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Climate Change Litigation and Its Potential Impact on Climate Induced Displacement

Towards Recognition of a Right to an Adequate Environment

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LIST OF ABBREVIATIONS

COP	Conference of the Parties (to the UNFCCC)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GHG	Greenhouse gas
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
IDMC	Internal Displacement Monitoring Centre
IDPs	Internally displaced people
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-governmental Organisation
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

Climate change forces the world to face new challenging issues and to respond with appropriate solutions. In the Intergovernmental Panel on Climate Change's (IPCC) 2014 Assessment Report, it was confirmed that the present climate changes are unprecedented, that human influence on the climate is evident, and that the adverse effects of climate change have extensively impacted the environment.[1] The average temperatures on earth are increasing, the sea-level is rising, the ocean is becoming sourer, the ice is melting, rainfall patterns are changing, and extreme weather conditions and natural disasters occur more frequently.[2] Climate change accordingly generates severe consequences, some of which are causing climate induced displacement. The United Nations High Commissioner for Refugees' (UNHCR) latest report presents that 70.8 million people were forcibly displaced worldwide at the end of 2018.[3] According to the Internal Displacement Monitoring Centre (IDMC), 25.3 million people leave their homes on average every year due to climate-related problems.[4] In March 2019 Cyclone Idai alone triggered more than 600,000 new displacements in Mozambique, Malawi, Zimbabwe, and Madagascar.[5] As these challenges rapidly worsen they must importantly be confronted. Climate induced displacement requires long-term and efficient solutions. The current response in international law is however insufficient and leaves a legal protection gap. Consequently, it is important to explore various approaches that may be utilised in the response. One such interesting approach is the right to an adequate environment. The world is facing an unprecedented environmental crisis however, the right to an adequate environment is not explicitly recognised in international law or by the United Nations (UN).

[1] Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2014: Synthesis Report' (Report, 2014) 2-8.

[2] See e.g. ibid; IPCC 'Global Warming of 1.5°C' (Report, 2018) 7-12; IPCC, 'The Ocean and Cryosphere in a Changing Climate' (Report, 24 September 2019) 8-11, 16-18.

[3] United Nations High Commissioner for Refugees (UNHCR), 'Global Trends: Forced Displacement in 2018' (Report, 20 June 2019) 2.

[4] Internal Displacement Monitoring Centre (IDMC), 'GRID 2017: Mini Global Report on Internal Displacement' (Report, May 2017) 19.

[5] IDMC, 'Mid-Year Figures: Internal Displacement from January to June 2019' (Report, 12 September 2019), 3.

1.1 Objective and research questions

The following is the principal research question guiding this thesis: *Is an individual right to an adequate environment emerging as customary law in light of recent climate change litigation, and what potential does it have to impact climate induced displacement?*

In order to answer the main research question, these sub-questions will be addressed:

- How is recent climate change litigation indicative of an emerging right of customary law?
- How can litigation be an efficient rights protector?
- What contribution does a rights-based approach bring to climate induced displacement?

The objective is to explore how the right to an adequate environment has emerged in recent years as it has been pursued through litigation. Through an analysis of *de lege ferenda* ('the law as it should be'), the aim is to determine whether a customary law standard of the right is emerging. Based on this assessment, the further objective is to examine how such a rights-based approach may impact climate induced displacement. Consequently, it is an effort to examine how the right to an adequate environment may be a valuable contribution to an overall holistic response to the adverse impacts of climate change. In light of current trends in the global community where protectionism and sovereignty are regaining strength while reluctance towards international law and cooperation is increasing, an underlying intention is to explore whether domestic developments of existing law initiated by non-state actors are more beneficial than attempts by States to create new international law through global arenas.

1.2 Relevance

Two circumstances construct the central relevance of this topic. First, the increasing global challenge of climate induced displacement in light of insufficient international legal protection. And second, the fact that a right to an adequate environment is not explicitly recognised in international law. In recent years, adverse impacts of climate change and displacement induced by its effects have been growing challenges.[6] According to IDMC 'Weather-related hazards account for more than 87 per cent of all disaster displacement, and the impacts

[6] See e.g. IDMC, Report 2017 (n 4) 19; IPCC, Report 2014 (n 1) 16, 73.

of climate change and the increasing concentration of populations in areas exposed to storms and floods mean that ever more people are at risk of being displaced.'[7] However, current responses in international law are inadequate and do not offer viable solutions.

There is accordingly an absence of international legal obligations linked to climate induced displacement. People affected are for instance not covered by the *Convention Relating to the Status of Refugees* (1951 Refugee Convention).[8] According to Philip, a review from 2018 of existing research in this field revealed that three potential solutions to the legal protection gap of climate induced displacement predominantly are proposed; (1) 'a new international legal instrument', (2) additional Protocols to the 1951 Refugee Convention or to the *United Nations Framework Convention on Climate Change* (UNFCCC), or (3) 'enhanced pathways under existing migration schemes'.[9] The first two options are the most prevalent, revealing that the main focus is on change from the 'top-down' through amendments or developments stemming from the international law regime. Considering current trends to disclaim and avoid responsibility for refugees and migrants under international law, it is unlikely that a new legally binding treaty or convention on climate induced displacement will be formed in the near future. McAdam observes that 'there is a broad consensus that it is premature to push for a new standard-setting agreement at the global level'.[10] In light of the current landscape, this assessment is thus based on the assumption that change needs to be initiated by the civil society and non-state actors instead of by States at the global level. One alternative is to challenge and develop domestic legislation and constitutions through litigation. Development and progressive interpretation of already existing laws might lead to a broader consensus which ultimately also can facilitate enhanced development of international law.

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[7] Sylvian Ponserre and Justin Ginnetti, 'Disaster Displacement: A global review, 2008-2018' (IDMC Thematic Report, May 2019) 5.

[8] UN General Assembly (UNGA), *Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137 (Refugee Convention).

[9] Thea Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Legal Regimes Deficiency, Proposed Solutions and a Way Forward for Australia' (2018) 19 Melbourne Journal of International Law 639, 651-8. See also Graeme Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

[10] Jane McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' (2016) 33 Windsor Yearbook of Access to Justice 1, 9. For a more detailed discussion see Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012) 187-92.

1.3 Methodology and structure

Traditional legal method through legal analysis will be the primary methodology utilised to answer the research questions. The thesis will explore current law as it is (*lex lata*) in the pursuance of a liberal interpretation of it and may be characterised as liberal legal research. *De lege ferenda* will be analysed to determine whether a customary law standard of the right to an adequate environment is emerging. The thesis is qualitative in nature, primarily with a legalistic methodology through analysis of case law, legislation and treaties. A comparative method is adopted to highlight differences and similarities between judgments and between domestic, regional and international developments. Judicial decisions will be analysed and compared to illustrate the application and development of the right and to establish state practice pursuant to customary international law. Some quantitative data will be used to obtain statistics about existing legislation, litigation and constitutional recognition and to determine the prevalence of climate induced displacement. Soft law, reports, official documents from the UN, and literature from academic fields within international law will be used to provide interpretative guidance and illustrate development when appropriate. These sources will be of important value in the assessment of essential aspects not addressed by primary sources of international law. International law method as specified in the *Statute of the International Court of Justice* (ICJ Statute) article 38(1) representing a general expression of international sources of law will be utilised when analysing international law instruments.[11] A limitation of the methodology is that it is influenced by a human rights perspective. The thesis also makes the assumption that the current global landscape is sceptic towards new legally binding international instruments related to refugees or migration. The most important assumption, however, is the existence and scope of climate change and its adverse effects which is now extensively evidenced by science.[12]

The assessment starts with Chapter 2 which clarifies key terminology and explains the context of the discussion based on customary international law, the evolution of a right to an adequate environment, and climate induced displacement as a global challenge. Chapter 3 then analyses global trends of pursuing rights to an adequate environment through climate change litigation. This chapter introduces influential cases and identifies trends, procedural barriers, enforcement aspects and their transferable value. In light of this assessment, state practice is identified to determine whether a customary law norm can be verified. Chapter 4

[11] United Nations, *Statute of the International Court of Justice* (18 April 1946) (ICJ Statute) art 38(1).

[12] See e.g. IPCC, Report 2014 (n 1); IPCC, Report 2018 (n 2).

will subsequently directly link the right to an adequate environment to issues of climate induced displacement. Challenges and advantages of such a rights-based approach will be identified, and the potential impact of the right will be assessed. The final chapter will summarise the key features of the overall discussion and respond to the initial research questions.

1.4 Scope and limitations

The focus concerning the right to an adequate environment is primarily on customary law determination and impacts. In-depth analysis of its substance is beyond the scope of the thesis and will only be referred to where appropriate to illustrate application and impact. Moreover, the emphasis will be on domestic litigation and international litigation is only referenced to highlight specific and essential elements. The assessment of litigation will also primarily be of lawsuits brought against governments. The aspect of the right to an adequate environment linked to corporations will thus not be specifically covered. Further assessments and implications of the right will primarily be limited to climate change and climate induced displacement. The right is examined as one possible approach and recognises the existence of other suitable responses but will not explore approaches that continually have been explored in literature such as complementary protection, refugee law, and the 1951 Refugee Convention.[13] Additionally, it is important to note that statistics concerning the correlation between climate change and displacement is lacking and limits the assessment. Data linking migration to causes, the extent of influence of climate change, and drivers for migration is also scarce.[14]

[13] See e.g. Demola Okeowo, 'Examining the link: climate change, environmental degradation and migration' (2013) 15 Environmental Law Review 273, 282-285; Philip (n 9).

[14] See e.g. Hugo (n 9) 30; Jon Barnett and Michael Webber, 'Migration as Adaptation: Opportunities and Limits' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

2 Background and Context

2.1 Clarification of terminology

It is useful to define terms that are significant throughout the assessments. Terms in need of clarification are defined below and include 'displacement', 'migration', 'climate induced displacement' and 'the right to an environment'. Terminology is important because there is no international consensus regarding the most appropriate term to use in discussions concerning human mobility related to climate change or environmental circumstances, nor as to whom it applies.[15] Statistics and data are also lacking and challenging to obtain until the terminology is determined and consensus is reached as to status and protection.

2.1.1 Displacement versus migration

Migration is an umbrella term defined as 'movement that requires a change in the place of usual residence and that is longer term'.[16] Displacement is a subcategory of migration, sometimes referred to as 'forced migration', and is principally the involuntary movement of people or 'people obliged to flee from their places of habitual residence'.[17] The line between displacement and general migration is usually not clear-cut. The main distinction is the elements of involuntariness or obligation. In the climate change context, it is extremely difficult to distinguish between forced and voluntary movement, as 'people's decisions [often] will involve a delicate mix of both elements in different proportions'.[18] Hugo observes that migration may be used as an adaptation strategy to environmental impacts, but becomes displacement 'when environmental deterioration becomes so extreme that people are forced to leave an area'.[19] The challenge is that no guidelines exist for determining when movement is voluntary migration and when it becomes forced displacement.[20] This thesis focuses on displacement because displaced people generally are extremely vulnerable but the term is applied inclusively rather than restrictively.

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[15] Tamer Afifi, Radha Govil, Patrick Sakdapolrak and Koko Warner, 'Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa' (UNHCR Report, June 2012) 39.

[16] International Bank for Reconstruction and Development (World Bank), 'Groundswell: Preparing for International Climate Migration' (Report, 2018) ix. See also International Organization for Migration (IOM) 'International Migration Law: Glossary on Migration' (2019) 135.

[17] World Bank, Report 2018 (n 16) viii. See also IOM, Glossary (n 16) 53; Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 81.

[18] Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 2.

[19] Hugo (n 9) 13.

[20] Kälin, 'Conceptualising Climate-Induced Displacement' (n 17) 90.

Permanent and temporary displacement must also be distinguished as protection needs vary accordingly. During and/or after immediate disasters, temporary displacement may be sufficient, whereas, in circumstances where island-States disappear due to rising sea-levels or when areas become uninhabitable due to desertification, permanent displacement may be required. Some countries, including the United States and the European Union (EU), have established temporary protection mechanisms that may be activated in certain situations. However, these protection alternatives are limited to sudden-onset disasters, have high thresholds for activation, and have only been applied ad hoc in specific situations.[21] These considerations are important as both short-term solutions for temporary displacement and long-term responses to permanent displacement are needed.

2.1.2 Climate induced displacement

'Climate induced displacement', 'climate-related displacement', and 'environmental migration' are overlapping terms regularly applied. Considering conceptual challenges 'there is no uniform terminology used to describe people who move in response to the impacts of climate change'.[22] The International Organization for Migration (IOM) defines 'climate migration' as a subcategory of 'environmental migration', when people 'predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently (…).[23] It is challenging to determine when displacement is caused by climate change only, and when other environmental influences or combinations of factors are involved.[24] For the purpose of this thesis 'climate induced displacement' will be the primary reference of terminology. The focus is consequently on climate change while also recognising various combinations of underlying causations and the fact that climate change frequently will intensify exist-

[21] IOM, 'IOM Outlook on Migration, Environment and Climate Change' (Report, 2014) 58. For a detailed discussion see McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 100-3. In the United States, Temporary Protection Status (TPS) only applies to people present in the United States when disasters strike, not to people fleeing afterward. TPS was designated in 2010 after the Haitian earthquake, in 1998 in the aftermath of Hurricane Mitch for Nicaragua and Honduras, and in 2001 after earthquakes in El Salvador.

[22] McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 6.

