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To what extent does international law ensure that historically responsible States are held liable for the consequences of climate change in Developing States?

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Glossary of acronyms

AOSIS	Alliance of Small Island States
CBDR	Common But Differentiated Responsibilities
CESCR	Covenant on Economic, Cultural and Social Rights
COP	Conference of the Parties
CRC	Convention on the Rights of the Child
DRR	Disaster Risk Reduction
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	General Comment
GCF	Green Climate Fund
GHG	Greenhouse Gases
GPID	Guiding Principles on Internal Displacement
ICJ	International Court of Justice
IPCC	Intergovernmental Panel on Climate Change
NGO	Non-governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
SIDS	Small Island Developing States
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
WIM	Warsaw International Mechanism

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Sammendrag

Klimaforandringene fører til ekstreme konsekvenser, spesielt for mennesker boende i fattige og sårbare områder. Denne masteroppgaven ser på hvordan internasjonal rett kan brukes til å holde utviklede stater ansvarlig for deres historiske utslipp av drivhusgasser, særlig CO_2. Disse historiske utslippene har ført til endringer i klimaet som er svært skadelig for flere hundre millioner mennesker. Blant annet fører klimaendringene til at havnivået stiger, noe som medfører at mennesker må flukte fra sine hjem, sin kultur og sine liv. På grunn av de massive utslippene av drivhusgasser, har antallet naturkatastrofer de siste 30 årene doblet seg og tar livet av 400.000 mennesker årlig. De alvorlige konsekvensene av klimaforandringer krever full oppmerksomhet av det internasjonale samfunnet. Klimaet er tross alt definert som «a common concern of humankind», og bør løses i fellesskap.

Artikkel 8 i Parisavtalen handler om tap og skade som følge av klimaendringer, både fra naturkatastrofer og begivenheter for skjer over tid, for eksempel stigning i havnivået. Artikkel 8 symboliserer et viktig steg i klimaforhandlingene, og på mange måter en seier for de mest sårbare statene og deres innbyggere. Imidlertid skaper artikkel 8 ingen grunnlag for ansvar eller erstatning for historiske ansvarlige stater. Denne masteroppgaven bruker derfor flere artikler hentet fra de internasjonale konvensjonene, miljørettslige prinsipper og etiske betraktninger for å presentere hvordan erstatning av skader fra klimaforandringer bør etableres. Selv om det er rettferdig at de som har ansvar for klimaforandringene skal holdes ansvarlig for kostnadene, er det flere praktiske utfordringer som gjør seg gjeldende når vi taler om ansvarliggjøring av stater. For det første vil det være nærmest umulig å bevise en nøyaktig årsakssammenheng mellom aktiviteten og skaden. For det annet nyter stater godt av sin suverenitet i internasjonal rett. Dermed er det svært krevende å holde stater ansvarlig for de skadene som deres utslipp fører til.

Denne masteroppgaven belyser også hvor relevant menneskerettigheter er for klimaforandringene. Klimaforandringene fører til krenkelse på flere grunnleggende menneskerettigheter. Retten til liv, utdanning, kultur, familieliv, rent vann, tilstrekkelige sanitærforhold og eiendom er bare noen av de menneskerettighetene som blir sterkt påvirket av endringer i klimaet. At så mange mennesker lever i nød på grunn av klimaendringene er et sterkt argument for å kreve ansvarliggjøring av stater som har bidratt mest til endringene. En økning av søksmål mot myndigheter er å regne som en positiv utvikling, og denne masteroppgaven ser opp til noen dommer av betydning for problemstillingen.

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1 Introduction

1.1 Climate Change – views on the problem

The lack of sufficient efforts by States in the past decades means that the world's climatic system develops dramatically to the worse. In 2014, the IPCC stated that the *"CO_2 emissions from fossil fuel combustion and industrial processes contributed about 78 % of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the period 2000 – 2010"*[1]. In 2018, the overall emission of CO_2 reached over 400 parts per million (ppm)[2]. The significant increase in GHG emissions into the atmosphere is resulting in global warming and devastating impacts for humans, especially those living in poor and vulnerable areas. As an illustration, global warming is causing sea-level rise and that is a tremendous problem especially for Small Islands Developing States (SIDS). Moreover, climate change has increased the number of extreme events, such as earthquakes, tsunamis and cyclones. These events have made huge impacts in people's lives, as a natural disaster puts houses in ruins, reducing the access to clean water, food and sanitation, and most importantly, kills many innocent people.

The international community was already concerned about the effects of global warming when the UNFCCC was adopted in 1992. In its preamble, the convention stated with concern that *"human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind"*[3]. For more than 25 years, the international community has been concerned about the adverse effects that climate change will have on humankind. The UNFCCC

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[1] IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp. Page 5-6

[2] Hannah Ritchie and Max Roser, 'CO_2 and Greenhouse Gas Emissions' [2017] Our World in Data <https://ourworldindata.org/co2-and-other-greenhouse-gas-emissions> accessed 1 April 2020.

[3] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)'.

defines adverse effects in Article 1 (1) as *"changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare"*[4]. Nevertheless, GHG emissions have increased significantly the last decades without the international community paying sufficient attention to how the cost of the effects should be met by as a unity.

This thesis will look upon how people in developing countries are particularly exposed for the adverse effects of climate change. The research question is intended to be used for giving developing countries, and their citizens, some legal tools and mechanisms to achieve climate justice for their losses. Moreover, this thesis will be studying how international law can be used to hold historically responsible States, who have gained massively benefits from their polluting activities, liable for the consequences of climate change.

The climate change problem can most certainly be understood in many different ways – as a technological, scientific or even religious problem. However, there are three perspectives that have dominated the international policy response to climate change. These perspectives are (i) climate change as an *environmental* problem, (ii) climate change as an *economic* problem, and (iii) climate change as an *ethical* problem[5]. In the following, this author will demonstrate these three ways of seeing the problem of climate change.

1.1.1 Environmental problem

The most obvious perspective on climate change is to see it as an environmental problem. Here, the goal for international climate policy is to prevent dangerous and serious anthropogenic climate change by mainly reducing net GHG emissions. Given the persistence of CO_2 in the atmosphere,

[4] ibid.

[5] 'Sand PH, "International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford Uni'. 2017, page. 4-5

the goal of preventing serious and dangerous climate change will eventually require completely eliminating net emissions, as the Paris Agreement recognizes[6].

1.1.2 Economic problem

Second, climate change can also be seen as an economic problem. Through this perspective, the goal for the climate policy is to achieve the most "efficient outcome" – that is, the outcome with the highest net benefits[7]. The main intention here is to reduce emissions only as long as the benefits of further reductions outweigh the costs. Moreover, this way of seeing climate change is also an efficient way of contributing to sustainable development. Using the current resources and mechanisms in the most cost-effective manner, will benefit both present and future generations. In general, a policy is cost-effective if it equalizes the marginal cost of compliance across time and place. If GHG emission can be reduced more cheaply in the future than now, or by one country more cheaply than another, then it may be possible to achieve the same climate benefits at a lower cost by shifting some of the pollution reductions into the future, or to countries with lower mitigation costs[8]. The Kyoto Protocol[9] serves as a good example when it comes to cost-effectiveness. The Kyoto Protocol contains marked mechanisms for reducing GHG emissions in the most cost-effective way. These are the Clean Development Mechanism (art. 12), Joint Implementation (art. 6) and Emissions Trading (art. 17). Together these mechanisms contribute to reduce the emissions' cost in an effective way by helping the countries with obligations, meaning the developed countries in Annex I of the Protocol, to meet their goals.

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[6] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21'.

[7] 'Sand PH, "International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford Uni' (n 5). 2017, page 6

[8] ibid. page. 7

[9] 'Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 11 December 1997, Entered into Force 16 February 2005)'.

1.1.3 Ethical problem

The third perspective on the climate change problem, is that of equity and climate justice[10]. This way of seeing climate change problems focuses on issues of distributive and corrective justice, including how do we equitably distribute the burdens of mitigating and adapting to climate change, and who, if anyone, is ethically responsible for the damages caused by climate change[11]. In general, there is little consensus about what climate justice and equity entail. Some accounts focus on *historical responsibility*, others on *duties to future generations*, others on a fair division of burdens based on *current capabilities*, and yet others on the egalitarian principle that *people have an equal right to the "atmospheric space"*[12].

1.1.3.1 Historical responsibilities

First, historical responsibility is driven by the thought that the countries that have emitted the most GHG into the atmosphere, need to take most of the responsibility when looking for ways to compensate the damages caused by climate change. The UNFCCC is clear when mentioning the aspect of historical responsibility when the preamble *"[n]oting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs"*[13]. This reference by the UNFCCC confirms clearly, and acknowledging, that developed countries are historically responsible for the emissions of GHG. At the same time, this reference point to the raising challenge with developing countries now starting to grow their GHG emissions, to meet their social and development needs. Developing countries wants to establish the same standard of living as in many European countries, and the only recipe they know is industrialization.

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[10] 'Sand PH, "International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford Uni' (n 5). page, 7

[11] ibid. page, 7

[12] Ibid.

[13] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

The carrying capacity of the planet will most likely get exceeded if developing countries takes the same path towards growth in their economy.

This author thinks the historical responsibility approach is a fair and adequate way of perhaps being able to put some liability and responsibility on historically responsible countries. The main reason for this view is the economic growth that especially developed countries has gained as a result of many years with industrialisation and extremely polluting activities. Therefore, it can be argued that if any moral and ethics should be some of the foundation for an international climate fund. The developed countries that have got so much out of their activities, should pay the most for the damages caused by climate change.

Unfortunately, there is a notion of developed countries *pulling up the ladder* after climbing up. Most likely, *pulling up the ladder* is necessary when considering how we can collectively reduce the global GHG in the atmosphere. At the end of the day, we only have one planet to live on, and the principle of solidarity among us humans should be a key principle going forward. This argument touches upon an important topic, and that is the discussion relating to climate justice. The focus on and the practice of climate justice, will be discussed later in this thesis.

1.1.3.2 Future generations

Second, some accounts focus on the duties of future generations. This approach and focus include the principles of inter-/ and intragenerational equity and the concept of sustainable development. Also, the principle of solidarity makes its way into this discussion. There are some disagreements relating to the precise definition of "future generations". Most concerning if the future generations only include the children and youth of today, or if it also includes the unborn. The UNFCCC preamble does not give a definition when it says that the convention is *"determined to protect the climate system for present and future generations"*[14]. This author thinks the future generations need to include also the unborn. The main reason for this argument is that the coming generations also need to feed off this planet's resources and have an adequate standard of living. If the global warming continues to increase, leaving many areas uninhabitable due to sea-level rise, drought and

[14] ibid.

lack of clean water, the yet unborn will be immensely affected.

An example that supports this interpretation of future generations to also include the unborn, is the Colombian case *Future Generations v. Ministry of the Environment and Others*[15]. 25 youth plaintiffs between the ages of 7 and 26, have sued several bodies within the Colombian government, Colombian municipalities, and a number of corporations, to enforce their claimed rights to a healthy environment, life, health, food, and water. The plaintiffs allege that climate change, along with the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Colombian Amazon by the year 2020, (as agreed under the Paris Agreement and the National Development Plan 2014-2018), threatens the plaintiffs' fundamental rights[16]. The Supreme Court of Colombia states that *"it can be preached, that the fundamental rights of life, health, the minimum subsistence, freedom and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children* ***or for future generation****. Neither can the existence of the family, society or the state itself be guaranteed*[17]. By separating between the youth and children of today, and future generations, the Court is quite clearly giving reasons to assume that the future generations include the yet unborn.

