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Using Specific Examples, Discuss the Development of Climate Litigation Internationally

Abstract

Climate change litigations (CCL) are on the rise globally as a promising means to increase action on both climate change mitigation and adaptation efforts. Within developed countries, most CCLs launched by non-governmental organizations (NGO) tend to focus on mitigation. Whereas in developing countries, majority of CCLs tend to focus on adaptation efforts. There is an increasing trend in developed country CCLs to use rights-based arguments and they have shown to be relatively successful. For developing countries, as their main targets are developed countries and large fossil fuel companies most responsible for causing the detrimental climate change impacts they experience, the international legal framework is inadequate for using CCL. However, CCL can be used in other ways to achieve their aims. This paper focuses on how CCL has developed to increase action on mitigation and adaptation efforts internationally, highlighting the key arguments which have proven relatively successful in their application.

Word Count: 149

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1. Introduction

Legal institutions have historically played an important role in determining the social norms for society. Increasingly over the past couple of decades, courts have been the battleground over issues relating to climate change[1]. In this paper, I discuss the development of climate change litigation (CCL) internationally, using specific case examples from both developed and developing countries, as a means to progress action on climate change.

I define CCL as "any piece of federal, state, tribal, or local administrative or judicial litigation in which the . . . tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts"[2]. For this paper, I extend that definition to include international cases related to the impacts and causes of climate change.

In this paper, I have included four cases of varying final outcomes, including one which did not even reach the court, as they provide important lessons on how progress could be made on climate change through the legal system. My focus is to discuss how CCL has developed to advance action on mitigation and adaptation efforts globally. I begin by identifying two significant cases in developed countries (Netherlands and United States of America) focusing on climate change mitigation, litigated to hold their governments accountable using rights-based arguments. Then, I highlight two cases from the developing world (Tuvalu and Peru) focusing on climate change adaptation, targeted at claiming damages from developed country governments and a private corporation responsible for causing climate change. I analyse the arguments presented in each case, followed by concluding with which litigation avenue I found to be the most successful. I find rights-based arguments, exemplified by cases in the Netherlands and the United States of America, based on the precautionary principle and the public trust doctrine respectively, as some of the more successful ones[3]. Moreover, for developing countries, I find they have limitations for using CCL on appropriate defendants but the no-harm rule and the nuisance provision within tort laws provide promising avenues for international CCLs to succeed.

I do recognise analysing four cases alone may not provide a comprehensive, in-depth understanding of other underlying reasons for the development of CCL in these jurisdictions outside of the courts. Moreover, I am aware that CCLs can be brought forward by litigants, such as private

[1] Burger, M., Gundlach, J., Kreilhuber, A., Ognibene, L., Kariuki, A. and Gachie, A. (2017). *The Status of Climate Change Litigation. A Global Review*. New York: United Nations Environment Programme.

[2] Markell, D. and Ruhl, J. (2012). An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?. *SSRN Electronic Journal.*

[3] See supra note 1.

corporations, to slow down or regress actions on climate change as well[4]. I also understand that there are differences between civil law and common law jurisdictions, primarily with regards to case law and following precedent. However, for this paper, I am focusing specifically on the key arguments used by environmentalists to progress action on climate change and how the courts have responded.

2. International Law and Climate Change

Greenhouse gas (GHG) emissions have been increasing at an alarming rate, placing the world's population increasingly at risk of catastrophic climate change[5]. Historically, many nations are guilty of releasing large amounts of GHG partly due to weak domestic and international legal frameworks limiting their release[6]. In view of the risks posed by climate change and its link to human activities, states convened in 1992 to negotiate the United Nations Framework Convention on Climate Change (UNFCCC) – an international environmental treaty aimed at addressing climate change[7]. There are 197 parties to the convention, essentially all member states of the United Nations[8]. Of these, 172 parties have ratified the treaty[9]. The main objective of the UNFCCC treaty is stated in its Article 2:

"...stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[10]

The UNFCCC treaty itself does not set any binding emission limits on countries or any enforcement mechanisms, but it does have protocols on how international treaties could be negotiated to set binding limits on GHGs[11]. The parties to the Convention have met annually since 1995, as the Convention of Parties (COP), to negotiate a universally legally binding agreement to limit GHG emissions[12]. During COP21 in Paris, parties reached a universally legally binding agreement, the Paris Agreement [13] (PA). Signatories to the PA have agreed to take action to keep the global average