[23] IOM, Glossary (n 16) 29, 63.

[24] François Crépeau, 'Human rights of migrants' (Report by the Special Rapporteur on the human rights of migrants, 13 August 2012) UN Doc A/67/299 para 31.

ing threats and challenges instead of being the sole cause of displacement.[25] The reference includes similar formulations of the term but emphasises the elements of force or obligation.

'Climate change' is defined by the UNFCCC as 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'.[26] Common features of most definitions are measurable changes of climate that persists over time. In this thesis, the significance is the adverse impacts of climate change which involve both sudden-onset disasters such as flooding or cyclones and slow-onset disasters such as sea-level rise, desertification, or droughts. This distinction is important in terms of climate induced displacement as McAdam observes that 'slow-onset impacts of climate change, in particular, pose a challenge to traditional understandings of 'forced' migration: although people may have no prospect of a sustainable livelihood if they remain in their home, they are not-yet-facing imminent harm'.[27] Slow-onset impacts will likely be considered to instigate primarily 'voluntary' migration and cause displacement only in most extreme situations once areas become uninhabitable. Although displacement is more apparent in cases concerning sudden-onset disasters, the terminology applied in this thesis is also relevant for displacement caused by slow-onset environmental degradation. Mitigation and adaptation are the two vital strategic responses linked to climate change and thus also useful to identify. Mitigation involves addressing the causes of climate change and limiting its impact, whereas adaptation is the 'process of adjustment to actual or expected climate change and its effects'.[28]

It is important to emphasise that terminology related to 'refugee' is inappropriate to apply when referring to human mobility linked to climate change. 'Refugee' is a legal term in international law which primarily belongs to people who fulfil the refugee definition in the 1951 Refugee Convention.[29] Displacement linked to climate change generally does not fall under this definition unless all the elements of the definition also are established. 'Climate refugee' is not a legal concept, is misleading, and may bring more confusion than clarifica-

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[25] McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 16.

[26] UNGA, *United Nations Framework Convention on Climate Change* (9 May 1992) 1771 UNTS 107 (UNFCCC) art 1(2). See also IPCC, Report 2014 (n 1) 120; World Bank, Report 2018 (n 16) vii.

[27] McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 6, 20. See also Kälin, 'Conceptualising Climate-Induced Displacement' (n 17) 85.

[28] IPCC, Report 2014 (n 1) 118. See also World Bank, Report 2018 (n 16) vii; Stephen Castles, 'Afterword: What Now? Climate-Induced Displacement after Copenhagen' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2012) 40.

[29] Refugee Convention (n 8) art 1 A(2).

tion. Various actors consciously choose not to use terms such as 'climate refugee' or 'environmental refugee', precisely because these individuals usually not are caught under the definition.[30]

Refugees must also be distinguished from internally displaced people (IDPs) who are addressed in the *Guiding Principles on Internal Displacement*, and cover circumstances where people leave their homes without crossing international borders 'to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters (…)'.[31] This definition is thus capable of covering people internally displaced due to severe consequences of climate change.[32] Importantly this instrument is not legally binding, and unlikely to cover slow-onset environmental degradation unless it reaches the threshold of a disaster.

2.1.3 A right to the environment

A right to the environment is recognised in various forms, including formulations and references to a 'safe', 'clean', 'healthy', 'wholesome', 'favourable', and 'adequate' environment.[33] 'Healthy environment' is the formulation used most frequently, however, it has been criticised for being restrictive and anthropocentric.[34] Boyle observes that 'a right to a satisfactory or decent environment would be less anthropocentric (…)',[35] an observation which also applies to the analogous term 'adequate'. The right to an adequate environment is preferable to use in the context of climate change and climate induced displacement. This term is broader and more inclusive in its application. Moreover, it avoids a restrictive focus limited to individuals and is rather beneficial for the environment and civilisation as a whole. This term also

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[30] See e.g. António Guterres, 'Climate change, natural disasters and human displacement: a UNHCR perspective' (Policy Paper, UNHCR 23 October 2008) 8. See also IOM, Glossary (n 16) 30.

[31] UNHCR, *Guiding Principles on Internal Displacement* (22 July 1998) ADM 1.1, PRL 12.1, PR00/98/109.

[32] Kälin, 'Conceptualising Climate-Induced Displacement' (n 17) 87; McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 176.

[33] Human Rights Council (HRC), 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (Report, 24 December 2012) UN Doc A/HRC/22/43, 5. See also Ole W. Pedersen, 'European environmental human rights and environmental rights: a long time coming?' (2008) 21 Georgetown International Environmental Law Review 73; Luis E. Rodriguez-Rivera, 'The Human Right to Environment in the 21st Century: A Case for Its Recognition and Comments on the Systemic Barriers It Encounters' (2018) 34 AM U Int'l L Rev 143.

[34] See e.g. David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012) 62.

[35] Alan Boyle, 'Human rights or environmental rights? A reassessment' (2007) 18 Fordham Environmental Law Review 471, 507.

conveys the notion of a stable environment that facilitates an adequate standard of living inclusive of human rights standards. The right to an 'adequate environment' is the primary reference in this thesis except where it is appropriate to reflect concrete wording from references. However, the formulation is inclusive and also encompasses other formulations of the right.

2.2 Customary international law

In order to determine whether the right to an adequate environment is emerging as a customary law norm, it is important to understand what customary law is and how it is established. Customary international law is recognised as a source of international law through article 38 of the ICJ Statute and is primarily considered to encompass two elements; state practice and *opinio juris*.[36] State practice involves consistent and general practice by States, while *opinio juris* portrays that the state practice is accepted as law.[37] In *North Sea Continental Shelf*, the International Court of Justice (ICJ) emphasised how the two elements are complementary and equally essential:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.[38]

State practice includes various practices by state organs, including legislation, statements and judicial decisions. Customary law can also be evidenced or crystallised by state practice through treaties and treaty ratification.[39] The state practice analysis in this thesis will focus on national court decisions but references to national legislation, constitutions, and treaties will also be made. The consistency, duration, and generality of state practice necessary to create customary law cannot be determined by specific rules but must be assessed on a case by case basis in light of the specific circumstances.[40] The absence of clear guidelines as to

[36] ICJ Statute (n 11) art 38(1)(b).

[37] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcom D. Evans (ed), *International Law* (5th edn, OUP 2018) 92.

[38] *North Sea Continental Shelf*, International Court of Justice (1969) ICJ Reports 1969, p 13, para 77.

[39] Roberts and Sivakumaran (n 37) 95.

[40] *North Sea Continental Shelf* (n 38) p 13, para 175.

what is required to establish new customary law is a challenge. An important consideration, however, is to ensure that state practice is representative by assessing the geographical, geo-political and economical variety of States adhering to the practice.[41] When customary law is identified in practice, the *opinio juris* and state practice of all States are usually not considered. In reality, only a small number of states are assessed with the claim that they represent a general and widespread practice.[42]

The most essential characteristic of customary law is that it generally is binding on all States. The exceptions are specific circumstances where a customary norm is local or special and only binds a certain group of States, and the persistent objector doctrine. States who consistently object to a rule of law while it develops into customary law, can continue to dismiss its application when it acquires customary law status.[43] Accordingly, customary law develops over time and is established through state practice and *opinio juris* examined in light of the specific circumstances of each situation.

2.3 The evolution of the right to an adequate environment

The right to an adequate environment is not recognised in international law through global human rights treaties or by the UN. However, since the 1970s there has been increasing recognition and development through various instruments at the international, regional and national levels. These developments and instruments will be outlined in this section.

2.3.1 International developments

Environmental rights were importantly not included in the initial human rights instruments.[44] With reference to the right to a 'healthy environment' Boyd identifies three key factors which triggered its emergence: first, the 'shift toward constitutional democracy across the globe', second, the 'rights revolution – at both the national and international levels', and third,

[41] For a detailed discussion see Roberts and Sivakumaran (n 37) 93.

[42] ibid 105.

[43] See Francesco Parisi and Vincy Fon, 'Stability and Change in Customary Law' in *The Economics of Lawmaking* (OUP 2009) 185. For early application of this doctrine by the ICJ see *Fisheries Judgment*, International Court of Justice (1951) ICJ Reports 1951, p 116, 131.

[44] See e.g. UNGA, *Universal Declaration of Human Rights* (10 December 1948) Resolution 217 A (III); UNGA, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171; UNGA, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 UNTS 3.

'the emergence of a global environmental crisis'.[45] The first international document to acknowledge the existence of a right to an adequate environment was the 1972 Stockholm Declaration, which states: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.[46] The Stockholm Declaration sparked a rapidly growing trend of recognition of environmental rights. Regardless of its non-legally binding nature, various States started to incorporate rights to an adequate environment into their constitutions. In 1975 Greece was one of the first countries to refer to the environment in its national constitution.[47] Today more than 147 constitutions worldwide explicitly refer to environmental rights or responsibilities.[48] The Stockholm Declaration has consequently extensively influenced developments of national environmental rights.[49]

The 1992 Rio Declaration on Environment and Development subsequently linked the right to development to 'environmental needs of present and future generations'.[50] The UNFCCC was also adopted in Rio and became the foundation for future global climate change action.[51] With 197 State Parties, the UNFCCC has achieved widespread ratification and acceptance by the global community. Importantly, the Framework Convention does not refer to a right to an adequate environment or the relationship between human rights and climate change. First through the 2010 Cancun Agreements, the UNFCCC committed to respecting human rights in implementations of the Convention.[52] Subsequently, the 2015 Paris Agreement encouraged State parties to respect, promote and consider human rights obligations

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[45] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 4, 7, 9.

[46] UNGA, 'Declaration of the United Nations Conference on the Human Environment' (15 December 1972) UN Doc A/CONF.48/14/Rev.1 (Stockholm Declaration).

[47] David Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20 Review of European Community & International Environmental Law 171, 173.

[48] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 47.

[49] See e.g. Boyle (n 35) 478-82.

[50] UNGA, 'Rio Declaration on Environment and Development' (Conference on Environment and Development in Rio de Janeiro Brazil 3-14 June 1992, 12 August 1992) UN Doc A/CONF.151/26/(Vol. I) principle 3.

[51] UNFCCC (n 26).

[52] UNFCCC, 'The Cancun Agreements: Outcome of the Work of the Ad Hock Working Group on Lon-term Cooperative Action under the Convention' (Report of the Conference of the Parties in Cancun Mexico 29 November-10 December 2010, Decision 1/CP.16, 15 March 2011) UN Doc FCCC/CP/2010/7/Add.1 (Cancun Agreements).

when addressing climate change.[53] The human rights protection under the UNFCCC regime is not remarkable but has progressed since its introduction in 1992. A possible argument is that State parties also impliedly commit to ensuring an adequate environment through the diverse climate change commitments such as mitigation and adaptation under the UNFCCC regime. The increased focus on the relationship between human rights and the environment in international instruments since the 1970s nonetheless illustrates progress towards international recognition of the right to an adequate environment.

Other initiatives by the international community also support this development. In 2012 the UN Human Rights Council (HRC) appointed a Special Rapporteur on the environment and human rights with a mandate to study, make recommendations and identify best practices concerning 'human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (…)'.[54] The UN General Assembly (UNGA) also has affirmed 'that a democratic and equitable international order (…)' requires the realisation of the right to a healthy environment.[55] Such commitments by UN organs position this right in a more expansive international policy framework and reflect global trends towards recognition of a right to an adequate environment. The Special Rapporteur has essentially stressed that the HRC 'should consider supporting the recognition of this right in a global instrument'.[56]

France has additionally promoted a Global Pact for the environment to be endorsed through a UNGA Resolution which in 2018 led to the adoption of a Resolution initiating negotiations on a potential future 'Global Pact'.[57] Regardless of this progress, it is important to acknowledge the overall reluctance to expressly recognise a right to an adequate environment in international legally binding instruments. However, soft law instruments should not be un-

[53] UNFCCC, *Paris Agreement* (12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1 (Paris Agreement) preamble.

[54] HRC, 'Human rights and the environment' (Resolution, 19 April 2012) UN Doc A/HRC/RES/19/10.

[55] UNGA, 'Promotion of a democratic and equitable international order' (Resolution, 23 January 2014) UN Doc A/RES/68/175, 4.

[56] See John H. Knox (Statement by the UN Special Rapporteur on human rights and the environment, Geneva 5 March 2018) < https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22755&LangID=E> accessed 1 October 2019. See also HRC, 'Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (Report of the Special Rapporteur, 8 January 2019) UN Doc A/HRC/40/55 para 16.

[57] UNGA, 'Towards a Global Pact for the Environment' (Resolution, 14 May 2018) UN Doc A/RES/72/277.

dermined either as they sometimes may be more effective due to speedier negotiations and the higher probability of attaining broad endorsement by States because of their legal status.[58]

2.3.2 Regional and domestic developments

The international legal landscape must be compared and contrasted with recognition in regional instruments, national legislation, and constitutions. Various regional human rights instruments recognise a right to an adequate environment.[59] The 1998 *Aarhus Convention* adopted as part of the 'Environment for Europe' process established various rights related to the environment, including access to environmental information, public participation in environmental decision-making, and access to justice.[60] Additionally, the Convention acknowledges 'the right of every person of present and future generations to live in an environment adequate to his or her health and well-being (…)'.[61] It consequently highlights that transparency and State accountability are essential for environmental protection and that participation of all stakeholders is vital for the achievement of sustainable development.[62] The *Aarhus Convention* is limited by its focus on procedural rights without providing an arena for rights holders to invoke the right to an adequate environment.[63] However, Pedersen argues that procedural rights recognition potentially contributes to developments of substantial rights.[64] Boyd furthermore concludes that the *Aarhus Convention* has been an important contributor to the development of procedural and substantive rights to an adequate environment in Europe.[65]

Despite progressive developments under the *Aarhus Convention,* it is noteworthy that the *European Convention on Human Rights* (ECHR) and the European Court of Human

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[58] See e.g. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 80.