1.1.3.3 Current capabilities

Third, some accounts focus on current capabilities. This can absolutely qualify as a logical argument in the question of who should take most of the costs for damages due to climate change impacts. For example, both China and India are per definition developing countries[18], and can therefore push the main responsibility over to the strict developed countries that have historically gained the most out of emitting GHG, using the argument of historical responsibility. However, China and India are experiencing significant economic growth due to their increase in polluting

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[15] 'Future Generations v. Ministry of the Environment and Others' (*Climate Change Litigation*) <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/> accessed 22 May 2020.

[16] ibid.

[17] ibid. page, 13

[18] 'List of developing countries | ISGE 2018' <https://isge2018.isgesociety.com/registration/list-of-developing-countries/> accessed 22 May 2020.

activities, and therefore their current capabilities to take some responsibility is absolutely present.

This author will warn actors within international climate change law to make this discussion about a strict distinction between historical and current responsibility and capability. No matter how we see it, the overall emission of GHG needs to be dramatically reduced globally. The developed countries cannot continue to push the argument of current responsibility over to for example China and India. Likewise, China and India cannot make exclusively use of the argument regarding historical responsibility. We need to come together in these critical times, and no matter where in the world the reduction happens and who takes responsibility of paying compensation for damages due to climate change, the planet will benefit from such measures. The above-mentioned marked mechanisms in the Kyoto Protocol are based on this logical idea.

1.1.3.4 Equal right to the atmospheric space

In the following section, this author will elaborate briefly on the final focus mentioned above, and that is to make use of the principle that people have an equal right to the atmospheric space. The UNFCCC notes that the earth's climate is a common concern of humankind[19]. As a starting point, the atmosphere and high seas are a common good. In these times, we need to shift the mentality from a common good, to a common concern. This final focus gives rise to a discussion that comes from the most basic argument, namely that we are all human beings with only one planet to feed off. Therefore, we need to take equal responsibility to develop practices and measures to reduce activities that are damaging our common goods. When something is defined as a common concern, this author would say that it also automatically leads to common responsibility. This argument can retrieve its justification from legal text on co-ownership. If two or more people own an object together with equally right to use that this, they also have the shared responsibility of taking good care of the object.

[19] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

1.1.4 Conclusion

After presenting the different ways of seeing the climate change problem, this author is most supportive of seeing it as an ethical problem. Moreover, this perspective is best suited for the research topic of this thesis. The ethical perspective, together with the historical responsibility perspective, represents the best chances of reaching justice within the international environmental community. There are mainly two reasons for that. First of all, there is no doubt that developed countries have emitted the overwhelming majority of GHG into the atmosphere, creating the adverse changes in the climatic system. It is only fair and reasonable that the actors causing a damage, also should be held liable for that damage. This is a quite logical argument which can be found in national tort laws. Second, the developed countries have not only emitted a huge amount of GHG, developed countries have also exclusively received the benefits from their emitting activities. This include mainly the quality of welfare in Western European countries. Norway could serve as an example in this matter. The government's total net cash flow from the petroleum industry is estimated to NOK 245 billion in 2020[20]. The industry plays a vital and decisive role in the Norwegian economy and in financing of the Norwegian welfare state.

This author wonders whether the environmental, economic and ethical problems should be seen strictly separate, or if they in a way work together. Based on the inner context between these three, they should be seen as related. When environmental damages occur, the damages should be repaired in the most cost-effective way and paid by the historically responsible states.

1.2 Thesis overview

1.2.1 Problem formulation

The problem formulation in this master thesis is: *"To what extent does international law ensure that historically responsible States are held liable for the consequences of climate change in Developing States?"*. This problem formulation intends to present the injustice for people living in SIDS or in developing States, when thinking about who have gained the most benefits from GHG emissions

[20] 'The Government's Revenues' (*Norwegianpetroleum.no*) <https://www.norskpetroleum.no/en/economy/governments-revenues/> accessed 18 April 2020.

during the last decades, and who is suffering from the adverse impacts of climate change. The adverse effects of climate change are particularly happening in SIDS and other developing countries, with increase in for example extreme weather events, sea level rise and droughts[21]. These events are forcing people in developing countries to leave their homes, livelihoods and culture. In the extension of this, these areas suffer from the lack of food, water, sanitation, housing, education, etc. Moreover, climate change, and especially extreme weather events, kills hundreds of thousands every year[22].

This thesis will evaluate if the current international regulations, and the international community as a whole, can provide climate justice for developing countries. Can populations in developing countries seek justice for their massive losses by using international law? Is there a way for developing countries to receive compensation for damages occurring in their territory due to climate change? Does international law provide mechanisms for making developed countries legally liable for the adverse effects of climate change? With a markedly increase in the amount of extreme weather events, and sea-level rise making populations in SIDS move from their heritage, these questions have never been more relevant than they are at this point in time.

1.2.2 Delimitation

The adverse effects of climate change affect mainly the poor and vulnerable persons in SIDS and other developing countries. However, developed countries and their citizens experiences some consequences of climate change, such as higher temperatures, drought and natural disasters. This thesis will not elaborate on the impacts in developed countries. The thesis is about justice for the people located in SIDS and developing countries, who have contributed the least to climate change.

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[21] Keith Wade, 'How Climate Change Will Impact Developed and Developing Countries - US - Schroders' (*Climate change and the global economy: regional effects*) <https://www.schroders.com/en/us/insights/economic-views/climate-change-and-the-global-economy-regional-effects/> accessed 16 May 2020.

[22] 'Newsweek: Climate Change Kills 400,000 a Year, New Report Reveals - DARA' <https://daraint.org/2013/02/11/4385/newsweek-climate-change-kills-400000-a-year-new-report-reveals/> accessed 16 May 2020.

The climate change problem is not only affecting humans and our livelihoods. Species, flora and fauna, habitats for animals and the environment itself are suffering devastating negative impacts due to climate change. For example, when the Amazonas rainforest wildfires occurred in large numbers in 2019, one of the main causes was global warming and the significant increase in longer dry seasons and higher temperatures. Even though this causes severe damages to the environment itself, and the lives of species, this thesis will not focus on these challenges.

Due to limited scope, this thesis will have some limitations. First of all, this thesis will not elaborate on how States have implemented the international conventions. The thesis will demonstrate what the law contains, and present ways of using this in the enforcement towards climate justice. Second, the questions on insurance of Loss and Damage will not be focused upon in this thesis. Third, this thesis will not elaborate in detail the enormous impacts that climate change has on migration. Climate change leads to millions on people migration every year and is certainly a negative consequence of climate change. However, due to limited scope, the challenge of displacement will only be briefly analysed.

1.2.3 Methodology

The purpose of this thesis is to demonstrate the global injustice as a result of climate change. Throughout the thesis, this author has taken the position of poor and vulnerable developing states when argues for climate justice. Using international conventions and environmental principles in describing the existing legal framework, this author presents them as descriptive. When elaborating on the international conventions and environmental principles, this author makes use of normative ethics assessments. In these assessments, the conventions and principles are being analysed for giving the fairest solution, based on the differences in historically emissions of GHG. When conventions and principles make recommendations to developed States, this author elaborates on the best options for action for those to whom the recommendations are directed. Such recommendations are of a normative character and prescribe how this author deems that those to whom the recommendations are directed *should* act.

This author uses some case law for presenting how the standing within the research question is today. Case law is important because it contributes to understanding how the conventions and principles in international law should be understood. Moreover, this thesis includes content from a

lot of different literature and articles regarding climate change and human rights. The content from the literature and articles are carefully selected to support the ethical assessments of the research question. When arguing for climate justice, this author also refers to legal theory when illustrating and emphasizing key points.

2 International legal framework governing States' response to Climate Change

2.1 Introduction

In the following, this chapter will shed some light on some different legal frameworks concerning the States' response to climate change. First and foremost, the chapter will start with presenting some relevant articles from both the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. For the sake of the length on this thesis, only some general and basic articles will be presented here, to create a platform for further considerations. Moreover, this chapter will also bring up some relevant environmental law principles which can offer some opportunities to create a debate concerning the responsibility for developed States. Even though environmental law principles are not strictly binding in their legal status, they most certainly represent important tools for interpreting laws and regulations. The principles are important to have in mind when reading the different convention and the regulations and should have some importance if there is doubt about the justice in certain cases.

2.2 Conventions

2.2.1 United Nations Framework Convention on Climate Change

The UNFCCC established the governance structure for the international climate regime, reflecting its role as a framework convention[23]. A framework convention describes a type of legally binding treaty which establishes broader commitments for its parties and leaves the setting of specific

[23] 'Sand PH, "International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford Uni' (n 5). page, 118

targets either to subsequent more detailed agreements (usually protocols) or to national legislation[24]. In essence, a framework convention serves as an umbrella document which lays down the principles, objectives and the rules of governance of the treaty regime[25].

Concerning how developing countries are mentioned in the UNFCCC, there are some provisions in the preamble worth mentioning. Among other things, the preamble addresses developing country concerns by linking the level of response measures to different responsibilities and respective capabilities of the parties *(recital 6)*, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty *(recital 21)* and recognizing that developing countries in particular need access to resources in order to achieve sustainable social and economic development *(recital 22)*[26].

Article 3 (2) of the UNFCCC states that *"the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration*[27] This article acknowledging the fact that the vulnerable developing countries takes the majority of negative consequences from change in the climatic system. Moreover, the article makes an unfortunate use of the term "should", as many international articles do. There is no specific obligation arising from the article, only that it recommends developed countries to consider the situation of vulnerable developing countries. Vulnerability may be regarded as the propensity or predisposition to be adversely affected by climate disasters and must be viewed in the context of a wide range of factors including diverse historical, social, economic, political, cultural, institutional,

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[24] 'Framework Convention Concept.Pdf' <https://www.unece.org/fileadmin/DAM/hlm/sessions/docs2011/informal.notice.5.pdf> accessed 19 May 2020.

[25] Ibid.

[26] Peter H Sand, 'International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford University Press, 2017. Pp. Xxxix, 400. Index. $105, £80.00.' (2017) 111 American Journal of International Law 1074. page 124-125

[27] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

natural resource and environmental conditions[28]. The UNFCCC was already adopted in 1992, and this author do not think that a lot of progress have been made in taking the situation of vulnerable developing countries into mind.

Article 3 (5) states that *"the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change"*[29]. Once again, the use of the term "should" in dominant and established a shadow on this article. It is not legally binding and creates no firm obligations for developed countries to cooperate and contribute to an international economic system. The Green Climate Fund (GCF), which was set up by the UNFCCC in 2010, is the world's largest dedicated fund helping developing countries reduce their greenhouse gas emissions and enhance their ability to respond to climate change[30]. This fund, established 18 years after the adoption of UNFCCC, symbolises a step forward in the right direction. With that said, the Fund are not efficient when talking about financing Loss and Damage or respond to climate disasters. These topics will be discussed later.