[4] Nachmany, M., Fankhauser, S., Setzer, J. and Averchenkova, A. (2017). *Global Trends in Climate Change Legislation and Litigation*. [ebook] Available at: https://www.cccep.ac.uk/wp-content/uploads/2017/05/Global-trends-in-climate-change-legislation-and-litigation-WEB.pdf [Accessed 3 Jan. 2018].
[5] IPCC 5th Assessment Synthesis Report. (2018). *IPCC Fifth Assessment Synthesis Report*. [online] Available at: http://ar5-syr.ipcc.ch/ [Accessed 5 Jan. 2018].
[6] Birnie, P.W. and Boyle, A.E., 1994. *International law and the environment*.
[7] Unfccc.int. (1992). *United Nations Framework Convention On Climate Change*. [online] Available at: https://unfccc.int/resource/docs/convkp/conveng.pdf [Accessed 28 Dec. 2017].
[8] Unfccc.int. (2018). *United Nations Framework Convention on Climate Change*. [online] Available at: http://unfccc.int/2860.php [Accessed 3 Jan. 2018].
[9] See supra note 7
[10] Ibid.
[11] Ibid.
[12] See supra note 8
[13] The Paris Agreement. (2015). *Adoption of the Paris Agreement - Paris Agreement text English*. [online] Available at: http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf [Accessed 29 Dec. 2017].

temperature to '*well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'*[14].

Many environmentalists had hoped the PA would impose legally binding GHG mitigation targets on developed countries and increase provision for the adaptation needs of developing countries, however, it did not deliver as effectively as hoped[15]. The PA is filled with verbs such as 'may, shall, should, etc.', each carrying a different legal implication[16]. While the PA forces the signed governments to recognize and provide for the *2°C* limit, it lacks a legal enforcement mechanism and a binding requirement for developed countries to reduce their GHG emissions. Moreover, under Article 8 of the PA on '*Loss and Damage'*, while parties acknowledged the impacts associated with the effects of climate change[17], a separate clause was added to state that the article could not be used for '*liability or compensation*'[18]. This was specifically added by developed countries, who have historically contributed the most to GHG emissions, to prevent developing countries from bringing claims against them for the impacts of climate change[19].

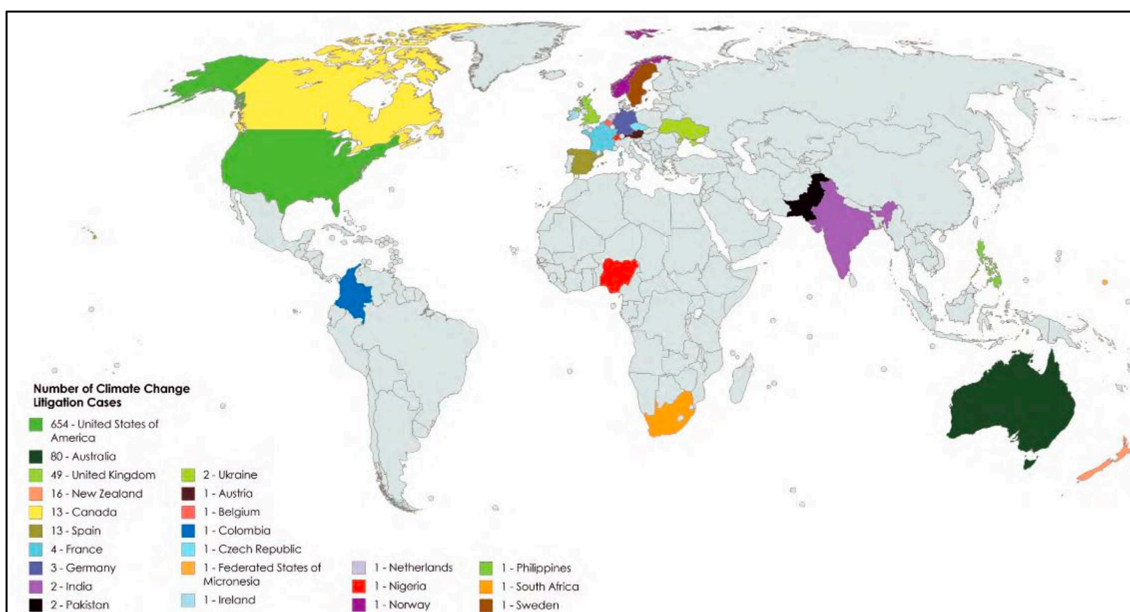

Figure 1: A snapshot of climate change litigations recorded globally[20]

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[14] Ibid.