[59] See e.g. Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (16 November 1999) A-52 art 11; League of Arab States, *Arab Charter on Human Rights* (22 May 2004) art 38; Organization of African Unity, *African Charter on Human and Peoples' Rights* (27 June 1981) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 art 24; Association of Southeast Asian Nations, *ASEAN Human Rights Declaration* (18 November 2012) principle 28(f).

[60] UN Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (25 June 1998) 2161 UNTS 447 (Aarhus Convention).

[61] ibid art 1.

[62] Sam Adelman, 'Rethinking human rights: the impact of climate change on the dominant discourse' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009) 170.

[63] For a discussion see Boyle (n 35) 477-8.

[64] Pedersen (n 33) 75, 92.

[65] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 195, 209.

Rights (ECtHR) have not recognised an individual right to an adequate environment. As a party to the *Aarhus Convention,* the EU is however, bound by the procedural rights it encompasses.[66] Additionally, the European Committee of Social Rights has concluded that the right to a healthy environment is incorporated in the *European Social Charter's* protection of health.[67] Case law developed by the ECtHR also establishes the right to a healthy environment is implied in the ECHR in specific circumstances through the rights to life and family life.[68] The Inter-American Court of Human Rights (IACtHR) also has affirmed that the right to live in a healthy environment is a fundamental human right linked to the rights to life, health, and development.[69] Moreover, a new regional environmental treaty, the *Escazú* Agreement, requires all State parties to 'guarantee the right of every person to live in a healthy environment'.[70] In light of the above, the commitment to recognition of rights to an adequate environment is stronger at the regional than the global level, with 124 States being parties to treaties specifically recognising such rights.[71] An important difference is that most of the regional instruments are legally binding treaties, whereas the global instruments acknowledging the right are without legally binding force.

At the national level recognition is also comprehensive. The former Special Rapporteur on human rights and the environment identified that 'proliferation of constitutional rights to a healthy environment' is a prime example of good practices at the national level.[72] If both explicit and implied recognitions are included, up to 140 of the 193 UN Member States recognise constitutional rights to an adequate environment.[73] More than 155 States have legally

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[66] Aarhus Convention (n 60).

[67] *Marangopoulos Foundation for Human Rights v. Greece* Complaint No. 30/2005 (Decision on the merits, European Committee of Social Rights, 2006) para 195.

[68] See e.g. *Lopez Ostra v. Spain* (European Court of Human Rights (ECtHR), 1995), which was one of the first cases where the ECtHR accepted this implied recognition; *Öneryıldız v. Turkey* App No 48939/99 (ECtHR, 30 November 2004) para 71-3; *Fadeyeva v. Russia* App No 55723/00 (ECtHR, 9 June 2005).

[69] Inter-American Court of Human Rights, 'Environment and Human Rights' (Advisory Opinion OC-23/17, 15 November 2017) 2-3.

[70] *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean* (Escazú Agreement, 4 March 2018) art 4. Enters into force when ratified by enough States.

[71] HRC, Report of the Special Rapporteur 2019 (n 56) para 11.

[72] HRC, 'Report of the Independent Expert on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (Report, 3 February 2015) UN Doc A/HRC/28/61 para 73.

[73] See David R. Boyd, 'Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment' in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018); Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights,*

recognised the right through various instruments including the treaties referred to above and consequently have legal obligations related to the right.[74] Significantly, 'no other human right has achieved such a broad level of constitutional recognition in such a short period of time'.[75] The above considerations will impact the assessment of whether the right is emerging into a customary norm which will be linked to domestic climate change litigation and returned to in Chapter 3.

2.4 Climate induced displacement: a global challenge

In order to justify an assessment of impacts of the right to an adequate environment related to climate induced displacement, it is essential to understand how and why climate induced displacement is an important global challenge. Consequences of climate change including droughts, flooding, sea-level rise and extreme weather conditions can lead to a lack of access to water and food, as well as making it difficult or impossible to maintain agriculture.[76] Recent reports by the IPCC confirm that extensive consequences of global warming already are recorded and that adverse effects of climate change such as sea-level rise have accelerated in the last decade.[77] Migration triggered by environmental changes is not a recent development, however, it is projected that unprecedented challenges related to climate induced displacement will emerge due to climate change.[78] According to IDMC, 17.2 million new internal displacements in 2018 were related to disasters defined as 'hazardous events', 16.1 million of these weather-related and potentially linked to climate change.[79] The majority of internal displacements (61%) were triggered by disasters rather than conflict (39%) and climate change was identified as a key driver of displacement. This clearly illustrates the significance of disaster-related climate induced displacement. The total prevalence of displacements induced by slow-onset environmental degradation is, however, unknown as data and reporting remain scarce, and is importantly not included in this report.[80] The World Bank's 2018 Report

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and the Environment (n 34) 52-60; Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 47) 171-2.

[74] HRC, Report of the Special Rapporteur 2019 (n 56) para 16.

[75] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 76.

[76] See IPCC, Report 2018 (n 2) 7-12; IPCC, Report 2019 (n 2) 8-11, 16-18; IPCC, Report 2014 (n 1).

[77] IPCC, Report 2018 (n 2); IPCC, Report 2019 (n 2) 10, 22.

[78] McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (n 18) 1.

[79] IDMC, 'GRID 2019: Global Report on Internal Displacement' (Report, May 2019) 6-7, 105.

[80] ibid v.

on internal climate migration furthermore projects that without action on climate change and development more than 143 million people in Sub-Saharan Africa, South Asia, and Latin America 'could be forced to move within their own countries to escape the slow-onset impacts of climate change' by 2050.[81]

Climate change is already and will more increasingly impact displacement. However, in most situations, it will be in combination with and affected by 'existing patterns of population mobility (…)' combined with 'vulnerability, resilience, resources and situations of communities'.[82] Accordingly, displacement involves complex and various interactions, which often are difficult to distinguish. Environmental factors such as climate change are capable of being the sole creator of displacement only in extreme circumstances. McAdam concludes that 'climate change is best conceived of as a threat multiplier which exacerbates pre-existing vulnerabilities'.[83] It is also important not to assume that everyone will migrate, as many people will attempt to adjust to the consequences through adaptation measures without moving.[84] However, climate induced displacement will occur even as a last resort and its prevalence will increase. Some will be forced to cross international borders, but it has become evident that most climate induced displacement will be internal displacement.[85] This is an important consideration strengthening the argument that the essential starting point should be to ensure sufficient development of regulations, policies, and protection at the national and local levels. Internal migration management is thus just as important as 'refugee-like' protection and consensus at the global level.

2.4.1 The framework context

In light of the increasing challenges outlined above, it is important to have appropriate national and international legal frameworks to safeguard the people affected. There are no international legally binding instruments concerning climate induced displacement, which leaves a legal protection gap. However, climate induced displacement has gained increasing attention from the global community. As climate induced displacement is not covered by the 1951 Refugee Convention, amendments are continually proposed as a solution. However,

[81] World Bank, Report 2018 (n 16) xix.

[82] Hugo (n 9) 9-17.

[83] McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 267.

[84] Hugo (n 9) 21-4.

[85] See e.g. World Bank, Report 2018 (n 16) xix, 1; McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' (n 10) 2.

various legal researchers including the UNHCR maintain that amendments potentially will undermine the existing legal instrument and open the floodgates.[86] The international climate change regime has also been slow to link migration-related challenges to climate change. Migration is not mentioned in the UNFCCC, but the 2010 Cancun Agreements encourage State parties to undertake 'measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation (…)'.[87] In 2013 the UNFCCC also established an international mechanism for loss and damage related to adverse effects of climate change, which has constructed an expert group working specifically on displacement.[88] However, Maguire and McGee underscore that no evidence of specific funding or legal State obligations related to this initiative exist, which may undermine its reach and potential.[89] Although the Paris Agreement encourages consideration of the human rights of migrants when addressing climate change, its legal force is limited by being addressed only in the preamble.[90] The migration response from the climate change regime is thus not very comprehensive.

However, several important global policy initiatives have been commenced by governments in recent years. These are comprehensive and useful guidelines clarifying the legal protection gap, but not legally binding. The Nansen Initiative, a state-led consultative process was launched in 2012 to address challenges of climate induced displacement and disasters. From 2016 the Platform on Disaster Development has continued the Nansen Initiative's work and implementation of its Protection Agenda which includes a toolbox to enhance preparedness and prevention of climate induced displacement.[91] Another recent development is the Global Compact for Migration adopted by the UNGA in 2018 which aims to 'minimize the adverse drivers and structural factors that compel people to leave their country of origin' which includes measures to better understand and address migration movements induced by

[86] See e.g. Edgar Morin, 'Sustainable development law on environmental migration: the story of an obelisk, a bag of marbles, and a tapestry' (2012) 14 Environmental Law Review 111, 113; Guterres (n 30) 9; Crépeau (n 24) para 62.

[87] Cancun Agreements (n 52) para 14(f).

[88] UNFCCC, 'Decisions adopted by the Conference of the Parties' (Report of the COP in Warsaw Poland 11-23 November 2013, Decision 2/CP.19, 31 January 2014) UN Doc FCCC/CP/2013/10/Add.1.

[89] Amy Maguire and Jeffrey McGee, 'A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change' (2017) 26 Review of European Community & International Environmental Law 54, 65.

[90] Paris Agreement (n 53) preamble.

[91] The Agenda is endorsed by more than 100 governments. For more information see The Platform on Disaster Development, <https://disasterdisplacement.org/the-platform/our-response> accessed 1 October 2019; The Nansen Initiative, <https://www.nanseninitiative.org/secretariat/> accessed 1 October 2019.

natural disasters, adverse effects of climate change and environmental degradation, and develop appropriate adaptation and resilience strategies.[92] Although these initiatives demonstrate global action on climate induced displacement, they are not legally binding. Accordingly, as McAdam observes, it is clear that current frameworks are incapable of managing the challenges of climate induced displacement.[93]

[92] UNGA, 'Global Compact for Safe, Orderly and Regular Migration' (Resolution adopted 19 December 2018, 11 January 2019) UN Doc A/RES/73/195 para 18.

[93] McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (n 18) 1.

3 A Global Trend: Pursuing the Right to an Adequate Environment Through Climate Change Litigation

Climate change litigation involves litigation where the essential focus is climate change and is a recent development compared with other areas of environmental law litigation.[94] It is challenging to determine the full range of climate change litigation, as 'disputes over climate change span a wide range of substantive areas of law and judicial and quasi-judicial fora'.[95] Here, climate change litigation is applied broadly to also include cases where climate change is the underlying motivation or combined with other issues. According to a 2019 Policy Report, climate change cases are increasingly used 'as a tool to influence policy outcomes (…)' worldwide.[96] Recent trends in climate change litigation related to rights to an adequate environment illustrate how this right has rapidly grown since the 1970s. More than 50 States have court decisions directly related to this right.[97] Boyd's assessment of available jurisprudence in Latin America revealed 'more than six hundred reported decisions based on the right to a healthy environment' across thirteen of eighteen nations.[98] Importantly, research related to the global prevalence of specific kinds of litigation is limited by restricted access to jurisprudence in various countries. Cases are not only emerging in national jurisdictions but have also been brought before the IACtHR, the Inter-American Commission on Human Rights (IACHR), the Court of Justice of the EU, and the UN Human Rights Committee.[99] As noted in Chapter 2.3, the ECtHR also has incorporated the right to a healthy environment in decisions under the ECHR.[100] The link between climate change, the environment, and human rights thus continues to be crystallised through litigation at the national and regional levels.

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[94] Noriko Okubo, 'Climate Change Litigation: A Global Tendency' in Oliver C. Ruppel, Christian Roschmann & Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (Nomos Verlagsgesellschaft mbH 2013) 742.

[95] Hari M. Osofsky and Jacqueline Peel, 'The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?' (2013) 30 Environmental and Planning Law Journal 303, 304.

[96] Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (Policy Report, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy 2019) 1.

[97] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 280; Boyd, 'Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment' (n 73).

[98] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 127.

[99] Setzer and Byrnes (n 96) 3.

[100] See e.g. *Lopez Ostra v. Spain* (n 68); *Öneryıldız v. Turkey* (n 68) paras 71-3.

Climate change litigation is usually either strategic or routine cases. Strategic litigation is designed to influence accountability and commitments to climate change policy and legislation and constructed with the intention to force governments to enforce legislation or improve climate change commitments.[101] In routine cases, impacts on climate change policy are incidental to the original purpose of the litigation.[102] Most of the cases referred to here are strategic litigation cases. Most cases are brought against governments or corporations responsible for substantial greenhouse gas (GHG) emissions, and the plaintiffs have included non-governmental organisations (NGO), corporations and individuals. May and Daly concluded in 2015 that 'there is noticeable and steady progress toward recognition of environmental rights as independent, dependent, and derivative, or dormant rights in courts throughout the world'.[103] In the assessment below it will be evident that since then, even more progress is evidenced through litigation.