Article 4 of the UNFCCC includes binding obligations and commitments for the contracting Parties to the convention. Article 4 (2) (a) states that *"the developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following; each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention*[31]. By using the term

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[28] 'Lyster R, Climate Justice and Disaster Law (Cambridge University Press 2016)'. page, 135

[29] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

[30] Green Climate Fund, 'About GCF' (*Green Climate Fund*, 12 February 2020) <https://www.greenclimate.fund/about> accessed 30 April 2020.

[31] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

"shall", this article is legally binding for the contracting developed country Parties. Their obligation is to reduce their emissions of GHG, and by doing so, demonstrating their historical responsibility by taking the lead. Even though this article looks good on paper, the reality is something else. In 2019, the world's CO_2 concentration exceeded over 415 ppm for the first time in human history[32]. Therefore, even though the article is legally binding, the emissions of GHG have increased for a long time since the introduction of the article.

The last article this author wants to bring up when talking about how developing countries can reach climate justice within UNFCCC, is article 4 (4). This article states that the developed country Parties and other developed Parties included in Annex II *"shall assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects"*[33]. By using the term "shall", this articles clearly indicates and gives rise to an obligation for developed countries, and not a recommendation. This article should be used by developing countries to seek help in financing measures when adapting to the adverse effects of climate change. For example, if developing countries need to build some massive seawalls for protecting their land and citizens as a result of the sea level drastically rising, developed parties should help finance the wall. Even though this article is quite clear in that developed States shall help developing States in adaptation, the reality is somewhat different. As will be discussed later, Kiribati bought land on Fiji in 2014 because of the sea-level rising. No compensation or financial help from the developed country Parties has been made.

2.2.2 The Paris Agreement

The Paris Agreement from 2015 set an ambitious direction for the climate regime and complements this direction with a set of common core obligations for all countries, including legally binding obligations of conduct in relation to parties' nationally determined mitigation contributions, and an

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[32] Peter Dockrill, 'It's Official: Atmospheric CO2 Just Exceeded 415 Ppm For The First Time in Human History' (*ScienceAlert*) <https://www.sciencealert.com/it-s-official-atmospheric-co2-just-exceeded-415-ppm-for-first-time-in-human-history> accessed 30 April 2020.

[33] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3). Article 4 (4)

expectation of progression over time[34]. In the following, this thesis will present and elaborate the relevant articles of the Paris Agreement when thinking of placing liability on historically responsible developed countries.

The preamble of the Paris Agreement represents markedly progress in international environmental law when talking about developing countries' special needs. Recital 5 of the preamble recognizing the specific need and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change[35]. Moreover, recital 11 symbolises a massive acknowledgment on the connection between climate change law and implications on human rights. The preamble of the Paris Agreement acknowledging that climate change is a common concern of humankind, Parties should and when taking action to address climate change, *respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrant and people in vulnerable situations, and the right to development, as well as intergenerational equity*[36]. When seeing how many human rights that are being violated due to dramatically changes in the climatic system, this reference by the Paris Agreement should be highlighted even more than it does today. This author will describe in detail which human rights are being affected in chapter 3.

The Paris Agreement also have in place some articles and tools to shine a light on the differences it is between some country Parties. An example is Article 2 which states *"that this Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances"*[37]. This is the principle of Common But Differentiated Responsibilities and Capabilities (CBDR), which will be presented more in detail under the elaboration on environmental law principles. Nevertheless, it is relevant to bring this principle up in this context as well. Since the principle is written down in the statutory objective (art. 2), the Paris Agreement needs to be interpreted in the light of this principle. A

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[34] Sand (n 26). Page, 210

[35] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Recital 5

[36] ibid. Recital 11

[37] ibid. Article 2 (2)

principle that acknowledging the differences between developed and developing countries and aims to put more responsibility on developed countries because of their capabilities compared with the developing country Parties.

Article 4 symbolizes how developed countries are stressed, rightfully so, to take the lead when it comes to reduces emissions. The article states that *"developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets"*[38]. By using the term "continue", the article indicated that this is an extension of an already existing obligation, which can be found in the UNFCCC[39]. Unfortunately, article 4 of the Paris Agreement states that developed countries *"should"* take the lead, implicating that it is not a strict obligation, but more of a recommendation based on developed countries' willingness.

Furthermore, article 4 states that support *"shall be provided to developing country Parties for the implementation of this Article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions"*[40]. This author thinks that article 4 (5), if followed sufficient in practice, would be extremely beneficiary for the whole international community. With more support to developing countries, these countries can allow themselves higher ambitions as well. As a result, the global reduction of GHG would most likely become much more efficient.

In the lead-up to Paris, finance was expected to be one of the most debated and difficult topics to resolve, given the seemingly unbridgeable gap between developing countries, which sought new financial commitments in the Paris Agreement, and developed countries, which insisted that they could not accept any new commitments and sought to broaden the donor pool. Article 9 (1) of the Paris Agreement reaffirms that "*developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of*

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[38] ibid. Article 4 (4)

[39] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3). Article 4 (2) (a)

[40] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Article 4 (5)

their existing obligations under the Convention"[41]. The finance article of the Paris Agreement will be analysed when elaborating on responsibility of States and compensation for Loss and Damages due to climate change.

2.3 Environmental Law Principles

2.3.1 No-harm principle

The classic formulation of the no-harm principle in an environmental context, appears in the *Trail Smelter* case *(United States v. Canada)*[42]. The Tribunal stated that *"no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"*[43].

Principle 21 of the Stockholm Declaration describes that "*[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*[44]. It is important to note that Principle 21 went further than the simple idea of transboundary harm, referring also to the duty not to cause damage *"of areas beyond the limits of national jurisdiction"*. The no-harm principle indicates that every State has the responsibility to think globally when exercising their sovereign right to exploit natural resources within their territory. This extension opened way for a more comprehensive notion of prevention.

The no-harm principle within international environmental law is relevant for developing countries to make use of because the activities coming from developed countries, is causing harm to the environment itself with ice melting in the Artic, and is causing harm on other States with the sea-

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[41] ibid.

[42] '1905-1982.Pdf' <https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf> accessed 6 March 2020.

[43] ibid. supra footnote 14, page. 1965

[44] 'United Nations Conference on the Human Environment (Adopted 15 December 1972) A/RES/2994'.

level rising and extreme weather events occurring much more frequently than before.

2.3.2 The Principle of Prevention

Principle 21 of the Stockholm Declaration symbolises the current formulation of the principle of prevention in the environmental context. As already noted, the content of Principle 21 was both a reflection of general international law *(re-affirming the no-harm principle)* and an attempt at progressive development of this area of law *(introducing the responsibility of States not to cause any damage to places outside State jurisdiction)*[45]. Today, the understanding of the principle of prevention can be presented in three different ways. First, it contains a general duty not only to refrain from causing significant damage to the environment, but also to pro-actively take measures to prevent such damage as well as to ensure that such measures are effectively implemented. Pro-active prevention means that there should be paid more attention to risk minimisation rather than reparation[46]. Second, the principle of prevention calls for a first procedural extension in the form of a duty to cooperation, particularly through notification and consultation. Lastly, a second procedural extension in the form of a requirement to conduct an environmental impact assessment where the proposed activity is likely to have a significant adverse impact[47].

The principle of prevention should be a well-suited argument for the developing countries to prevent or hinder the developed countries to start up new polluting activities such as searching for new oil or setting up dangerous industrial facilities. By making use of environmental impacts assessments, developed countries and their actors should see how the new planned activity will contribute to significant more emission of GHG, and based on scientific results, be obligated to take reasonable decision that prevent damage being caused. The point of scientific result brings this author to the next environmental law principle.

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[45] 'Dupuy P-M and Viñuales JE, International Environmental Law (2nd EdnCambridge University Press 2018)'. page. 66

[46] ibid.

[47] Ibid. page, 69

2.3.3 The Principle of Precaution

The underlying idea of this principle is mainly that the lack of scientific certainty about the actual or potential effects of an activity, must not prevent States from taking appropriate measures when such effects may be serious or irreversible. This principle got increasing attention and weight from 1990 and onwards. The 1992 Rio Declaration on Environment and Development Principle 15 states that *"in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a season for postponing cost-effective measures to prevent environmental degradation"*[48].

Furthermore, this principle is mentioned in the UNFCCC. Article 3 (3) of the UNFCCC provides that the Parties *"should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures"*[49]. This formulation raises some difficult issues relating to interpretation, such as the determination of the concepts "full scientific certainty", "serious or irreversible damage", and the distinction between "duties" of States "according to their capabilities". Regarding the "full scientific certainty", this author is of the opinion that it would be necessary to take measures when there is a reasonable possibility for that measure to help the situation in a sufficient degree

There is no doubt about the importance of this principle, and moreover, in different courts and tribunals the principle of precaution has been recognized. As an illustration, the European Court of Human Rights (ECtHR) has stated that the importance of the precautionary principle, which was intended to apply in order to ensure a level of high protection of health, the safety of consumers and the environment in all Community activities[50].

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[48] 'United Nations Rio Declaration on Environment and Development (Adopted 14 June 1994) A/CONF.151/26'.

[49] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

[50] Tatar v. Romania, ECtHR Application No. 67021/01, Judgement (27 January 2006, Final 6 July 2009) para. 120

The Urgenda-case symbolises a landmark decision within disputes relating to environmental damages, human rights and the responsibility of a State to reduce their GHG emissions. Urgenda is an NGO that took the Dutch government to court, arguing that the government does not fulfil their obligations to reduce the GHG emissions within the European Union community and the Paris Agreement. The Court of Appeal and the Supreme Court of the Netherlands gave all their support to Urgenda and ruled in favour of the organisation. The Court of Appeal made an interesting assessment of the principle of precaution. The Court stated that *"the circumstances that full scientific certainty regarding the efficacy of the ordered reduction scenario is lacking therefore does not mean that the State is entitled to refrain from taking further measures. High plausibility, as described above, suffices"*[51]. The Court concludes that if there is a high plausibility for damage, it is sufficient to take action for reducing the risk of irreversible and/or serious damage.

The precautionary principle has gained some more weight after the scientific research and reports delivered by the IPCC. The IPCC gives quite clear scenarios that is likely to happen in the future, and which effect and consequences these scenarios will have. For example, in 2014, the IPCC stated that *"mitigation scenarios reaching about 450 to about 500 ppm CO_2eq by 2100 show reduced costs for achieving air quality and energy security objectives, with significant co-benefits for human health, ecosystem impacts, and sufficiency of resources and resilience of the energy system"*[52]. If the global emissions can be controlled and not increase noticeably, this will most likely give significant co-benefits for the human health. This is only one example of why the developing countries should stress the historically responsible States to lower especially their CO_2 emissions, by using the precautionary principle. Even though it is not completely evidenced that the co-benefits will happen, it cannot be used as an excuse to not take appropriate and immediate action.