[15] Benjamin, L. and Thomas, A., 2016. 1.5 C to stay alive. *AOSIS and the long term temperature goal in the Paris Agreement. IUCNAEL E-Journal*, *7*, pp.122-129

[16] Roberts, T. and Arellano, A. (2017). *Is the Paris climate deal legally binding or not?*. [online] Climate Home News. Available at: http://www.climatechangenews.com/2017/11/02/paris-climate-deal-legally-binding-not/ [Accessed 3 Jan. 2018].

[17] See supra note 13

[18] Unfccc.int. (2018). *Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*. [online] Available at: https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf [Accessed 5 Jan. 2018].

[19] Kreienkamp, J. and Vanhala, L. (2018). *Policy Brief - Climate Change Loss And Damage*. [online] Ucl.ac.uk. Available at: https://www.ucl.ac.uk/global-governance/downloads/policybriefs/policy-brief-loss-and-damage [Accessed 5 Jan. 2018].

[20] See supra note 1

Perhaps in light of the relatively slow movement of the international negotiations over climate change, CCLs are on the rise globally. According to a recent report, there have been 654 CCLs filed in the United States (US) alone and 230 cases filed in the rest of the world[21]. Since the mid-2000s, there have been at least 10 new cases each year, in the jurisdictions studied[22]. These litigation cases are generally founded upon the laws that are relevant to climate change in the respective jurisdictions[23]. As of 2017, there are about 1200 climate change or climate-change-relevant laws globally – an increase of over 20 times over the past 20 years[24]. The challenge now is to strengthen the existing laws, which climate litigation can help with[25]. Where international negotiations have failed to deliver, the courts have the potential to contribute towards progressive action in mitigation and adaptation efforts[26].

3. CCL in Developed Countries

Of the more than 880 CCLs recorded recently, over 90% of occurred in developed countries[27] and the government is the main defendant usually[28]. A high proportion of these cases were brought forward by non-governmental organisations against governments[29]. Many of these cases focused on holding developed nations' governments accountable for mitigation efforts towards climate change[30], as developed countries are the main contributors to GHGs resulting in the present-day climate crisis[31]. In the following two cases, I analyse two key cases and the legal principles they are founded on to hold their governments accountable.

3.1 Netherlands (*Urgenda Foundation v. Kingdom of the Netherlands*)

One of the most significant cases that made use of rights-based arguments and set a useful precedent for many around the world was *Urgenda Foundation v. Kingdom of the Netherlands*. In 2015, the plaintiffs - composed of the Urgenda Foundation and 900 Dutch citizens - sued the Dutch

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[21] Ibid.
[22] See supra note 4
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Grantham Research Institute on climate change and the environment. (2017). *Climate Change Laws of the World - Grantham Research Institute on climate change and the environment*. [online] Available at: http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world/ [Accessed 3 Jan. 2018].
[31] Ibid.

government to do more in decreasing its GHG emissions[32]. The claim was made on the grounds that the government had violated their constitutional duty of care towards its citizens[33]. The government had pledged to limit their GHG emissions by 17% below 1990 levels by 2020, however, the court decided it was insufficient and ordered a decrease of 25% instead[34]. The Hague District Court, which made this decision, looked at the Netherland's international commitments for reference. The Netherlands had ratified the UNFCCC and the court concluded that the Netherlands had to make a fair contribution toward the UN goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions[35]. To arrive at the decision, the court cited, without applying directly, various laws and principles, including 'Article 21 of the Dutch Constitution' (on citizens' rights), 'principles under the European Convention on Human Rights' and the 'precautionary principle' in the UNFCCC[36].

Urgenda was the first case in the world where a court ordered a state to limit its GHG emissions on a rights-based analysis, outside of specific statutory mandates[37]. Moreover, it was the first successful CCL involving collective public action holding its government accountable to the precautionary principle of the UNFCCC in a developed country[38]. One of the main challenges in CCL is proving causation[39] and the principle offers a potential solution towards this.

The precautionary principle is stated in Article 3.3 of the UNFCCC as:

"*The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost*."[40]

The precautionary principle is useful for two reasons. First, in many CCLs, it is difficult for litigants to prove causation and the principle offers a potential way out. For example, it is difficult to show that a particular emitters' GHG emissions caused damage in a specific region, as current climate attribution science still has not reached that level of specificity to be useful in a legal context to show

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Mackenzie, C. *International Environmental Law lecture* on 16th Nov 2017
[40] See supra note 7

linear causality[41]. In fact, the IPCC specifies climate change's key causal mechanism as "well- mixed greenhouse gases" in the atmosphere[42]. The mixing blurs distinct contributions and makes attribution of damage, and thus causality, difficult. The precautionary principle can be useful here as it can be applied before the GHGs are even released[43], on the grounds that GHGs are factually known to impact the climate negatively[44]. Second, in a case where a policy or an action by an entity could cause harm to the environment, and there is no scientific consensus, the principle causes the burden of proof to fall on the entity implementing the policy or action to show that no harm will occur[45]. This is useful as it removes the burden from environmentalists, who may not have the resources or capability to show proof.

Given that all UN nations have ratified the UNFCCC[46], which contains a precautionary principle[47], it offers a potential way to avoid showing direct causality and could be one of the many arguments used by environmentalists in a CCL to hold their government accountable to their international commitments. However, in the convention, the word "should" is used when referring to the principle, implying that it is more of a goal than a requirement that parties apply this principle[48]. Thus, not all governments and national courts would be as flexible in interpreting their international commitments as progressively as the Netherlands did in *Urgenda*. Still, *Urgenda* paved the way for many similar CCLs, using rights-based arguments, collective action and international commitments amongst others, to be filed challenging the inaction of governments across Europe, North America and the Asia-Pacific regions[49].

3.2 United States of America (*Juliana v. United States*)

The United States of America (US) lacks a comprehensive legislation directly aimed at tackling climate change and CCLs have helped to fill part of that gap[50]. With 654 recorded CCLs, the US has about three times as many cases relative to the rest of the world combined[51]. In the US,

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[41] Allen, M., Pall, P., Stone, D., Stott, P., Frame, D., Min, S.K., Nozawa, T. and Yukimoto, S., 2007. Scientific challenges in the attribution of harm to human influence on climate. *University of Pennsylvania Law Review*, pp.1353-1400.
[42] Field, C.B. and Barros, V.R. eds., 2014. *Climate change 2014: impacts, adaptation, and vulnerability* (Vol. 1). Cambridge and New York: Cambridge University Press.
[43] Cameron, J. and Abouchar, J., 1991. *The precautionary principle: a fundamental principle of law and policy for the protection of the global environment*. BC Int'l & Comp. L. Rev., 14, p.1.
[44] See supra note 42
[45] Kriebel, D., Tickner, J., Epstein, P., Lemons, J., Levins, R., Loechler, E.L., Quinn, M., Rudel, R., Schettler, T. and Stoto, M., 2001. The precautionary principle in environmental science. Environmental health perspectives, 109(9), p.871.
[46] See supra note 8
[47] See supra note 7
[48] Ibid.
[49] See supra note 1.
[50] See supra note 4
[51] Ibid.

majority of the cases were launched by environmental NGOs against the government[52]. Of the 201 cases that were filed in the US by 2010, more than 80% of them helped to increase regulation or liability linked with climate change[53]. Moreover, with a current political administration that systematically denies climate change, it has become even more important for CCLs to mobilise action on climate change and hold the government accountable[54]. This is particularly important as a mitigation strategy, since the US currently accounts for about 25% of the world's GHG emissions[55]. One of the key trends on the rise within US CCLs is the use of the public trust doctrine[56].

In the US, various plaintiffs have used the public trust doctrine as the basis of their argument in courts that the government takes action on climate change[57]. The public trust doctrine, as applied to natural resources, can be defined as the government's duties which prevent it from

> "*depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens*"[58].

One of the most high-profile cases currently litigated with this doctrine is *Juliana v. United States*[59]. In the case, twenty-one youth plaintiffs assisted by the NGO 'Our Children's Trust' alleged that the US government had violated their rights protected under the US Constitution by allowing carbon dioxide emissions to accumulate and destabilize the climate system[60]. The plaintiffs argued that the climate system was critical to their guaranteed fundamental constitutional rights to 'life, liberty, and property' and that the government had intentionally allowed the emission of carbon dioxide to reach a 'catastrophic level'[61]. As a result, the plaintiffs argued, the defendants had not fulfilled their duty under the public trust doctrine[62].