3.1 Influential cases

Various influential cases have emerged in recent years and this section will explore early developments of linking climate change and human rights, present some of the most significant decisions and highlight recent endeavours in the pursuance of protecting the right to an adequate environment. Interesting aspects related to procedural barriers and enforcement will be discussed. This assessment will display that cases related to a right to an adequate environment involve various approaches, foundations, and outcomes. The case analyses will vary in depth depending on their significance and applicability.

3.1.1 Early developments and subsequent effects: linking climate change and human rights

Some early cases related to the right to an adequate environment was initiated in the 1980s and 1990s.[104] However, these cases were generally founded on the environmental right as a single issue and not linked to the broader global challenge of climate change. The Inuit Petition before the IACHR was one of the earlier attempts at strategic litigation linking cli-

[101] Setzer and Byrnes (n 96) 2.

[102] ibid.

[103] James R. May and Erin Daly, 'Adjudicating environmental constitutionalism' in *Global Environmental Constitutionalism* (CUP 2015) 89.

[104] ibid 109-116.

mate change and rights to an adequate environment.[105] It was initiated in 2005 when links between environmental issues and human rights were uncommon and before the UNFCCC's commitment to human rights. The petition was based on the adverse impacts global warming had on human rights and alleged that the United States violated the Inuit's human rights by contributing to global warming and failing to mitigate climate change. It was rejected due to insufficient information to determine rights violations, but the IACHR did not take a stand regarding the legal issues. Regardless of rejection, the petition opened a dialogue for the petitioners, created public debate, generated pressure on the government, and drew attention to the complex issues of linking climate change, the environment, and human rights.[106] *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. And Others* (*Gbemre*) is another case from 2005 where climate change and human rights were linked.[107] The Federal High Court of Nigeria held gas flaring to be a gross violation of the fundamental constitutional rights to life and dignity. The court concluded that these constitutional rights 'includes the rights to clean, poison-free, pollution-free healthy environment' and ordered oil companies to stop gas flaring.[108]

Since the Inuit Petition and especially in recent years, there has been an increase of judgments from various jurisdictions related to the right to an adequate environment. In 2015 several landmark decisions gained attention. *Urgenda Foundation v. State of the Netherlands* (*Urgenda*) is maybe the most significant; a Dutch judgment decided in 2015 and subsequently upheld by the Hague Court of Appeal in 2018.[109] The Urgenda Foundation and 900 private actors sued the Dutch government claiming its commitment to GHG emissions reduction was insufficient and violating human rights. Both courts ruled against the government and held that it was obliged to pursue a more ambitious commitment to GHG emissions reductions and limit emissions by a minimum of 25% compared to 1990 levels by 2020. It is the first judgment of this kind based on other grounds than legislative requirements and to successfully

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[105] Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (2005) No. P-1413-05 (Inuit Petition).

[106] Hari M. Osofsky, 'Complexities of addressing the impacts of climate change on indigenous peoples through international law petitions: A case study of the Inuit petition to the Inter-American Commission on Human Rights' in Randall S. Abate & Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing 2013) 334-5.

[107] *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. And Others* FHC/B/CS/53/05.

[108] ibid 29; Constitution of the Federal Republic of Nigeria (1999) Act No. 24 arts 33, 34.

[109] *Urgenda Foundation v. State of the Netherlands* [2015] HAZA C/09/00456689.

force a government to adopt more ambitious GHG emissions reduction targets.[110] The government appealed the decision and a ruling from the Supreme Court is expected at the end of 2019. Another influential case from 2015 is *Leghari v. Federation of Pakistan* (*Leghari*), where the Lahore High Court held that effective and immediate implementation of national climate change policies was necessary to protect the constitutional rights to life and dignity.[111] *Future Generations v. Ministry of Environment and Others* (*Future Generations*) is a more recent landmark decision where 25 youth plaintiffs sued the Colombian government, municipalities, and corporations claiming that failure to reduce deforestation of the Amazon violated their rights to food, health, life, water, and a healthy environment.[112] The Supreme Court held that these fundamental rights were infringed as deforestation results in increased GHG emissions which generate increased average temperatures, increased water levels and droughts.

Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy (Greenpeace judgment) is another recent case which gained international attention, where NGOs sued the Norwegian government for issuing new licenses for oil extraction in the Arctic.[113] The lawsuit was founded on the constitutional right 'to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained'.[114] The District Court ruled in favour of the government in 2018 and found no violation as the government had satisfied its obligations before issuing the licenses. Nonetheless, a significant outcome was that the court confirmed that the constitutional provision is a rights provision.[115] The decision is appealed and findings by the Court of Appeal are expected at the end of 2019. The case has been closely observed as it is the first time the essence of this environmental provision as an individual right is subject to judicial consideration.

In the United States where courts have been very reluctant to recognise environmental rights, the case of *Juliana v. United States* (Juliana case) received massive attention in 2016 when a District Court Judge allowed the case to proceed and upheld the notion that an adequate environment is a fundamental right.[116] The lawsuit concerns 21 young plaintiffs suing the government for actions damaging the environment and claiming rights to an adequate en-

[110] Setzer and Byrnes (n 96) 6.

[111] *Leghari v. Federation of Pakistan* W.P. No. 25501/2015 para 13.

[112] *Future Generations v. Ministry of Environment and Others* (2018) 11001 22 03 000 2018 00319 0.

[113] *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy* TOSLO-2016-16674 (Greenpeace judgment).

[114] Constitution of the Kingdom of Norway (1814) LOV-1814-05-17 art 112.

[115] Greenpeace judgment (n 113) 17.

[116] *Juliana v. United States* Case No. 6:15-cv1517 D. Or. (Opinion and order, 10 November 2016) 32-33.

vironment through other constitutional rights. The case is currently stayed due to multiple attempts by the federal government to get the case dismissed. A recent low-level judgment from Australia has also been described as a landmark decision and gained attention. In *Gloucester Resources Ltd v. Minister for Planning* (*Gloucester*), permits to build a coal mine were rejected based on various factors including considerations of adverse impacts of climate change.[117] The Justice reasoned that 'the direct and indirect GHG emissions of the [coal mine] will impact on the environment'.[118] Considering the developments outlined in this section, litigation related to the right to an adequate environment has been increasingly and successfully applied and in recent years.

3.1.2 Procedural barriers

Litigation linking human rights and climate change involves various procedural challenges related to inter alia evidence, standing, cost, causation, jurisdiction, and burdens of proof. Although most States today recognise constitutional rights to an adequate environment, only some provisions have been adjudicated or tested before judiciaries.[119] In the United States, for instance, courts have been very reluctant to recognise environmental rights and most cases have been dismissed on procedural grounds such as standing at early stages. Another continuous procedural limitation in the United States is the political questions doctrine. Courts repeatedly find climate change-related issues to be non-justiciable political questions to be determined by political divisions rather than the judiciary.[120] This is one reason why the Juliana case gained massive attention when it was allowed to proceed. The Juliana case also exemplifies how the federal government continues to object to the global evolution of environmental rights recognition. As noted above, the government has consistently utilised all available mechanisms to get the case dismissed which is why proceedings currently are stayed.[121] Causation is another major challenge as causes and impacts related to climate change usually are not directly connected in time or place. Averill notes that 'both causes and impacts are global in nature, making it difficult to hold any one actor accountable, at least in a

[117] *Gloucester Resources Ltd v. Minister for Planning* [2019] NSWLEC 7.

[118] ibid para 514.

[119] May and Daly 'Adjudicating environmental constitutionalism' (n 103) 109.

[120] See e.g. Marilyn Averill, 'Linking Climate Litigation and Human Rights' (2009) 18 Review of European Community & International Environmental Law 139, 143.

[121] *Juliana v. United States* Case No. 18-36082 9th Cir. / 18-80176 9th Cir. / 6:15-cv1517 D. Or.

court of law'.[122] Sovereignty is strongly protected in most jurisdictions and extraterritorial applications of law usually do not apply. In the Greenpeace judgment, for instance, the court concluded that based on principles of sovereignty, the Norwegian government could not be held accountable for emissions from exported oil.[123] However, climate change litigation founded on human rights claims has increasingly been accepted by judges notwithstanding procedural challenges such as causation.[124]

Other aspects of the right to an adequate environment that create procedural barriers related to causation and standing are the protection of future harm and future generations. This has been seen as a challenge, especially regarding enforcement through litigation, as courts generally are 'not equipped to deal with predictions of future injuries, except where the harm is expected to be quite imminent'.[125] Averill observes that 'current legal systems simply are not set up to deal with such claims, and climate litigation is not well suited to address threats to the rights of future generations'.[126] However, several recent cases have overcome these barriers. The Juliana case was allowed to proceed although it concerns 21 young plaintiffs suing the government on behalf of themselves and future generations.[127] In contrast, the *Clean Air Council v. United States,* a case inspired by the Juliana case was dismissed due to lack of standing because specific, imminent or certain harm of the plaintiffs could not be evidenced.[128] In *Urgenda*, a different approach was taken as the court avoided to conclude on standing related to future generations because it was sufficient that the claim already was admissible on behalf of the present generation.[129] However, the court concluded that the government had positive obligations to prevent future violations of the concerned rights through its duty of care under the ECHR.[130]

Another procedural barrier is limited access to courts due to considerations such as cost and time, as most lawsuits are expensive and time-consuming. In the Juliana case, the government has not successfully gotten the case dismissed, however, it has caused extensive delays limiting its progress. Additionally, due to considerations of cost, vulnerable people

[122] Averill (n 120) 141.
[123] Greenpeace judgment (n 113) 19.
[124] Setzer and Byrnes (n 96) 1.
[125] Averill (n 120) 141.
[126] ibid 142.
[127] *Juliana* (n 121).
[128] *Clean Air Council v. United States* Case No. 2:17-cv-04977 E.D. Pa. (2019).
[129] *Urgenda* (n 109) para 37.
[130] ibid paras 41-2.

likely to be affected by adverse impacts of climate change are unlikely to be able to access courts unless they are represented by NGOs or 'public-interest law firms'.[131] As seen above, many cases are initiated or supported by NGOs. *Urgenda* is led by the Urgenda Foundation, a Dutch environmental NGO. The Greenpeace judgment was similarly initiated by Greenpeace Nordic and Nature and Youth. The Juliana case was filed and funded by Our Children's Trust representing the 21 youth plaintiffs in the case. Similarly, in *Future Generations,* the 25 young plaintiffs were supported by Dejusticia a Colombia-based research and advocate organisation. Consequently, many of these cases and developments are dependent on funding and advise by resourceful NGOs. This also means that the most vulnerable people in developing countries without access to such organisations are unlikely to obtain access to courts and remedies.

Procedural barriers and variations in jurisdictional rules also result in various foundations and causes of actions used to bring cases before the judiciary. Factors such as explicit and implied recognition, constitutional recognition, the enforceability of rights, and relationships between international and national law affect this consideration. In the Juliana case, the plaintiffs claim a constitutional right to an adequate environment implied in the rights to life, liberty and property, and that the federal government has violated them by causing dangerously high GHG emissions.[132] In *Gbemre* rights to an adequate environment were also implied in the constitutional rights to life and dignity and through obligations under the *African Charter on Human and Peoples Rights*.[133] In *Leghari*, the court similarly specified that the constitutional right to life 'includes the right to a healthy and clean environment (…)' and cited both domestic and international legal principles.[134] In *Urgenda* however, the Court of Appeal primarily founded its decision on human rights law and international obligations, specifically referring to serious risks to the rights to life and family life under the ECHR, and obligations under the UNFCCC and the Paris Agreement.[135] In *Future Generations*, the Colombian Supreme Court applied a combined approach of the explicit constitutional right to a healthy environment linked to other fundamental constitutional rights and international obligations un-

[131] Averill (n 120) 145.

[132] *Juliana* (n 121).

[133] *Gbemre* (n 107) 29; *African Charter on Human and Peoples' Rights* (n 59) arts 4, 16, 24.

[134] *Leghari* (n 111) paras 12, 8.

[135] *Urgenda* (n 109) paras 73-6; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended, 4 November 1950) ETS 5 arts 2, 8.

der the UNFCCC and the Paris Agreement to reduce deforestation in the Amazon.[136] Considering the hurdles faced to get cases before courts and the short amount of time since rights to an adequate environment were acknowledged, the trends and increase in litigation illustrate progressive applications of the right.

3.1.3 Enforcement and remedies

Enforcement also provides interesting aspects in terms of litigation related to the right to an adequate environment. Enforcement mechanisms raise important challenges at the international level and can be exemplified by the lack of efficient enforcement mechanisms of environmental law.[137] As sovereignty is highly valued, States are hesitant to renounce enough power to ensure efficient international enforcement mechanisms. Domestic court systems are generally stronger and may be regarded as more efficient. Nonetheless, challenges of enforcement also prevail in national jurisdictions. Although decisions are described as 'landmark' and create important precedents, the success may be limited if enforcement is lacking. In *Gbemre* for instance, although the judgment was significant, its impact has been limited because the Nigerian government has neglected to enforce it.[138] Some scholars suggest the lack of enforcement has been influenced by 'lack of understanding of the root causes of the crisis in the region, coupled with the desire for economic development at the expense of a safe and healthy environment (…)'.[139] Boyd observes that in Africa, 'there continues to be a huge gap between the aspirations expressed on paper and the actions that take place on the ground'.[140] This is linked to other regional challenges including scarce financial and human resources, malfunctioning court systems, poverty, foreign investment, and prioritising development over the environment.