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[51] 'Urgenda v. The Dutch Government (Urgenda Climate Case) The Court of Appeal - English Translation' <https://www.urgenda.nl/wp-content/uploads/ECLI_NL_GHDHA_2018_2610.pdf> accessed 22 May 2020. para, 63

[52] IPCC, 2014: Summary for Policymakers. In: Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Edenhofer, O., R. Pichs-Madruga, Y. Sokona, E. Farahani, S. Kadner, K. Seyboth, A. Adler, I. Baum, S. Brunner, P. Eickemeier, B. Kriemann, J. Savolainen, S. Schlömer, C. von Stechow, T. Zwickel and J.C. Minx (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. Page, 16

2.3.4 The Polluter-pays Principle

The polluter-pays principle can certainty be understood in more ways than one. At first sight, it can appear as a mere vision of the duty to restore/repair the damage caused to others as applied in an environmental context. However, such a limited understanding would deprive the principle of any autonomous content, given that such duty is well-established in customary international law through both the no-harm and the prevention principles[53].

The Rio Declaration has enshrined this principle in its Principle 16 where it says *"national authorities should endeavour to promote the internalization of environmental costs and the use of economic instrument, taking into account the approach that the polluter should, in principle, bear the cost of the pollution, with due regard to the public interest and without distorting international trade and investment"*[54]. This author finds it quite clear that to establish a causal link between the act and the damage, will often be much easier to prove when talking of local and domestic events. The main reason for that will often be that the legislation domestically is much more precise and detailed. Also, the geographical aspect of this argument is very important. There are extremely challenging to prove that an activity in Germany, caused damages in Bangladesh.

Moving the discussion from local and domestic harm, to international harm, the tone changes quite remarkably. First of all, the geographical argument makes it difficult and challenging to prove the polluter-pays principle on the international arena. How can it be established a causal link between the opening of for example Equinor's new oil platform and the droughts in Africa? Was the GHG emissions from this facility "the final straw" causing the drought? I wonder whether it is possible to make clear evidence in this matter, because the lack of establishing a high plausibility that one polluter has the main responsibility, the polluter-pays principle will have small effect in creating liability for compensation. Second, the legal picture is very different on the international arena than it is on the domestic scene. Domestically, as mentioned above, the question of liability is often

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[53] 'Dupuy P-M and Viñuales JE, International Environmental Law (2nd EdnCambridge University Press 2018)' (n 45). page, 80

[54] ibid. page. 82

regulated clearly within the national legislation regarding liability and compensation of harm. International law is often vague and extremely difficult to enforce.

In general, this principle is very clear when it comes to who should pay for the damages. As this author will present in chapter 4, there are however difficult to prove which facility or activity in a developed country that was the main actor in creating the damages suffered in the developing country. To hold one actor, a State or a company, liable for the damages, seems quite impossible to prove.

This author will therefore suggest moving away from trying to identify one tortfeasor, and instead hold on to the categorization of historically responsible states. Then it is easier to make use of the polluter-pays principle, by pointing to all of these countries as one polluter.

2.3.5 Principle of Common but Differentiated Responsibilities and Respective Capabilities

First articulated in the UNFCCC, this principle represents a departure from the more traditional approach of international agreements, namely, to define a common set of obligations for all Parties. It gives expression to the profound concern relating to equity raised by the challenges of climate change, by providing that climate change commitments of parties should de differentiated, based on their different responsibilities and capabilities. Article 3 of the UNFCCC states that *"the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof".* This principle is also featured in the Kyoto Protocol[55] and in several provisions of the Paris Agreement, although the Paris Agreement contains the qualifier "in light of different national circumstances"[56].

[55] 'Kyoto Protocol to the United Nations Framework Convention on Climate Change (Adopted 11 December 1997, Entered into Force 16 February 2005)' (n 9). Article 10

[56] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Article 2 (2)

Even though there is international support for the principle of CBDR, there is very little agreement and consensus on its rationale, core content, and application in particular situations. With respect to the rationale for differentiation, developing countries have tended to pay special attention to the term "responsibilities", which they understand to be a function of the "historical emissions", whereas some developed countries – the USA, in particular – have focused on the term "capabilities"[57]. If the different historical contributions to the climate change problem provide the bases for differentiation, as developing countries contend, then differentiation will change quite slowly. In contrast, if capabilities provide the basis for differentiation, then a State's obligations could evolve more rapidly, as the State develops and gains greater financial, technological, and administrative capabilities.

This author can absolutely see why the focus on "capability" will serve as the most logical focus nowadays. First of all, current capabilities are based on the situation today, avoiding a scenario where a historical responsible State how have decreased its GNP needs to pay for emissions produced several years ago. Second, the focus on capability is more dynamic in that it always focuses on which States has the greatest capability to take the lead in climate finance and mitigation. On the other hand, this author is convinced that the focus needs to be on "responsibility". The historically responsible States have gained so many benefits in their nation's welfare and economy, that they should also have a legal and moral obligation to pay significant amount of money to climate finance and pay for the Loss and Damage that occurs in developing countries.

In contrast to the explicit categorization of countries seen in the Kyoto Protocol and the UNFCCC annexes, the *self-differentiation approach* in the Paris Agreement allows parties to define their own commitments, tailor these to their own national circumstances, constraints and capacities, and in that way differentiate themselves from each other[58]. The evolution of this approach represented a significant step change in the climate regime, and basically set the tone for a more nuanced

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[57] 'Sand PH, "International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford Uni' (n 5). page, 27

[58] ibid. page, 29

approach to differentiation in the Paris Agreement. Obviously, there is a risk with this approach. State Parties that do not want to take a substantial step towards more responsibility, can in a way make their national circumstances appear less impressive than they are.

The developing countries should, in light of climate justice, stress the developed countries to make higher ambition and acknowledge their responsibilities. This principle confirms how states should have different responsibilities, and the responsibilities within this principle should be determined by historically GHG emissions.

2.4 Conclusion

The legal framework in both the UNFCCC and the Paris Agreement consists of articles that, on paper, looks elegant and is well-suited to be used by developing countries towards more action on climate justice. However, there are unfortunately markedly differences between what looks good on paper, and what is actually happening in practise. Throughout the UNFCCC and the Paris Agreement, the needs of developing countries that are particularly vulnerable to climate change are highly visible in both the preambles and articles. For example, article 4 (4) of the UNFCCC marks that developed countries *shall* help assist developing countries in financing their efforts on adaptation to the adverse effects of climate change[59]. In 2014, the government of Kiribati, a small island developing State bought land on Fiji for 8.77 million USD[60]. Even though this purchase clearly is an adaptation effort, it was no financial compensation or help given from the developed countries. Instead, this became a discussion whether it was an adaptation measure or a more voluntary purchase. This author sees a lot of potential in the articles of both UNFCCC and the Paris Agreement, but their effectiveness depends massively on the willingness and ethical consideration of developed countries.

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[59] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

[60] 'Kiribati's Land Purchase in Fiji: Does It Make Sense?' (*Devpolicy Blog from the Development Policy Centre*, 10 January 2016) <https://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111/> accessed 3 May 2020.

This author thinks the environmental law principles express some good reasonings for holding a historically responsible developed country liable for the adverse effects of climate change. The principles are interconnected in many ways and need to be seen as a whole to achieve liability for developed States. For example, the polluter-pays principle and the no-harm principle lean on each other. If there is harm caused, there is often someone responsible for that harm to happen. Then the main rule should obviously be the polluter-pays principle, if the actors responsible for the harm can be identified. This author thinks the principle of prevention should be given extra attention. As noted above, this principle includes not only a general duty to refrain from causing significant damage, but also to pro-actively take measures to prevent such damage. Today, the scientific data delivered from IPCC on climate change, clearly shows that the emitting activities ongoing in especially developed countries are contributing markedly to the negative development. Knowing about the risk and consequences of their polluting activities, this author thinks developed countries and their emitting companies violate the principle of prevention. The principle of common but differentiated responsibilities and respective capabilities, should be frequently used to illuminate that the developed countries shall take the lead in reducing these activities, to avoid even more devastating effects from climate change.

This chapter has been useful in presenting some legal texts from UNFCCC and the Paris Agreement. Going forward, these articles and principles makes it easier to understand how international law is relevant when elaborating on climate justice and human rights violations. In the following chapters, this thesis will demonstrate the importance of climate justice and how to make efficient claims for the injustice happening in developing countries. Human rights considerations will be a central element when presenting how severe the consequences of climate change are.

3 Legal tools towards Climate Justice for Developing States

3.1 Introduction

In this chapter of the thesis, this author will be more profound and elaborate more on the term climate justice, and which approaches to climate justice that are best suited for success. Moreover, this author will elaborate and discuss on some different human rights that are being violated through the adverse effects on climate change. This chapter will also contain important information on Loss

and Damage, and how that it relevant for developing countries in claiming their climate justice. First, this author will outline what climate justice includes and where to find references to the therm. Second, legal tools such as Loss and Damage and human rights will be presented.

3.2 Climate Justice

3.2.1 Paris Agreement

The term "climate justice" was for the first time in an international environmental convention mentioned in the preamble of the Paris Agreement. Recital 13 states that *"[n]oting the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the* ***importance for some of the concept of "climate justice",*** *when taking action to address climate change"*[61]. This reference to climate justice is in fact very vague, but still marks a positive step by actually being mentions in the Convention. I wonder why the concept, according to recital 13 in the Paris Agreement, is only important *for some*. The majority of the population in the world lives in areas that are particularly vulnerable to the adverse effects of climate change. Moreover, climate justice should also be important for developed countries. If the developed countries can provide financial help to such an extent that less people from developing countries needs to migrate to the developed countries, it will be beneficiary for all. Furthermore, there are a lot of developed countries with businesses and important supply chains ongoing in developing countries. The adverse effects of climate change can therefore also affect the developed countries through this.

Human rights-based approaches have the potential to provide a moral and ethical guide for decision makers, ensuring any actions taken are considered with regard to the individual welfare and rights of those affected. "Guidelines" can act as a safeguard to prevent climate responses violating human rights, and ensure fair outcomes for vulnerable groups, including potential mechanisms for reparations. This author thinks a human rights-based approach includes a more efficient way of reaching climate justice. Human rights, such as the right to life, family life, food and water, can

[61] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Recital 13

more easily be brought before the courts and tribunals.

Article 1 of the Universal Declaration of Human Rights declares that *"all human beings are born equal in dignity and rights"*[62]. This author thinks it is important to remind the international community about this self-evident statement. In the discussion on climate justice, it should definitely serve as a guideline and a moral compass towards acknowledging the liability of historically responsible developed countries to help developing countries financially on their losses and damages due to climate change. Everyone have an equal right to being protected against these adverse effects, no matter where in the world they are.

Climate justice issues are also raised by the fact that the country's most vulnerable to climate change, for example small islands states, have contributed the least to causing it. This is the essence of climate justice. Climate change is likely to unfairly affect developing countries, many of which are acutely vulnerable to the impacts. It is projected that to slow down economic growth, make poverty reduction more difficult, further erode food security, and prolong existing and create new poverty traps[63]. Furthermore, climate change raises issues of inter-generational equity, because most of the burdens will be borne by future generations, especially from developing countries that are likely to have limited resources to adapt.