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[52] Grantham Research Institute on climate change and the environment. (2017). Climate in the courtroom: Litigation is increasingly used to influence action on climate change. [online] Available at: http://www.lse.ac.uk/GranthamInstitute/news/climate-in-the-courtroom-litigation-is-increasingly-used-to-influence-action-on-climate-change/ [Accessed 3 Jan. 2018].

[53] Ibid.

[54] Bookbinder, D. (2017). How Trump's reckless climate policy invites a judicial backlash. [online] Vox. Available at: https://www.vox.com/the-big-idea/2017/12/11/16759208/trump-climate-policy-courts-juliana-public-nuisance-lawsuits [Accessed 5 Jan. 2018].

[55] World Economic Forum. (2015). Which countries emit the most greenhouse gas?. [online] Available at: https://www.weforum.org/agenda/2015/07/countries-emitting-most-greenhouse-gas/ [Accessed 5 Jan. 2018].

[56] See supra note 1

[57] Sabin Center for Climate Change Law (2017). U.S. Climate Change Litigation Database. [online] Available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/us-climate-change-litigation/ [Accessed 2 Jan. 2018].

[58] U.S. Climate Change Litigation Database. (2017). Juliana v. United States. [online] Available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2016/20161110_docket-615-cv-1517_opinion-and-order-1.pdf [Accessed 28 Dec. 2017].

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid.

Juliana v. United States is now proceeding to the Supreme Court, after passing the scrutiny of the District Court of Oregon who agreed with the plaintiffs[63]. The Oregon court noted that for more than fifty years, officials in the federal government had known about the potential negative impacts of GHG emissions on humans, which worsen over time[64]. Moreover, in the first rejection of the government's request to dismiss the case, the judge used *Urgenda* as a demonstration that courts can aid climate change[65]. Time will tell how the case will be decided in the Supreme Court later this year. If the plaintiffs win, the case will have a potentially great impact on the US, stating that the government has a fundamental duty to prevent catastrophic climate change[66]. However, already, *Juliana* has had ripple effects in other courts that have referred to it, as other plaintiffs bring similar claims[67].

The public trust doctrine is a good potential litigation avenue for two main reasons. First, since the public trust doctrine is derived from old Roman laws, it is present in both civil and common law systems[68]. Hence, the foundational concepts of the doctrine can be found in a broad set of legal systems that could be capitalized on for CCLs[69]. Second, the doctrine in general can be relatively flexible in its interpretation[70]. Thus, both interest groups and citizens can use it in legal actions against governments to protect the environment[71]. Yet, the public trust doctrine is not without its limitations. Disagreements exists as to whether the doctrine can be extended to include the atmosphere and oceans, as traditionally it has only been applied to land and rivers in the US[72]. In *Juliana*, since the plaintiffs also included territorial waters, the case was not dismissed[73]. Overall, the public trust doctrine holds great potential as part of a rights-based argument in a CCL.

4. CCL in Developing Countries

4.1 Limitations

CCL as a way to mobilise action on climate change is not without its limitations, which are most apparent in developing countries. In the previous cases, CCLs were used to hold developed country governments accountable with the goal of increasing their mitigation efforts. However, there

[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] See supra note 1
[67] Ibid.
[68] Nanda, V.P. and Ris Jr, W.R., 1975. The Public Trust Doctrine: A Viable Approach to International Environmental Protection. *Ecology LQ*, *5*, p.291.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] See supra note 58
[73] Ibid.

is added complexity when attempting to use CCL in developing country contexts to advance action on climate change.

Most developing countries do not contribute as significantly to global GHG emissions as developed countries do[74]. For a number of reasons, people in developing countries are more vulnerable to climate change impacts than those in developed countries[75]. Hence, their needs are generally more adaptation-oriented[76], such as claiming for damages due to climate change. While there has been a steady rise of adaptation-related CCLs in developing countries against their own governments[77], the main challenge is using CCL against those most responsible for the climate crisis in the first place: developed nations and private corporations, who historically contributed most to GHG emissions[78]. As the following case shows, there are limits to using CCL towards that aim.