In other cases, more specific orders have been imposed to warrant action. In *Leghari,* the court composed a Climate Change Commission to ensure the government's effective implementation of Pakistan's national climate change policy. This proved an effective remedy

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[136] *Future Generations* (n 112) 13; Constitution of Colombia (1991) Constitutional Gazette No. 116 art 79.

[137] See James R. May and Erin Daly, 'The nature of environmental constitutionalism' in *Global Environmental Constitutionalism* (CUP 2015) 21-22, 26-27.

[138] *Gbemre* (n 107).

[139] Bukola Faturoti, Godswill Agbaitoro and Obinna Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?' (2019) 27 African Journal of International and Comparative Law 225, 228.

[140] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 157.

and the court highlighted in its assessment of the commission that it 'has been the driving force in sensitizing the Governments and other stakeholders regarding gravity and importance of climate change'.[141] In *Future Generations*, the court had a similar approach and ordered the Colombian government to compose and implement an action plan to counteract deforestation in the Amazon and address the adverse effects of climate change.[142] Lack of enforcement has regrettably already proven to be a challenge, as extensive deforestation has continued.[143] This might be influenced by the recurring challenges faced in Latin America related to 'lack of enforcement resources and a reluctance to enforce laws when doing so could adversely affect economic interests'.[144]

Remedies related to these cases are interesting to consider as the focus shifts from pecuniary damages to non-pecuniary damages. The primary form of remedies involved in these kinds of cases has been injunctive relief, for instance, orders compelling governments to enforce, implement or commit to specific adaptation and mitigation measures. As seen in *Gbemre* the reliefs sought were not focused on monetary compensation, but rather on the recognition of the right to a healthy, clean, poison-free and pollution-free environment.[145] *Gbemre* was notably brought as a fundamental rights application in contrast to other environmental cases brought as tort claims which may have influenced the relief sought.[146] In a recent lawsuit filed in Canada, the plaintiffs are similarly seeking a declaratory relief of their rights violations and an order requiring the government to implement a climate recovery plan rather than pecuniary damages.[147] Likewise, in the Greenpeace judgment, the prayer of relief was limited to legal costs and a declaration that the awarding of licenses was wholly or partially invalid.[148] In light of the above, incompatibility between expectations related to the recognition of rights to an adequate environment and the realistic accomplishments once explicitly

[141] *Leghari* (n 111) paras 13, 19.

[142] *Future Generations* (n 112) 48.

[143] Setzer and Byrnes (n 96) 7.

[144] See Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 146.

[145] *Gbemre* (n 107)

[146] Faturoti, Agbaitoro and Onya (n 139) 234-5.

[147] *La Rose v. Her Majesty the Queen* (2019) T-1750-19.

[148] Greenpeace judgment (n 113) para 3.4.

recognised and applied poses challenges. However, as Boyd emphasises, this factor cannot justify a reasonable argument against recognition.[149]

3.1.4 Transferable value

It is clear from the foregoing discussions that litigation has been important for the emergence of a right to an adequate environment. McAdam emphasises that strategic litigation has 'played an important role in drawing attention to legal gaps and grey areas.[150] The Inuit Petition is an example as it was intended to educate and encourage climate change action, and spread awareness about issues related to climate change and its link to human rights.[151] After such initial efforts, the HRC has adopted various Resolutions addressing the issue, starting in 2008 when it first expressed concern 'that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights'.[152] Court decisions can have major impacts within and across jurisdictions and contribute to or trigger legal evolutions at the national and international levels. In this regard, decisions may carry significant transferable value. *Leghari*, for instance has been referred to in other decisions and based on the law it established influenced the filing of a claim involving comparable arguments.[153] Moreover, in *Gloucester* the Australian Judge referred to the Dutch *Urgenda* decision in his reasoning.[154] The success achieved through litigation exemplified by decisions such as *Urgenda* has inspired similar litigations globally in various jurisdictions.[155] Numerous cases are currently filed and pending in jurisdictions worldwide, including in Pakistan,[156] France,[157] Germany,[158] Uganda,[159] Canada,[160]

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[149] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 43.

[150] McAdam, 'Building International Approaches to Climate Change, Disasters, and Displacement' (n 10) 7.

[151] See Hari M. Osofsky, 'The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' (2006) 31 American Indian Law Review 675, 687, 695-6.

[152] HRC, 'Human rights and climate change' (Resolution, March 2008) UN Doc A/HRC/RES/7/23. See also e.g. HRC, 'Human rights and climate change' (Resolution, March 2009) UN Doc A/HRC/RES/10/4; HRC, 'Human rights and climate change' (Resolution, 17 October 2011) UN Doc A/HRC/RES/18/22; HRC, 'Human rights and climate change' (Resolution, 15 July 2014) UN Doc A/HRC/RES/26/27; HRC, 'Human rights and climate change' (Resolution, 18 July 2016) UN Doc A/HRC/RES/32/33.

[153] *Maria Khan et al. v. Federation of Pakistan et al.* W.P. No. 8960/2019; *Sheikh Asim Farooq v. Federation of Pakistan etc*. W.P. No. 192069/2018, para 26.

[154] *Gloucester Resources Ltd* (n 117) paras 521-4, 539.

[155] Setzer and Byrnes (n 96) 6.

[156] See e.g. *Maria Khan et al.* (n 153).

[157] *Commune de Grande-Synthe v. France* (2019); *Notre Affaire à Tous and Others v. France* (2018).

[158] *Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany* (2018).

India,[161] and the United Kingdom.[162] Leijten argues that *Urgenda* 'emphasises the need for more climate action, as well as the role that both courts and human rights can play in this regard'.[163]

Another example of transferable value can be found in *Gloucester,* which was decided by a low-level state court in Australia. *Gloucester* was not appealed to higher courts but still has the potential of bringing transferable value to other jurisdictions, notably across state jurisdictions within Australia, but also to other federal countries and common law jurisdictions. An essential element in *Gloucester* was that the projected climate change impacts of the mine's GHG emissions were an essential consideration among the grounds for refusal.[164] Hughes underscores that the judgment does not provide legally binding precedent; however, it has the potential to influence similar cases where the reasoning may be applied.[165] As these sections have illustrated developments, challenges and outcomes of climate change litigation, impacts are importantly not sufficiently recorded and more research is needed to ascertain its total influence.[166]

3.2 Indicia of customary law

3.2.1 State practice

Judicial decisions can be utilised to determine international customary law. This section will evaluate whether an individual right to an adequate environment is emerging as customary law in light of domestic climate change litigation discussed above. As established in Chapter 2.2. customary law requires the existence of two elements; state practice and *opinio juris*. It remains a challenge that most climate change litigation is commenced in high-income countries such as the United States, Australia, and Spain.[167] However, in recent years cases have increasingly had a wider geographical, economic, and geopolitical variety of representa-

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[159] *Mbabazi and Others v. The Attorney General and National Environmental Management Authority* (2012) Civil Suit No. 283 of 2012.

[160] *La Rose* (n 147).

[161] *Pandey v. India* (2017).

[162] *Plan B Earth and Others v. Secretary of State for Transport* [2019] EWHC 1070.

[163] Ingrid Leijten, 'Human rights v. Insufficient climate action: The Urgenda case' (2019) 37 Netherlands Quarterly of Human Rights 112, 113.

[164] *Gloucester Resources Ltd* (n 117) paras 696-9.

[165] Lesley Hughes, 'The Rocky Hill decision: a watershed for climate change action?' (2019) 37 Journal of Energy & Natural Resources Law 341, 348-9.

[166] Setzer and Byrnes (n 96) 1.

[167] ibid 7.

tion.[168] The decisions referred to above represent a variety of cases from most regions in the world. The broad constitutional recognition of rights to an adequate environment combined with growing recognition through judiciaries indicates broad state practice. Rajamani submits that the increased recognition does not evidence 'the evolution of a distinctive autonomous right to a healthy environment (…)' but rather 'an emerging understanding that environmental harms impact human rights (…)'.[169] However, significant developments have occurred in recent years, especially in terms of recognition through judicial decisions. Lee observed already in 2000 that the right to a healthy environment was 'developing as a rule of customary international law'.[170] In 2009, Adelman likewise claimed that 'the number of cases in which courts have accepted a link between human rights and the environment that might form the basis for the assertion of the emergence of customary international human rights law is growing (…)'.[171] In terms of state practice evidenced through litigation, it is important to acknowledge the barriers of getting cases before courts to get specific rights tried, including issues of standing, causation, and jurisdiction as discussed above. State practice from litigation is consequently not as easy to develop as other forms of state practice such as legislation, policies, and statements.

The variations of foundations for claims related to rights to an adequate environment may be an important consideration for these developments of customary law. An important distinction must be made between foundations on explicit constitutional rights,[172] and implied rights through other fundamental rights.[173] Boyd has identified at least 20 States with cases ruling the right to an adequate environment to be implicit through other constitutional rights.[174] In several countries with explicit recognition of rights to an adequate environment including Costa Rica, Nepal, and Romania, the rights were impliedly recognised by courts before constitutional recognition.[175] The implicit judicial recognition is consequently im-

[168] ibid 1.

[169] Lavanya Rajamani, 'The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change' (2010) 22 Journal of Environmental Law 391, 408. See also Pedersen (n 38) 82, 111.

[170] John Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 Columbia Journal of Environmental Law 283, 339.

[171] Adelman (n 62) 171.

[172] See e.g. Greenpeace judgment (n 113); *Future Generations* (n 112).

[173] See e.g. *Urgenda* (n 109); *Leghari* (n 111); *Gbemre* (n 107); *Juliana* (n 121).

[174] Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (n 47) 171-2.

[175] ibid.

portant as it may indicate a trend towards explicit recognition. The United States has in contrast explicitly stated that it does not recognise an explicit or implied right to an adequate or healthy environment and proclaimed itself as a persistent objector if it acquires recognition as customary international law.[176]

3.2.2 *Opinio juris*

It is challenging to determine *opinio juris* as it requires indications that the right to an adequate environment is accepted as law and that States are obliged to enforce it. The widespread constitutional protection enjoyed by rights to an adequate environment is significant as constitutional recognition is one of the strongest legal protections. As Pedersen highlights, 'National constitutional environmental rights are strong indicators of national *opinio juris* and represent the highest level of national law operating as a *lex suprema*'.[177] May and Daly furthermore observe that 'comparing the constitutional environmental jurisprudence of countries around the world yields insights into the ways different legal cultures have responded to similar problems'.[178] Moreover, the right to an adequate environment has continually been incorporated and implied through other rights by judiciaries which may indicate a conviction of an obligation to protect the right and its existence. The Special Rapporteur on the environment and human rights noted in his 2019 Report that he 'would like to clarify the extent to which States are clearly obligated to respect, protect and fulfil the right to a healthy environment because of binding international treaties, constitutions and national environmental legislation'.[179] This indicates clear legal obligations imposed by diverse recognition to protect this right.

Judicial decisions can also themselves evidence *opinio juris* as the role of the judiciary is to interpret, apply and settle disputes about the law. Decisions by courts thus represent what the judicial organ of a State accepts as law. Specific parts of their reasonings may further strengthen this indication. An example can be found in *Future Generations*, where the Colombian court referred to internationally emerging regulations, instruments and hard and soft law. The court stated that they 'serve as guiding criteria for national legislation as to resolve citizen complaints on the destruction of our habitat, in favour of the protection of the subjec-

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[176] *Mossville Environmental Action Now v. United States,* Report No. 43/10, Petition No 242-05 (Inter-American Commission on Human Rights, 17 March 2010) para 18. See also Lee (n 170) 310-11.

[177] Pedersen (n 33) 111.

[178] James R. May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015) 10, 33.

[179] HRC, Report of the Special Rapporteur 2019 (n 56) para 6.

tive rights of people, of present and future generations'.[180] This may indicate a conviction that legal obligations to protect the right to an adequate environment are established through international practice. Boyd observed in 2012 that 'it appears that the majority of organizations and experts specializing in international law, human rights law, and environmental law agree that there is an emerging human right to a healthy environment'.[181] In light of the foregoing assessment, taking into account extensive constitutional recognitions, recognition by treaties and treaty bodies, as well as developments through judicial decisions, it seems clear that the right to an adequate environment is emerging as customary international law. Whether or not it has reached the required threshold to be accepted as a customary norm is, however, debatable.

[180] *Future Generations* (n 112) 22.

[181] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 106. See also Rodriguez-Rivera (n 33) 165-6, 194-5.

4 A Rights-Based Approach to Climate Induced Displacement Through the Right to an Adequate Environment

4.1 A rights-based approach

A clear human rights approach has been applied to challenges of climate change first in recent years.[182] Climate change and human rights have since continually been explored in literature. A specific link between the right to an adequate environment and climate induced displacement is, however, not widely elaborated upon. The perspective is included here as it can provide a valuable contribution to the overall assessment of approaches which may be utilised in facing the issue of climate induced displacement. This chapter will explore what added value this right can bring in this context and whether it can contribute to mitigation and adaptation of adverse impacts of climate change. Challenges and advantages in adopting such a strategy will be assessed.

Caney has identified various implications arising when a rights-based approach is applied to climate change impacts.[183] One challenge he identifies is that a human rights approach will primarily be founded on specific effects that violate recognised rights and thus not provide a comprehensive response. Moreover, he identifies that compensation which is essential for human rights violations is absent from the climate change regime's limited approach of mitigation and adaptation. A rights-based approach would thus need to include and combine duties of mitigation, adaptation, and compensation. As seen in Chapter 3, remedies, for instance, have thus far been focused on mitigation, adaptation, injunctive relief and declaratory judgments rather than compensation. Efforts to ensure a combined approach are thus needed. Another challenge in this context is that it is not sufficiently clear whether or to what extent states, civil society, NGOs, international organisations, or corporations have duties and responsibilities related to remedies, compensation or prevention of climate induced displacement. Issues of competing and overlapping responsibilities also arise, especially as distinct legal regimes are involved. The UNHCR, for instance, has a limited role as climate induced displacement is beyond their principal mandate. As no agreement exists to extend its mandate, the UNHCR has only been involved on a case-by-case basis. Considering the added resources and capacity such a responsibility requires, it may not be sustainable for the UNHCR to ac-

[182] See e.g. Rajamani (n 169) 394.

[183] Simon Caney 'Climate change, human rights and moral thresholds' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009) 86-90.

quire this responsibility.[184] On the contrary, UNHCR has specific knowledge, expertise and data concerning displacement, has extensive protection competence, and may currently be the agency with the most relevant mandate.[185] IOM has the opposite challenge, as its mandate is accused of being too broad by encompassing all categories of migration without providing sufficient 'attention to human rights protection'.[186] Consensus regarding the responsibilities of various actors must importantly be reached to ensure a sustainable response.

Regardless of these challenges, human rights norms bring added value in the response to climate change impacts. The Special Rapporteur on human rights and migration underscores that 'all public policies with respect to climate-change-induced migration should be guided by a general respect for the dignity and human rights of the affected individuals, groups and communities (…)'.[187] Boyle also claims that human rights law and a right to an adequate environment has the potential to protect environmental considerations and complement environmental law.[188] Obligations stemming from a recognised right to an adequate environment will also strengthen commitments under the UNFCCC and the Paris Agreement, which 'have an important preventive effect on displacement'.[189] Strengthened commitments to reduce GHG emissions will slow down and desirably stop climate change and its adverse effects.

4.1.1 The need for an individual right

Some scholars support the developments seen in Chapter 3 and claim that a right to an adequate environment needs to be recognised as an individual right.[190] May and Daly observe that 'existing international environmental law regimes do not afford an enforceable right to a quality environment'.[191] They argue that current protection under international environmental law is insufficient, especially in terms of environmental rights. Other scholars claim that incorporation through other rights is more beneficial due to conceptual uncertainty and chal-

[184] See Walter Kälin and Nina Schrepfer, 'Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches' (UNHCR, 2012) PPLA/2012/01, 44.

[185] Guy S. Goodwin-Gill and Jane McAdam, 'UNHCR & Climate Change, Disasters and Displacement' (UNHCR Report, 2017) 29-31.

[186] Megan Bradley and Roberta Cohen, 'Disasters and Displacement: Gaps in Protection' (2010) 1 Journal of International Humanitarian Legal Studies 95, 118.

[187] Crépeau (n 24) para 51.

[188] Boyle (n 35) 510.

[189] Kälin, 'Conceptualising Climate-Induced Displacement' (n 17) 82.

[190] See e.g. HRC, Report of the Special Rapporteur 2019 (n 56) para 16; Lee (n 170) 292; Pedersen (n 33) 74.

[191] May and Daly, 'The nature of environmental constitutionalism' (n 137) 21.

lenges of definition.[192] Another argument is that existing protections are sufficiently broad and that additional environmental rights are not needed.[193] The right to an adequate environment is consequently redundant because 'environmental rights are adequately protected under the existing environmental law framework of international treaties and agreements that already address environmental issues.[194] The reasoning is that 'new' separate rights might undermine the integrity of the existing human rights regime.

Another important consideration is that recognition in itself does not necessarily produce enhanced protection or action beyond formal recognition. Challenges related to enforcement such as those identified in Chapter 3.1.3 may lead to false hope as reality and results might not always be compatible. However, as Boyd emphasises, this factor cannot justify a reasonable argument against recognising the right.[195] The arguments against the necessity of recognition may also be refuted by the positive effects related to constitutional recognition, including stronger environmental laws, improved public participation, better decision-making, and more effective enforcement.[196]

4.2 General implications of the right to an adequate environment

The right to an adequate environment involves various implications. This thesis has largely focused on its development in national jurisdictions. When rights are developed separately by different jurisdictions, lack of international consistency may be a challenge. Carlarne also observes that utilisation of domestic law to address climate security might stimulate the fragmentation of international law as developments will be closely tied to national interests and agendas.[197] Other scholars suggest that national judiciaries are appropriate arenas for implementation of such emerging international standards and that it can be beneficial that implementation is customised to fit particular situations of States or regions.[198] Issues of cross-border cooperation also arise because States generally have obligations towards individuals

[192] See Boyle (n 35) 484.

[193] See e.g. May and Daly, 'The nature of environmental constitutionalism' (n 137) 25; Boyle (n 35) 484.

[194] May and Daly, 'The nature of environmental constitutionalism' (n 137) 20. For a discussion see also Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 35.

[195] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 43.

[196] ibid 7, 28-33. See also May and Daly, *Global Environmental Constitutionalism* (n 178).

[197] Cinnamon Carlarne, 'Risky Business: The Ups and Downs of Mixing Economics, Security and Climate Change' (2009) Melbourne Journal of International Law 465, 466.

[198] See e.g. May and Daly, *Global Environmental Constitutionalism* (n 178) 8.

within their jurisdictions but not beyond. Morin argues that 'a stronger incentive for international cooperation is essential: too often, human rights are conceived as a relationship between a nation and a state, and this concept does not lead to a discourse sufficiently supportive of cross-border cooperation'.[199]

According to Boyd (referring to the right to a 'healthy' environment), scholars argue that potential benefits related to the right 'are outweighed by problems such as low likelihood of effectiveness; negative implications for democracy; the vague articulation of the right; the excessive focus on individuals; adverse effects on other rights; anthropocentrism; and the creation of false hope'.[200] The critics also argue that the right is absolute, redundant, not enforceable or justiciable, and may lead to excessive litigation. As noted in Chapter 2.1 the criticism concerning individualism and anthropocentrism may be avoided when the right is formulated in terms of an 'adequate environment' instead of 'healthy environment'. Indeed, recognition of the right is usually focused on individuals, however, in some constitutions, the right is placed in sections on collective rights and some regional instruments explicitly refer to it in collective terms.[201] Boyd thus concludes that the right encompasses a combination of individual and collective elements. Another challenge is identified in situations of competing rights as critics claim it may adversely impact and 'trump' other rights. However, the right to an adequate environment may essentially ensure better balance, as it strengthens the position of environmental concerns.[202] A balancing exercise of involved rights is usually applied, and the right to an adequate environment will thus not be absolute and able to undermine other rights. In Boyd's research of constitutional recognition of the right, an absolutist application has not emerged, to the contrary, a balancing approach has been applied in situations concerning competing rights.[203]

The most obvious challenge is perhaps related to the substance of the right. The content of the right to an adequate environment is uncertain and challenging to determine, especially in terms of substantial content. As seen above, procedural content has been considera-

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[199] Morin (n 86) 123.

[200] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 14; 33-43, 245-51. See also Rodriguez-Rivera (n 33) 146.

[201] See Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 25, 41-2.

[202] ibid 28, 30.

[203] ibid 245. Boyle also supports this reasoning, see Boyle (n 35) 493.

bly specified and determined through instruments such as the *Aarhus Convention*.[204] Some common trends are also seen through the application of the right. One trend in national judgments related to climate change is to incorporate sustainable development, the doctrine of public trust, and international environmental principles, such as the precautionary principle, intergenerational equity, and environmental impact assessment as part of the right.[205] The Special Rapporteur on the environment and human rights has also identified six key elements forming part of the right, including a safe climate, breathing clean air, healthy biodiversity and ecosystems, safe water and sanitation, healthy and sustainably produced food, and non-toxic environment.[206] As has been the case with other human rights, the specific contents of rights are often developed over time and after international recognition. Boyd observes that the 'content of a substantive environmental right will evolve over time, and just as other human rights vary in content from nation to nation, so will environmental rights'.[207] Moreover, the substance is under constant development as it continues to be applied. The vagueness referred to by some critics may be linked to the uncertainty of substance. However, this right is not vaguer than other rights, and as Boyd highlights, ambiguity might be advantageous 'because it provides flexibility in filling gaps in legislation, dealing with emerging issues, and responding to new knowledge in the fields of science, health, and ecology'.[208] In light of Chapter 3, vagueness has neither hindered effective application and implementation through judiciaries worldwide.

4.2.1 Litigation as rights protection in the climate change context

Boyd concludes that 'courts are playing a greater role in environmental governance because of increased public access to the judicial system'.[209] As observed in Chapter 3, litigation has progressively been utilised as a rights protection mechanism to pursue rights to an adequate environment in the context of climate change. This section explores whether litigation can be an effective enforcement mechanism used in this regard. It is important to appreciate the judicial role in the context of developing the law in response to such emerging is-

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[204] Aarhus Convention (n 60).

[205] See e.g. *Leghari* (n 111) paras 3, 12, 20-1; *Gloucester Resources Ltd* (n 117) paras 694-6.

[206] HRC, Report of the Special Rapporteur 2019 (n 56) para 17.

[207] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 26. Boyd exemplifies this through references to the right to life.

[208] ibid 34.

[209] ibid 278.

sues. The right to an adequate environment 'could enhance the courts' role in ensuring accountability by facilitating citizen access to judicial remedies'.[210] Both routine and strategic litigation result in either increasing commitments to climate change action or in disrupting climate change protection.[211] As observed above, litigation has certain limitations such as procedural barriers, enforcement, and lawsuits being costly and timely. McAdams also identifies that although litigation and judicial interpretation may cause legal progress, it is 'reliant on good test cases, cogent legal arguments by counsel for expansion, and acceptance by Parliament (which may be able to legislate to overturn the implications of the decision for the future)'.[212]

Nonetheless, litigation has the potential to complement the legislature, ensure legal growth, instigate more ambitious actions by policymakers and legislators, supplement legislative and political inaction, and enhance existing regulations and policies. The Special Rapporteur on human rights of migrants highlights that 'courts at the regional and domestic levels can (…) play an important role in protecting the rights of climate-change-induced migrants'.[213] The United States which recently has been resistant to climate change action and commenced widespread deregulations of climate change policies exemplifies how the judiciary may ensure rights protection. Despite governmental opposition, so far under the Trump Administration 'no rollback of a climate regulation brought before the courts has survived a legal challenge'.[214] Climate change litigation can involve various objectives including damages, improve, enforce or create new legislation, influence administration, information flow, and public awareness. Several of these are present in the decisions referred to above. *Urgenda* illustrates how litigation can be used as a tool to force more ambitious GHG reduction targets by governments.[215] The Greenpeace judgment, in contrast, illustrates how a 'negative ruling' still can provide significant contributions through confirming the nature of a constitutional provision as a rights provision and by placing discussions about the existence of the right behind and move to discussions of its substance.[216] Additionally, decisions like these initiate public attention to the issue and generate important debates and awareness.

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[210] ibid 31.

[211] Setzer and Byrnes (n 96) 2.

[212] McAdam, *Climate Change, Forced Migration, and International Law* (n 10) 54.

[213] Crépeau (n 24) para 78.

[214] Setzer and Byrnes (n 96) 6.

[215] *Urgenda* (n 109).

[216] Greenpeace judgment (n 113).

In light of Chapter 3, climate change litigation pursuing the right to an adequate environment is significant by contributing as evidence of emerging customary law. Another significant contribution is that it forces states to take a stand on new subject matters and develop important issues which need to be resolved. May and Daly stress that 'courts around the world are showing that environmental rights are better advanced through constitutional law at the national level'.[217] The IDMC also highlights that 'disasters are essentially local phenomena, so the role of local authorities and national governments are key'.[218] However, the 2019 Policy Report importantly underscores that impacts of climate change litigation are not sufficiently recorded and more research is needed to ascertain its impact.[219] Moreover, litigation is not necessarily always the most efficient and appropriate mechanism for climate change-related issues due to barriers such as cost, standing, evidence, burdens of proof, and causation. However, recognition of the right to an adequate environment enables individuals to pursue remedies for rights violations, enhances access to justice, and may ensure the development of jurisprudence related to the procedural barriers which 'currently undermines the efficacy of environmental law'.[220]

4.3 Enhanced safeguarding against climate induced displacement

Existing protection mechanisms do generally not 'deal with the drivers of displacement'.[221] As such the right to an adequate environment may offer broader protection against climate induced displacement than initiatives primarily focused on subsequent protection. This section discusses how this right may enhance safeguarding against climate induced displacement through its multi-level reach. Zetter observes that 'a rights-based approach to protection provides both the means of addressing some of the challenges of migration, as well as averting some of the migratory outcomes'.[222] The protection of future generations and future harm strengthens this reasoning as the approach combines a proactive and reactive application

[217] May and Daly, 'The nature of environmental constitutionalism' (n 137) 31.

[218] Ponserre and Ginnetti (n 7) 17.

[219] Setzer and Byrnes (n 96) 1.

[220] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 31.

[221] Roger Zetter, 'Protecting People Displaced by Climate Change: Some Conceptual Challenges' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010) 136.

[222] ibid 150.

compared to for example the 1951 Refugee Convention which in essence only offers protection after fleeing.

As is evident now with international treaties such as the 1951 Refugee Convention is that most treaties are not suited for preparing for future events, are not easily amended, and develop slowly. Moreover, uncertainty and lack of agreement as to the best suitable approaches to tackle climate induced displacement persist. Consequently, there are 'significant barriers to the widespread acceptance and formulation of such a regime' in the short-term at the international level.[223] Domestic and regional law might respond more efficiently to emerging challenges and develop as new situations arise, as has been the case with the right to an adequate environment since the 1970s.[224] Once widely recognised at domestic levels throughout various legal regimes, the right becomes more feasible to transform into international protection mechanisms. With recognition through constitutions, legislation, and jurisprudence, individuals also gain access to courts. As the HRC affirms, 'human rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes'.[225] Boyd identifies various outcomes of constitutional recognition of rights to an adequate environment which may enhance environmental protection, including stronger environmental legislation; enhanced implementation and enforcement of existing laws and policies; filling legal protection gaps; better balance with competing rights; heightened accountability; enhanced participation in decision making; protection of vulnerable populations; and increased awareness and knowledge about the importance of environmental protection.[226] These outcomes will correspondingly enhance safeguarding against climate induced displacement. It is important to emphasise that challenges related to climate induced displacement cannot be solved by one single approach. The right to an adequate environment will not by itself be a sufficient response. However, in combination with other methods, it can strengthen the response to safeguard people affected. As McAdam observes, the law is not a

[223] Hugo (n 9) 31.

[224] ibid.

[225] HRC, Resolution A/HRC/RES/32/33 (n 152) 2; HRC, Resolution A/HRC/RES/18/22 (n 152).

[226] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 28-33, 233-44.

comprehensive solution, but it may determine the minimum standards required by States to respect.[227]

4.3.1 State obligations

The right to an adequate environment imposes specific State obligations which enhances protection. A rights-based approach incorporates the tripartite framework which includes obligations to respect, protect and fulfil the right. This involves respect by refraining from State violations; protect against third-party violations; fulfil through actions such as services and management.[228] Boyd observes that State obligations concerning the right to an adequate environment, 'appears to embody both negative and positive aspects'.[229] Measures to mitigate occurrences of climate induced displacement and obligations during and after displacement would thus be encompassed. Chaloka similarly observes that climate induced displacement not only concerns negative obligations preventing drivers of displacement but 'puts more emphasis on the positive obligations of states to anticipate and take measures to prevent or mitigate conditions that may bring about displacement'.[230] The HRC recognised in a draft resolution that human rights law incorporates State obligations related to enjoying a 'safe, clean, healthy and sustainable environment (…)' including to respect and protect the rights to information and freedom of expression, 'ensure access to effective remedies (…)', ensure human rights protection in environmental policies, and 'protect against non-State human rights abuses (…)'.[231] These were endorsed and elaborated upon by the former Special Rapporteur on human rights and the environment in the 2018 Framework Principles on Human Rights and the Environment (Framework Principles) which outlines principal duties related to enjoying an adequate environment.[232] The most recent report by the current Special Rappor-

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[227] Jane McAdam, 'Climate Change 'Refugees' and International Law' (2008) Bar News: The Journal of the NSW Bar Association 27, 30.

[228] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 243.

[229] ibid 24.

[230] Chaloka Beyani, 'Climate Change and Internal Displacement' (Report, Brookings-LSE Project on Internal Displacement, 2014) 11.

[231] HRC, 'Human rights and the environment' (Draft Resolution, 24 March 2014) UN Doc A/HRC/25/L.31, 3.

[232] John H. Knox, 'Framework Principles on Human Rights and the Environment: The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2018) 5.

teur also confirms these obligations and underscores that they include 'procedural, substantive, and special obligations toward those in vulnerable situations'.[233]

Recognition of the right to an adequate environment entails State obligations owed directly to individuals who can challenge their compliance and thus provides new mechanisms to hold governments accountable in terms of climate induced displacement. Enhanced accountability is significant as the right can be utilised to 'seek remedies for violations of the right and also, in a preventive manner, to avoid prospective environmental damage'.[234] Rajamani highlights several positive impacts in this context, including to safeguard government accountability, provide arenas for enforcement through litigation, 'offer benchmarks against which states' actions can be evaluated (…)', and introduce an 'additional criteria for the interpretation of applicable principles and obligations (…)'.[235] The IOM has also identified appropriate State obligations before, during and after climate induced displacement as follows. To prevent or mitigate displacement, States should be obliged to undertake risk assessments; employ systems of early warnings; have in place 'evacuation plans'; and ensure 'community education'.[236] Protection and management during displacement should include obligations to seek and accept assistance; evaluate sustainable alternatives other than displacement; obtain consent by the displaced people; and provide laws identifying the authority with primary responsibility concerning management and protection during displacement. After displacement, States should permit voluntary return by people displaced, facilitate them to 'integrate in the host community or resettle voluntarily in another part of the country'; and enable 'the recovery of land, houses, property and other possessions left behind'.[237] These recommendations are not legally binding but could be used as guidelines also in the context of determining obligations imposed by the right to an adequate environment related to climate induced displacement.

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[233] See UNGA, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (Report, 15 July 2019) UN Doc A/74/161, 17-9.

[234] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 31.

[235] Rajamani (n 169) 417-18, 429.

[236] IOM, Report 2014 (n 21) 30.

[237] ibid.

4.3.2 Protecting the most vulnerable

It is well established that those least responsible for climate change will be the most affected by its adverse impacts.[238] According to the Framework Principles concerning obligations related to enjoying an adequate environment, 'States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risk and capabilities'.[239] People affected by or risking climate induced displacement should thus be specifically attended to and belong to a particularly vulnerable group. The aspect of the right related to the protection of future generations' interest is also significant in this regard as future generations likewise are extremely vulnerable. Boyd identifies that constitutional recognition of rights to an adequate environment may enhance the protection of 'vulnerable populations, including future generations, from environmentally destructive acts of the majority'.[240] Enhanced safeguarding through this right thus encompasses vulnerable parts of populations that normally are not subject to protection through rights, legislation or treaties.

4.3.3 Mitigation and adaptation

Another beneficial aspect of the right to an adequate environment is that it can be used as a tool in strategies of adaptation and mitigation. The HRC also urges States to integrate human rights in policies for climate change mitigation and adaptation.[241] As illustrated above the right can be used through litigation to limit adverse impacts of climate change by pursuing GHG emissions reductions.[242] This correspondingly contributes to mitigating climate induced displacement as it targets the underlying cause of adverse impacts of climate change. In *Leghari*, the court highlighted that the heavy floods and droughts caused by climate change also triggered concerns related to water and food security which increase displacement risks.[243] The court's establishment of a Climate Change Committee to oversee implementation of the national climate change policy involving measures of both adaptation and mitigation could significantly limit such risks. A 2019 World Bank Report asserts that intensive action

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[238] See e.g. HRC, Resolution A/HRC/RES/10/4 (n 152).

[239] Knox (n 232) 20.

[240] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 28.

[241] HRC, Resolution A/HRC/RES/32/33 (n 152).

[242] Averill (n 120) 140; *Urgenda* (n 109).

[243] *Leghari* (n 111) para 11.

on three central areas can assist the reduction of climate-related internal migration by 2050: cutting GHG emissions; embed climate migration in development planning; prompt investments to improve understanding of internal climate migration.[244] The right to an adequate environment may contribute to implementing these components. Through assessing the impact of constitutional recognition of rights to an adequate environment, Boyd identified coherent indications that constitutional recognition of such rights is liked to greater environmental performance. These States 'have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements, and made faster progress in reducing (…) greenhouse gases than nations without such provisions'.[245] However, he notes that this consistency only proves the existence of the relationship, not necessarily that recognition causes the enhanced environmental performance. Nonetheless, it supports beneficial mitigation and adaptation outcomes linked to the right to an adequate environment.

Migration can importantly also be used as an effective strategy of adaptation if 'managed carefully and supported by good development policies and targeted investments'.[246] It is important to understand what mobility options that are available to people risking displacement due to climate change. In this regard, the right to an adequate environment may safeguard 'the right to stay as well as the right to leave, allowing people to choose the response that best suits their needs and values'.[247] The right may thus also include protecting the right to stay and to obtain assistance in adapting to life in areas adversely affected by climate change.

[244] World Bank, Report 2018 (n 16) xxv.

[245] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 273, 253-77, 281.

[246] World Bank, Report 2018 (n 16) xxiv.

[247] Barnett and Webber (n 14) 38.

5 Concluding Remarks

The assessments throughout this thesis illustrate how the right to an adequate environment has rapidly grown in recognition and application since it gained attention in the 1970s. The right has recently been linked to climate change and been pursued through litigation aimed at protection against adverse impacts of climate change. This trend has caused progressive developments of the right in national jurisdictions worldwide. Furthermore, the thesis has provided useful insights into how a rights-based approach through the right to an adequate environment may benefit the response to climate induced displacement. It is useful to be reminded of the research question which has guided the assessment:

> *Is an individual right to an adequate environment emerging as customary law in light of recent climate change litigation, and what potential does it have to impact climate induced displacement?*

In light of Chapter 3, state practice and *opinio juris* evidenced through litigation, constitutional recognition, international obligations, regional treaties, and legislation establish that rights to an adequate environment are emerging worldwide. Boyd's conclusion from 2012 still appears persuasive: 'While there is not yet global unanimity regarding the right to a healthy environment, the threshold for becoming customary international law or a general principle of law is very close to being met, if it has not already been surpassed'.[248]

The thesis maintains that 'adequate environment' is a preferable formulation in the context of climate change and displacement as it warrants a more inclusive right and avoids challenges related to individualism and anthropocentrism. It is highlighted that even if the right to an adequate environment is considered to be customary international law, major challenges linked to this right persists, especially in terms of substance, enforceability and procedural barriers. Protection of this right through climate change litigation has nonetheless been increasingly effective to supplement legislation, enhance existing regulations, and force political and legal action. Evidently, this right is not suggested as a comprehensive solution to the challenges of climate induced displacement. However, such a rights-based approach may be a valuable contributor by offering enhanced safeguarding through mitigating drivers of climate induced displacement and offer adaptation and protection during and after displacement. As

[248] Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (n 34) 113.

illustrated above, the right has been criticised in terms of fragmenting international law, inefficiency, vagueness, and absolutism. However, the right continues to be effectively implemented and applied in jurisdictions worldwide, the substance of the right continues to be developed, it flexibly responds to legal protection gaps and strengthens the position of environmental concerns in competing rights claims.[249] Through State obligations, and measures of mitigation and adaptation the right to an adequate environment may enhance protection against climate induced displacement.

Reliable and satisfactory statistics and data related to this issue are lacking and difficult to obtain until a consensus is reached in terms of terminology, status, and protection. This is important to ensure the development of common policies and responses. As highlighted by Morin, 'once the precise, narrower legal gaps in different legal regimes are identified, transforming the law becomes a less ambitious, more realistic, task'.[250] A holistic approach is needed, and the right to an adequate environment can be a significant contributor to the overall response. In light of the devastating projections for the future, sustainable long-term approaches need to be installed to ensure the protection of the most vulnerable groups affected by climate change.

[249] See e.g. ibid 14, 28, 30-43, 245-51.

[250] Morin (n 86) 113.

Table of reference

Books / Book Chapters:

Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcom D. Evans (ed), *International Law* (5th edn, OUP 2018).

David R. Boyd, 'Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment' in John H. Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018).

David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012).

Francesco Parisi and Vincy Fon, 'Stability and Change in Customary Law' in *The Economics of Lawmaking* (OUP 2009).

Graeme Hugo, 'Climate Change-Induced Mobility and the Existing Migration Regime in Asia and the Pacific' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

Hari M. Osofsky, 'Complexities of addressing the impacts of climate change on indigenous peoples through international law petitions: A case study of the Inuit petition to the Inter-American Commission on Human Rights' in Randall S. Abate & Elizabeth Ann Kronk (eds) *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing 2013).

James R. May and Erin Daly, 'Adjudicating environmental constitutionalism' in *Global Environmental Constitutionalism* (CUP 2015).

James R. May and Erin Daly, 'The nature of environmental constitutionalism' in *Global Environmental Constitutionalism* (CUP 2015).

James R. May and Erin Daly, *Global Environmental Constitutionalism* (CUP 2015).
Jane McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

Jane McAdam, *Climate Change, Forced Migration, and International Law* (OUP 2012).

Jon Barnett and Michael Webber, 'Migration as Adaptation: Opportunities and Limits' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

Noriko Okubo, 'Climate Change Litigation: A Global Tendency' in Oliver C. Ruppel, Christian Roschmann & Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance* (Nomos Verlagsgesellschaft mbH 2013).

Roger Zetter, 'Protecting People Displaced by Climate Change: Some Conceptual Challenges' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

Sam Adelman, 'Rethinking human rights: the impact of climate change on the dominant discourse' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009).

Simon Caney 'Climate change, human rights and moral thresholds' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2009).

Stephen Castles, 'Afterword: What Now? Climate-Induced Displacement after Copenhagen' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

Stephen Humphreys and Mary Robinson, *Human Rights and Climate Change* (CUP 2009).

Walter Kälin, 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing 2010).

Decisions / Advisory Opinions from International Bodies:

'Environment and Human Rights'	Inter-American Court of Human Rights (Advisory opinion, 15 November 2017) OC-23/17.
Fadeyeva v. Russia	Application No. 55723/00 (European Court of Human Rights, 9 June 2005).
Fisheries Judgment	International Court of Justice (1951) ICJ Reports 1951, p 116.
Lopez Ostra v. Spain	Application No. 16798/90 (European Court of Human Rights, 1995).
Marangopoulos Foundation for Human Rights v. Greece	Complaint No. 30/2005 (Decision on the merits, European Committee of Social Rights, 2006).
Mossville Environmental Action Now v. United States	Report No. 43/10, Petition No 242-05 (Inter-American Commission on Human Rights, 17 March 2010).
North Sea Continental Shelf	International Court of Justice (1969) ICJ Reports 1969, p 13.
Öneryıldız v. Turkey	Application No. 48939/99 (European Court of Human Rights, 30 November 2004).
The Inuit Petition	Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (2005) No. P-1413-05.

International Agreements / Conventions / Treaties

1951 Refugee Convention	UN General Assembly, *Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137.
Aarhus Convention	UN Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (25 June 1998) 2161 UNTS 447.
African Charter on Human and Peoples' Rights	Organization of African Unity, *African Charter on Human and Peoples' Rights* (27 June 1981) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.
American Convention on Human Rights	Organization of American States, *American Convention on Human Rights* (22 November 1969).
Arab Charter on Human Rights	League of Arab States, *Arab Charter on Human Rights* (22 May 2004).
ASEAN Human Rights Declaration	Association of Southeast Asian Nations, *ASEAN Human Rights Declaration* (18 November 2012).
ECHR	Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (as amended, 4 November 1950) ETS 5.
Escazú Agreement	Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean (4 March 2018).
European Social Charter	Council of Europe, *European Social Charter* (1961) ETS 35.
ICCPR	UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171.
ICESCR	UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 UNTS 3.
Paris Agreement	UNFCCC, *Paris Agreement* (12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1.

Protocol of San Salvador	Organization of American States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (16 November 1999) A-52.
Protocol to the Refugee Convention	UN General Assembly, *Protocol Relating to the Status of Refugees* (31 January 1967) 606 UNTS 267.
Statute of the ICJ	United Nations, *Statute of the International Court of Justice* (18 April 1946).
UDHR	UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) Resolution 217 A (III).
UNFCCC	UN General Assembly, *United Nations Framework Convention on Climate Change* (9 May 1992) 1771 UNTS 107.

Journal Articles:

Alan Boyle, 'Human rights or environmental rights? A reassessment' (2007) 18 Fordham Environmental Law Review 471.

Amy Maguire and Jeffrey McGee, 'A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change' (2017) 26 Review of European Community & International Environmental Law 54.

Bukola Faturoti, Godswill Agbaitoro and Obinna Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?' (2019) 27 African Journal of International and Comparative Law 225.

Cinnamon Carlarne, 'Risky Business: The Ups and Downs of Mixing Economics, Security and Climate Change' (2009) Melbourne Journal of International Law 465.

David Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20 Review of European Community & International Environmental Law 171.

Demola Okeowo, ‘Examining the link: climate change, environmental degradation and migration’ (2013) 15 Environmental Law Review 273.

Edgar Morin, ‘Sustainable development law on environmental migration: the story of an obelisk, a bag of marbles, and a tapestry’ (2012) 14 Environmental Law Review 111.

Hari M. Osofsky and Jacqueline Peel, ‘The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?’ (2013) 30 Environmental and Planning Law Journal 303.

Hari M. Osofsky, ‘The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ (2006) 31 American Indian Law Review 675.

Ingrid Leijten, ‘Human rights v. Insufficient climate action: The Urgenda case’ (2019) 37 Netherlands Quarterly of Human Rights 112.

Jane McAdam, ‘Building International Approaches to Climate Change, Disasters, and Displacement’ (2016) 33 Windsor Yearbook of Access to Justice 1.

Jane McAdam, ‘Climate Change ‘Refugees’ and International Law’ (2008) Bar News: The Journal of the NSW Bar Association 27.

John Lee, ‘The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law’ (2000) 25 Columbia Journal of Environmental Law 283.

Lavanya Rajamani, ‘The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change’ (2010) 22 Journal of Environmental Law 391.

Lesley Hughes, ‘The Rocky Hill decision: a watershed for climate change action?’ (2019) 37 Journal of Energy & Natural Resources Law 341.

Luis E. Rodriguez-Rivera, 'The Human Right to Environment in the 21st Century: A Case for Its Recognition and Comments on the Systemic Barriers It Encounters' (2018) 34 AM U Int'l L Rev 143.

Marilyn Averill, 'Linking Climate Litigation and Human Rights' (2009) 18 Review of European Community & International Environmental Law 139.

Megan Bradley and Roberta Cohen, 'Disasters and Displacement: Gaps in Protection' (2010) 1 Journal of International Humanitarian Legal Studies 95.

Ole W. Pedersen, 'European environmental human rights and environmental rights: a long time coming?' (2008) 21 Georgetown International Environmental Law Review 73.

Thea Philip, 'Climate Change Displacement and Migration: An Analysis of the Current International Legal Regimes Deficiency, Proposed Solutions and a Way Forward for Australia' (2018) 19 Melbourne Journal of International Law 639.

Judgments from National Jurisdictions:

Clean Air Council v. United States	(2019) Case No. 2:17-cv-04977 E.D. Pa. (US).
Commune de Grande-Synthe v. France	(2019) (FR).
Friends of the Earth Germany, Association of Solar Supporters, and Others v. Germany	(2018) (DE).
Future Generations v. Ministry of Environment and Others	(2018) 11001 22 03 000 2018 00319 00 (CO).
Gbemre v. Shell Petroleum Development Company of Nigeria Ltd. And Others	(2005) FHC/B/CS/53/05 (NG).
Gloucester Resources Ltd v. Minister for Planning	[2019] NSWLEC 7 (AU).
Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy	TOSLO-2016-16674 (NO).
Juliana v. United States	No. 18-36082 9th Cir. (US). No. 18-80176 9th Cir. (US). 6:15-cv1517 D. Or. (US).

La Rose v. Her Majesty the Queen (2019) T-1750-19 (CA).
Leghari v. Federation of Pakistan W.P. No. 25501/2015 (PK).
Maria Khan et al. v. Federation of Pakistan et al W.P. No. 8960/2019 (PK).
Mbabazi and Others v. The Attorney General and National Environmental Management Authority Civil Suit No. 283 of 2012 (UG).
Notre Affaire à Tous and Others v. France (2018) (FR).
Pandey v. India (2017) (IN).
Plan B Earth and Others v. Secretary of State for Transport [2019] EWHC 1070 (GB).
Sheikh Asim Farooq v. Federation of Pakistan etc. W.P. No. 192069/2018 (PK).
Urgenda Foundation v. State of the Netherlands [2015] HAZA C/09/00456689 (NL).

Legislation:

Constitution of Colombia (1991) Constitutional Gazette No. 116.
Constitution of the Federal Republic of Nigeria (1999) Act No. 24.
Constitution of the Kingdom of Norway (1814) LOV-1814-05-17.

Reports:

Brookings Chaloka Beyani, 'Climate Change and Internal Displacement' (Report, Brookings-LSE Project on Internal Displacement, 2014).
Grantham Research Institute Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (Policy Report, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, 2019).
IDMC Internal Displacement Monitoring Centre, 'GRID 2017: Mini Global Report on Internal Displacement' (Report, May 2017).
IDMC Internal Displacement Monitoring Centre, 'GRID 2019: Global Report on Internal Displacement' (Report, May 2019).
IDMC Internal Displacement Monitoring Centre, 'Mid-Year Figures: Internal Displacement from January to June 2019' (Report, 12 September 2019).
IDMC Sylvian Ponserre and Justin Ginnetti, 'Disaster Displacement:

	A global review, 2008-2018' (Thematic Report, May 2019).
IOM	International Organization for Migration 'International Migration Law: Glossary on Migration' (2019).
IOM	International Organization for Migration, 'IOM Outlook on Migration, Environment and Climate Change' (Report, 2014).
IPCC	Intergovernmental Panel on Climate Change, 'Climate Change 2014: Synthesis Report' (Report, 2014).
IPCC	Intergovernmental Panel on Climate Change, **'**Global Warming of 1.5°C**'** (Report, 2018).
IPCC	Intergovernmental Panel on Climate Change, 'The Ocean and Cryosphere in a Changing Climate' (Report, 24 September 2019).
The World Bank	International Bank for Reconstruction and Development, 'Groundswell: Preparing for International Climate Migration' (Report, 2018).

UN Documents / Declarations / Reports / Resolutions / Statements:

Cancun Agreements	UNFCCC, 'The Cancun Agreements: Outcome of the Work of the Ad Hock Working Group on Lon-term Cooperative Action under the Convention' (Report of the Conference of the Parties in Cancun Mexico 29 November-10 December 2010, Decision 1/CP.16, 15 March 2011) UN Doc FCCC/CP/2010/7/Add.1.
Global Compact for Migration	UN General Assembly 'Global Compact for Safe, Orderly and Regular Migration' (Resolution adopted 19 December 2018, 11 January 2019) UN Doc A/RES/73/195.
Guiding Principles on Internal Displacement	UN High Commissioner for Refugees, *Guiding Principles on Internal Displacement* (22 July 1998) ADM 1.1, PRL 12.1, PR00/98/109.
Rio Declaration	UN General Assembly 'Rio Declaration on Environment and Development' (Conference on Environment and Development in Rio de Janeiro Brazil 3-14 June 1992, 12 August 1992) UN Doc A/CONF.151/26/(Vol. I).

Special Rapporteur on human rights and the environment	John H. Knox (Statement by the UN Special Rapporteur on human rights and the environment, Geneva 5 March 2018) < https://www.ohchr.org/EN/NewsEvents/Pages/ DisplayNews.aspx?NewsID=22755&LangID=E> accessed 1 October 2019.
Special Rapporteur on human rights and the environment	John H. Knox, 'Framework Principles on Human Rights and the Environment: The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (2018).
Stockholm Declaration	UN General Assembly, 'Declaration of the United Nations Conference on the Human Environment' (15 December 1972) UN Doc A/CONF.48/14/Rev.1.
UNGA Report	François Crépeau, 'Human rights of migrants' (Report by the Special Rapporteur on the human rights of migrants, 13 August 2012) UN Doc A/67/299.
UNGA Report	Human Rights Council, 'Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (Report of the Special Rapporteur, 8 January 2019) UN Doc A/HRC/40/55.
UNGA Report	Human Rights Council, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (Report, 24 December 2012) UN Doc A/HRC/22/43.
UNGA Report	Human Rights Council, 'Report of the Independent Expert on the issues of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox' (Report, 3 February 2015) UN Doc A/HRC/28/61.
UNGA Report	UN General Assembly, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (Report, 15 July 2019) UN Doc A/74/161.

UNGA Resolution	'Promotion of a democratic and equitable international order' (Resolution, 23 January 2014) UN Doc A/RES/68/175.
UNGA Resolution	Human Rights Council, 'Human rights and climate change' (Resolution, March 2008) UN Doc A/HRC/RES/7/23.
UNGA Resolution	Human Rights Council, 'Human rights and climate change' (Resolution, March 2009) UN Doc A/HRC/RES/10/4.
UNGA Resolution	Human Rights Council, 'Human rights and climate change' (Resolution, 17 October 2011) UN Doc A/HRC/RES/18/22.
UNGA Resolution	Human Rights Council, 'Human rights and climate change' (Resolution, 15 July 2014) UN Doc A/HRC/RES/26/27.
UNGA Resolution	Human Rights Council, 'Human rights and climate change' (Resolution, 22 July 2015) UN Doc A/HRC/RES/29/15.
UNGA Resolution	Human Rights Council, 'Human rights and climate change' (Resolution, 18 July 2016) UN Doc A/HRC/RES/32/33.
UNGA Resolution	Human Rights Council, 'Human rights and the environment' (Resolution, 19 April 2012) UN Doc A/HRC/RES/19/10.
UNGA Resolution	UN General Assembly, 'Towards a Global Pact for the Environment' (Resolution, 14 May 2018) UN Doc A/RES/72/277.
UNHCR	António Guterres, 'Climate change, natural disasters and human displacement: a UNHCR perspective' (Policy Paper, UNHCR 23 October 2008).
UNHCR	Guy S. Goodwin-Gill and Jane McAdam, 'UNHCR & Climate Change, Disasters and Displacement' (UNHCR Report, 2017).
UNHCR	Tamer Afifi, Radha Govil, Patrick Sakdapolrak and Koko Warner, 'Climate Change, Vulnerability and Human Mobility: Perspectives of Refugees from the East and Horn of Africa' (UNHCR Report, June 2012).
UNHCR	United Nations High Commissioner for Refugees, 'Global Trends: Forced Displacement in 2018' (Report, 20 June 2019).
UNHCR	Walter Kälin & Nina Schrepfer, 'Protecting People Crossing

	Borders in the Context of Climate Change Normative Gaps and Possible Approaches' (UNHCR, 2012) PPLA/2012/01.
Warsaw International Mechanism for Loss and Damage	UNFCCC, 'Decisions adopted by the Conference of the Parties' (Report of the Conference of the Parties in Warsaw Poland 11-23 November 2013, Decision 2/CP.19, 31 January 2014) UN Doc FCCC/CP/2013/10/Add.1.

Websites:

Platform on Disaster Displacement	<https://disasterdisplacement.org/the-platform/our-response> accessed 1 October 2019.
The Nansen Initiative	<https://www.nanseninitiative.org/secretariat/> accessed 1 October 2019.