Mary Robinson once stated that *"[c]limate justice requires that States look beyond their responsibility to their own people, to accept their responsibility to those living beyond their shores, who are particularly vulnerable to climate change. And also, to the generation to come"*[64]. This author is highly supportive of such a statement. Furthermore, the Supreme Court of Colombia notes that *"we are all obliged to stop exclusively thinking about our self-interest. We must consider the way in which our daily actions and behaviours affects society and nature. In the words of Peces-Barbe, we must shift from "private ethics", focused on private goods, to "public ethics", understood as the implementation of moral values that aim to achieve a particular notion of social*

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[62] 'UN General Assembly, Universal Declaration of Human Rights (Adopted 10 December 1948) 217 A (III)'.

[63] IPCC, Climate Change 2014: Impacts, Adaptation and Vulnerability (Cambrigde University Press, 2014) SPM,20

[64] 'COP21.Pdf' <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> accessed 30 March 2020. page, 24

justice"[65]. This author thinks the formulation of moving from private ethics towards public ethics is exceptional. It sounds quite easy to just shift the focus, but obviously it requires a lot of effort and willingness from individuals, organisations, local communities and national governments.

When pointing out that climate justice is dependent on States looking beyond their responsibility to their own people, Mary Robinson indicates that we need to go from private ethics towards public ethics, as mentioned in the Colombian climate case[66]. This author agrees with the fact that climate justice is very much depending on the historically responsible countries taking action on own initiative and helps the developing countries in international negotiations on especially Loss and Damage, and compensation for the destructions the climate change is causing.

The cost of adaptation in developing countries is increasing, strengthening the need for immediate and enhanced mitigation action, or to get compensation for this significant amount of money. Sector, national and global studies show that adaptation cost increase under higher emissions scenario. This reinforces the notion that deep mitigation actions are the best insurance against rapidly increasing adaptation cost and the potential limits of adaptation[67]. Today, developing countries already face an adaptation finance gap. This gap is huge and also likely to grow substantially over the next decades, unless significant progress is made to secure additional and new finance for adaptation[68].

Many multilateral agencies confirm that *"the world has recently witnessed a series of weather events so extreme that they are at the limits of modern human experience"*[69] and are undercutting development efforts in communities that are already poor and vulnerable[70]. The impacts of these

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[65] 'Future Generations v. Ministry of the Environment and Others' (n 15). page, 18

[66] ibid.

[67] UNEP 2016. The Adaptation Finance Gap Report 2016. United Nations Environment Programme (UNEP), Nairobi, page xiii

[68] Ibid. page, xiv

[69] 'World_resources_report_2010-2011.Pdf' <http://pdf.wri.org/world_resources_report_2010-2011.pdf> accessed 17 March 2020. page, 13

[70] ibid. page, 29

events are being felt strongly in developed economies as well, while the slow onset disasters of drought and desertification in various regions of the world exacerbate poverty, conflict and migration. Indeed, the Parties to the UNFCCC themselves acknowledge that neither their mitigation efforts not adaptation strategies will effectively ward off all of the impacts of climate change. Consequently, the WIM has been established to try to protect those developing countries most impacted by climate change. The devastating impacts of climate disasters seriously undermine development efforts in developing countries, while also wreaking havoc on peoples' lives in developed countries, especially those who are already vulnerable.

3.2.2 Approaches to Climate Justice

In the following, this author will present some approaches to climate justice and elaborate on how these can be used to enhance action on this topic.

3.2.2.1 The Capability Approach

The Capability Approach is important for two reasons. First, it resonates tremendously good with the well-known fact that climate disasters fundamentally destroy and undermine capabilities unless vulnerability and exposure are reduced, and resilience building is actively pursued. Even then, extensive uncompensated economic and non-economic losses are likely to exist in a significant degree. The capacity of developed countries to respond to the challenge of climate disasters depends primarily on the political will of political leaders to embrace climate science and engage in a comprehensive program of prevention; response; recovery; rehabilitation and reconstruction; and compensation[71]. In developing countries, the capacity to respond to disasters depends largely on having the financial resources to engage in adaptation and disaster risk reduction activities, while compensation remains a significant difficulty[72].

Invoking the Capability Approach to climate justice is especially justified when one considers the fact that the capacity to manage risks and adapt to change is unevenly distributed within and across

[71] 'Lyster R, Climate Justice and Disaster Law (Cambridge University Press 2016)' (n 28). page, 106

[72] ibid.

nations, regions, communities and households. When disasters strike, the poor quickly exhaust limited resources, further undermining household sustainability. In the long run, this reduces capital and increases hazard exposure or vulnerability, while the poverty and vulnerability trap renders recovery to pre-disaster levels of well-being increasingly difficult[73].

3.2.2.2 The Contribution to the Problem Approach

The contribution to the problem approach to climate justice is a very familiar approach given the incorporation of the polluter-pays principle into modern environmental law by way of Principle 16 in the Rio Declaration[74]. The idea is that countries should contribute to the costs, in proportion to their share of global cumulative greenhouse emissions, to manage climate change. As the CBDR principle insists, developed countries have an ethical responsibility to reduce their emissions given their ongoing and cumulative emissions[75]. This approach is based on the same thoughts as the historical responsibility of developed countries. Those who have directly caused the damage or played a decisive role in why the damages occurs, should be held liable. Also, the international environmental law principle of polluter-pays, are based on the fact that those who have contributed to the harm must pay for the damages. Therefore, this author is highly supportive of this approach to climate justice, because the essence of climate justice is that those who have contributed the least are getting the most severe negative consequences.

3.2.2.3 The Ability to Pay Approach

The "ability to pay" principle leans on the CBDR principle when claiming that developed countries have greater wealth and capacity to cover the mitigation and adaption cost of climate change. This approach is indifferent as to contribution to the problem and focuses only on who can rectify the harm, and indeed there may be remedially responsible states without causal responsibility and states without remedial responsibility that are nevertheless casually responsible. It has been suggested that the ability to pay approach should not focus on resources, but rather on the excess capacity of

[73] ibid. page, 139

[74] ibid. page, 126

[75] ibid. page, 126-127

developed countries to pay up to the point where their citizens' well-being is not compromised[76].

This author thinks the ability to pay approach is quite closed linked to seeing the responsibility question as a matter of who have the best "capability". Clearly, holding those who have capability to pay responsible, is far more dynamic and ensures that the financial coverage is not a problem. However, it is not fair that historically responsible countries could get away from the responsibility because of their current capability is lower now than earlier.

3.2.2.4 The Hybrid Approach

A hybrid approach to justice suggests that Climate Justice might combine elements of the "contribution to the problem" and the "ability to pay" principles[77]. A number of problems with the polluter pays principle are noted; the principal of which is that to apply the principle, it is necessary to specify the harm and establish the causal link between the emissions and the harm. From a practical perspective, it is often claimed this cannot be done if the nature of harm is uncertain or unpredictable, or the link between climate change and harm is uncertain[78]. Nevertheless, the polluter-pays principle is not abandoned, but modified to include a *Poverty Sensitive Polluter Paus Principle*, that is, persons should bear the burden of climate change they have caused but should not be required to compromise on a decent standard of living[79].

3.2.2.5 The Beneficiary Approach

Yet another approach is to say that countries that have benefited the most from emitting GHG historically, bear the greatest responsibility for Climate Justice. There is no attempt here to hold countries liable for causing climate change, either strictly or conditionally, but they are held strictly liable to pay for the negative externalities from which they have benefited. This is called the *"beneficiary pays principle"*[80]. Those countries who have gained enormous economic benefits by

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[76] ibid. page, 129

[77] ibid.

[78] ibid.

[79] ibid. page, 130

[80] ibid.

emitting GHG for a long time into the common atmospheric space, should be those paying the costs of the consequences.

3.2.3 Conclusion

This author thinks there are several helpful approaches towards more climate justice. Especially both the contribution to the problem approach and the beneficiary approach creates a solid foundation for increasing the discussions on responsibility and liability of climate change. A combination of those two approaches will be based on the historical responsibility and who have gained the most benefits by emitting GHG into the common atmospheric space. Ethically and morally, these two combined could definitely establish a feeling of responsibility for the historically high emitters.

3.3 Loss and Damage

The issue of Loss and Damage represents some ethical and moral challenges in worldwide climate governance. Loss and Damage is relevant for climate justice because it presents the consequences of climate change. Among other things, it raises questions of responsibility and obligation, compensation, reparation, and the inevitable consequences of what the international community may face in near future. Therefore, fundamental and important concepts of justice, fairness and equity should be central elements of the response measures to climate change impacts.

3.3.1 Background for Loss and Damage

The Loss and Damage issue has its origins in calls from Small Island Developing States (SIDS) for compensation for climate change impacts, particularly sea-level rise[81]. Loss and Damage has gained more attention within the UNFCCC process, as limitation of adaptation and mitigation has become more acknowledged. Already in 1991, SIDS led discussions of Loss and Damage within the UNFCCC with the AOSIS proposal of an international insurance pool to provide compensation to

[81] Emily Boyd and others, 'A Typology of Loss and Damage Perspectives' (2017) 7 Nature Climate Change 723.

countries particularly affected by sea-level rise[82]. The proposal was not adopted; however, it gave rise to more discussions about the meaning of Loss and Damage.

3.3.2 What is Loss and Damage?

There has been some debate regarding the connection between Loss and Damage, and both mitigation and adaptation. An important example of how adaptation deviates from Loss and Damage within the Warsaw International Mechanism (WIM), is the inclusion of non-economic losses. The WIM was established at the UNFCCC climate negotiations in November 2013 (the 19th COP) to promote implementation of approaches to address Loss and Damage associated with the adverse effects of climate change, in a comprehensive, integrated and coherent manner[83]. While adaptation may serve to reduce Loss and Damage, the Parties now recognize that some losses are unavoidable and non-substitutable, meaning that nothing can sufficiently replace what a country or community might lose. Non-economic losses clearly demonstrate this predicament as no amount of money or resources can adequately replace losses such as life, cultural heritage, or territory. While adaptation may minimize or reduce the risk of extensive Loss and Damage, adaptation in itself may accrue perceivably lesser forms of loss, often in a non-economic form.

Article 8 of the Paris Agreement states that Parties recognize the importance of averting, minimizing and addressing *Loss and Damage* associated with adverse effects of climate change, including *extreme weather events* and *slow onset events*, and the role of sustainable development in reducing the risk of Loss and Damage. Today, there is no official and precise definition of the term "Loss and Damage" in the Paris Agreement. However, it is widely accepted that this phrase relates to the desire of vulnerable countries, especially SIDS, to secure formal recognition from the international community that there are adverse impacts of human-induced climate change that

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[82] Adelle Thomas, Inga Menke and Olivia Serdeczny, 'Loss and Damage Costing and Financing Mechanisms: Caribbean Outlook' 21. page 3, under 1.1

[83] 'Significance of the Warsaw International Mechanism - Institute for Environment and Human Security' <https://ehs.unu.edu/news/news/significance-of-the-warsaw-international-mechanism.html> accessed 19 May 2020.

cannot be avoided by mitigation or adaptation[84]. *"Loss"* refers to climate-related impacts for which restoration is not possible. The total destruction of coastal infrastructure due to sea-level rise would constitute a loss[85]. *"Damage"* refers to negative impacts for which restoration is possible[86]. For example, if a bridge is destroyed during a hurricane and this e.g. affects the infrastructure in the area, it will fall within the term *"damage"*.

