

CLIMATE JUSTICE

GREENPEACE

Holding your Government Accountable
for Climate Change:

A PEOPLE'S GUIDE



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FOR
JUSTICE!**

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**PEOPLE HAVE
RIGHTS
STATES HAVE
DUTIES
COMPANIES HAVE
RESPONSIBILITIES**

EXECUTIVE SUMMARY

The creation of a People's Guide comes out of a need expressed by individuals and communities all over the world experiencing the harmful impacts of climate change. The People's Guide is a handy tool for those considering whether to bring a human rights-based case against their governments in their fight for justice. The recommendation is to use the Guide as a stepping-stone for developing the human rights-based aspect of your climate litigation case. Due to differences in the laws of each country, you should always consult with local experts.



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While there were detractors in the past, climate change is no longer an issue of debate. It is accepted that the earth is getting warmer at an alarming rate and that this is causing irreparable damage to the planet and human beings. If leaders don't act now by 2100 the world as we know it today would be unrecognizable. Dire action is required, and climate litigation is one such action which focuses on holding governments and corporations accountable. Climate justice presents ordinary people with a pathway to seeking the protection of their human rights.

The People's Guide explores how to develop a rights-based climate case and a rights-based campaign strategy to accompany it. Both these steps should be conducted concurrently versus one after the other. In terms of building a rights-based climate case on government inaction and/or harmful actions, there are four main steps to take: gathering evidence of the harm, identifying a legally enforceable right, proving a violation of your human rights and securing a remedy. Each of these steps involves meticulous consideration and research. Moreover, you must satisfy the legal admissibility requirements of your country. An understanding of climate science, a thorough knowledge of human rights law, and solid facts are all crucial in building a successful case. In addition, insight into previous and ongoing cases can inspire you as well as inform you about the inherent challenges.

A key aspect of developing the campaign is to be clear on the change you want to achieve as a result of bringing the case. This can be achieved both in the courtroom and in the court of public opinion. Campaigning outside of the courtroom is about seizing media and social-media attention, garnering public support through creative activities and events, all the while bringing more and more awareness to your case and climate change in general.

To be forewarned is to be forearmed so, before launching your case, be clear on what is needed including human and financial resources. Be ready for whatever may arise because of the case. Standing up for justice can be met with

all manner of retaliation and impact – have a plan in place for the “what ifs”. Lastly but perhaps most importantly, when bringing a case on behalf of a community it is essential that you speak with the people, that their voices are authentically represented in the case. Climate justice embodies people-powered and empowerment principles that should be evident especially in the way often marginalised communities are represented.

As people are increasingly mobilising and reclaiming their rights and the latest IPCC science sends an urgent call for action, governments are put on notice to act now or expect more human rights climate litigation in the near future. We hope that the People's Guide provides you with the necessary information needed when seeking climate justice. From detailing the use of climate science as a factual basis in developing your arguments, to discussing how to overcome common defenses, we hope this Guide can be a stepping-stone in developing a people-powered climate justice strategy.

**STRONG
CLIMATE
JUSTICE**

1.1

WHAT IS THE AIM OF THIS GUIDE?

Greenpeace's Climate Justice and Liability Campaign receives numerous requests to assist in developing people-powered climate cases. The People's Guide has been formulated as a response to those requests. This Guide builds on Greenpeace's experience and the leading efforts by many others to provide some ideas for community members, non-governmental organisations and public interest lawyers on how to assess, build and implement legal actions that address the impacts of climate change from a human rights perspective. This Guide is just the start of a conversation and will evolve over time.

This Guide aims to show how strategic, people-powered, climate litigation can be successfully developed using human rights law to hold governments accountable for inadequate climate mitigation.

1

INTRODUCTION

1.2

WHY DO WE NEED TO HOLD GOVERNMENTS ACCOUNTABLE?



The scientific consensus is clear: climate change is an existential threat and we can no longer delay taking action. We are already living with the impacts, and these are likely to worsen significantly. Urgent and sustained action on a global scale is now needed to ensure that future generations have a livable planet.

As explained in more detail in section 2, global warming is a direct result of an increase in greenhouse gases (GHGs) in the earth's atmosphere. The current emissions reduction commitments by countries deliver only a third of the reduction in greenhouse gases needed to meet the goal of keeping the average global temperature rise to 1.5°C.¹ According to the United Nations Environment Program (UNEP), the world is likely to face warming of around 3°C by 2100.

There is a short window of opportunity to close the emissions gap, and governments must be held accountable to honour their international commitments and protect people's human rights by taking urgent and ambitious action. Climate change litigation is one way of doing this. **From city-dwellers to farmers, youth to seniors, communities around the world are part of a growing global movement that is demanding climate justice through human rights.²** Together, the movement is demanding that governments live up to their duty to protect people from the climate crisis.

¹ UNEP, "The Emissions Gap Report 2018", online: <<https://newclimate.org/2018/11/27/emissions-gap-report-2018/>> (Accessed 2018/11/27)

² Jeremy Hodges, Lauren Leatherby and Kartikay Mehrotra, 24 May 2018, "Climate Change Warriors' Latest Weapon of Choice Is Litigation", online: <<https://www.bloomberg.com/graphics/2018-climate-change-lawsuits/>> (Accessed 2018/11/27)

1.3

WHAT DOES THIS GUIDE COVER?

The People's Guide provides an overview of what to consider when developing a successful human rights-based climate case. This guide is not prescriptive. There is no “one size fits all” approach to suing governments for climate protection. **Specifically, this Guide focuses on lawsuits that use human rights and constitutional law to increase government ambition to reduce GHGs.**

This Guide does not address in detail other aspects of climate litigation, for example legal actions related to adaptation to climate change or cases against private entities. It also does not address the different procedural ways of using the law to fight for climate protection. It does not reflect the legal requirements specific to each jurisdiction, nor does it address political context that is always relevant. The climate litigation world is a fast-changing arena, so please verify if the information contained in this guide is still up-to-date.

BUILDING YOUR CASE ON OTHER LEGAL ARGUMENTS

It is rarely the case that litigants can successfully refer to human rights

(including constitutional law) arguments alone in climate litigation.

Climate change litigants usually combine human rights arguments with different legal grounds,

such as judicial review of a law or decision, administrative law, tort (non-contractual liability)/harm principle law, and environmental law to name a few.

The People's Guide, however, does not cover other areas of law which you should consider, but aims to provide a stepping-stone in developing part of the rights-based arguments of your case.

SECTION 1

(Introduction) sets out the aim of the Guide, what it covers and to whom it is addressed.

SECTION 3

(Human rights-based climate litigation) sets out how human rights relate to climate change and what is climate justice.

SECTION 2

(Climate litigation) sets out an overview of what climate change is, how can the law help address it and what are the different types of climate litigation.

SECTION 4

(Developing a rights-based climate case) contains some steps in using human rights and environmental law arguments in your climate case against the authorities for inadequate climate action.

SECTION 5

(Developing a rights-based campaign strategy) explores how to identify and decide on launching a human rights climate case, as well as how to develop a campaign strategy around it. The steps in sections 4 and 5 (developing a case and campaign strategy) should be developed simultaneously.

1.4

WHAT OTHER GUIDES CAN I CONSULT?

In developing your climate lawsuit, you may also wish to refer to the following guides and reports.

- **Action for Justice**, which provides practical information and advice on how to pursue a public interest litigation case, has a chapter on [climate litigation](#).
- [Business and Human Rights Resource Center](#), a research center which tracks corporate accountability and has a section on climate justice, including a [report on corporate legal accountability for climate change](#).
- [Climate Liability News](#), which tracks news about climate change litigation.
- [Climate Action Tracker](#), which quantifies and evaluates climate change mitigation commitments, and assesses whether countries are on track to meeting those.
- [Columbia Law School's Sabin Center for Climate Change](#), provides up-to-date news on climate change cases around the world on its blog, as well as a case-chart for easy research.
- **Environmental Law Alliance Worldwide (ELAW)**'s [litigation strategies](#) and [climate litigation primer](#).
- **London School of Economics and Grantham Research Institute on Climate Change and the Environment's** [databases](#) of climate change laws of the world and climate litigation of the world.

- **United Nations Environment Programme and Columbia University, Sabin Center for Climate Change Law’s 2017 report for global review of climate litigation (also available in French, Spanish and German).**
- **United Nations Climate Change secretariat, United Nations Environment Programme, and the Commonwealth Secretariat’s Law and Climate Change Toolkit, which is an online and open database on existing climate change-related laws and policies.**



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**THERE IS
NO JUSTICE
IN CLIMATE
CHANGE**

2.1

WHAT IS THE PROBLEM?

A. WHAT CAUSES CLIMATE CHANGE?

Certain gases in the atmosphere, such as carbon dioxide (CO₂), methane, nitrous oxide and chlorofluorocarbons (CFCs), create what's called the "greenhouse effect", trapping in heat radiating from Earth toward space. These gases act as a thermal blanket for the Earth, absorbing heat and warming the surface to a life-supporting temperature. Over the course of Earth's history, these global temperatures have, for natural reasons, risen and fallen. However, there was a marked period when scientists found that they could no longer explain the warming or the speed with which it was happening by natural causes, the human factor had to be considered.

While not the most potent greenhouse gas (GHG), CO₂ is by far the most emitted by human activities. Specifically, over the last century, the burning of fossil fuels, such as coal, oil and gas, has released GHGs into the atmosphere. More GHGs in the atmosphere, especially more CO₂, means a more intense greenhouse effect (trapping of the heat), causing the earth to warm.

2

CLIMATE LITIGATION

While there are still some climate deniers, **at least 97% of scientists globally agree that the earth's temperature is rising and human activity plays a central role – NASA has compiled the studies to prove it.**³ In the **Fifth Assessment Report (AR5)**, the Intergovernmental Panel on Climate Change (IPCC), a group of 1,300 independent scientific experts from countries all over the world under the auspices of the United Nations, concluded that there's a more than 95% probability that human-produced GHGs, such as CO₂, methane and nitrous oxide, have caused much of the observed increase in Earth's temperature over the past 50 years.⁴

B. WHAT ARE THE EFFECTS OF CLIMATE CHANGE?

The most compelling evidence scientists have of climate change comes from long-term data relating to GHG levels and temperature. Through careful study, the effects of climate change on the environment have been observed.

³ NASA, "Scientific consensus: Earth's climate is warming", online: <<https://climate.nasa.gov/scientific-consensus/>> (Accessed 2018/11/17)

⁴ IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151



The IPCC concludes that there is enough evidence showing that the damages resulting from climate change are likely to be significant and to increase over time. It also concludes that global temperatures will continue to rise for decades to come due to GHG produced by human activities.

Changes in global temperatures have major impacts on our ecosystems and pose major threats to human life.



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Here are some ways climate change could be affecting your community:

- Temperature extremes, such as increasingly frequent and severe heatwaves;
- changes in patterns of rainfall, leading to more floods, landslides and droughts;
- rise in sea levels, leading to flooding of coastal areas;
- melting of permafrost, snow, ice

- and glaciers, leading to flooding and release of GHGs; and
- air pollution severely impacting the health of your family and community.

These effects have severe impacts on human life, including but not limited to:

- Food and water shortages;
- threats to physical health and survival;
- loss of property and home; and
- loss of way of life and cultural survival.



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CLIMATE CHANGE AND CHILDREN

Children are acutely vulnerable to the impacts of climate change and face increased and specific risks compared to the wider population for three main reasons:

1. Childhood, especially from birth to the age of five, represents a unique stage of physiological and mental development.

Children who experience climate-induced changes in their environment can be affected by those impacts with potentially lifelong consequences.

2. Children make up one of the largest groups affected by climate change, as many of the countries identified as most vulnerable to its impacts, are also those in which children tend to account for a large share of the overall population. Zones most at risk from disasters and

While climate change is a global problem, it's important to note that its impacts are local and vary, affecting some regions and peoples much more than others.⁵

⁵ IPCC: 1997. "The Regional Impacts of Climate Change: An Assessment of Vulnerability", Summary for Policymakers, A special Report of IPCC Working Group II Published for the Intergovernmental Panel on Climate Change

climate change impacts frequently overlap with areas of high poverty, further undermining the ability of poor children to cope and take advantage of opportunities.

3. Despite being least responsible for the causes of climate change, it is children and future generations that will bear the heaviest burden of the current inadequate action to tackle climate change, since they will live longer and face more profound,

widespread and recurrent crises as the impacts of climate change escalate over time.

For more details on how climate change affects the rights of children, see here and here.⁶

⁶ United Nations, Human Rights Council, 37th Session, 24/01/2018, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/58; UNICEF, *Amicus Curiae* Brief submitted by UNICEF to the Honourable Commission on Human Rights of the Philippines, December 2017, National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility therefore, if any, of the "Carbon Majors"



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Climate change amplifies existing environmental, social, economic and political challenges and increases the risk of displacement and competition and conflict over resources. It accelerates social injustices, inequalities, and vulnerabilities and threatens constitutional and human rights, including the right to life itself.



2.2

HOW IS THE PROBLEM BEING ADDRESSED?



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The good news is that affordable, scalable solutions are now available to transition to cleaner economies.

It is important to recognise that the impact and scope of climate change is global – emissions anywhere affect people locally everywhere. Such a global issue requires solutions that need to be coordinated at the international level and implemented at the national and local level.

The United Nations Framework Convention on Climate Change (UNFCCC) is the first global treaty addressing climate change. It sets the global framework for negotiations on climate-related matters and enjoys near universal membership, with 197 parties.⁷ The UNFCCC is designed to be a framework convention, meaning one whose commitments are general enough to permit adjustments over the years as scientific evidence, understanding and political will evolves. The yearly negotiations, called the Conference of the Parties (COP), first started in 1994 and have resulted in the adoption of numerous decisions, including the Kyoto Protocol and Paris Agreement. The Kyoto Protocol, adopted in 1997, is a treaty under the framework of the UNFCCC that sets out legally binding emissions reduction obligations for industrialised countries (developed countries).⁸ These countries must report regularly on their climate change policies and provide annual inventories of GHG emissions since 1990.

⁷ United Nations Framework Convention on Climate Change, 1771 UNTS 107; Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 IL 849 (1992) (“UNFCCC”)

⁸ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10 1997, 37 I.L.M. 22 (1998) (entered into force Feb. 15, 2005) (“Kyoto Protocol”)

They are also required to report their actions to address and adapt to climate change.

The most recent agreement to combat climate change is the landmark 2015 Paris Agreement, which for the first time brings almost all nations into a common goal to undertake ambitious efforts to combat and adapt to climate change, with special support offered to developing countries.⁹

The Paris Agreement contains a transparency framework to build mutual trust and confidence, while also sending a powerful signal to markets that now is the time to invest in the low emission economy. The agreement will serve as an important tool to mobilise finance, technological support and capacity building for developing countries, as well as scale up global efforts to address and minimise loss and damage from climate change.

The Paris Agreement, requires all countries to submit “nationally determined contributions” (NDCs), which detail the country’s efforts to reduce GHG emissions in a progressively ambitious manner. To date, 179 countries have ratified the Paris Agreement.

⁹ United Nations Framework Convention on Climate Change. (2015a). Paris Agreement – Decision 1/CP.21 – Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015 Addendum Part two: Action taken by the Conference of the Parties at its twenty-first session. Bonn (“Paris Agreement”)

STRONG CLIMATE JUSTICE

THE PARIS AGREEMENT IS BINDING

The Paris Agreement is a treaty under international law, therefore it is binding on the countries that have signed it (the “Parties”). The Paris Agreement does not replace but instead builds upon the UNFCCC, and it incorporates existing

elements of the climate regime. The Paris Agreement comprises a statement of purpose followed by stipulations of the general obligations all parties must fulfill to achieve the purpose. The rest of the agreement comprises of articles that elaborate on this general obligation making provisions under

more specific headings. Few of the provisions of the Paris Agreement are detailed enough to create precise obligations, which gives some flexibility to states to implement its provisions.

In addition, the Paris Agreement can only be applied between one state government and another;

the treaty does not confer rights to individuals. This means that, in arguing a climate litigation case, only citing the provisions of the Paris Agreement will not be sufficient; the argument would need to be bolstered by citing national human rights, environmental rights and civil liability provisions.

2.3

WHAT IS CLIMATE LITIGATION?

By climate litigation, we refer to lawsuits in “which climate change and its impacts are either a contributing or key consideration in legal argumentation and adjudication”.¹⁰ Over the past decades, climate litigation has boomed across the world. A recent United Nations Environment Program (UNEP) report details that, as of March 2017, there were more than 654 cases filed in the United States and, using a larger definition of climate litigation¹¹, over 230 cases brought in other countries. Since that date, more cases have been filed at a phenomenal speed.¹²

10 Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, “If at First You Don’t Succeed: Suing Corporations for Climate Change”, *Oxford Journal of Legal Studies*, (2018), at 3

11 United Nations Environment Program, *The Status of Climate Change Litigation: A Global Review* (2017) at 10

12 For a database of both US and non-US cases, see the Climate Litigation Database maintained by the Sabin Center, online <<http://climatecasechart.com/us-climate-change-litigation/>> (Accessed 2018/11/01)

STRATEGIC LITIGATION

Climate change litigation is much more than simply bringing a case before a judge. Because of the potential ramifications of

such litigation, climate change cases are part of what is known as strategic litigation or impact litigation.

Strategic litigation involves selecting and bringing a

case to the court with the goal of creating broader changes in society. The impact of a case goes beyond the individual or group acting as claimant. Strategic litigation is part of an overall advocacy

campaign designed to raise awareness on an issue or promote the rights of a certain group of people who are often not heard by governments.

So far, in the non-US jurisdictions, most of the cases address climate change as a relevant issue but not the focus of the case.¹³ As stated by Ganguly, Setzer and Heyvaert of the London School of Economics:

“Strategic climate litigation, in contrast, concerns cases initiated to exert bottom-up pressure on governments (‘strategic public climate litigation’) or corporations (‘strategic private climate litigation’) to mitigate, adapt or compensate for losses resulting from climate change. Strategic climate litigation cases are in the minority, but receive considerable attention from academics, state and non-state actors. Strategic public climate litigation aims to influence public policy or policy decisions with climate change implications, primarily through the attainment of injunctive relief”.¹⁴

While this Guide focuses on human rights-based strategic public climate litigation targeted at governments for their inadequate GHG reduction policies, it is important to keep in mind that there are many ways to use law to bring about climate justice. Below is a non-exhaustive list of types of climate lawsuits.

¹³ Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, “If at First You Don’t Succeed: Suing Corporations for Climate Change”, *Oxford Journal of Legal Studies*, (2018), at 3 (Ganguly, Setzer and Heyvaert)

¹⁴ *Ibid*

A. LAWSUITS AGAINST GOVERNMENTS

1. Mitigation claims

Essentially this type of climate litigation case involves asking for better mitigation measures, often called measures for “climate protection”.

Mitigation claims, typically against governments, refer to lawsuits forcing governments to take bolder action to reduce emissions, to stop or reduce specific emissions or to support non-GHG emitting alternatives, such as renewable energy. **The People’s Guide focuses on human rights-based mitigation claims (inadequate action on GHG mitigation measures).**



Urgenda / Chantal Bekker

URGENDA V THE NETHERLANDS

In 2013, a Dutch environmental group, Urgenda Foundation, together with 886 citizens sued the state of Netherlands in a world-first victory of citizens holding their government accountable for climate change.¹⁵ In 2015, the

¹⁵ *Urgenda Foundation v Kingdom of the Netherlands*, [2015] HAZA C/09/00456689 (“2015 decision”)

District Court of the Hague ruled that the Dutch government must, by 2020, have reduced emissions from 1990 levels by 25%. As governments do, they appealed.

However, in October 2018, the Hague Court of Appeal confirmed this ground-breaking decision issued in 2015, meaning that the Dutch government must increase its climate ambition and reduce emissions to protect the rights of its citizens.¹⁶

On 16 November 2018, the Dutch government announced its intention to appeal the Hague Court of Appeal’s judgment.¹⁷ Urgenda’s first victory in 2015 was the first time ever that a country’s government was held accountable for its

¹⁶ *The state of the Netherlands v Urgenda Foundation*, [2018] ECLI:NL:GH-DHA:2018:2610 C/09/456689/ HA ZA 13-1396 (“2018 decision”)

¹⁷ *Urgenda*, “16 November 2018 - Dutch government fights obligations to act on climate change”, online <<https://www.urgenda.nl/en/themas/climate-case/>> (Accessed 2018/11/02)

contribution to dangerous climate change. The fact that Urgenda won again on appeal in 2018 reinforces the statement that countries that don’t actively prevent climate-related harms are violating human rights.

PENA AND OTHERS V GOVERNMENT OF COLOMBIA

Twenty-five young people, with the support of *Dejusticia*, sued the Colombian government for failing to honour its commitment to tackling climate change. In a historic win in April 2018, Colombia's Supreme Court of Justice found the Colombian government liable for not halting the increasing deforestation of the Amazon forest, thereby increasing the average temperature in the country and threatening the young

people's rights to life, health, food, water and a healthy environment.¹⁸

The Supreme Court gave two main orders: to build a short, medium and long-term action plan to stop deforestation within four months, and to create an Intergenerational Pact for the Life of the Colombian Amazon within a five-month period. For example, the Court ordered the President and the Ministries of

¹⁸ *Dejusticia*: law, justice, society. "In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation" 5 April 2018, online: <<https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/>> (Accessed 2018/11/19)

Environment and Agriculture to propose a policy plan aimed at totally stopping, at some point in the future, deforestation and emissions of GHGs.

The decision is also ground-breaking because it recognised that the Amazon Basin is "a subject of rights". The Supreme Court arrived at that decision by citing a 2016 decision from the Colombian Constitutional Court that assigned rights to a river. This is the first climate case where a river basin is recognised as a legitimate right-holder

whose interest can be represented in a court of law.

Since the Supreme Court's landmark decision, there are ongoing meetings to develop the two plans between delegates from the Ministries of Environment, Agriculture and Transport, the Amazon Mission, the General Attorney's Office, the Police, the SINCHI research institute, autonomous corporations, indigenous representatives and Afro-descendants came together.



César A. Rodríguez for *Dejusticia*

2. Adaptation claims

Another type of climate change litigation case involves forcing governments to take adaptation measures to protect communities from the impacts of climate change that are already occurring, for example from life-threatening extreme weather events. Such cases can also be used to request ongoing adaptation measures for projected climate impacts. Examples of adaptation measures include building flood defenses and raising the levels of dykes, choosing tree species and forestry practices less vulnerable to storms and fires, and developing drought-tolerant crops.

LEGHARI V REPUBLIC OF PAKISTAN

A case was brought against government authorities in Pakistan by a local farmer for their failure to put in place sufficient adaptation measures and the resulting

damage to his livelihood. A historic decision was rendered in September 2015, focusing on the need for government action on climate adaptation based on human rights and constitutional protections. The Court held that Pakistan had violated

citizens' rights to life, dignity and property and ordered the government to take measures to minimise the impacts of changing weather patterns, including presenting a list of climate adaptation measures and to establish a Climate Change Commission.

The Court's innovative approach requires ongoing judicial supervision to ensure resulting.¹⁹

¹⁹ *Leghari v Republic of Pakistan* (2015) W.P. No. 25501/2015, online: <<http://climatecasechart.com/non-us-case/ash-gar-leghari-v-federation-of-pakistan/>> (Accessed 2018/11/19)

3. Procedural claims

While adaptation and mitigation claims against governments address the climate change policies intended to ensure climate resilience (adaptation) or control GHG emissions (mitigation), procedural claims focus on procedural requirements in the context of land use and planning. A typical example in such a context is a claim citing that a proposed project should be cancelled or reassessed because there was no adequate analysis of potential climate change impacts in an environmental impact assessment (EIA). Such litigation could include access to information claims that require a public entity to disclose information pertaining to GHG mitigation or adaptation policies. There is also the possibility of a claim to invalidate a decision because of an inadequate public participation process.



**EARTHLIFE AFRICA
JOHANNESBURG V MINISTER OF
ENVIRONMENTAL AFFAIRS AND
OTHERS**

South Africa's High Court invalidated a ministerial decision to approve a new coal-fired power plant because the environmental review did not include

the climate change impacts. Even if the requirement to assess climate change impacts was not required specifically in law, the High Court ruled that for several reasons, including South Africa's commitments under the Paris Agreement, the environmental review should have included a climate change impact assessment.²⁰

²⁰ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others*, Case no. 65662/16 (2017)

B. LAWSUITS AGAINST PRIVATE ENTITIES

Climate litigation can be brought against corporations on issues such as harmful activities by a corporation that result in a person's human rights being violated, none or insufficient contributions from the corporation towards the economic costs of adapting to climate change and non-compliance with environmental permits. Such cases can also simply be based on complainants seeking the prevention of further harm brought on from a corporation's contribution to climate change impacts.



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LLIUYA V RWE

What can you do when the melting of mountain glaciers is increasing the risk of a glacial lake flooding your village? Sue the largest German electricity producer.

In November 2015, Saúl Luciano Lliuya, a Peruvian

farmer, filed a lawsuit in a German court against RWE. Lliuya claims that RWE, having knowingly contributed to climate change by emitting substantial volumes of GHGs, has a measure of responsibility for the melting of mountain glaciers near his hometown of Huaraz. Because RWE

was only a contributor to the emissions responsible for climate change, Lliuya asked the court to order RWE to reimburse him for a portion of the costs to establish flood protections. After earlier dismissals, in 2017, a German appellate court allowed the plaintiff to proceed to the evidence phase, which sends a

strong signal that individual companies could be held accountable for climate damage occurring in other countries even if many others have contributed to the harm.²¹

²¹ *Lliuya v RWE AG*, 2015 Case No. 2 O 285/15 Essen Regional Court, online: <<https://germanwatch.org/en/huaraz>> (Accessed 2018/11/19)

Scientists' increasing ability to correlate extreme weather events to climate change, as well as attributing the amount of GHG emissions in the atmosphere to specific corporations, has resulted in a growing number of individuals, communities and local governments holding corporations accountable (see [Event attribution science](#)).

GREENPEACE SOUTHEAST ASIA AND OTHERS V CARBON MAJORS

The Philippines Commission on Human Rights started hearing a petition seeking to hold the “Carbon Majors” (the largest companies producing crude oil, natural gas, coal and cement) accountable for contributing to global emissions of GHGs and the

associated consequences of climate change. This is the world's first national human rights investigation of its kind, brought by a coalition of 14 organisations, along with Filipino farmers, fisherfolk, human rights advocates, typhoon survivors, artists and concerned citizens. The petition was triggered by the devastating aftermath of Super Typhoon Haiyan, which wreaked havoc in the Philippines in 2013 and bolstered by the recent ability of

scientists to attribute the emissions of individual companies to GHGs in the atmosphere. Community leaders, indigenous people, the head of a national association of farmers and workers from the transport sector have given testimonies on the hardships they suffered due, in part, to climate change, while experts have given evidence on the science of climate change, its impacts and causes and the responsibility of the Carbon Majors.

The Commission is expected to deliver its decision in 2019. A positive outcome for the petitioners would be ground-breaking. Unlike lawsuits seeking compensation for damages, the investigation is focused on preventing further harm and could result in recommendations to policymakers and legislators concerning corporate responsibility for the climate crisis.



2.4

WHY DOES CLIMATE LITIGATION MATTER?

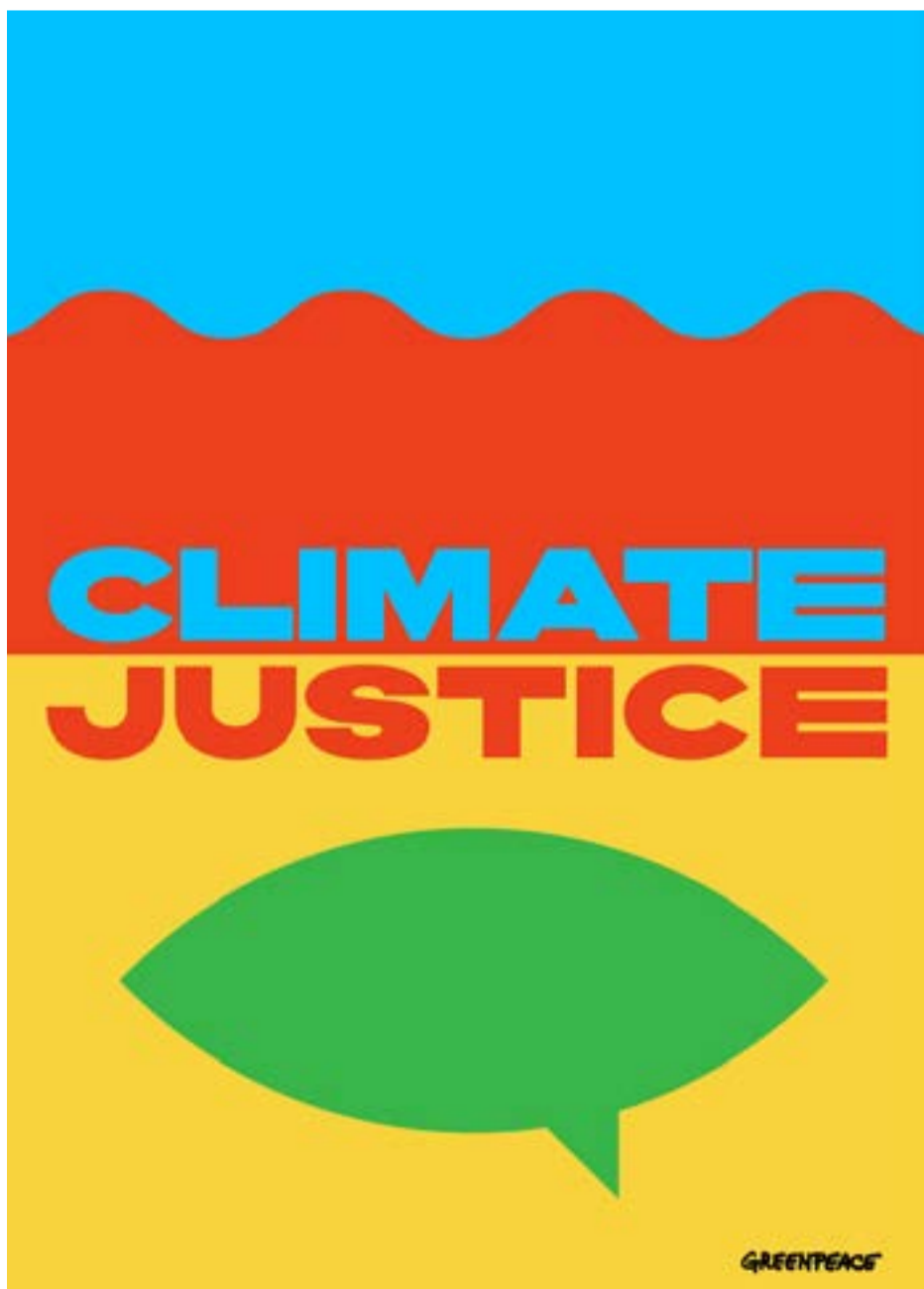


Climate litigation matters because it empowers people to bring about justice for their families, communities, and all of humanity. Climate litigation raises public awareness that climate change poses a threat to the people's rights and those of future generations. It can foster public discussion on the level of ambition (or lack thereof) of states in regulating climate change.

Climate litigation matters because it has the potential to give members of the public the power to hold those responsible accountable and to stand up for a different future in creative and experimental ways. It provides affected people and communities a platform to mobilise and reclaim their human rights. It also encourages the recognition that governments and corporations can and must take urgent actions to protect and uphold people's rights. Climate litigation matters because today's generation is the last generation that can take steps to avoid the worst impacts of climate change. Through legal mobilisation, people and communities rise up and lead the way for upholding the moral and historical responsibilities towards future generations.

Climate litigation could result in individual protection of human rights, as well as in the improvement of climate policy at the national and international levels. At the national level, strategic climate cases could lead to the implementation of more ambitious targets for GHG reduction. At the international level, such cases could collectively help in closing the ambition gap between weak national climate policies and the long-term goals of the UNFCCC and the Paris Agreement.²²

²² Cordelia Christiane Bähr, Ursula Brunner, Kristin Casper and Sandra H Lustig, “Klimasenioren: lessons from the Swiss senior women’s case for future climate litigation”, *Journal of Human Rights and the Environment* 9:2, September 2018, 194-221



**CLIMATE
CHANGE IS A
HUMAN RIGHTS
ISSUE**

3.1

WHAT ARE HUMAN RIGHTS?

Human rights are universal entitlements that allow all people to live with dignity, freedom, equality, justice and peace. Human rights belong to all people equally, regardless of status and identity and regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other identity markers in society.

Every person has these rights because they are human beings. Human rights may not be taken away or transferred. The rights are interconnected, and the fulfillment or violation of one right might affect the fulfillment of other rights as well.²³

²³ However, whether you can have your human rights enforced in your claim depends on the facts of your case and the legal test you need to pass. See section 4.

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3

HUMAN-RIGHTS BASED CLIMATE LITIGATION

3.2

Human rights are essential to the full development of individuals and communities. They cover basic needs for survival such as food, clean water, shelter, health care, a clean and healthy environment and education. They also cover social and cultural issues relating to participation in the workplace, social security, family life and cultural life.

Human rights express the entitlement of all people to be treated equally and to live their lives in safety, freedom and be protected by their governments.

WHY DO HUMAN RIGHTS MATTER?



3.3

WHY ARE WE TALKING ABOUT HUMAN RIGHTS?

A clean, healthy and functional environment is a precondition to the enjoyment of human rights such as the right to life, health, food and an adequate standard of living. Climate change has already begun to adversely affect wildlife and the natural resources that support access to clean water, food, and other basic human needs. When you combine these impacts with the direct harm to people, property, and physical infrastructure, **climate change poses a serious threat to the enjoyment and exercise of human rights.**

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BASIC HUMAN RIGHTS TREATIES

- International Convention on the Elimination of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (plus the ILO Fundamental Conventions)
- Convention on the Elimination of Discrimination against Women (CEDAW)
- Convention against Torture (CAT)
- Convention on the Rights of the Child (CRC)
- International Convention on the Rights of Migrant Workers (ICRMW)
- Convention on the Rights of Persons with Disabilities (CRPD)
- International Convention on Protection from Enforced Disappearance (CPED)

Europe

- European Convention on Human Rights (ECHR)
- European Social Charter
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Africa

- African Charter on Human and Peoples' Rights (ACHPR, Banjul Charter)

Americas

- American Declaration on the Rights and Duties of Man
- American Convention on Human Rights (ACHR)

3.4

WHAT ARE THE HUMAN RIGHTS OBLIGATIONS OF GOVERNMENTS?

When a national government signs and ratifies a human rights treaty, it agrees to respect, protect and fulfill those human rights.

OBLIGATION TO RESPECT:

1. Governments must not take actions interfering (i.e. negatively impacting) with your human rights.

For example, governments must not pollute rivers people drink from. This would violate the obligation to respect the right to clean water.

OBLIGATION TO PROTECT:

2. Governments must take action to prevent third parties (e.g. corporations, individuals) from interfering with human rights.

For example, governments must adopt and enforce laws regulating corporations, ensure they are held accountable and that people receive a remedy when they interfere with your human rights.

OBLIGATION TO FULFILL:

3. Governments must take action to facilitate and provide for the enjoyment of human rights.

For example, governments must pass laws, develop policies, fund public services and educate people about their rights.

Governments owe these obligations to people inside and outside the country's borders (these are called extraterritorial obligations).²⁴

²⁴ Where the country has control or influence over their rights (for example by permitting emissions that affect others) or is able to cooperate with and assist other governments to fulfil rights

Climate justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable and sharing the burdens and benefits of climate change and its resolution equitably and fairly.²⁵

Mary Robinson Foundation - Climate Justice

3.5

WHAT IS CLIMATE JUSTICE?

Climate justice is the fulfillment of human rights in the face of climate change, particularly for those under-represented in politics, who have contributed the least to the problem but are disproportionately suffering from its harms. Through climate justice, people are reclaiming power and becoming participants in climate action. They must be the primary beneficiaries of climate action, and they have the right to access effective remedies.

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²⁵ Mary Robinson Foundation: Climate Justice, “Principles of Climate Justice”, online: <https://www.mrfcj.org/principles-of-climate-justice/> (Accessed 2018/11/19)



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To achieve climate justice, government and corporate action must be consistent with existing human rights agreements, obligations, standards and principles. More specifically, under human rights law, states have positive, affirmative obligations to take effective measures to prevent and redress the impacts of climate change, and therefore, to mitigate climate change. States must also ensure that all human beings have the necessary capacity to adapt to the climate crisis.

Climate crisis is a human rights crisis, and so the human rights framework must be part of the solution. Without significant reductions of GHG emissions, the threats to our human rights will only increase.

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3.6

WHY IS CLIMATE CHANGE A HUMAN RIGHTS CRISIS?

Climate change has a profound impact on a wide variety of human rights. Below is a list of the human rights that are most directly threatened by climate change.

A. THE RIGHT TO LIFE ²⁶

Climate change clearly poses a threat to human life due to the higher incidence of mortality associated with extreme weather events, increased heat, drought, disease, etc. According to the World Health Organization (WHO), climate change is expected to cause approximately 250,000 additional deaths per year between 2030 and 2050 due to increases in malnutrition, malaria, dengue, diarrhea, and heat stress alone.²⁷ Climate change can also affect mortality in other ways that are more difficult to quantify, for example by undermining livelihoods and displacing people from their homes, or exacerbating violent conflict over resource scarcity.

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²⁶ Article 3, Universal Declaration of Human Rights (1948) Article 6 International Covenant on Civil and Political Rights (1966); Article 6 Convention on the Rights of the Child; Similar provisions can be found in Art. 2 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ('ECHR'), Art. 4 American Convention on Human Rights (1969) ('ACHR'), Art. 4 African Charter on Human and Peoples' Rights (1981) ('AChHPR'). As a cornerstone of international human rights law, the right to life is not only guaranteed by treaty law provisions, but also part of customary international law.

²⁷ World Health Organization, Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s, 2014, online: <<http://www.who.int/globalchange/publications/quantitative-risk-assessment/en/>> (Accessed 2018/11/12)



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RIGHT TO LIFE IN A CHANGING CLIMATE

David R. Boyd, the UN Special Rapporteur on Human Rights and the Environment, issued a statement on the human rights obligations related to climate change, with a particular focus on the right to life, for a climate case in Ireland (Friends of the Irish Environment CLG v. The Government of Ireland,

Ireland and the Attorney General).²⁸ The statement is worth reading and can help you when developing your argumentation:

“There is no doubt that climate change is already violating the right to life and other human

28 David R. Boyd, UN Special Rapporteur on Human Rights and Environment, October 25, 2018, *Statement on the human rights obligations related to climate change, with a particular focus on the right to life*, online: <<https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx>> (Accessed 2018/11/28)

rights today. In the future, these violations will expand in terms of geographic scope, severity, and the number of people affected unless effective measures are implemented in the short term to reduce greenhouse gas emissions and protect natural carbon sinks.

The Government of Ireland has clear, positive, and enforceable

obligations to protect against the infringement of human rights by climate change. It must reduce emissions as rapidly as possible, applying the maximum available resources. This conclusion follows from the nature of Ireland’s obligations under international human rights law and international environmental law.”

B. THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT ²⁸

The right to a clean and healthy environment has increasingly become recognised as an independent human right by national constitutions and laws. However, it has not yet been recognised globally. Climate polluting activities such as fossil fuel extraction and expansion of GHG emitting infrastructures impact directly on the right to a clean and healthy environment.

²⁸ For example, Article 24 of the African Charter of Human Rights. Many national constitutions protect the right to a healthy environment, and many national or regional human rights instruments have interpreted other human rights as including the right to a healthy environment. Globally, there is a growing push for the UN to recognise the right to a healthy environment.



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C. THE RIGHT TO HEALTH ²⁹

Climate change can impact health through increases in the incidence of heat-related respiratory and cardiovascular diseases caused by extreme weather events and natural disasters and nutrition deficits linked to food shortages and loss of livelihoods. There is also evidence of an increase in vector-borne diseases linked to climate change.

²⁹ The right to health can be found directly in some national human rights instruments and is often referred to as the right to an adequate standard of living (Article 25, UDHR), or as the right to the highest attainable standard of physical and mental health (Article 12, International Covenant on Economic, Social and Cultural Rights (1966) “ICESCR”). Regionally, it can be found in Article 11 of Protocol of San Salvador to the Inter-American Convention on Human Rights, in Article 11 of the European Social Charter and Article 35 of the Charter of Fundamental Rights of the European Union and Article 16 of the African Charter on Human Rights and People’s Rights.



D. THE RIGHT TO WATER AND SANITATION ³⁰

According to IPCC projections, climate change will significantly reduce surface water and groundwater resources, as well as increase the frequency of droughts in presently dry areas. This can lead to competition over water supplies for human consumption, agriculture, and other uses. In addition, extreme weather events often affect water and sanitation infrastructure and flooding can leave behind contaminated water, contributing to the spread of waterborne diseases.

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E. THE RIGHT TO FOOD ³¹

The right to food can be impacted by climate change. For example, changes in temperature and precipitation may affect crop production of rice, wheat and maize. It may also affect fishery productivity due to fish migrating to cooler and deeper waters in response to warming ocean temperatures. In the long-term, there could be severe impacts on global food security.

³⁰ Several national constitutions protect the right to water or outline the general responsibility of the State to ensure access to safe drinking water and sanitation for all. Internationally, the human right to safe drinking water was first recognized by the UN General Assembly and the Human Rights Council as part of binding international law in 2010. The human right to sanitation was explicitly recognized as a distinct right by the UN General Assembly in 2015.

³¹ Often referred to as the right to adequate food, the right to food is part of the right to an adequate standard of living under Article 11 of the IESCR. It is also part of many optional protocols to international and regional treaties, as well as in Article 24 of the International Convention on the Right of the Child (one of the most widely ratified treaty globally).

F. THE RIGHT TO PROPERTY AND HOUSING ³²

Rising sea levels, flooding, forest fires and other climate-related harms will arbitrarily deprive many individuals of their housing and other property.



G. THE RIGHT TO WORK ³³

Increased global warming may deprive individuals such as farmers and fisherfolk of their livelihoods.

³² Usually recognised as two separate rights. The right to housing is part of the right to an adequate standard of living, (Article 11(1) of the ICESCR). The right to property is one of the most controversial human rights, recognised in the UDHR (Article 17) but not in the ICESCR. Regionally, the right to property is recognised in the African Charter (Article 14), in the American Convention on Human Rights (Article 21) and as the right to peaceful enjoyment of possessions in Article 1 of Protocol I to the ECHR.

³³ The right to work is enshrined in the UDHR and recognised in international human rights law through its inclusion in Article 6 of the ICESCR.

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THE GERMAN CLIMATE CASE

In October 2018, three German families and Greenpeace Germany filed a climate lawsuit against the German federal government for violating their constitutional rights to life and health, property and occupational freedom, by failing to take measures to meet Germany's commitment to reduce greenhouse gas emissions as set out in the 2020

climate protection target and under European law.

The plaintiff families each run organic farms in the so called "Altes Land" near Hamburg, on the island of Pellworm, and in Brandenburg. They have already been affected by the impacts of global warming as their crops have been damaged by pests previously unknown in their regions and extreme weather events.

The plaintiffs are seeking climate protection, not monetary compensation. They argue that the abandonment of the 2020 target is an impermissible encroachment on their right to life and health, right to occupational freedom and right to property under the German constitution. The plaintiffs also claim that the federal government's failure to meet this 2020 target is in contravention of Germany's minimum obligation to reduce GHG

emissions for the period of 2013 to 2020 under the legally-binding EU Effort Sharing Decision (406/2009/EC).

"Whether hail storms, drought or new pests, the impacts of global warming threaten our livelihood. As the federal government is not acting to protect the climate, we demand our rights before the court", says Johannes Blohm, one of the plaintiffs in the case.

H. THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE ³⁴

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The right to private life requires respect for one's home and its surrounding environment. Extreme weather events caused by climate change threaten the enjoyment of this right, either by directly impacting personal property or a more indirect impact, such as a change in land value due to flooding.



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³⁴ Article 8, European Convention on Human Rights

I. THE RIGHT TO SELF-DETERMINATION ³⁵

The right to self-determination is the right of peoples to choose their own political, social, economic and cultural development. Climate change threatens the existence and traditional livelihoods of whole nations. For example, rising sea levels have resulted in a threat to the physical and cultural survival of various Pacific island nations.

35 ICCPR Art. 1, ICESCR Art. 1



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J. THE RIGHTS OF INDIGENOUS PEOPLES ³⁶

States also have unique obligations with respect to Indigenous Peoples. Such groups often live in ecosystems which are particularly sensitive to changes in the environment making them especially vulnerable to climate change. This threat could potentially undermine the right to self-determination for Indigenous Peoples (see above) as well as the rights outlined in the UN Declaration on the Rights of Indigenous Peoples. The declaration puts forward that states must obtain free, prior and informed consent before undertaking any measures that would adversely affect the traditional lands and resources of Indigenous Peoples. It also requires states to provide redress measures in the event that land or property is taken without their consent.

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³⁶ Often recognised in national constitutions, also part of the UN Declaration on the Rights of Indigenous Peoples. In the Inter-American and African systems, rather than a separate right per se, the other human rights (for example the right to property) are applied with a special consideration to Indigenous Peoples.



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K. THE RIGHT TO EQUALITY AND NON-DISCRIMINATION

As stated by the IPCC, “people who are socially, economically, politically, institutionally or otherwise marginalized are especially vulnerable to climate change.”³⁷ The heightened impact of climate change on certain people is a product of both heightened exposure to climate change impacts as well as limited capacity to adapt to those impacts. For example, women, children and people with disabilities, are affected to a greater extent because they have been denied sufficient resources to adapt to these impacts.

L. THE RIGHTS OF CHILDREN AND FUTURE GENERATIONS

While the rights of children are protected internationally by the Convention on Child Rights, the rights of future generations (in the sense of generations yet unborn) are not formally recognised in major international human rights instruments. However, many national constitutions have captured this right explicitly, often within the right to a healthy environment. For example, in a recent Advisory Opinion, the Inter-American Court of Human Rights (IACtHR) acknowledged that the right to a healthy environment is an individual and a collective right stating that “in its collective dimension, the right to a healthy environment constitutes a universal interest, which is owed to present as well as future generations.”³⁸



³⁷ IPCC, 2014: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Summaries, Frequently Asked Questions, and Cross-Chapter Boxes. A Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, at page 6, online: https://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-IntegrationBrochure_FINAL.pdf (Accessed 2018/10/22)

³⁸ Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, Opinión Consultiva OC-23/17 Inter-Am. Ct. H.R., at para 55 (translated)

YOUTH STANDING UP FOR THE PLANET

Around the world, from the US to Uganda, young people are taking their government to court to protect their rights from suffering from the impacts of climate change.

In the United States, Our Children's Trust is advocating on behalf of youth and future generations for legally-binding, science-based climate policies.

Amongst the legal cases they are involved in, one

of the most famous ones is Juliana v United States. Back in 2015, 21 young people and a climate scientist, as guardian for future generations, sued the US federal government and president for violating their constitutional rights to life, liberty and equal protection as well as their public trust rights to vital natural resources. After repeated attempts by the Obama and Trump administrations to have their claims rejected, the United States Supreme Court denied the Trump administration's application for stay on 2 November 2018. However, in the days following, the

Department of Justice filed a motion for stay with the U.S. District Court for the District of Oregon and an application for stay and another petition for a writ of mandamus with the Ninth Circuit Court of Appeals. On 8 November 2018, the Ninth Circuit Court of Appeals partially granted the Trump administration's motion for a temporary stay of District Court proceedings. Trial preparations continue. This landmark case is rapidly developing, so please be sure to visit Our Children's Trust website for the latest.

In Uganda, young people and a local environmental

NGO, Greenwatch, launched a case in 2012 against the government for violating their right to a healthy environment because of the inadequate climate change mitigation plans and failure to protect Ugandan children from the adverse impacts of climate change.

Portuguese children have begun crowdfunding to support a lawsuit against 47 governments in the European Court of Human Rights, while other young people have launched lawsuits in India, Pakistan, Japan, Norway and Colombia.

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Robin Loznak/Our Children's Trust

3.7

HOW CAN HUMAN RIGHTS LITIGATION HELP?

While seminal and important, the UNFCCC and the Paris Agreement do not give the right for individuals and communities to bring claims against governments.³⁹ Even though most nations have signed the Paris Agreement, almost all countries are failing to reduce their GHG emissions in line with climate science and as required by their international commitments. Such a situation, especially considering the mounting impacts of climate change, calls for a means to hold these governments to account.

Climate justice looks to other laws and bodies as a way to challenge countries' climate policies. In instances when governments have not taken the necessary actions as per their international commitments or actions contrary to these commitments, communities affected by climate change have used litigation to hold governments accountable. Human rights litigation in particular has been identified as an important way for affected communities and individuals to challenge their government's climate policies in national and regional courts, as well as in other bodies such as national human rights institutions.

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Human rights litigation is only one way government climate policy can be challenged. Other types of climate litigation that can be used in conjunction with human rights arguments include environmental law, administrative law and civil liability.



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³⁹ Some inter-State procedures exist under Article 14 of the UNFCCC.

WHAT NEXT?



If you think that your government is not doing enough on mitigation to protect your human rights from the impact of climate change, then consider taking steps to see whether you could use the law to protect your human rights. The steps proposed are elaborated in section 4 (Developing a rights-based climate case) and section 5 (Developing a rights-based campaign strategy) of the People's Guide. It's important to note that these two steps are not consecutive but rather should be worked on simultaneously.

If you are considering launching a human rights-based case this section can help you. The list below is not a recipe, and this Guide is not a cookbook. While the information presents some general factors to consider, consulting with local lawyers and experts cannot be omitted.

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SWISS SENIOR WOMEN FOR CLIMATE PROTECTION V SWISS FEDERAL GOVERNMENT (KLIMASENIORINNEN)

A group of senior Swiss women are using human rights and constitutional law to challenge their government's inadequate climate policies. Climate change is affecting their human rights through severe heat waves which have profound impacts on their life, health and well-being. They are arguing that their government's failure to reduce Switzerland's GHG emissions violates their rights

to life and to private and family life, which are protected in the Swiss constitution and the European Convention of Human Rights. They are asking Swiss courts to order the government to increase their GHG emission reduction target, implement existing commitments, and take additional action to prevent climate change in line with the Paris Agreement.⁴¹

41 Cordelia Christiane Bähr, Ursula Brunner, Kristin Casper and Sandra H Lustig, "Klimasenioren: lessons from the Swiss senior women's case for future climate litigation", *Journal of Human Rights and the Environment* 9:2, September 2018, 194-221





**STAND UP
FOR
JUSTICE!**

4.1

GATHERING THE FACTS AND EVIDENCE OF THE HARM

Such experts will be able to advise on the specific procedural and substantive legal considerations as well as the political situation in your country.

As a reminder, the steps below apply to bringing a lawsuit against government authorities for their inadequate climate policies infringing the plaintiffs' human rights. Finally, this section should be followed in conjunction with section 5 (Developing a rights-based campaign strategy).

Evidence is key to all successful litigation. If you want to bring climate litigation, make sure you have gathered enough scientific evidence to prove to a court how climate change affects your rights and how your government's failures contribute to the problem.

4

DEVELOPING A RIGHTS-BASED CLIMATE CASE

A. POLITICAL CONSENSUS ON CLIMATE SCIENCE

Climate science provides important evidence to build your case. Climate change, its causes and its impacts have been proven and are almost universally accepted by climate scientists around the world. The most reliable and easily acceptable sources are the IPCC reports because they have been endorsed by governments. In addition, courts have relied on IPCC reports in several cases.

IPCC REPORTS

The IPCC, which stands for the Intergovernmental Panel on Climate Change, is an international body for assessing climate science. Hundreds of leading climate scientists take part in, and 195 representatives of countries are members of the IPCC, giving its findings exceptional weight.

While it doesn't do its own research, it does conduct scientific assessments of existing published science. Significantly, its findings provide the basis for all the major international agreements on climate change.

The IPCC's "assessment reports" outline the

occurrence, causes and impacts of climate change. The reports also outline the amount countries need to reduce their GHG emissions by to prevent dangerous climate change.

The IPCC's reports represent the scientific consensus on climate change. And

because countries are gradually adopting the recommendations of the IPCCs reports, these assessments also represent the political consensus on climate change science. For these reasons, they offer a great starting point in gathering evidence on which to base your litigation.



In addition to the IPCC reports, other UN bodies, NGOs and associations of climate scientists produce reports detailing climate change impacts and their links to government policy, for example:

- **UNEP**
- **Climate Action Tracker**
- **The World Meteorological Association**
- **The Union of Concerned Scientists**
- **The Climate Vulnerable Forum**
- **The World Health Organization**

CLIMATE CHANGE IS UNDISPUTED

One important factor to consider in climate litigation: there is no dispute that climate change

is in fact happening and that the impacts are already being felt. Courts generally accept the scientific consensus surrounding climate change. However, since there is no global scientific consensus on

the local climate change impacts that people are experiencing, you may need to bring the scientific evidence to prove this and show how climate change is or will impact on your human rights.

To build evidence, consider partnering with local scientists, universities, scientific and climate research centers, as well as using your government's own data on climate impacts.

B. LOCAL CLIMATE CHANGE IMPACTS

A significant part of your argument will likely include evidence of the local climate change impacts. In addition to global climate science, climate scientists and even government agencies in your country should have specific evidence on the impacts of climate change locally. Such evidence is crucial and will be helpful in connecting global changes in the climate to impacts in your community. In addition, it could help determine who should bring the case (young people, farmers, environmental NGOs, trade unions, teachers, doctors, etc). For more information, see the section on Event attribution science.



C. DETERMINING WHAT YOUR GOVERNMENT'S TARGET SHOULD BE

Although there is global agreement on the need for mitigation to prevent dangerous climate change, there is no single standard which determines by how much countries must reduce their GHG emissions. However, in the 2015 Paris Agreement, each country gave a nationally determined commitment to reduce or limit GHG emissions.

Industrialised countries have historically emitted and continue to emit a disproportionate amount of GHGs, and so it was determined that they ought to have higher reduction targets compared to developing countries (denoted in the Paris Agreement as “common but differentiated responsibility and respective capabilities”).



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THERE IS NO SAFE LEVEL OF WARMING

It is important to remember that there is no “safe” level of warming. Currently,

with warming of “just” 1°C above pre-industrial levels, 2018 has seen record-breaking heatwaves, wildfires raging from the Arctic Circle to the Mediterranean and the

US West Coast, reports of permafrost abruptly thawing and ancient baobab trees suddenly dying. The fact of the Great Barrier Reef collapsing and Antarctic melt tripling in just

five years adds to provide alarming and painful reminders of just how far into the danger zone we have already plunged.

GHG reduction targets continue to evolve as climate science and international agreements develop. Below are the main standards against which your government's climate policies can be reviewed against:

1. The “well below” 2 °C Target

The IPCC 4th Assessment Report (AR4) (2007) established that an average global temperature increase of above 2°C poses a risk of uncontrollable, dangerous and irreversible climate change.⁴¹ To have a fighting chance at keeping the temperature rise below 2°C, industrialised countries must reduce their emissions by at least 25-40% below 1990 levels by 2020, and by at least 50% by 2030.

In 2010, at the Cancun climate summit (Conference of the Parties or “COP”), the parties to the UNFCCC established a review process to evaluate whether the 2°C was adequate to avoid dangerous climate change.⁴² The review process focused on the differences in impacts between 1.5°C and 2°C warming above pre-industrial levels. The final report, published in 2015, concluded that a warming of 2°C cannot be considered safe and that 1.5°C is closer to being a safe “guardrail”.⁴³

⁴¹ IPCC AR4 (2007) Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change Core Writing Team, Pachauri, R.K. and Reisinger, A. (Eds.) IPCC, Geneva, Switzerland, online: <http://www.ipcc.ch/publications_and_data/ar4/syr/en/contents.html> (Accessed 2018/10/03)

⁴² After the IPCC AR4, vulnerable countries at the UNFCCC Copenhagen Conference (COP15) in 2009 were calling for warming to be limited to below 1.5 °C relative to pre-industrial levels. Although COP15 is regarded as a failure, the countries did agree to the goal of holding the increase in warming below 2 °C. The countries also agreed to review the “below 2 °C” long-term goal with a view to strengthening it and addressing the 1.5 °C limit called for by vulnerable countries.

⁴³ UNFCCC (SBSTA, SBI), Report on the structured expert dialogue on the 2013-2015 review FCCC/SB/2015/INF.1

The new understanding has been reflected in the goal of the 2015 Paris Agreement, which commits to limiting the global average temperature rise to **well-below 2°C while pursuing efforts to limit the temperature rise to 1.5°C.**

2. The 1.5°C Target

When it came time to develop a new climate agreement, there were enough countries at the 2015 COP21 Paris meeting that were in support of the inclusion of the mention of a 1.5°C limit as a long-term temperature goal. As part of the text of the Paris Agreement and as a way forward, the UNFCCC “invited” the IPCC to provide a special report to be delivered in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels, along with ways the world could feasibly keep the temperature from rising further. Below are significant points with regards to the IPCC 1.5°C Special Report.



- One of the most important conclusions of the report was that 2°C is much more dangerous than initially considered at the time that the Paris Agreement was signed (based on the Fifth Assessment Report “AR5”).
- The Special Report highlights the importance of ensuring that your climate lawsuits should always be based on the best science available at the time of filing.
- The 2018 IPCC 1.5°C Special Report is currently a reasonable starting point especially because it was endorsed by all member states.⁴⁴

⁴⁴ While the IPCC does not take a position on what would be a “safe level” of warming, courts have relied on IPCC reports in the past.

- **The 2018 IPCC 1.5°C Special Report is based on four scenarios (pathways) for limiting temperature rise to 1.5°C above pre-industrial levels.⁴⁵**

1. The P1 pathway assumes that social, business and technological innovations will result in lower energy demand by 2050, while living standards will rise, especially in the global South. A downsized energy system enables rapid decarbonisation of energy supply. The P2 pathway follows a similar model but includes the proposal of using negative emissions technology. Simply put, negative emissions mean reducing the amount of carbon by capturing it, extracting it from the environment and storing it in a safe place. This involves using bio-energy with carbon capture and storage (BECCs) which entails burning plant matter, or biomass, for energy and then collecting the CO₂ emissions and pumping the gases underground. This is one type of technology in the family of negative emissions technologies (NETs), also known as carbon dioxide removal. The P3 pathway relies on a larger quantity of BECCs in comparison to the P2 pathway and the P4 pathway relies on it the most.

2. However, NETs carry significant risk for communities and the natural world, risks that are not fully understood yet. Deployment of BECCs in the P2, P3 and P4 scenarios would involve massive increase in intensive production of monoculture crops or tree plantations, leading to greater loss of natural habitats and biodiversity, threatening Indigenous Peoples, small farmers and local communities, squeezing land needed for food production and increasing water competition. In addition, looking to NETs as a sole solution carries the danger of believing that emission reductions are not urgent.



⁴⁵ Carbon Brief, 8 October 2018. "In-depth Q&A: The IPCC's special report on climate change at 1.5C", available at <https://www.carbonbrief.org/in-depth-qa-ipccs-special-report-on-climate-change-at-one-point-five-c> (Accessed 2018/11/19)

IPCC 1.5 SPECIAL REPORT

We are now 1°C above pre-industrial levels. If temperatures continue to increase at the current rate, a 1.5°C warming will be exceeded between 2030 and 2052. This 0.5°C rise will increase widespread impacts, risks and losses. A 1.5°C rise above pre-industrial levels could be enough to destabilise ice sheets, kill up to 90% of warm water corals, cause severe problems to marine life, the Arctic and of course human beings.

Importantly, limiting the temperature increase to 1.5°C instead of

2°C would reduce any further risks and impacts substantially, regarding weather extremes, species loss, water scarcity, food shortages, heat-related deaths, ocean impacts, etc. Even if countries comply with the Nationally Determined Contributions (NDCs), that is the climate targets committed to under the 2015 Paris Agreement, we are still heading for an increase of well above 3°C. It would lead to about double the emissions of where we ought to be by 2030 and by 2100 the world as we know it would be unrecognisable.

To get below 1.5°C without relying on NETs, global CO2 emissions would need

to be halved by 2030 and reach net zero by mid-century at the latest, with substantial reductions in other gases. The faster we cut emissions the greater the reduction in warming and related risks and costs

What does it mean for government obligations? States have positive obligations to prevent foreseeable violations of human rights. The IPCC report outlines the very foreseeable risks of a world that is not aligned with 1.5C. The failure of states to take measures to prevent climate change-related harms can therefore be qualified as a violation of affected human rights. As such, governments

are put “on notice” that their climate and energy laws and policies are not aligned with the latest IPCC science, which exposes them to climate lawsuits. Conclusions contained in the special report expressed as being ‘likely’ or ‘very likely’, could be relied upon as fact (for the purposes of satisfying the civil standard of proof) in court proceedings.

Indeed, governmental’ failure to act and align policies with IPCC reports they themselves have endorsed (at the very least), reinforces the importance of judicial bodies in the protection of human rights.

3. The 1°C Target

While the latest IPCC science (2018) shows the necessity for a 1.5°C limit, it has been convincingly argued that the best available climate science demands that a target of limiting temperature increases to 1°C is required to avoid dangerous climate change.

Our Children’s Trust has presented scientific evidence to UN bodies and courts supporting the 1°C limit.

1° C/350 PPM TARGET

Our Children's Trust convincingly argues that government climate and energy policies must be based on a target of 350 ppm atmospheric CO₂ and 1°C by 2100 to protect young people and future generations, instead of the 1.5°C or "well-below" 2°C targets.

They point to the numerous scientific bases, including by renowned expert Dr. James Hansen, as evidence that the best available climate science sets 350 ppm by 2100 as the uppermost safe limit for atmospheric CO₂ concentrations. There are three main reasons explaining why a 1°C/350 ppm target is considered by some litigants to be the best available science:

1. "Restoring CO₂ concentration to below 350 ppm would restore the energy balance of the earth and allow as much heat to escape into space as Earth retains, which has kept our planet in the sweet spot for humans and other species to thrive (...);
2. CO₂ levels exceeding 350 ppm are creating a warmer planet than humans have ever lived in and are disrupting the physical and biological systems in which human civilisation has developed (...);
3. 30% of the increased CO₂ levels is absorbed by the oceans. Marine animals, including coral reefs, cannot tolerate the acidifying and warming of our ocean waters that results from this increase. At 400 ppm CO₂, coral reefs and shellfish are rapidly declining and will be irreversibly compromised if we do not quickly reverse course.(...)."47

47 Our Children's Trust, "The Science", online: <<https://www.ourchildrenstrust.org/the-science/?rq=target>> (Accessed 2018/10/03); In addition, there has been recognition in IPCC SR1.5 that coral reef decline has outpaced previous IPCC projections, which lends support to the 350 ppm target for coral reefs.



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4.2

IDENTIFYING A LEGALLY ENFORCEABLE RIGHT



Having gathered (or identified) the evidenced needed, you must also think about identifying a legally enforceable right. Legally enforceable rights are legal rights that can be enforced in court. Although human rights are universal (in principle), this does not mean that every human right can be enforced in every court, in every country. Some human rights may not (yet) be recognised as legally enforceable in your country. This will determine which right or rights you can base your case on.

To enforce human rights through litigation, you must:

1. Find the human right(s) that is affected by your government's inaction or insufficient action on mitigating climate change, whether it is codified in a written statute or recognised in court decisions; and
2. This right must be enforceable in a court that you can access, i.e. you must satisfy the local rules for standing and jurisdiction (see section 4.3 [Satisfying admissibility requirements](#) below). These two requirements are connected. The legal source of your human rights will determine where you can go to enforce your rights.

Laws protecting your human rights can be found at national, regional and international levels.

A. NATIONAL HUMAN RIGHTS PROTECTIONS

While human rights are recognised in international and regional human rights law (see below), they are primarily enforced in national courts as well as implemented in national laws. When it comes to enforcing your human rights through litigation, national courts are the first place to start. In most cases in front of international human rights bodies, you first have to show that you have tried to obtain a remedy from national courts (“exhaustion of remedies”).

The legal source for such litigation will often be found in national law as well.

- National constitutions often contain protections for human rights. National courts can generally enforce constitutional rights, overruling law and policy which violates human rights and/or ordering the government to take certain action to protect human rights.



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1. In the *Klimaseniorinnen* case, the constitutional right to life is one of the rights being used to challenge Switzerland's inadequate climate policies.
 2. In India (*In re Court on its own motion v State of Himachal Pradesh and others*), courts have used the constitutional right to a clean environment to order the government to take measures to protect against climate change.
 3. In Norway (*Greenpeace Nordic Association and Nature & Youth v Ministry of Petroleum and Energy*), licenses for exploratory drilling for oil and gas in the Barents Sea are being challenged in court on the grounds that they violate the constitutional right to a clean and healthy environment.
- National courts are responsible for protecting the rights recognised in national human rights legislation. Their powers under such legislation can range from making human rights-compatible interpretations, issuing declarations of incompatibility or overruling conflicting law and policy.
 - National courts can also expand human rights or recognise certain rights that are not codified in the human rights legislation.⁴⁷

National human rights protections are also influenced by international human rights laws. This influences how national courts apply national human rights laws and can also be applied directly in some countries (see below). Even if your case is in national court, it is good practice to also mention or base your arguments on international law.

⁴⁷ For example, in *Friends of the Irish Environment v Fingal County Council*, the Irish High Court recognised an implicit constitutional right to a healthy environment: *Friends of the Irish Environment v Fingal County Council* (2017) No 201 JR.

B. REGIONAL HUMAN RIGHTS TREATIES

In certain parts of the world, regional human rights treaties protect the human rights of people in countries within a region. These regional human rights treaties are supervised by regional human rights decision-making bodies (and sometimes a human rights commission, as shown by the examples above), which can hear individual human rights complaints.

Before you can access regional courts, in most circumstances you must have first brought your claim before your national courts (referred to as the “exhaustion of local remedies”).⁴⁸ However, if the

⁴⁸ An interesting exception to this rule is the ECOWAS Community Court of Justice which individuals in West Africa can directly petition. In an environmental context, this was used in *SERAP v Nigeria* to enforce the right to a healthy environment (similar facts to *SERAC v Nigeria*)

local authorities sit on the claim and do nothing, or move too slowly, the claim could also be moved onward based on the failure of the local authorities to act.

Key examples of regional human rights treaties include:

- The European Convention on Human Rights (ECHR). The ECHR is an international treaty to protect human rights and political freedoms. Key rights relating to climate change litigation include the right to life, right to respect for private and family life, and the right to property. In the same vein and working in tandem, the European Social Charter protects the rights to health and housing.

MARANGOPOULOS FOUNDATION V GREECE

The European Committee on Social Rights (a regional human rights body that oversees the protection of certain economic and social rights in most of Europe) recognised that the right to health contained a right to a healthy

environment. In 2007, the Committee found in favour of the Marangopoulos Foundation and put forward a requirement for Greece to reduce its GHG emissions in line with the UNFCCC and the Kyoto Protocol.⁵⁰

⁵⁰ European Committee on Social Rights, Decision on the merits: *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Collective Complaint No. 30/2005, 06/12/2006



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- **The American Convention of Human Rights (ACHR). The ACHR covers 23 countries in the Americas. Key rights for climate change litigation in the ACHR include the right to life, rights to physical integrity and security and right to property.**

THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT IN THE INTER-AMERICAN SYSTEM

Building on the rights recognised in the ACHR, the Inter-American Court of Human Rights has recently recognised a right to a clean and healthy environment.⁵¹ This could be used as a basis for climate litigation in the Inter-American system.

⁵¹ Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, Opinión Consultiva OC-23/17 Inter-Am. Ct. H.R

CLIMATE CHANGE CASES IN THE INTER-AMERICAN SYSTEM

Inuit communities threatened by climate change have brought a case before the Inter-American Commission on Human Rights (e.g. *Inuit Circumpolar Conference Case*).⁵² While none of these have been successful, their occurrence shows the possibility of bringing climate litigation in the Inter-American system. The recent recognition of the right to a clean and healthy environment could strengthen future cases.

⁵² Inter-American Commission on Human Rights, Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts And Omissions Of The United States (2006), online: <<http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/>> (Accessed 2018/11/01)

- The African Charter on Human and People's Rights (ACHPR). The ACHPR covers 53 countries in Africa. Key rights for climate change litigation include the right to life, right to property, right to health, right to dispose of your wealth and natural resources, right to social and economic development and the right to a satisfactory environment. The African Commission on Human and People's Rights has also recognised rights to food and housing.

It's important to note that in some countries covered by regional human rights treaties, national courts are often able to enforce those rights directly or, at a minimum, must interpret national laws in accordance with regional human rights treaties. For example, in *Urgenda v Netherlands*, the Hague Court of Appeal stated that the ECHR rights are directly applicable and have precedence over Dutch national laws that contradict them.

C. INTERNATIONAL HUMAN RIGHTS LAW

Almost all countries have human rights obligations through treaties they have ratified. These treaties and agreements between states together make up a system of international human rights law (IHRL). The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are examples of widely ratified treaties and they both contain a wide range of human rights that are affected by climate change (see section 3.4 [What are the human rights obligations of governments?](#) above for a list of the obligations governments undertake when they ratify these treaties.).

While the ratifications are significant for climate justice (explained further below), there is no global court to enforce these treaties, and they often cannot be directly enforced in national courts. Instead, countries must incorporate international human rights standards in national laws, and it is the national laws which can be enforced in national courts.

This notwithstanding, IHRL can be used in human rights and climate litigation in the following ways:

- 1. In some countries, IHRL has “direct effect”, meaning that it can be directly enforced in national courts.**
 - For example, in Nepal, international human rights treaties have been enforced directly.
- 2. In many countries, courts must interpret national laws so that they comply with IHRL.**
 - For example, in South Africa, courts must interpret national law consistently with IHRL when possible. Even where this duty does not exist, IHRL can influence national courts in how they apply national laws.
- 3. Some countries have joined “optional protocols” to international human rights treaties which allows people to file human rights complaints against their governments at UN “treaty bodies”. These bodies are not courts but can deliver non-binding decisions on whether your government has violated its human rights obligations and make orders as to how they should protect your human rights. These findings can be used to support your national proceeding.⁵²**

⁵² In Spain for example, the Supreme Court affirmed in July 2018 that the views expressed by UN Human Rights Treaty Bodies, in this case the Committee on the Elimination of Discrimination Against Women (CEDAW), in individual complaints are binding on the state and that the state must comply with the decision of the Committee.

4. At several of these human rights treaty bodies (for example the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights), governments must regularly report on their obligations. The bodies may issue official observations in which they urge individual governments to reduce GHG emissions.
- For example the Committee on Economic, Social and Cultural Rights recently concluded that Argentina should reconsider large-scale exploitation of non-conventional fossil in order to safeguard its obligations under the ICESCR and its commitments in the Paris Agreement.⁵³



Even in cases where IHRL is not the primary legal source in your case, including it can strengthen the argument that your government's inadequate climate policies violate your human rights. It could ultimately influence how national courts apply national human rights laws. In addition, citing IHRL in the case will provide an international benchmark and give general guidance to the court. It is also a good idea to include these arguments so that in the event where domestic remedies are exhausted, you will be ready to take the case to international bodies (which include regional ones).

The next step after identifying a legally enforceable right(s) that has been threatened by climate change and an appropriate court to bring your case, is to make sure that your case is admissible.

⁵³ Naciones Unidas, Consejo Económico y Social, E/C.12/ARG/CO/4, 1 November 2018 at paras 13-15

4.3

SATISFYING ADMISSIBILITY REQUIREMENTS

Before you can argue the substance of your case (i.e. that your government's inadequate climate policies violate its human rights obligations), the court must consider whether it is able to hear your case. To establish this, your case must be admissible.

While specific admissibility requirements depend on the relevant court and laws, there are some general requirements, listed below, that must be met to bring human rights-based climate litigation.

A. STANDING

Standing refers to the right to bring a case before a court. If a court finds that you do not have standing, it will reject your case without considering your arguments.

In some countries, general claims can be brought in the public interest (sometimes called “actio popularis”) without any further requirements. In other countries, claims can also be brought on behalf of future generations or on behalf of the environment itself. It's worth checking to see if your legal system allows such claims.



For human rights litigation, traditionally only persons who are directly or specially affected by alleged human rights violations will have standing to bring claims before a court. Following on from this, in some countries, the law might require you to show that the impacts of climate change have affected (or will affect) you in a way which differentiates you from other persons in your country.

If you can prove that your rights are already being affected by climate change and these are linked to your government's actions, you may be able to satisfy the legal requirement. For example, if you are living in an area which is particularly affected by forest fires or droughts which can be linked to climate change, you could argue you are directly affected by your government's inadequate climate policies.

YOUNG PLAINTIFFS' STANDING IN THE JULIANA CASE

In the *Juliana* case (USA), a court rejected the

government's defense that climate change broadly affects the entire planet (and all people on it) in some way and therefore the young people had no standing. The court decided that it did not

matter how many persons have been injured by climate change so long as "the party bringing suit shows that the action injures him in a concrete and personal way". For example, one of the young

plaintiffs explained how the dry conditions caused by forest fires aggravates her asthma.



Robin Loznak/Our Children's Trust.

In many national and regional systems, people suffering from potential human rights violations also have standing. This includes people who can produce reasonable and convincing evidence of the likelihood that a violation will occur and directly affect them. Even if it cannot be shown that you are currently being directly affected by climate change, credible future threats could be sufficient.

The likelihood of you having standing increases if you are especially vulnerable to the effects of climate change, as it will be easier to show the alleged human rights violation. Here are some concrete examples:

- The Swiss *Klimaseniorinnen* case is being brought by senior women. Older women in Switzerland are especially vulnerable to heat waves linked to climate change as they are less capable of adapting to extreme temperatures and suffer the greatest health impairments. Therefore, there is a strong case that they are especially vulnerable to Switzerland's inadequate climate policies.
- Indigenous groups, such as the Saami people (further below), whose livelihoods are threatened by global temperature rises and the melting of ice can claim to be especially vulnerable to the effects of climate change.

Some jurisdictions allow non-governmental organisations to bring a claim on behalf of a group of individuals based on human rights law.

CLIMATE CHANGE THREATENS CULTURES

The Saami people are the indigenous people of the northern parts of Sweden, Norway, Finland and the Kola Peninsula of Russia. Their traditional way of living and culture is centered around reindeer husbandry. Climate change is happening

at a faster rate in polar regions. Over the past 50 years, there has been an increase in the frequency and intensity of winter warming events in northern Scandinavia. Projections show that this warming will continue at greater rates than the global average. As a result, the natural habitat of the reindeer is greatly impacted (for example decrease in food source

and increase in disease due to parasites breeding in the heat).

While not all Saami people are reindeer herders, reindeer are integral to the lives and culture of all Saami. For the Sáminuorra, an organisation of Saami youth in Sweden, the fate of the reindeer is directly linked to the future of the Saami. The consequences of climate

change are felt in the entire Saami community, affecting mental health, language, handicrafts, fishing and hunting. Sáminuorra is part of the coalition of families in Europe, Fiji and Kenya (supported by Climate Action Network Europe) taking the European Union to court for its inadequate climate policies (*People's climate case*).



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B. SEPARATION OF POWERS

In addition to standing requirements, it is often argued that courts do not have authority to hear climate change cases because such cases raise political questions that should be left to the legislative and executive arms of government. The degree to which a case should or should not be heard is legally referred to as “justiciability”, and relates to the principle known as separation of powers, which prevents a concentration of power and ensures checks and balances.

This type of argument is particularly required in lawsuits against government authorities for their failure to act sufficiently to mitigate climate change and for orders requesting governments to enact more ambitious policies, as such scenarios could be seen to traverse between legal and political terrain.

When bringing your case, you must consider the separation of powers model and prove that the case does not contravene the intent behind this model. You should consult with your lawyer, as some countries have specific legal tests to meet, while in others such arguments are presented more generally. Some jurisdictions, like the United States and other common law countries, have developed complex legal tests to see whether the dispute brought in front of the court should be decided by judges, or whether it is a “political question”. However, even in countries where there is no clear legal test, judges are required to think about their role and whether their decision should better be taken by elected members of the legislative or executive branches of government. **Regardless, precedent has shown that courts have the authority to decide legal questions (e.g. violation of human rights), even if those decisions might have political consequences.**



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While the judiciary (courts) has the role to review the constitutionality of the actions and policies of the executive and legislative branches of government (this is called “judicial review”), judges give a measure of discretion to the government. For example, government authorities have some discretion in determining the appropriate levels of environmental protection, considering the need to balance the goal of preventing all environmental harm with other social goals. In addition, governments have discretion in determining how they achieve such levels of protection.

This discretion is sometimes called the “margin of appreciation” (for instance in Europe), or reasonableness or differentiation. No matter the name, these are open-ended, vague and

abstract concepts which government-defendants often argue to have climate lawsuits dismissed. Nonetheless, the state has no discretion regarding the question of fulfilling its legal obligation in meeting the “well below” 2°C/1.5°C target, at a minimum; its discretion is limited to selecting the specific measures with which it wants to achieve this mandatory target.

While the question of separation of powers and discretion of the state are some of the most common reasons for a climate lawsuit to be dismissed, many courts around the world have looked at these issues and decided that they could review the government’s inaction on climate change.

Significantly, in the *Urgenda* case in the Netherlands, both the first instance judgment and the judgment by the Hague Court of Appeal accepted that issuing a decision on the case was not violating the separation of powers. The first instance court was aware that it might be perceived as overstepping the competences of the judiciary and explained that the Dutch constitution does not provide for a strict separation of powers, but a system of checks and balances on how the other branches of government perform their duties and functions. The Court accepted the petitioners’ distinction between a political decision and a legal decision with political consequences. The Court

also held that the government retained discretion on how to achieve the Court’s reduction order, specifically the government could decide which policies to implement to achieve the prescribed reduction in GHG emissions by 2020. The Hague Court of Appeal confirmed the first decision in its 2018 judgment. The Court of Appeal stated that the Netherlands was violating human rights because of its insufficient climate mitigation target, therefore the argument that the case was violating separation of powers was rejected.

Incidentally, the Court acknowledges that, especially in our industrialised society, measures to reduce CO₂ emissions are drastic and require financial and other sacrifices but there is also much at stake: the risk of irreversible changes to the worldwide ecosystems and liveability of our planet. The State argues that for this reason the system of the separation of powers should not be interfered with, because it is not up to the courts but to the democratically legitimised government as the appropriate body to make the attendant policy choices. This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order.⁵⁴

⁵⁴ *The Netherlands v Urgenda*, 2018 Hague Court of Appeal at para 67, online: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610&showbut-ton=true&keyword=urgenda>>

In *Thomson v New Zealand*, the High Court of New Zealand rejected the government’s argument that climate policy was a political question. The judgment had a long discussion regarding the authority of courts to review climate change policy, including looking at cases decided in other countries. The judge stated that courts should not consider climate policy a “no go area” simply because the state has entered international obligations, because the problem is a global one or because of the complexity of the science.



THOMPSON V NEW ZEALAND

In 2015 in New Zealand, Sarah Thompson, at the time a law student, filed a lawsuit against New Zealand’s Minister of Climate Change issues. She claimed that that the minister had

failed to set GHG emissions reduction targets as required under the Climate Change Response Act.

The High Court of New Zealand heard the case and it found that climate change presents significant risks and government actions on climate change are subject

to judicial scrutiny. The Court also found that the former Minister for Climate Change acted unlawfully by failing to review the country’s climate change targets after the United Nations Intergovernmental Panel on Climate Change (IPCC) published an updated report

on climate science. The Court didn’t issue an order against the recently elected government because the new Prime Minister, Jacinda Ardern, had committed the country to zero carbon by 2050.

The court also stated that the “IPCC reports provide a factual basis on which decisions can be made”.⁵⁵ (See paragraphs 101-134 of the [decision](#).) In the landmark Juliana lawsuit in the United States, the young plaintiffs are asking the courts to order the federal government to implement a plan to put the nation on a trajectory (that if adhered to by other major emitters) would reduce atmospheric CO₂ concentration to no more than 350 ppm by 2100. In response to the government’s claim that this posed justiciability issues, the Court stated:

[10] (...) As a result, I give special consideration to the argument that granting plaintiffs’ requested relief would usurp the Executive Branch’s foreign relations authority. Climate change policy has global implications and so is sometimes the subject of international agreements. But unlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not inherently, or even primarily, a foreign policy decision. ... See *Baker* 369 U.S. at 211 (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”) (...) First, intervenors contend the Court cannot set a permissible emissions level without making ad hoc policy determinations about how to weigh competing economic and environmental concerns. But plaintiffs do not ask this Court to pinpoint the “best” emissions level; they ask this

⁵⁵ *Thomson v Minister for Climate Change Issues*, [2017] NZHC 733, [133]

Court to determine what emissions level would be sufficient to redress their injuries. That question can be answered without any consideration of competing interests ... The science may well be complex, but logistical difficulties are immaterial to the political question analysis(...)F.3d at 552, 555 (“[T]he crux of th[e political question] injury is ... not whether the case is unmanageable in the sense of being large, complicated or otherwise difficult to tackle from a logistical standpoint,” but rather whether “a legal framework exists by which courts can evaluate ... claims in a reasoned manner.”)⁵⁶

Courts in other countries have also dismissed these arguments and reviewed government action on climate change where it concerns human rights, including in Colombia (*Dejusticia*) and Ireland (*Fingal*).

⁵⁶ *Juliana v United States* No 6:15-CV-1517-TC (DC Or, 8 April 2016), upheld on review in *Juliana v United States* 217 F Supp 3d 1224 (DC Or, 10 November 2016).

CAN THE COURT REVIEW YOUR CASE?

In many countries, procedural law can create an obstacle for plaintiffs. Especially in challenges to government inaction or to a specific law or policy, procedural law might require that there be an administrative decision in order for the court to be

able to review the case. One way to deal with this is to force a decision. For example, you could formally request your government authority to issue a ruling to refrain from the alleged unlawful act. Such an action should force a decision (the government agrees or disagrees) and thus (in the case of a refusal) provide you with a case you can

take on to the courts. This was the strategy employed in the *Klimaseniorinnen* case, where for example, where the lower court’s decision was on the administrative law issue of whether the government should have issued a ruling on the matter. Despite the scientific evidence, the court ruled that that women over 75 years old are not more

impacted by the effects of climate change than other population groups in Switzerland, therefore denying the senior women access to justice. As of 10 December 2018, the Senior Women are considering appealing. In preparation, be sure to consult with lawyers with knowledge of the administrative law in your jurisdiction.

The role of courts in ensuring climate justice and respect of human rights was also highlighted in the UN Committee on Economic, Social and Cultural Rights' comment on the IPCC's 1.5C report:

7. In some countries, courts and other human rights mechanisms, including national human rights institutions, have taken an active role in ensuring that States comply with their duties under existing human rights instruments to combat climate change. In particular, courts have accepted to hear claims filed by victims of climate change or by non-governmental organisations, and ordered States to adopt action plans reasonably tailored to the urgent need to mitigate climate change, and where necessary, to adapt to its impacts which cannot be avoided.

8. The Committee welcomes this development. Human rights mechanisms have an essential role to play in protecting human rights by ensuring that States avoid taking measures that could accelerate climate change, and that they dedicate the maximum available resources to the adoption of measures that could mitigate climate change. (...). (our emphasis)⁵⁷

When arguing your lawsuit, you could refer to these foreign decisions and to their recognition that simply because there is an international climate framework in place, or that climate policy is a complicated matter, does not mean that courts may not review to see if there is a human rights violation. You can also craft your demand of legal remedy with this in mind, for example by asking

⁵⁷ Committee on Economic, Social and Cultural Rights, 8 October 2018. "Climate change and the International Covenant on Economic, Social and Cultural Rights" at paras 7-8, online: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E> (Accessed 2018/11/17)

4.4

PROVING A VIOLATION OF YOUR HUMAN RIGHTS

for a general court order of setting reductions by a certain amount, leaving the task of how to achieve the reduction to the discretion of the government.

Once your case is deemed admissible (a judge can hear and decide on the issue), the court will decide whether there has been a breach of the government's obligations and eventually a violation of your rights. Be prepared with strong arguments, based on human rights, environmental law and climate science (as well as the relevant legal arguments, such as administrative, constitutional or civil liability laws) to show that your government's inadequate climate policies are in contradiction with their human rights obligations.

Proving a human rights violation depends on: (1) what legal system you are in, (2) what human rights your complaint concerns and (3) what human rights obligations you are arguing your government has violated. However, across different national and regional systems, you will likely go through the following steps to prove that your government has violated its human rights obligations by failing to reduce its GHG emissions.

A. SHOWING THAT THE GOVERNMENT HAS A DUTY TO PROTECT THE PLAINTIFF

In cases where you ask for the enforcement of a positive obligation (a request to provide protection), you have to establish that the government has a duty to protect the plaintiff(s).

To do that, you must demonstrate what the government should be doing in terms of GHG emissions reductions, based on

the target you have chosen, the Paris Agreement, the best available science and in some cases the precautionary principle (see further explanation below in (i)).

The plaintiff must also show that the government has failed to do these things. This is where you must highlight the inaction/insufficient action of the government (measured for example through its energy production or GHG



ESTABLISHING THE REQUIRED LEVEL OF PROTECTION IN THE KLIMASENIORINNEN CASE

In this case of over 1000 Swiss women aged 65 and up suing the Swiss federal government for its inadequate climate policies, the precautionary principle was principally used to demonstrate the required level of protection in terms of the right to life. The senior women argued that Switzerland has an obligation to protect them from climate change and that the degree of this obligation should be based on the Paris Agreement, the best available science and the precautionary principle. Measured like this, they argue that the current Swiss GHG emissions reduction target does not satisfy the obligation to protect their right to life.

To show that their right to life is infringed, they argued that it is sufficient to show that the GHG emissions are fueling heatwaves, and that heatwaves are putting them at risk.

They supported their claims with scientific findings of the causal link between climate change (which is scientifically proven as already occurring) and premature deaths of senior women during and following heatwaves.

The senior Swiss women made the case that contrary to sudden-onset disasters like earthquakes, the global climate change (including the resulting substantial increase in heatwaves) is a slow-onset disaster, which has been scientifically documented as already being underway and specifically affecting them.

On 7 December 2018 the Swiss Federal Administrative Court has ruled, in conflict with overwhelming scientific evidence, that women over 75 years old are not more impacted by the effects of climate change than other population groups in Switzerland. The group now has 30 days to take the case to the highest court in Switzerland, the Federal Supreme Court.

emissions reduction policies) in meeting the climate protection target you believe it should be aiming for (see 4.1.C [Determining what your government's target should be](#)).

B. PROVING THAT THE GOVERNMENT'S INACTION HAS INTERFERED WITH YOUR HUMAN RIGHTS

After establishing that the government has a duty to protect you from climate change (including showing that the contested government inaction is incompatible with the long-term climate target the country should be following), you must show that your government's failure to reduce its GHG emissions in accordance with the right climate target negatively impacts or threatens the enjoyment of your human rights. This means you must prove that:

- Climate change seriously impacts your enjoyment of a human right (see section 3.6 [Why is climate change a human rights crisis?](#) for examples), and
- There is a link between your government's failure to reduce its GHG emissions and the impacts.

One of the major barriers to success in climate justice litigation has been the difficulty of linking particular climate change impacts to emissions from a specific source. You will have to establish that the harm complained about has been contributed to by the defendant and that there is some form of redress. This means that the plaintiff needs to establish that the harm



complained of affected them in a special way (or will in the future), that it was caused by climate change and that the defendant contributed to climate change in an impermissible way.

Climate change is a global problem, with emissions being released into the atmosphere from entities in countries all over the world. The atmosphere encompasses the planet and therefore the emissions from entities in countries all over the world collectively cause harm. Because of the collective nature of this phenomenon, in climate lawsuits against governments for their failure to act, a part of the case resides in showing the court that there is a proof of causation or contribution on the part of that specific defendant. This means demonstrating that the emission of GHGs to the atmosphere by the state is impermissible (unlawful) and will contribute to (or already has resulted in) infringements on the human rights of the plaintiff.

The specific requirements for showing causation or contribution (showing the link between the violation of your human rights and the inaction of your specific government in sufficiently regulating GHG emissions) will vary depending on which country you are in. In some jurisdictions, the strict “but-for test” is not used to assess the causal link in environmental lawsuits or human rights infringements, while in others it is.⁵⁸

Below are some legal and scientific tools that can help you argue that there is sufficient link.

⁵⁸ A legal test that is often used to show causation: but-for-the activity X, result Y would not happen.

1. Precautionary Principle

The precautionary principle requires that decision-makers take an active preventative approach. This means that public authorities need to act to prevent damage even in cases of uncertainty. Where there is a threat to human health or the environment, measures should be taken to prevent such harm, even if there is no conclusive scientific proof linking that particular activity (or inactivity) to the harm. It ensures that the lack of scientific certainty should not be a reason for postponing measures to prevent harm where there is a threat of serious or irreversible damage. Essentially, the precautionary principle calls for giving the benefit of the doubt to the environment.

The precautionary principle involves two concepts:

- 1.Prevention: requiring scientific evidence regarding the harmfulness of a behaviour, substance or situation; and**
- 2.Precaution: requiring no such evidence before acting, though requiring sufficient probability.**

Governments have the duty to apply the precautionary principle, as it is part of international law and has been expressly included in international agreements and affirmed in decisions of the International Court of Justice.⁵⁹ Most national legislation also include the precautionary

⁵⁹ For example: *Gabčíkovo-Nagymaros Project, Hungary v Slovakia*, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162; *Southern Bluefin Tuna, New Zealand v Japan, Provisional Measures*, ITLOS Case No 3, (1999) 38 ILM 1624, ICGJ 337 (ITLOS 1999)

principle.

The global UN treaty on climate change, the UNFCCC, also restates the precautionary principle as one of the guiding principle of countries when acting on climate change.⁶⁰

Using the precautionary principle in climate litigation can help you argue that there is no justification for state inaction (or inadequate action) on climate change mitigation, even if there is no scientific certainty concerning the measures with

⁶⁰ UNFCCC, Article 3(3)



OSLO PRINCIPLES ON GLOBAL CLIMATE CHANGE

The Oslo Principles set out existing obligations regarding the climate,

along with a detailed legal commentary that draws on the best joint interpretation of international law, human rights law, national environmental law and tort law. The Oslo Principles were prepared by an

expert group on global climate obligations, which consisted of legal experts from around the world. While the Oslo Principles are “soft-law” (not directly binding to countries), they may help judges decide

whether governments are in compliance with their legal obligations to address climate change and can be cited in your case to support your position.⁶²

⁶² Benjamin A and others, *Oslo Principles on Global Climate Change Obligations* (Eleven International Publishing 2015)

which to resolve the problem of climate change or if there is no full scientific certainty of the local impacts of climate change.

According to Principle 1 of the Oslo Principles on global climate change, the precautionary principle requires that:

GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided; and The level of reductions of GHG emissions required to achieve this should be based on any credible and realistic worst-case scenario accepted by a substantial number of

PRECAUTIONARY PRINCIPLE, IPCC SCIENCE AND GOVERNMENT OBLIGATIONS

There is sufficient scientific certainty that climate change is happening. Climate change today is not a matter of precaution, but one of prevention: preventing an acknowledged risk. With the IPCC science, including the latest 1.5°C Special Report, there is clear and convincing science that human-produced GHG emissions are causing significant changes to the climate and that these changes are posing grave risks of irreversible harm to humanity (including future generations), to the environment (including the entire natural habitat) and to the global economy.

If you consider the scientific evidence, including the 1.5°C Special Report's mention of "likely" and "very likely" impacts of a world beyond 1.5°C global warming, and apply the precautionary principle, three conclusions could be argued:

1. If the precautionary principle and scientific evidence are both considered, the government emissions reductions should at least be commensurate with the global '1.5°C' target (and possibly even lower based on the best available science);⁶³
2. The risks continuing to exist must be limited through a precautionary approach provided such measures are proportionate; and
3. Insofar as the remaining risks cannot be limited by proportionate means, they must be dealt with through simultaneously taking adaptation measures.

⁶³ The IPCC reports themselves expressly do not "support" any target, as their role is not to delve into policy-prescriptive and values-laden inquiry. Therefore, the IPCC 1.5 Special Report, especially in the reasons for concern, does not conclude that the risks of climate change impacts acceptable at 1.5°C of warming. In fact, the Special Report may warrant a lower threshold that has not been assessed by the scientific body to date. (see The 1°C Target, above)

eminent climate change experts.

The precautionary principle is relevant when interpreting the government's human rights duties in the field of climate protection.

Using the precautionary principle approach in your climate lawsuit can increase the chances of success by overcoming arguments of scientific uncertainty that are often raised by defendants. However, IPCC science provides clear and convincing argument and in most cases should be sufficient. You can always raise the precautionary principle as an alternative argument to help prove a causal link.

Indeed, although there is strong scientific evidence of climate change and its impacts through the IPCC reports and attribution studies, it is not always possible to link a specific impact to a specific source of emissions. Using the precautionary principle, a court might accept more general evidence of climate change impacts (e.g. IPCC's global predictions of sea level rise) as evidence for the likelihood of specific climate change-induced injury at a specific place (e.g. increased coastal erosion along a state coastline).

- For example, in Australia, a court accepted the scientific consensus that climate change will lead to a risk of extreme weather events, and,

therefore, did not grant a building permit for the construction of seaside apartments.⁶³

Therefore, you can argue that the precautionary principle means that the general evidence of impacts of climate change based on the available reports such as IPCC assessment reports and the 1.5°C Special Report can be used to show that there is a probative likelihood of specific damage at the local level. Look especially for mentions of “likely” or “very likely” climate impacts in the IPCC reports.

In addition, some plaintiffs argue that the precautionary principle shifts the burden of proof to the defendant. This could happen if the court is convinced that there is a threat of serious or irreversible damage despite uncertainties. Therefore, the defendant would have the burden to prove that the threat does not exist, or is negligible.

- This occurred in the case *Massachusetts v EPA* in the United States, where the court took a precautionary approach in this case, arguing that the Environmental Protection Agency (EPA) could not avoid its obligations because of some “residual uncertainty”.⁶⁴ The burden was shifted to the EPA to prove that GHGs from the transport industry do

⁶³ *Gippsland Coastal Board v South Gippslands & Others*, online: <https://www.vcat.vic.gov.au/sites/default/files/resources/gippsland_coastal_board_v_south_gippsland_sc_and_others.pdf> (Accessed 2018/11/27)

⁶⁴ *Massachusetts v Environmental Protection Agency*, 2007 549 U.S. 497

not contribute towards climate change. The EPA failed to prove this and as a result was bound to regulate emissions from the transport sector.

2. Event attribution science

Extreme weather event attribution (or “event attribution”) is the science that seeks to determine the extent to which climate change has altered the probability or magnitude of a weather event or type of weather events. This branch of science seeks to quantify the human influence on the extreme weather events that are increasingly causing severe loss and affecting human rights.⁶⁵ In climate lawsuits, event attribution

⁶⁵ This section was developed based on the 2018 article by Sophie Marjanac & Lindene Patton (2018) “Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?”, *Journal of Energy & Natural Resources Law*, 36:3, 265-298 (Marjanac & Patton)



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WHAT KIND OF IMPACTS ARE EVENT ATTRIBUTION SCIENTISTS LOOKING AT?

Since 2012, the American Meteorological Society

has published an annual compilation of articles focusing on the attribution of specific extreme weather events over the previous year. The studies that have been compiled in the annual Explaining

Extreme Events of (Year) from a Climate Perspective (BAMS) have noted that many studies detected with high confidence the influence of climate change on extreme weather events. These studies have

looked at the contribution of climate change, for example on heat-related events, increased wildfire risk, health and economic impacts, etc.

science may be useful in proving that you are specially affected or threatened by a certain extreme weather event and that this event is fueled by climate change.

In most countries, there are established processes for verifying the accuracy and veracity of scientific studies. If you bring such studies as part of your climate lawsuit, be prepared to have experts who can testify to the court how the study was conducted (for example on the methodology) and what the results mean.

However, there are important distinctions between what is called “legal causation” and what attribution scientists are examining. As explained by Marjanac and Patton (2018),

“The scientific inquiry focuses not on whether the event would or would not have occurred without human-caused greenhouse gas emissions, but rather on the question of how that influence has changed the characteristics of the event. Scientists resist the idea that the simple question ‘Was event X caused by climate change?’ can be answered, and instead suggest

that a more helpful question to ask is ‘How has human activity changed the likelihood of this event occurring or its magnitude?’ (our emphasis)”⁶⁶

Event attribution studies usually look at the probability of an increased risk of an event happening due to climate change, rather than being caused by it. This is because of the **different standards of proof in science and in law**. While scientists seek to demonstrate that their results are proven with at least 90%

66 Marjanac & Patton, *ibid* at 273

67 Marjanac & Patton, *ibid* at 280

certainty, in many countries, for civil legal matters (the standard is different for criminal matters), it is sufficient to show evidence that is correct with a certainty of greater than 50% (“more likely than not”, “on the balance of probabilities”).⁶⁷

Having event attribution studies in your lawsuit can help your claim by showing a likelihood that climate change is having a local impact on the plaintiffs. Along with the IPCC 1.5°C Special Report,



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such studies can help you argue that **continued government inaction will result (or is resulting already) in foreseeable climate change impacts on human rights.**

C. ESTABLISHING THAT THE INTERFERENCE WITH YOUR HUMAN RIGHTS CANNOT BE JUSTIFIED

Finally, to convince the court that the interference with your human rights is also a violation of the government's obligations, you generally have to show that interference is not proportionate to competing public interests that could be used by the government to justify its actions (often called "legitimate aims" – for example economic development).

When building an argument that your government's failure to sufficiently reduce its GHG emissions is a disproportionate interference with your human rights, consider the following questions:

- How serious is the impact of climate change on your human rights?
- How vulnerable are you to the impacts

of climate change?

- How foreseeable were/are the impacts of climate change on your human rights to the government?
- How suitable is the government's reason for failing to take action against climate change (for example for economic development reasons)?
- Does the government have an alternative to its current policy? Has the government considered these alternatives?
- How good was the procedure that led to the government policy or law that is subject to your complaint? Did the public have a chance to participate? Was there thorough political debate? Was an EIA carried out?
- Has your government taken every feasible step to limit emissions?
- Is the state disproportionately allocating resources to other concerns e.g. defense?
- Have there been progressive increases in GHG emissions reduction targets over-time?

An argument often used by governments to justify their inaction is the "drop in the ocean" argument. Governments will claim that their emissions are too small



compared with global emissions to cause any real impact, or that increasing their ambition on climate mitigation will not affect global climate change because of other more major polluting countries. The precautionary principle can help you overcome this “**drop-in-the-ocean**” argument. For example, in the Urgenda case decisions (in the first instance in 2015 and confirmed on appeal in 2018, now on appeal to the Supreme Court), the court used the precautionary principle to reject the Netherland’s defense.

- **2015: “The fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligation to take precautionary measures in view of the State’s obligation to exercise care. After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO₂ levels in the atmosphere and therefore to hazardous climate change... The rules given in that ruling also apply, by analogy, to the obligation to take precautionary measures in order to avert a danger which is also the subject of this case. Therefore, the court arrives at the opinion that the single circumstance does not alter the State’s obligation to exercise care towards third parties.”⁶⁸**
- **This was reaffirmed by the Court of Appeal in 2018: “The Court, too, acknowledges that this is a global problem and that the State cannot solve this problem on its own.”**

⁶⁸ *Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, Rechtbank Den Haag, C/09/456689/HA ZA 13-139, paragraph 4.79

However, this does not release the State from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change. The precautionary principle, a generally accepted principle in international law included in the United Nations Framework Convention on Climate Change and confirmed in the case-law of the European Court of Human Rights (...), precludes the State from pleading that it has to take account of the uncertainties of climate change and other uncertainties (for instance in ground of appeal 8). Those uncertainties could after all imply that, due to the occurrence of a ‘tipping point’ for instance, the situation could become much worse than currently envisioned. The circumstance that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above,

PROVING A VIOLATION OF A HUMAN RIGHT LARGELY DEPENDS ON THE FACTS OF YOUR CASE

This Guide explains general principles and

tips that seek to help you bring human rights litigation to challenge your government’s GHG reduction policies. Whether a violation can be proven in your case will depend on a number of factors specific to your case.

Key Factors:

- The impacts climate change has (e.g. forest fires or heatwaves) on your region and personal life.
- The availability of climate science connecting these environmental issues to climate change.
- The measures your government has taken to reduce its GHG emissions.
- Your country’s level of development and dependence on GHG emitting industries.

suffices.”⁶⁹

When developing a rights-based strategy, asking yourself what kind of change you want and identifying your demand is the basic first step and should be included in the initial complaint. If the court is convinced that the government has breached its obligations, it will issue a legal remedy. A remedy is a form of legal reparation ordered by a court when it finds that your rights have been violated.

⁶⁹ *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda*, ECLI-number: ECLI:NL:GHDHA:2018:2591), 2018 Hague Court of Appeal, at paras 64-66 online: <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610&showbutton=true&keyword=urgenda>> (Accessed 2018/11/27)

4.5

GETTING A REMEDY



Robin Loznak/Our Children's Trust.

EXAMPLES OF REMEDIES THAT CAN BE SOUGHT IN CLIMATE LITIGATION AGAINST GOVERNMENTS

- Change the government's current regulatory system that facilitates climate pollution and allows climate deception, e.g. new laws to regulate carbon producers.
- Increase the ambition of national climate and energy laws, policies, and actions.
- Introduce national energy plans based on the transition to 100% renewable energy.
- Stop new major fossil fuel development.
- Stop fossil fuel subsidies.
- Challenge government actions that make it harder to achieve targets or are contrary to stated goals.
- Request to conduct environmental impact assessments, give access to information and conduct public participation in decisions.

The following remedies are common in human rights litigation, whether they are available in your case depends on the laws in your country.

A. DECLARATORY JUDGEMENTS

Declaratory judgements are decisions where a court simply finds there has been a violation of the human rights obligations by the government. While this is not a specific remedy, it could achieve the objective of getting your government to reduce its GHG emissions.

If you get the court to rule that the government violated your human rights by failing to reduce its GHG emissions in line with the Paris Agreement and the best available climate science, it implies a specific obligation for the government to reduce its GHG emissions accordingly (for example through new legislation). To increase the effect of declaratory judgements, it is important that you define the government's positive obligations in your arguments so you can draw attention to the impact

of the court's judgement after it is given. If you believe your government has not properly enforced a declaratory judgement, you can go back to the court and ask them to define and enforce their judgement.

B. COURT ORDERS

After finding a violation, courts can make orders, requiring the government to take specific actions or stop an ongoing course of action in response to or to prevent a violation of human rights. If you can get a court order, this can make the process of enforcing your judgement easier.

In the Urgenda case, the Court of Appeal ordered the government to reduce its emissions by 25% (compared to 1990 levels) by 2020. The government has the discretion on how it implements this order (i.e. what policies it will take). For another example, see the Court's decision in Peña and others v Government of Colombia (under section 2.3.A.i. **Mitigation claims** above).

The *Klimaseniorinnen* case offers another useful example of the orders you can ask a court to make to get a government to reduce its GHG emissions. The senior Swiss women asked the government to (1) increase their insufficient GHG emission reduction



4.6

QUESTIONS TO ASK WHEN DEVELOPING A RIGHTS-BASED CLIMATE LITIGATION

targets for 2020 in accordance with the IPCC targets, (2) increase their mitigation measures to meet the 2020 target required by the IPCC reports to avoid dangerous climate change, and (3) correct the insufficient GHG emissions reduction targets they have set for 2030. Below is a useful list of questions to ask yourself (or consult with climate and energy experts on) when contemplating a new climate case based on human rights.

1. What are the total GHG emissions for your country?
2. How much renewable energy is there in your country?
3. What is the current GHG emission reduction target for your country according to national laws?
4. Is your country on track to reach its GHG emission reduction target?
5. If not, what are the reasons (evaluation of the implementation of the current climate law)?
6. What commitments has your country made to the UNFCCC in its nationally determined contribution?
7. What is the legal status of the Paris Agreement in your country?
8. How should the national GHG emission target be in order to meet the Paris Agreement's target?
9. What are the major energy policies that relate to climate targets, mitigation and adaptation?
10. Are there major fossil fuel projects in development?
11. What are the current renewable

energy laws or policies in your country? What assessments have been done on the potential of renewable energy in the country?

12. What are the key government agencies involved in climate and energy decision-making?
13. What role do private or public companies play in influencing national climate policy?
14. What places or people are most vulnerable to the impacts of climate change in your country?
15. What is widely considered to be an example of a climate change impact? E.g. floods and heatwaves.
16. Who are the leading scientific experts in your country?
17. Who are the leading voices for climate action in your country?
18. Who are the leading voices for renewable energy in your country?
19. If your country set a higher GHG emissions target, how would this impact climate policy in the region and globally?

Here are some questions you should be asking the lawyers helping you with the case.

1. Can citizens (and people living in your country) and/or NGOs (e.g. public interest NGOs) sue the government for failing to protect their rights enshrined in the Constitution (e.g. rights to life, environment, etc.) , and upheld or by regional bodies such as the European Convention on Human Rights by (a) failing to implement a science-

based GHG target that is at a minimum aligned with the Paris Agreement (e.g. 1.5°C);

(b) permitting/licensing energy projects that are contrary to national and international law; and

(c) having inadequate commitments to renewable energy?

2. What is the legal status of the regional human rights treaty, the Paris Agreement, and international law in general in your country?

3. What are your government's human rights obligations under international law (what treaties has it signed and ratified - what is the status of these commitments in national law) and national law (what rights are included

in the national constitution and other legislation)?

4. What other legal grounds might exist to hold the government accountable for inaction, e.g. regulatory, government liability, public trust, etc?

5. What types of remedies can people seek, e.g. injunction on new coal, improvements in climate and energy policy, implementation of mitigation and adaptation measures, increased commitments to renewable energy?

6. Who can sue? Can a large group of people, e.g. 10,000 people? Can a small group and/or association on behalf of a larger population bring an action



4.7

IS YOUR CASE SOLID AND STRATEGIC?

together? Can children sue? Can a case be brought on behalf of future generations?

7. What are the costs of bringing such a case? What if the plaintiffs lose? Would they be forced to pay the other side's costs?

We suggest that you also explore other strategies in parallel to launching a climate lawsuit. Consider participating in activities such as attending consultations on government policy, lobbying, proposing legislation, commenting publicly and peacefully protesting. After engaging in these non-judicial possibilities, you should also evaluate whether your climate litigation is strategic and worth pursuing. This decision should be based on several criteria, including two necessary ones:

- The claim must be **meritorious**. This means there are strong factual, scientific and legal grounds for the claim and it is backed by an authentic group of people; and
- There is **sufficient legal capacity** to ensure the action is conducted professionally and executed in a manner that will achieve your objectives.

Only go ahead if the first two criteria above are met and if two or more of the following ones apply:

- The legal action is a part of a campaign with a political, communications

and mobilisation strategy that includes meaningful engagement for supporters.

- The action embraces local groups, indigenous groups, specific communities allowing stories of injustices to be told and the facts to be put on record.
- The action seeks to change the rules of the game and/or use the laws made to steer government regulations towards climate protection.



RAISE
YOUR
VOICE

- The legal action is replicable in other countries with similar legal systems to create precedents and inspire others to do the same.

All legal actions require strong peer-review and best available climate science as evidence.

The overall objective of rights-based climate litigation cases is to build pressure and support for action to cut GHG emissions to prevent and stop ongoing human rights violations caused by climate change. There must be a coherent strategy to ensure you have a good chance of succeeding both inside and outside of the courts. This section is to be developed at the same time as the legal consultation explained in section 4. It outlines some considerations to bear in mind when developing your strategy, and the different tools and approaches

5.1

WHAT KIND OF CHANGE DO YOU WANT?



5

DEVELOPING A RIGHTS-BASED CAMPAIGN STRATEGY

you can use. The process explained here is a simplified version of the social justice model for strategy development described by the Change Agency. You can visit their website and toolkit on strategy development for more detailed information and for exercises.

Other tools which can be useful when thinking about developing strategies for litigation include:

1. **SWOT analysis**: Identify the strengths and weaknesses within the organisation, and the opportunities and threats outside of it.
2. **Theory of Change**: Inputs, Activities, Outputs, Outcomes and Impact.⁷⁰
3. **Golden Circle**: Why are you doing this? How will you do it? What actions will you take?
4. **Business model**: What are your aspirations and the specific goals against which you can measure

⁷⁰ The theory of change model helps you define all the necessary conditions required to bring about a given outcome. It involves setting a long-term goal and then working back from that goal to identify all the conditions (outcomes) that must be achieved. You can find more information on how to proceed with this methodology: Center for Theory of Change, “When Does Theory of Change Work”, online: < <https://www.theoryofchange.org/> > (Accessed 2018/11/20)



EXAMPLES OF CREATIVE CAMPAIGN TACTICS TO COMPLEMENT LEGAL CASES

The Senior Women for Climate Protection (Klimaseniorinnen), an association of now over 1000 women, age 65 and older, are continuously campaigning alongside their legal case. Their aims include building

the climate movement, making climate change a topic of discussion in new communities such as in the arts world and women rights circles, and educating politicians, the media, and the mainstream public about the devastating effects of climate change on health and basic human rights. In 2018, the association presented their case at the Museum of Modern Art in

Zurich and participated in a glacier walk to document the impacts of climate change in Switzerland, which led to the publication of a book.

One month before the start of the hearings in the unprecedented climate change and human rights inquiry in the Philippines, the Greenpeace ship, Rainbow Warrior, visited the country to amplify the

voices of those impacted by climate change. Community representatives from Nature & Youth (Norway), the Pacific Climate Warriors (Fiji), and Our Children’s Trust (USA) participated in the human “LIVErary” (people served as “living books” to share their stories) that the people of Eastern Visayas set up with the participation of Greenpeace SEA-PH and its partners.

your impact? Where should you act? How will you win where others have failed? What skills and capabilities are necessary to win? What management systems are necessary to support the key capabilities?

A. IDENTIFYING THE CHANGE YOU WANT

One of the first steps in developing a rights-based campaign strategy for climate justice is to clearly imagine the world you want to create, based on a set of core values that define your group and what you are fighting for.

Some questions that you might ask yourself are:

- 1. What problems are you angry or upset about?**
- 2. Do other people share your anger or frustration?**
- 3. Are there concrete solutions to the problem?**
- 4. What is your vision of a better future?**

These questions can start to help you think through what are the important problems to address. The first two questions can help you identify whether the problem is deeply and widely felt. The more a problem impacts the lives of people in a significant way and the more an injustice is felt, the more people are willing to act to address the problem.

- For example, when developing the Klimaseniorinnen case, where senior women sued the Swiss government, the problem was identified as the following: people still think of climate change as something distant, not**



affecting us directly and policymakers would see no purpose in having Switzerland being more ambitious than other countries, despite known predictions that current commitments would lead to a collective failure towards implementing the Paris Agreement.

The third question will help you think through the solutions to the problem, while the last question makes you think about what is the change you want to bring about and what that will feel like. The campaign strategy for the senior women in Switzerland was identified as the following:

Highlight and make the public and the government realise that climate change is already severely affecting us now.

- The senior women are directly under threat, climate change is a real health risk to them already. They wanted the media and people to understand that action is required now. That is why they also did several successful public activities to highlight their case (including a glacier walk).
- Directly target the policy makers.
- This is through the core legal action because if they win the current policies would need to be changed.
- The senior women remain active in the political sphere, for example by targeting politicians concerned about health impacts but not yet engaged in climate issue, which could make a difference in the parliament.
- Inspiring and creating a whole movement.
- The senior women used their activism to demonstrate that everyone can be engaged for a better future.

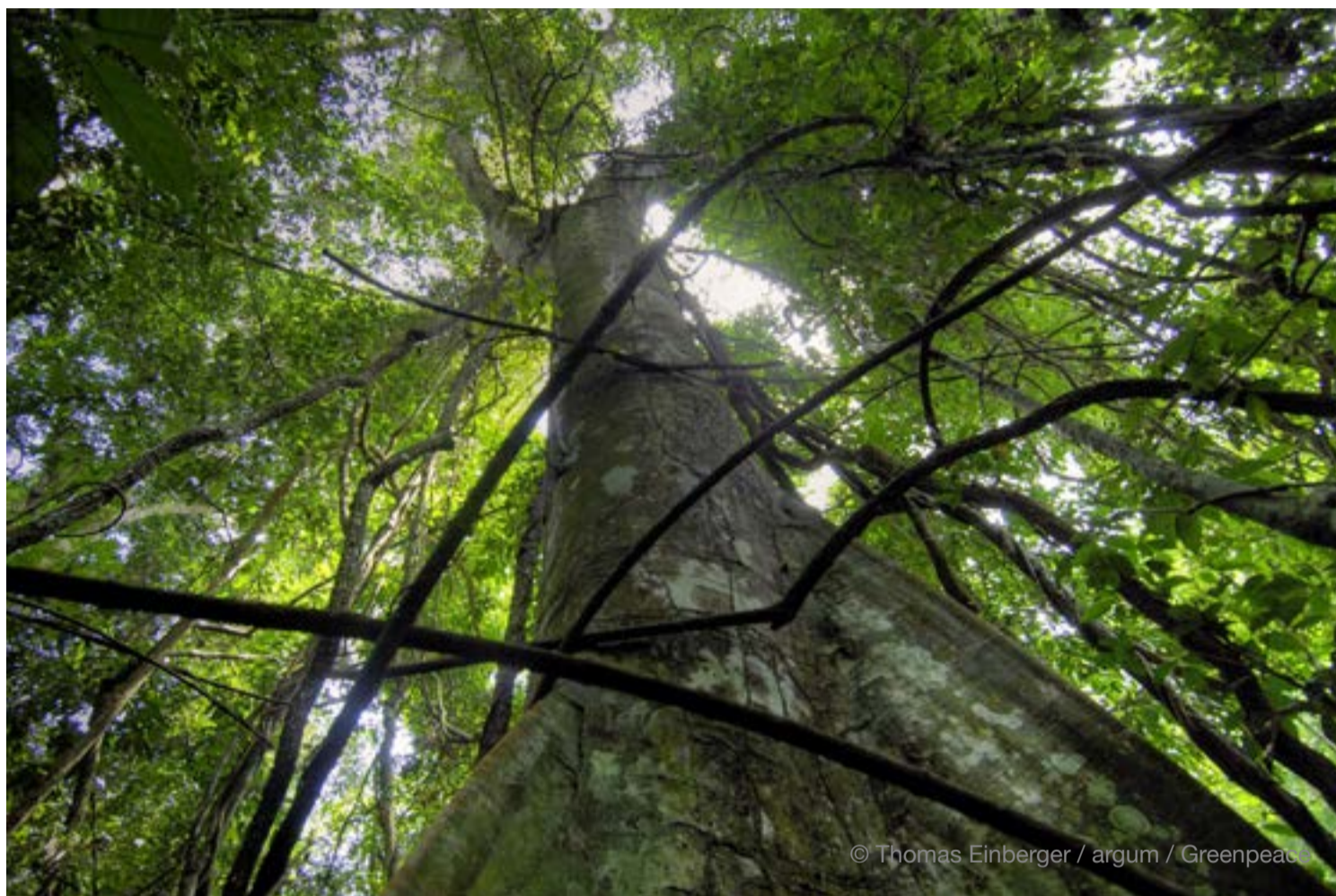


- Being part of and building a movement was another solution to the problem for them. That is why they have already more than 1100 members (all women aged 65 and over) and more than 1000 supporters.

CAMPAIGN SCOPE AND GOALS

After establishing your vision, the next step is to break down the big challenge into manageable parts to determine which problem or issue you intend to work on and why. At this point, there needs to be a deeper analysis of the

B. IDENTIFYING THE



ROOT CAUSE TREE TOOL

One popular way of analyzing the concerns in your community and where you should concentrate your efforts to create a lasting change is the Root Cause Tree tool. This involves identifying different layers of the problem.

1. Leaves: the visible and tangible parts of the problem. What problems do you see in your community?
 - In the climate change context, it could be lack of clean water, heat strokes affecting seniors

or droughts affecting farmers.

2. Trunks: What structures, practices and policies create an environment that supports the problem? What is “holding up” the problems? Why do these problems exist?
 - For example, policies that increase coal extraction and consumption or the allocation of deforestation permits causing further depletion of fossil fuels.
3. Roots: What are the underlying historical,

social or economic root causes of these problems? Why do the structures and policies exist? What is the context? What factors are likely to help or hinder you in achieving your objectives?

- For example, fossil fuel companies often have a stranglehold over national climate laws and policies. Another common problem comes from governments whose focus regarding energy development involves quickly providing electricity to the population and opting for coal-powered

energy instead of making a more sustainable choice.

Focus on challenging the programs, practices and policies you listed under the trunk. If you only address the leaves, you may only create Band-Aid solutions. It is difficult to address the roots because they are based on longstanding injustices. Cutting off the problems at the trunk is your best opportunity to defeat the problems in your community.

5.2

WHAT TYPE OF SUPPORT DO YOU NEED?



problem which will help you determine how to address it in a manner that will make a lasting change in your community. There are many tools available to narrow down the campaign scope, from macro strategy analysis to exercises to develop your theory of change.

C. IDENTIFYING YOUR DEMAND

Once you have analysed the problem and the structures, you are ready to name your solutions. Your solutions should aim to address the policies, practices or structures that are keeping the problem in place. One way to ensure you create strong demands is to make them S.M.A.R.T (Specific, Measurable, Attainable, Realistic and Timely).

All litigation requires time, resources and legal expertise. To reduce the difficulties in bringing litigation, you must build support for your climate litigation case.

A. LEGAL SUPPORT

1. Reach out to established local or international non-governmental organisations, who can help you connect with lawyers, other NGOs or other communities who might be bringing a similar case.
2. Successful climate litigation requires legal expertise to build a convincing legal argument grounded in evidence. It is essential you find lawyers to bring your climate litigation case.
3. There is a growing movement of NGOs, public interest law firms and civil-society organisations that are engaging in climate change litigation and often have the resources (legal



- etc.) to support new climate litigation initiatives around the world. This can help to reduce costs. Law school clinics can also contribute by doing legal research analysis. Such organisations may also be able to support you in gathering evidence and building a campaign around your case.
4. **Getting second and third legal opinions is important in complex and innovative cases like climate litigation, particularly where your lawyer has an expertise in one area but not others (for example, civil damages, but not environment or human rights).**
 - If possible, seek out the legal opinion of several lawyers when you are exploring and shaping your claim.
 - Before filing (sending out) major court documents with your arguments, it is good practice to establish a legal sounding-board to test out the ideas.
 - You can reach out to various lawyers, law professors and climate and energy campaigners to test out the strength of your arguments.
 5. **Bringing a climate change lawsuit is a long commitment and demands a multidisciplinary team.**
 6. **Organise the group that will ultimately bring the claim:**
 - As climate change impacts many people and communities, there is the



potential to build local coalitions that can together bring a case.

- To build a coalition or association you should identify other groups and people who are similarly affected by climate change and are motivated to bring such a lawsuit.

B. FINANCIAL SUPPORT

While litigation can be costly, there are ways to reduce or share the costs of litigation.

1. The first step should be conducting (asking your lawyers to do) a thorough research of the financial costs:
 - Filing the case: apart from the lawyer's fees, what are costs associated with the court, the gathering of evidence, getting expert testimony and so on.
 - Losing the case: will you have to pay the opposing parties' costs?
 - Appealing the case: is this a case that will likely head to appeal and if so what will be the costs then?
 - Also consider with a lawyer whether the state can bear the costs: for example, is there a human rights ombudsman or can there be an exemption for covering the other party's costs if this is an issue of first impression or a public interest litigation.
2. Consider crowdfunding or accessing public interest litigation funds. Consult with a lawyer to understand the rules around funding litigation. Examples of crowdfunding platforms include:
 - CrowdJustice
 - CrowdRise

work in your favour inside the courtroom as the judge is reminded that the issue being brought forth is one of paramount importance.

To create awareness and pressure, it is important to:

- Use the media and social media to publicise the effects climate change is having on your community.
- Identify the key messages (the story and framing that you would like the campaign to have) and draft communication guidelines (do's and don'ts) to make the story line come to life.
- Publicise every positive step taken in your case.
- Build alliances with other groups and organisations that can increase your voice.
- Reach out to universities to get



- Harbour Litigation Funding (UK)
 - GoFundMe
 - Grata Fund (AUS)
3. Seek the support of allies (see section below) to help bring your case.
 4. Consider applying for funding from major charitable organisations.

C. ENGAGEMENT SUPPORT

Raising awareness through a campaign is vital. Human rights-based climate litigation builds public awareness, leverages people power to shift mindsets and puts pressure on governments to reduce climate pollution. Cases that have authentic public support have a better chance of succeeding because the legal arguments are representative of what is in the public's interest. In addition, if the litigation does not succeed in court, an effective campaign can help ensure the government is still held accountable in the “court of public opinion”. It can also



5.3

HOW TO WORK WITH COMMUNITIES

academic interest in your case.

- Incorporate a multilingual approach, translating key legal documents and your engagement messages (tweets for example) so that researchers, international media and other communities and organisations can hear your demands for climate justice. For environmental NGOs working with people and communities who are affected by climate change, it is important to remember that the ultimate aim of such people-powered climate litigation is not only to win rights or policy outcomes, but to win them in ways that enhance the communities' power and capacity to win future struggles.

Best practices in bringing a people-powered case with impacted communities includes:

- Amplifying and adequately representing the diversity of groups working with communities;
- Working with communities to develop their campaign and litigation so they could pursue it with or without NGO presence;
- Building trust, being clear from the beginning about the level of commitment and listening instead of imposing agendas;
- Re-defining the notion of experts, seeing the communities as experts on traditional knowledge, oral history, cultural traditions and the ability to monitor the impacts of climate change



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5.4

MITIGATING RISK

themselves. Build on the concept of citizen's science;

- When talking about individuals and/or groups, always use the terms they use themselves. Don't superimpose terms onto them; and
- Build coalitions nationally and globally.

Any legal action targeting powerful governments could face backlash and retaliation. It's a good idea to assess the risks stemming from the case and campaign.

Among them are:

- The risk faced by community members who could become the targets of violence, imprisonment, defamatory remarks, or other retaliatory action;
- The impact on community members if, at the end of the appeal process, the legal action is unsuccessful;
- Capacity issues that might interfere with your ability to continue with the case
- The risk of costly and onerous document requests to disclose information about the case;
- The risk of reputational damage;
- The risk of unexpected legal costs;
- The risk of attack lawsuits (especially defamation lawsuits, which can include strategic lawsuits against public participation (SLAPP suits);⁷¹
- Threats to security of information (hacking, leaking of confidential

⁷¹ Strategic Lawsuit against Public Participation (SLAPP), is a retaliatory legal action designed to bury and silence a party. It is a real threat for communities and their lawyers, especially when suing large corporations or parties who have the money to engage in lengthy legal recourses. However, human rights, environmental and justice NGOs are standing together in a new task force of organisations that have long dealt with SLAPP threats called "[Protect the Protest](#)".

information, etc.); and

- **The risk that a case that is not strategic or not based on the best science might lead the court to issue a restrictive ruling that prevents future possible litigation.**

Some measures to mitigate those risks include:

- **If possible, ensure any public statements on governments or corporations are reviewed for accuracy and truthfulness by lawyers first before being issued;**
- **Ensure there are clear agreements between partners in the case and/or litigation for the full lifetime of the case;**
- **Develop and train all involved on a protocol for confidential information;**
- **Ensure that the science used is accurate and up-to-date;**
- **Develop a robust communication plan;**
- **For environmental NGOs, secure a strong partnership with the community, or with an NGO that has solid ties with the community;**
- **Conduct proper briefings and continued engagement with the members of community;**
- **Develop security management plans that cover all infiltration, hacking, intimidation tactics;**
- **Fund support for witness protection (if needed); and**
- **Present the claim in a way that the court or tribunal may find consistent with principles it has recognised in the**



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past.⁷²

⁷² In some cases, it may be strategic to ask for less rather than more to increase the chance of success and avoid a negative decision.

6

CONCLUSION

Scientists around the world agree that the increase in GHGs from human activities is driving climate change, and it continues to get worse. Recent events reveal that people (particularly vulnerable communities) are already experiencing the significant impacts of climate change, which includes rising sea levels, extreme heat waves, drought and fires. Notably, climate change accelerates social injustices and inequalities, and threatens constitutional and human rights, including the right to life itself. Without action, the world's average surface temperature is projected to keep rising and is likely to surpass 3°C this century—with some areas of the world expected to warm even more. By 2100, if urgent action isn't taken now, the world as we know it today could become unrecognisable.

The People's Guide stands for the idea that people have a right to a stable climate and to protection from the dangers of hazardous climate change. Governments do not have unlimited discretion to decide how to address climate change. People have a right to seek legal protection from courts, and courts have an important role to play in determining whether authorities are acting lawfully in addressing climate change.

You can target government authorities through people-powered legal actions that seek to force political leaders to fulfill their duties to protect people's human rights. This Guide gives you examples of how to accompany the lawsuit with a campaign strategy that raises public awareness of the threats posed to human rights as well as to

those particularly vulnerable to the impacts, such as children.

From detailing the use of climate science as a factual basis in developing your arguments, to discussing how to overcome common defenses in climate lawsuits, the task of holding our governments accountable is a big one. While we don't pretend to have all the answers, we hope that this Guide can be a stepping-stone in your climate strategy.

The work compiled in this Guide represents a snapshot of insights gained over the last couple of years. Greenpeace offices will continue to learn from communities and our allies about achieving climate justice using the power of the law. We welcome your feedback and please keep us informed of your efforts.

While climate litigation is not a catch-all or perfect solution, it can be a useful tool in achieving climate justice. As people are increasingly mobilising and reclaiming their rights and the latest IPCC science sends an urgent call for action, governments are on notice to act now or expect more human rights climate litigation in the near future.

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