4.1.1 Tuvalu (*Tuvalu v. United States of America and Australia*)

One of the main issues developing countries to bring a CCL against a developed country is that few, if any, international legal institutions have the experience as well as jurisdiction to oversee such a case[79]. Of the international courts and tribunals available, the International Court of Justice (ICJ) is a potential option.

In 2002, Tuvalu, a low-lying small island developing state (SID) at risk of sea-level rise, threatened to bring a case against the US and Australia, over their contributions to climate change through the ICJ[80]. The ICJ is the "principal judicial organ of the United Nations" and has the judicial capacity to settle, as well as advise, legal disputes between UN member states[81]. Tuvalu alleged that these countries failed to stabilize their GHG emissions as required by the UNFCCC. Then in 2011, Palau, another SID, similarly announced during an UN General Assembly that it will seek an advisory opinion from the ICJ on whether countries have a legal responsibility to avoid harming other states

[74] See supra note 55
[75] Intergovernmental Panel on Climate Change, 2014. *Climate Change 2014–Impacts, Adaptation and Vulnerability: Regional Aspects*. Cambridge University Press.
[76] Adger, W.N., Huq, S., Brown, K., Conway, D. and Hulme, M., 2003. Adaptation to climate change in the developing world. *Progress in development studies*, *3*(3), pp.179-195.
[77] See supra note 1
[78] See supra note 55
[79] Mackenzie, C. *International Environmental Law lecture* on 16th Nov 2017
[80] Boom, K. (2018). See you in court: the rising tide of international climate litigation. [online] The Conversation. Available at: https://theconversation.com/see-you-in-court-the-rising-tide-of-international-climate-litigation-3542 [Accessed 7 Jan. 2018].
[81] Crawford, J. and Grant, T., 2007. International Court of Justice. In The Oxford Handbook on the United Nations.

due to GHG emissions from their own territories[82]. In both instances, no further legal action was taken.

There are a number of potential reasons why no cases were filed and it is important to understand the legal challenges, as well as opportunities, states face when attempting to bring a CCL through the ICJ. For cases to proceed to the ICJ, all parties involved in the case have to consent to it and only states that are members to the UN can litigate. This is difficult, as developed countries are aware of their historical GHG emissions and will want to avoid paying for damages caused by climate change, hence, they would likely not consent to the case[83]. This itself would have prevented the SIDs from progressing any further in their claims.

If, however, a developing state overcame the consent hurdle and used the ICJ, there are opportunities to make a claim through the 'no-harm rule'. The 'no-harm rule' exists in customary international law and is generally defined as

"a State is duty-bound to prevent, reduce and control the risk of environmental harm to other states"[84].

The 'no-harm rule' is particularly suitable for addressing climate change as it defines the duty one state has towards another environmentally and it is not needed to show that harm has already taken place[85]. Simply an increase in the risk of harm is enough, though it has to be significant[86]. This rule is incorporated in many international conventions in different forms, including recital 8 of the UNFCCC preamble, Principle 21 of the 1972 Stockholm Declaration and Article 194(2) of UNCLOS[87]. While the no-harm rule could be applied to a transboundary case involving climate change impact, or at least parts of it, it may not be enough to prove legal liability to pay for damages[88]. The rule is loosely defined for legal interpretation, giving no real specification for unacceptable levels of harm, and the issue of causation may again be of concern, resulting in the difficulty to directly prove cause and effect[89].

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[82] UN News Service Section. (2018). UN News - Palau seeks UN World Court opinion on damage caused by greenhouse gases. [online] Available at: http://www.un.org/apps/news/story.asp?NewsID=39710 [Accessed 10 Jan. 2018].
[83] See supra note 55
[84] Patricia Birnie, Alan Boyle and Catherine Redgwell in: International Law and the Environment, 3rd ed., Oxford 2009, pp.143-152.
[85] Ibid.
[86] See supra note 80
[87] Legalresponseinitiative.org. (2012). 'No-harm rule' and climate change. [online] Available at: http://legalresponseinitiative.org/wp-content/uploads/2013/07/BP42E-Briefing-Paper-No-Harm-Rule-and-Climate-Change-24-July-2012.pdf [Accessed 10 Jan. 2018].
[88] Ibid.
[89] Ibid.

Thus, it is a challenge for developing countries to find both the right legal foundations in international law and the adjudicating body to bring a CCL against a developed country. However, there might still be hope. In the following case, we observe how a farmer from a developing country recently brought a case against a private fossil fuel company in a developed country's domestic court.

4.2 Peru (*Lliuya v. RWE*)

Private fossil fuel companies are one of the major culprits for causing climate change. It is estimated that just 100 of the world's fossil fuel companies are responsible for more than 70% of the world's GHG emissions since 1988[90]. This fact, together with the challenges of litigating through an international court like the ICJ, were some of the factors that resulted in the recent case *Lliuya v. RWE* in 2015.

In *Lliuya v. RWE*, a Peruvian famer (Lliuya) sued Germany's largest electricity producer (RWE) to bear some responsibility for the flood protections he had built in his hometown due to damages caused by climate change[91]. He alleged that RWE had deliberately contributed to the climate change impacts through the release of GHGs, which have caused glacial melting resulting in the flooding of his hometown[92]. The case was initially dismissed on the grounds that he could not prove a 'linear causal chain' – that the specific emissions from RWE were the cause of the flooding in his hometown[93]. However, in November 2017, the appeals court overturned the previous decision and the case is now in its evidentiary phase[94].

The case is grounded in § 1004 of the German Civil Law Code (BGB), the 'nuisance' provision as part of their tort law[95]. The German appellate court stated that while the entire flood risk posed to Lliuya's hometown cannot be attributed to RWE's GHG emissions alone, it was enough to show that a '*partial causation*' exists. Furthermore, the court has allowed the use of climate models as legal evidence in this case, without the need for direct attribution. While the case is ongoing, the potential implication of a court holding a private company liable for damages due to climate change, in another part of the world, is a powerful advancement in law.

Lliuya provides a number of useful lessons. First, it demonstrates the nuisance provision, under tort law, provides a potentially useful foundation for CCLs to be launched. Given that nuisance

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[90] Riley, T. (2018). Just 100 companies responsible for 71% of global emissions, study says. [online] The Guardian. Available at: https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change [Accessed 9 Jan. 2018].
[91] Grantham Research Institute on climate change and the environment. (2017). *Lliuya v. RWE*. [online] Available at: http://www.lse.ac.uk/GranthamInstitute/litigation/lliuya-v-rwe/ [Accessed 11 Jan. 2018].
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.

provisions exist in some form in many jurisdictions[96], the potential for damages to be claimed using it against private fossil fuel corporations could be explored further. However, while some provisions might exist in civil law jurisdictions similar to tort and nuisance, they are generally not the same[97]. Second, the case shows that an individual's claim for damages can be brought against private corporations in national jurisdictions that allow it, bypassing the need for an international court, like the ICJ. According to a report by Environmental Alliance Worldwide (ELAW), Germany is able to hear such a case under the 2001 Brussels Regulation, which allows plaintiffs to "file a case in a European Union member state against a corporation domiciled in that country for climate damages that take place outside of Europe"[98]. There is no precedent for *Lliuya* but if successful, it will encourage many more such claims to be filed in European courts.

5. Conclusions

Through analysing four CCLs across developing and developed countries, I have shown that the continual development of CCLs in addressing climate change looks promising. In light of the lacking proper international frameworks to hold polluters accountable, CCLs both within national jurisdictions and across borders, like *Lliuya*, show promise of finally bridging the gap in climate justice that international agreements like the PA have not been able to provide. Overall, I believe the rights-based arguments used in both *Urgenda* and *Juliana* have been the most successful litigation avenues from the cases, due to their progress in the courts and precedent-setting for others around the world. I am keenly interested in how *Lliuya* will be decided but given that it is still in its evidentiary phase, it is still too early to tell. Yet, it has also already set a few useful precedents for many others to launch similar cases.

CCLs, both within and across countries, are expected to grow in the coming years. This will be the case with the likely increase of climate refugees, as the impacts of climate change worsen over time. Perhaps over the next few years we will see the development of international law to better meet the needs of those most affected by climate change.

[96] Ibid.
[97] See supra note 1
[98] French, K. (2017). A Peruvian farmer is suing an energy giant over climate change. [online] The Verge. Available at: https://www.theverge.com/2015/12/2/9821758/climate-change-lawsuit-un-rwe-energy-vs-peru-farmer [Accessed 10 Jan. 2018].