In article 8 of the Paris Agreement, both extreme weather events and slow onset events are included. Extreme weather, such as a climate disaster or a natural disaster, typically includes hurricanes, tsunamis and floods. The IPCC defines climate disasters as *"severe alternations in the normal functioning of a community or a society due to hazardous physical events interacting with vulnerable social conditions, leading to widespread adverse human, material, economic, or environmental effects that require immediate emergency response to satisfy human needs and that may require external support for recovery"*.[87] An example of a slow onset event is the global concern relating to sea-level rise.

Further, Loss and Damage can be both economic and non-economic. *Economic* Loss and Damage is impairment of goods and services that are traded in markets and can thus be quantified and priced[88]. Examples in this matter will be damage to infrastructure and decreased agricultural and fisheries production. *Non-economic* Loss and Damage is impairment to things that are generally not trades in

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[84] '(PDF) What Does It Mean to "Address Displacement" Under the UNFCCC? - An Analysis of the Negotiations Process and the Role of Research' <https://www.researchgate.net/publication/317598369_What_Does_It_Mean_to_Address_Displacement_Under_the_UNFCCC_-_An_Analysis_of_the_Negotiations_Process_and_the_Role_of_Research> accessed 2 March 2020.

[85] 'Burkett_4ClimateLaw119.Pdf' <https://scholarspace.manoa.hawaii.edu/bitstream/10125/36061/Burkett_4ClimateLaw119.pdf> accessed 2 March 2020. page. 120

[86] ibid. page. 121

[87] IPCC, 2012: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, UK, and New York, NY, USA, 582 pp.

[88] Thomas, Menke and Serdeczny (n 82). page 2, table 1

markets and are thus difficult to quantify or price[89]. Non-economic Loss and Damage can for example be displacement and migration of communities, loss of cultural heritage and loss of life.

This author thinks this strict distinction between economic and non-economic Loss and Damage can be somewhat unnecessary in the larger context. The main reason for this argument is primarily that a natural disaster such as a tsunami, or sea-level risk, will create both economic and non-economic losses. The earthquake and tsunami called Tōhoku that hit Japan in 2011, can serve as an example. As of 10 June 2016, the number of confirmed deaths was 15.894[90]. This constitutes a huge degree of non-economic loss. When looking at the economic damages Tōhoku caused, the numbers are massive. It is estimated that the cost of Tōhoku is 199 billion USD, and that over 1 million buildings got either totally destroyed, half-destroyed or partially destroyed[91]. To conclude this example, a natural disaster will always lead to major devastating Loss and Damage in the area in which it occurs, both economically and non-economically.

Together, Loss and Damage describe the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems[92]. This author does not agree with the fact that only developing countries are being mentioned in the definition above. Obviously, Loss and Damage can, and will, occur also in developed countries. While there is no broad consensus regarding the definition of Loss and Damage, there is a common understanding that impacts will occur beyond those measures both adaptation and mitigation will be able to address. Therefore, there is a strong need for policies relating to how the issue of Loss and Damage should be handled. Typical questions are: who can be held liable? How can the impacts be financed?

It is important to stress that developing countries are bearing the overwhelming majority of the

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[89] ibid.

[90] Becky Oskin-Contributing Writer September 13 and 2017, 'Japan Earthquake & Tsunami of 2011: Facts and Information' (*livescience.com*) <https://www.livescience.com/39110-japan-2011-earthquake-tsunami-facts.html> accessed 5 March 2020.

[91] ibid.

[92] 'Burkett_4ClimateLaw119.Pdf' (n 85). page 121

human and environmental costs of climate change. Consider only one tragic incident – the Cyclones Idai and Kenneth – which caused more than $3 billion in economic damages in Mozambique alone, roughly 20% of its GDP, with lasting implications, not to mention the loss of lives and livelihoods[93]. Loss and Damage is important for the claims of climate justice. Loss and Damage symbolises the realisation of the adverse effects of climate change.

3.3.3 Framing Loss and Damage

As for the environment itself, Loss and Damage is a global concern. There are some disagreements concerning how to address the problem, with especially developed countries stating it should be a national concern. Framing Loss and Damage as a national issue that should be addressed with disaster risk reduction (DRR), will place the financial onus on national governments to bear it. I wonder whether this can be justifiable one way or another. It is no secret that most of the climate change impacts are occurring in developing countries, and they can be unable to meet the costs required for restoration. Framing Loss and Damage as an international issue, places the matter within international policy and legal frameworks to address[94]. This approach brings up issues related to compensation and liability – subjects that especially developing countries are more than willing to discuss. The attitude toward talks on compensation and liability is somewhat lacking willingness from the developed countries. This is reflected, for instance in developed countries attempts to have Loss and Damage related outside the Paris Agreement through a COP decision, or inside the text of the agreement but under the same article as adaptation. As for compensation, any references to such concept have mostly been avoided, with developed countries shifting instead the attention to non-economic Loss and Damage, such as losses of lives and negative impacts for health, and loss of biodiversity and ecosystem services necessary to sustain livelihoods[95]. This author would suggest that framing Loss and Damage as an international issue would be by far the

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[93] 'Report2019.Pdf' <http://civilsocietyreview.org/report2019/> accessed 18 May 2020. page, 5

[94] Thomas, Menke and Serdeczny (n 82). page 4

[95] Elisa Calliari, Swenja Surminski and Jaroslav Mysiak, 'The Politics of (and Behind) the UNFCCC's Loss and Damage Mechanism' in Reinhard Mechler and others (eds), *Loss and Damage from Climate Change: Concepts, Methods and Policy Options* (Springer International Publishing 2019) <https://doi.org/10.1007/978-3-319-72026-5_6>. page. 162

better alternative.

One of the reasons why Loss and Damage should be framed within the international community, is that the majority of emissions contributing to the adverse effects of climate change come from the developed countries. There is a strong sense that the developed world, in particular, has a legal and moral obligation to help rehabilitate and compensate communities for climate-related losses that are unavoidable despite adaption, or not avoided because of inadequate mitigation[96].

Though the well-being of small island has been a stated concern since the UNFCCC inception, opposition to mechanisms that might suggest developed world liability and developing world access to compensation, stalled meaningful negotiation on Loss and Damage. Indeed, attention to Loss and Damage within the UNFCCC did not begin in earnest until 2007 with the Bali Action Plan[97].

In 2010, the Cancun Adaptation framework noted that approaches to address Loss and Damage should consider impacts, including ocean acidification, increasing temperatures and sea-level rise. It further recognized the *"need to strengthen international cooperation and expertise in order to understand and reduce Loss and Damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow-onset events"*[98]. This author thinks the statement mentioned above clearly indicates that the issues of Loss and Damage is an international concern, and that the international community needs to enhance its knowledge on the topic.

Decision 3/CP.18 emerged from the COP18 meetings located in Doha and represented a significant advance in the discussions relating to Loss and Damage, and how to address it. It recognized the importance of the work on Loss and Damage, including the need to enhance comprehensive climate risk management approaches. It further called for a better understanding of non-economic Loss and Damage, patterns of migration and displacement, and identification and development of approaches

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[96] 'Burkett_4ClimateLaw119.Pdf' (n 85).page 125

[97] ibid. page 126

[98] '07a01.Pdf' <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> accessed 4 March 2020. paragraph 25

to rehabilitation following climate-related Loss and Damage[99].

Even though the negotiations on Loss and Damage have gotten more and more attention and substance, one major difficulty still remains. This difficulty concerns mainly the implications of paragraph 51 of Decision 1/CP.21[100]. The paragraph states that the parties to the Paris Agreement *"agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation"*[101]. This author finds paragraph 51 horrendous when wanting to put some liability on historically responsible States. There is also a quite clear causal link and connection between the historical and current emissions done by developed countries, and the increase in the numbers of extreme weather events that causes severe Loss and Damage on vulnerable countries. Unfortunately, paragraph 51 symbolizes a victory in the negotiations for developed countries, even though the topic of Loss and Damage have gained more attention during the last decade.

The developing countries sees Loss and Damage as something beyond adaptation and mitigation. It is a burden of losses that can no longer be avoided through adaption because too much GHG has already been emitted. Vulnerable countries see themselves faced with high losses and demanded that these losses should be compensated by developed States with high levels of GHG emissions[102]. Furthermore, the issue of Loss and Damage calls for international *solidarity*. This author thinks that the importance of solidarity as a principle to address Loss and Damage should not be underestimated. At the end of the day, we have only one planet and we are all human no matter where in the world we come from. Developed or developing states - this distinction is important for different reasons within climate change law, for example in financing adaptation and mitigation

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[99] '08a01.Pdf' <https://unfccc.int/resource/docs/2012/cop18/eng/08a01.pdf> accessed 5 March 2020.

[100] 'Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 11 December 2015. Addendum. Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session.' 36.

[101] ibid.

[102] '(PDF) What Does It Mean to "Address Displacement" Under the UNFCCC? - An Analysis of the Negotiations Process and the Role of Research' <https://www.researchgate.net/publication/317598369_What_Does_It_Mean_to_Address_Displacement_Under_the_UNFCCC_-_An_Analysis_of_the_Negotiations_Process_and_the_Role_of_Research> accessed 2 March 2020. page, 19

under article 9 of the Paris Agreement[103]. Solidarity is about countries, no matter if they are developing or developed, standing together in reducing activities that are causing harm to the environment, and is further helping each other to overcome the adverse effects of climate change. The principle of solidarity, and e.g. the fact that the environment is a common problem on the international arena, can be interpreted into the UNFCCC itself. In its preamble, UNFCCC clearly states that the Parties to the convention acknowledge that *"change in the Earth´s climate and its adverse effects are a common concern of humankind"*[104]. That is why this author find it so important to illuminate the fact that countries shall work together in solidarity, and not let the distinction between developed and developing countries stand in the way for making significant progress in international climate change law negotiations.

Furthermore, the UNFCCC points out in its preamble that the Parties to the convention should acknowledge that the global nature of climate change *"calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions"*[105]. This article clearly indicates that the issues of Loss and Damage should be framed within the international community, when it stresses that the challenges on climate change call for the *widest possible cooperation by all countries*[106].

Therefore, a change of narrative may be necessary to avoid making the issue of liability and compensation into a win-lose negotiation game between specifically developed and developing countries. Instead, a better emphasis on mutual gains and benefits through adaptation and action on Loss and Damage for both developed and developing countries is needed. Examples of such mutual benefits are more resilient global supply chains, reduction of climate-induced migration and

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[103] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6).

[104] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

[105] ibid. Recital 6

[106] ibid.

enhanced security[107]. In an interview, Ambassador Ronald Jumeau, Seychelles' Permanent Representative to the UN stated: *Loss and damage has devolved too much into an argument about money. It is not enough about people, about justice. It is important to remember to consider the ways that Loss and Damage will affect not only groups of vulnerable States…but also the vulnerable groups within them. How can we consider these without looking at it as a rights issue? (2015)*. This author supports such a statement. The discussions on Loss and Damage is dominated by economic considerations and who should be being for damages. It is important to remember that there are people who experience Loss and Damage, and this is a question about justice.

I would suggest more actors and scholars to take these types of approaches to the negotiations on liability and compensation. This author is of the opinion that developed countries do not see the mutual benefits and losses concerning the impacts of natural disasters occurring in developing countries.

3.3.4 Conclusion

Loss and Damage represents an important development in international environmental law. The acknowledgment of how devastating losses and damages certain vulnerable developing countries are suffering is constituting an important recognition from the international community. In its essence, Loss and Damage is well-suited to serve as a guideline in establishing liability for developed countries, but the markedly limitation that paragraph 51 in Decision 1/CP.21 symbolizes. The negotiations on Loss and Damage suffers from the typical ineffectiveness that international law in general are dominated by. The intentions are good, but in practice and when it comes to enforcement, the negotiations break down because responsible states do not want to acknowledge their role and pay for the actual losses.

[107] Calliari, Surminski and Mysiak (n 95). page. 155

3.4 Climate Change impacts on Human Rights in Developing States

3.4.1 Introduction

In the following sections, this author will demonstrate how essential human rights are getting violated due to the adverse effects of climate change. This author's intention by doing this, is to connect climate change and human rights even more together. Claims concerning violations on human rights have a tendency to be more effective than damages to the environment, and therefore it will be beneficiary to present the close relationship between these two legal areas. It is beyond every debate that the adverse effects of climate change will, in their severity, threaten a range of human rights, including the rights of life, health, food and housing. There is also no doubt that impacts of climate change already have constituted violation to human rights. Mary Robinson, a former UN High Commissioner for Human Rights, has called climate change *"the greatest threat to human rights in the twenty-first century"*[108]. Especially during the last decade, interest in the theme of human rights and climate change has increased tremendously. Litigators have begun to bring claims asserting that climate change is implicated in human rights violations, and the academic community has explored the theoretical and practical issues involved.

3.4.2 Relationship between Environmental and Human Rights perspective

This section will start with a reference to the Vienna Convention of the Law of Treaties (VCLT). Article 31 (3) (c) states that the interpretation of treaties and their mandate cannot be read in isolation but shall take into account *"any relevant rules of international law applicable in the relations between the Parties"*[109], thus including international human rights law. Therefore, the climate change regime and the associated conventions cannot be strictly understood as being limited

[108] Quoted in Report of the Special Rapporteur on the issues of human rights obligations relating to the enjoyment on a safe, clean, healthy and sustainable environement (1. february 2016) UN Doc A/HRC/31/52,7

[109] 'Volume-1155-I-18232-English.Pdf' <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> accessed 27 March 2020.

to their objective because law is also about protecting rights and enforcing obligations.[110]. Given that most States' parties to the UNFCCC have ratified the International Human Rights Covenants, ensuring that the two issues are formally linked, is central to reiterating the role for human rights in climate governance.

A huge step when in acknowledging the connection between climate change and human rights, was the mentioning of human right in the Paris Agreement of 2015. The preamble of the Paris Agreement makes explicit reference to human rights when recital 11 describes that the States *"(a)cknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity"*[111]. Even though these mentions of human rights in the Paris Agreement definitely constitutes a huge step forward, it does not involve an obligation of States. States *should* respect, promote and consider their human rights obligations when addressing climate change, but there is no actual obligation contributing to liability if human rights are violated through climate change.

The IPCC states that throughout the twentieth century, climate change will result in increasing ill-health especially in low income developing countries. There will be more injuries, diseases and death from intense heatwaves and fires; diminished food production resulting in undernutrition in poor regions; reduced labour productively invulnerable population, and increased risk from food- and water-borne diseases[112]. Moreover, the IPCC states that climate-related risks to health, livelihoods, food security, water supply, human security and economic growth are projected to

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[110] Patrick Toussaint and Adrian Martínez Blanco, 'A Human Rights-Based Approach to Loss and Damage under the Climate Change Regime' (2019) 0 Climate Policy 1. page, 7

[111] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Recital 11

[112] IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland, 151 pp. Page, 15

increase with global warming of 1.5°C and increase further with 2°C[113]. Populations at disproportionately higher risk of adverse consequences with global warming of 1.5°C and beyond include disadvantaged and vulnerable populations, some indigenous peoples, and local communities dependent of agricultural or coastal livelihoods[114].

Proposals to treat climate change as a human rights issue, give raise to many fundamental questions. Normatively, does it make sense to approach climate change as a human rights issue? What are the advantages and disadvantages of a human rights approach to climate change? Theoretically, what does it mean to conceptualize climate change in human rights terms? In other words, how would a human rights approach differ from an approach that treated climate change as an environmental, economic, or scientific problem? Descriptively, what does human rights law say about climate change and, conversely, what does climate change law say about human rights?[115]

The environmental perspective on climate change is in many respects similar to the human rights perspective. The policy debate about climate change has always focused on its human impacts – the harms to coastal communities, agriculture, drought-prone areas, human health and, also, human welfare in general. Furthermore, human rights are less absolutist than some believe, and, like environmental law, can involve balancing tests[116]. Environmental law also frequently defines minimum or maximum thresholds. For example, the UNFCCC defines its objective in terms of a maximum threshold level of GHG concentrations, above which dangerous climate change would occur. The Paris Agreement supplements this concentration threshold with a temperature change

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[113] IPCC, 2018: Summary for Policymakers. In: Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [V. Masson-Delmotte, P. Zhai, H. O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, T. Waterfield (eds.)]. In Press. Page, 9 (B.5)

[114] Ibid.

[115] 'Sand PH, "International Climate Change Law. By Daniel Bodansky , Jutta Brunnée and Lavanya Rajamani . Oxford: Oxford Uni' (n 5). page, 297

[116] ibid. page, 298

threshold of "well below 2° C" – and a goal of achieving 1.5 ° C[117]. Nevertheless, there are important differences between the human rights and environmental approaches. Most clearly, human rights law defines obligations states owe to individuals, whereas international environmental law focuses primarily on obligations that states owe to one another. As a result, human rights law highlights the harms affecting individuals, such as climate change.

Although few cases have considered the human rights implications of climate change, it is well established that environmental harms have pervasive effects on human rights. In his separate opinion in the *Gabcikovo-Nagyramos Case*, Judge Weeramantry recognized the protection of the environment as a *"sine qua non for numerous human rights such as the right to health and the right to life itself*"[118]. The European Court of Human Rights (ECtHR) in this landmark judgement in *Lopez Ostra*, held that *"severe environmental pollution may affect individuals well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely"*[119].

The roots of modern understanding of the relationship between human rights and environmental protection as purely synergistic, can be found in the 1972 Stockholm Conference on the Human Environment. The Stockholm Declaration emphasised the deep synergies between these two bodies of international law. Principle 1 provides, indeed, that *"man has the fundamental right to freedom, equality and adequate condition of life, in an environment of a quality that permits a life of dignity and well-being"*[120]. Nowadays, the synergistic view is deeply rooted in international practice. The OHCHR Analytical Study, published in 2011, reflects this intellectual prism when it identifies the

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[117] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Article 2 (1) (a)

[118] Gabcikovo-Nagyramos Project (Hungary/Slovakia) (Judgment) (1997) ICJ Rep 7, Separate Opinion of Vice-President Weeramantry, 88, 91.

[119] 'LÓPEZ OSTRA v. SPAIN' <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57905%22]}> accessed 15 March 2020. para, 51

[120] 'United Nations Conference on the Human Environment (Adopted 15 December 1972) A/RES/2994' (n 44).

"the major approaches" to the relations between human rights and environmental protection[121]. First and foremost, and following the Stockholm Declaration, a satisfactory environment is viewed as a necessary condition for the enjoyment of human rights. This stance could imply that, from the perspective of human rights, environmental protection has only an instrumental value in that it is but a contribution to respect such rights. Conversely, the protection of the environment per se would remain open[122].

The preamble to the Paris Agreement identifies factors that could prove very helpful in interpreting the agreement. These include the CBDRRC principle, special circumstances of particularly vulnerable countries, eradication of poverty and equitable access to sustainable development, special needs and situation of the LDCs, human rights and climate justice. The mentioning of human rights is perhaps the most significant and debated reference[123]. There is no doubt that climate change impacts threatens a variety of human rights, including for example the rights to life, health, family, food and housing.

This ambiguity has significant implications for the second approaches identified by the Analytical Study, namely the instrumental use of human rights as a legal technique to ensure a certain level of environmental protection. This approach is based upon three main considerations. One is that the holders of human rights are numerous and can be specifically identified, whereas the protection of the environment does not have a clear "rights holder"[124]. The second consideration is that such specifically and numerous identified rights holders can bring a claim before a growing number of adjudicatory and quasi-adjudicatory bodies, which are more sophisticated than those available in

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[121] 'Dupuy P-M and Viñuales JE, International Environmental Law (2nd EdnCambridge University Press 2018)' (n 45). page, 359

[122] ibid.

[123] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Recital 11

[124] 'Dupuy P-M and Viñuales JE, International Environmental Law (2nd EdnCambridge University Press 2018)' (n 45). page, 359. This is why the Institut de Droit International has proposed the creation of a "High Commissioner for the Environment" that would act for the "international community" in the context of responsibility and liability claims. (Session of Strasbourg), Art. 28

international environmental law[125]. Finally, human rights are perceived as a higher value and, as a result, they have a stronger and more urgent social and political pull than pure environmental considerations.

The third approach identified by the Analytical Study is perhaps the most ambiguous of the three. It states that human rights must be view as an integral component of the concept of sustainable development[126].

In the following, some different human rights will be presented. The goal is to illuminate how these different human rights is being violated as a consequences of climate change. The list of human rights is not meant to be exhaustively but symbolize a selection of rights. Even though displacement is more of a consequence than a right, it will briefly be elaborated on displacement due to climate change.

3.4.3 Right to an adequate standard of living

In the UN Declaration of Human Rights from 1948, article 25 states that *"everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"* (this authors underlines)[127].

Furthermore, the Convention on Economic, Social and Cultural Rights (CESCR) from 1976 also makes a clear reference when it comes to this right. Article 11 notes that the States Parties to the convention *"recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living*

[125] ibid.

[126] ibid.

[127] 'UN General Assembly, Universal Declaration of Human Rights (Adopted 10 December 1948) 217 A (III)' (n 62).

conditions"[128]. The article also makes an important reference when pointing out that the States Parties recognising the fundamental right for everyone to be free from hunger, and they shall take individually and cooperative measures for the realization of this right.

What is the core element of the right to food? What does this right include? The use of the term "adequate" gives a clear indication towards a necessary amount of food, or a form for minimum requirement, and not a "more than enough" mindset. This author thinks there are some subjective elements written into the article. Obviously, there is a markedly difference when it comes to what is "adequate" for a grown adult as opposed to a young child. In the following sections it will be elaborated briefly on the three elements of this right; food, water, and housing.

3.4.3.1 Right to food

The environmental change has already had a massive impact on the right to food. In 2019, the IPCC stated with high confidence that *"climate change has already affected food security due to warming, changing precipitation patterns, and greater frequency of some extreme events"*[129]. Climate change creates additional pressure on land, exacerbating existing risks on food systems. Moreover, the IPCC states that the stability of food supply is projected to decrease as the magnitude and frequency of extreme weather events that disrupt food chains increases[130]. The Paris Agreement recognizes that food security is an important and crucial element in the synergy between climate change and human rights. In its preamble, the Paris Agreement is "*[r]ecognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food*

[128] 'UN General Assembly, International Covenant on Economic, Social and Cultural Rights (Adopted 16 December 1966, Entered into Force 3 January 1976)'.

[129] IPCC, 2019: Summary for Policymakers. In: Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems [P.R. Shukla, J. Skea, E. Calvo Buendia, V. Masson-Delmotte, H.-O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (eds.)]. In press. Page, 8 (A.2.8)

[130] Ibid. page, 15 (A.5)

production systems to the adverse impacts of climate change"[131]. Also, mentioned as an objective in the Paris Agreement, the Parties should increase *"the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production"*[132]. When included in the objective article of the Paris Agreement, there is no doubt about the importance of this right on an global scale.

The right to food is accomplished when every man, woman and child, alone or in a community with others, has physical and economic access at all times to adequate food or the means for its procurement[133]. According to General Comment 12, the core content of this right includes (i) availability of food, (ii) food safety, (iii) acceptability, (iv) availability, (v) accessibility and (vi) physical accessibility[134]. For the OHCHR, the right to food is the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear[135].

Food demand will inevitably increase as the world population reaches an estimated number of 9 billion in 2050. Moreover, redistribution of catch potential of marine fisheries from tropical countries to higher latitudes has potential implication for food security[136]. The Food and Agriculture Organisation (FAO), meanwhile estimates that, in 2012-2014, 1/9 of the world's population were chronically undernourished with insufficient food for an action and healthy life, and with the vast

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[131] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Recital 9

[132] ibid. Article 2 (1) (b)

[133] 'The Right to an Adequate Standard of Living' (*Icelandic Human Rights Centre*) <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-an-adequate-standard-of-living> accessed 22 March 2020.

[134] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), Publication Date 12 May 1999, UN Economic and Social Council'.

[135] 'OHCHR | Special Rapporteur on the Right to Food' <https://www.ohchr.org/en/issues/food/pages/foodindex.aspx> accessed 22 March 2020.

[136] 'Lyster R, Climate Justice and Disaster Law (Cambridge University Press 2016)' (n 28). page, 141

majority of them living in developing regions[137].

With the combination of increase in the worlds' population and the increased intensity of migration due to climate change, many areas will be exposed to lack of resources. This can clearly result in armed conflicts for those desperate for food, for themselves and their family.

3.4.3.2 Right to water and sanitation

The right to water and the right to an adequate standard of living are linked together. Enjoyment of the right to water is clearly an essential part of the right to an adequate standard of living, and also the right to health. Actually, without equitable access to clean water, these other rights are not attainable. The right to water is implicit in Article 11 (1) of the CESCR because its realisation is linked to the realisation of rights such as the right to food, the right to health and the right to earn a living[138]. When speaking of the right to water, the Committee on Economic, Social and Cultural Rights' General Comment 15 is of high importance. The right to water contains both entitlements and freedoms. The entitlements include the right to a system of water management and supply that provides equality of opportunity for people to make use of, and enjoy, the right to water. By contrast, the freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies[139]. General Comment 15 acknowledges that while the adequacy of water may vary according to different condition and circumstances, three factors apply in all situation. Those are (i) availability, (ii) quality and (iii) accessibility[140]. An extreme weather event, or drought, can leave huge areas without any access to clean drinking water. Many groups of persons need to walk long distances to get a hold of clean water. This right is being disrupted by climate change.

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[137] Ibid.

[138] 'The Right to an Adequate Standard of Living' (n 133).

[139] ibid.

[140] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), Publication Date 20 January 2003, E/C.12/2002/11, UN Economic and Social Council'.

The first Special Rapporteur appointed by the Human Rights Council on this right, Catarina de Albuquerque, elaborated on the sanitation dimension, which is now considered as both a component of the right to water and as a distinct human right[141]. The UN General Assembly expressly recognised that "*(t)he human rights to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the rights to ab adequate standard of living"*[142].

The sustainable development goals (SDG) have as their sixth goal *"clean water and sanitation"*[143]. Globally, the proportion of population using safely managed drinking waters services increased from 61% to 71% between 2000 and 2015[144]. An additional 19% of the global population used basic drinking water services. This means that 785 million people still lacked even a basic drinking water service[145]. The main impact on this right from an environmental perspective, is clearly happening when an extreme weather events occurs. Homes and other areas with access to clean drinking water gets destroyed, and the resources to build up new water stations can be a challenge for vulnerable developing countries due to their economy.

3.4.3.3 Right to adequate housing

Finally, the right to adequate housing is enshrined in Article 11 CESCR. The right to housing means more than just a roof over one's head. It should be seen as the right to live somewhere in

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[141] See «Human Rights Obligations related to Access to Sanitation», 1 July 2009, UN Doc. A/HRC/12/24

[142] 'N1544272.Pdf' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/442/72/PDF/N1544272.pdf?OpenElement> accessed 16 March 2020. para, 2

[143] 'Sustainable Development Goals .:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/?menu=1300> accessed 4 May 2020.

[144] 'Goal 6 .:. Sustainable Development Knowledge Platform' <https://sustainabledevelopment.un.org/sdg6> accessed 4 May 2020.

[145] ibid.

security, peace and dignity[146]. Importantly, the requirements for adequate housing is defined in General Comments 4 and 7 of the Committee on Economic, Social and Cultural Rights. According to the Committee, the core content of the right includes (i) security of tenure, (ii) affordability, (iii) habitability, (iv) accessibility, (v) location and (vi) cultural adequacy[147]. It is easy to think that this right does not have some much relevance when talking about the adverse effects of climate change. However, this right is massively affected. More than 10% of the global population live in coastal areas that are less than 10 meters above sea level[148]. Oceans, coastal and marine resources are very important for people living in coastal communities, who represent 37% of the global population in 2017[149]. It is essential for the people living in these areas to survive on fishing and activities from the sea. Even though it is a vulnerable place to create livelihoods because of sea level rise or a tsunami, these people are fully depended on access to the sea.

3.4.4 Displacement

The impact of environmental change on migration will increase in the future. In particular, environmental change may threaten people's livelihoods, and a traditional response to this is to migrate. Environmental change will also alter populations' exposure to natural disasters, and migration is, in many cases, the only response to this[150]. For example, 42 million people were displaced by natural disasters during 2010[151].

Already in their 2012 report, the IPCC states that *"(d)isasters associated with climate extreme influence population mobility and relocation, affecting host and origin communities. If disasters occur more frequently and/or with greater magnitude, some local areas will become increasingly*

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[146] 'The Right to an Adequate Standard of Living' (n 133).

[147] 'UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), Publication Date 13 December 1991, E/1992/23'.

[148] 'Ocean-Fact-Sheet-Package.Pdf' <https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/05/Ocean-fact-sheet-package.pdf> accessed 4 May 2020.

[149] ibid.

[150] 'Foresight: Migration and Global Environmental Change (2011) Final Project Report The Government Office for Science, London'. Page, 9

[151] ibid.

marginal as places to live or in which to maintain livelihoods. In such cases, migration and displacement could become permanent and could introduce new pressures in areas of relocation. For locations such as atolls, in some cases it is possible that many residents will have to relocate"[152]. It cannot be expected that those exposed for natural disasters to stay in the area where there is little chance of surviving due to the lack of essential resources. The disruption caused by climate change – including flooding and drought, extreme weather events, and sea-level rise – are likely to trigger large scale movement of people. The IPCC in 1990 predicted that the gravest effects of climate change may be those on human migration[153].

Environmental migration poses an important, future and present challenge for international actors to address as countries around the world already struggle to meet the needs of asylum seekers and other displaced people. When it comes to defining who are the environmental migrants, this author is supportive of the definition given by the IOM. The IOM says that environmental migrants *"are persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad"*[154]. This definition includes many aspects of migration due to climate change. By referring to sudden event and progressive change, the definition includes both migration due to extreme weather events and slow onset events. Moreover, the definition acknowledges that migration can be both voluntarily and involuntarily. Lastly, this definition includes temporarily and permanently migration, and that it can be both internal and external. Collectively, the IOMs definition of environmental migrants should be used as a guideline going forward.

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[152] IPCC, 2012: Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation. A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change [Field, C.B., V. Barros, T.F. Stocker, D. Qin, D.J. Dokken, K.L. Ebi, M.D. Mastrandrea, K.J. Mach, G.-K. Plattner, S.K. Allen, M. Tignor, and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, UK, and New York, NY, USA, 582 pp. Page, 14

[153] IPCC, Climate Change,: The IPCC Scientific Assessment (1990) (Cambridge University Press, 1990) 20.

[154] 'ENVIRONMENTAL MIGRATION | Environmental Migration Portal' <https://environmentalmigration.iom.int/environmental-migration> accessed 27 March 2020.

It is generally expected that future climate change-related Loss and Damage will contribute especially to internal displacement, although in extreme cases entire populations and communities might need to be relocated. In terms of international mobility, this will likely occur *"from one poor, developing country into another"*[155]. One example of an extreme case is the fact that Kiribati bought land from Fiji back in 2014 for 8.7 million USD[156]. The main motivation for the purchase was the fear of even further increase of sea-level rise in the region, and e.g. the fact that it was absolutely necessary to provide an alternative location for the citizens of Kiribati. I wonder how this can be justified from both a legal and ethical perspective. Kiribati is clearly a developing country and has contributed minimally to the significant increase of GHG-emissions into the atmosphere, that is causing the harmful sea-level rise. Article 9 of the Paris Agreement states that developed country Parties *"shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention"*[157]. Kiribati used their own money to buy land on Fiji, and doing that, adapting to the increase of sea-level rise in the region that is threatening livelihoods and the community. This author thinks it is reasonable to expect that developed country Parties to the Paris Agreement compensate the economic loss Kiribati suffered when they bought land. Climate justice makes a contribution in this matter. There is no justice in the fact that countries that have contributed the least to climate change impacts, need to suffer the most. To force entire populations to migrate and causing displacement is a serious intervention in people's lives.

Within the UNFCCC, developed country Parties have a financial obligation to provide assistance to developing countries. Article 4 (4) states that the developed country Parties and other developed Parties included in Annex II *"shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse*

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[155] Susan F Martin, *International Migration: Evolving Trends from the Early Twentieth Century to the Present* (Cambridge University Press 2014). page. 218

[156] Laurence Caramel, 'Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji' *The Guardian* (1 July 2014) <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu> accessed 5 March 2020.

[157] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6).

effects"[158]. Using the term "shall", both article 4 (4) in the UNFCCC and article 9 in the Paris Agreement set out a binding and strong obligation to provide assistance to developing country Parties. There cannot be any doubt that Kiribati's purchase of land on Fiji is an adaptation effort. They see the current, and future, risk of not having an alternative place to live, because of the sea-level rise. This author suggests interpreting the above-mentioned articles more strictly and enforce compensation for the Loss and Damage that Kiribati in this example suffered.

3.4.5 Right to education

In his 2011 report to the General Assembly, the United Nations Special Rapporteur on the right to food stated that the impacts of successive droughts had caused some children to be *"removed from schools because education became unaffordable and because their work was needed by the family as a source of revenue"*[159]. According to the World Bank, climate impacts can *"exacerbate the existing development challenge of ensuring that the educational needs of all children are met"*[160]. This author thinks the World Bank are making an important and interesting statement here. