gap Report 2022' (*UNEP*, 2022) <www.unep.org/resources/emissions-gap-report-2022> accessed 10 March 2024 (UNEP Emissions Gap Report 2022). The 2023 Emissions Gap Report highlighted that the 'emissions gap for 2030 remains largely unchanged compared with last year's assessment.' See UNEP, 'The Emissions Gap Report: 2023' (*UNEP*, 2023) <www.unep.org/resources/emissions-gap-report-2023> accessed 10 March 2024.

the gap between governments' mitigation efforts and the scale of action needed to limit global warming to 1.5°C above pre-industrial levels, along with the 'rapidly narrowing window to raise ambition and implement existing commitments' in order to achieve this.[27] Litigation against governments targeting the 'ambition' of their mitigation targets is therefore likely to remain a focus in the coming years.

In addition, litigation is likely to target other problematic aspects of governments' inadequate climate policies. For instance, while various countries have adopted more ambitious (albeit still insufficient) emission reduction targets in recent years, most are not on track to meet these targets.[28] If left unaddressed, these shortfalls in implementation are a likely target for future litigation. Concerns around the (lack of) transparency and feasibility of governments' climate policies, including in connection with widely adopted but often poorly operationalised net-zero targets, are also likely to trigger further claims.[29]

Again, the contributions from the ECtHR and ITLOS are likely to reinforce these trends. The ECtHR's establishment of specific positive obligations for states under the European Convention on Human Rights provides a detailed framework for challenging government inaction on climate change. Similarly, the ITLOS Advisory Opinion's clarification of states' obligations under the UN Convention on the Law of the Sea (UNCLOS) opens up new possibilities for litigation focused on marine protection and climate change. These decisions will undoubtedly serve as blueprints for new cases in other jurisdictions and under different legal regimes.

20.1.4 *Interlinkages between Climate Change, Biodiversity, and Rights of Nature*

The intricate relationship between climate change and biodiversity loss is crystallising in science, policy, and law.[30] Climate change is a direct driver of biodiversity decline, while ecosystem degradation exacerbates climate change impacts.[31] Consequently, legal approaches integrating climate change and biodiversity protection are emerging, including in litigation.

[27] Technical Dialogue of the First Global Stocktake: Synthesis Report by the Co-Facilitators on the Technical Dialogue, UN Doc FCCC/SB/2023/9, [9].

[28] ibid.

[29] UNEP Emissions Gap Report 2022 (n 25), 36, noting that most governments are failing to present a 'credible path from 2030 towards the achievement of national net-zero targets'. See further Lucy Maxwell, April Williamson, and Sarah Mead, 'Trends and Opportunities in Strategic Climate Litigation' in Ekaterina Aristova and Justin Lim (eds), *Climate Litigation in Europe Unleashed: Catalysing Action Against States and Corporations* (University of Oxford Bonavero Institute 2021) 57.

[30] IPCC, 'Climate Change 2022: Impacts, Adaptation and Vulnerability' (*IPCC*, 2022) <www.ipcc.ch/report/ar6/wg2/> accessed 10 March 2024.

[31] ibid.

Some countries have enacted legal frameworks recognising the interconnectedness between climate and biodiversity.[32] Litigation defending biodiversity through a climate lens represents largely uncharted legal territory holding immense potential. Lawsuits could invoke biodiversity protection laws to challenge fossil fuel expansion projects that would exacerbate climate change and endanger ecosystems. Opportunities also exist for creative lawsuits using climate laws to prevent activities threatening biodiversity. Successfully establishing legal responsibility for biodiversity impacts resulting from climate change would be groundbreaking. Exploring interconnected climate and biodiversity impacts in lawsuits could ultimately foster more holistic legal approaches addressing these twinned global crises.

Further developments around rights of nature could drive and accelerate evolution in this area. As Borràs-Pentinat's chapter demonstrated, lawsuits invoking the rights of nature and legal decisions recognising such rights emphasise the potential of fostering sustainable and meaningful relationships between humans and the natural world. These lawsuits and decisions align with the shifting ethical paradigm underlying rights of nature – from conceiving nature as property to recognising its inherent value. Landmark judgments such as *Future Generations v Ministry of the Environment and Others*[33] show the transformational potential of climate litigation upholding nature's rights, potentially redefining legal systems' relationship with the natural world. Although nascent, strategic litigation centred on interconnected human, climate, and biodiversity considerations, as well as the rights of nature, represents a highly promising approach for multi-species climate justice.

The ITLOS Advisory Opinion reinforces the importance of these interlinkages, particularly in the context of marine ecosystems. By drawing legal conclusions from the demonstrated impacts of climate change on marine biodiversity, it provides a legal basis for integrating climate and biodiversity considerations in future litigation strategies.

20.1.5 *Inter-State Climate Litigation*

As Mead and Doelle's chapter unveiled, international law has significant potential when applied more fully in climate adjudication. Savaresi's chapter underscores this potential, with the analysis of state responsibility signalling that inter-state climate litigation could profoundly shape international climate politics and law. In essence, the cross-border nature of climate change means states are increasingly facing transboundary harms. The acts and omissions of states causing these harms potentially breach the no-harm rule, the principle of prevention, and a wide range

[32] See e.g. Eloise Scotford and Lavanya Rajamani, 'Climate Change and Biodiversity Legislation in the Asia Pacific' (2021) 1(1) Asian Journal of Law and Society 1.

[33] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)* [2018] 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia).

of other obligations of states under international law.[34] The chapter recognises that inter-state climate lawsuits face barriers, including procedural obstacles and uncertainties around the exact scope and content of applicable international norms. However, the ITLOS' clarification of states' obligations under UNCLOS has significantly reduced this uncertainty, with the forthcoming advisory opinions on climate change obligations and legal consequences from the International Court of Justice and the Inter-American Court of Human Rights poised to further strengthen the foundations for inter-state climate claims.

Once procedural obstacles are overcome, inter-state climate lawsuits could lead to further crystallisation of states' obligations related to climate change under international law. Resulting judgments may also provide grounds for affected states to claim reparations for climate damages. This type of inter-state climate litigation would be unprecedented, with potentially major implications for international cooperation and climate governance. Ultimately, realisation of this frontier hinges on visionary legal interpretation aligned with foundational legal norms and principles, most notably including the *jus cogens* right of self-determination and other fundamental rights. Pioneering cases centred on the protection of the rights of peoples at the climate frontlines may be essential to unlock the radical potential of inter-state climate litigation.

20.2 CONCLUDING THOUGHTS

Climate change is an existential threat demanding urgent and unprecedented action across all levels of society. As this Handbook illustrates, climate litigation has emerged as a vital strategy for catalysing such action. At the same time, the emerging best practice discussed in this Handbook highlights the potential of strategic climate litigation to recalibrate institutional and policy responses to the climate crisis. Often, this is achieved by demanding the fulfilment of existing state duties and the enhancement of corporate accountability. Realising this potential more fully will require sustained creativity, ambition, and collaboration among communities of practice worldwide.

Taking a bird eye's view, it seems no exaggeration to say that climate change necessitates reimagining legal systems and firmly upholding – or even expanding – notions of justiciability. As several of the contributions to this Handbook have also shown, it is essential that principles of equity and human rights inform these processes of legal evolution and innovation. Commitment to these fundamental legal norms, alongside tireless persistence from civil society and the legal community, will determine the success of climate litigation in delivering climate justice. Borràs-Pentinat's chapter further reminds us of the power of legal imagination, with the

[34] See also Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019).

evolving jurisprudence on the rights of nature representing perhaps the most apt illustration of transformational legal reasoning capable of confronting narratives and norms that have helped facilitate the climate crisis.

This Handbook represents, we hope, a milestone in the evolving scholarly discourse and legal practice in the field of climate litigation. But it is also an invitation to further scholarly analysis. As the field continues innovating, additional perspectives highlighting promising developments, nascent strategies, and emerging issues will be needed. We hope this Handbook provides inspiration for scholars, practitioners, and concerned citizens around the world to boldly engage in this agenda-setting area of legal scholarship and practice. With the stakes higher than ever, the global quest for climate justice – through litigation and other means – must press on.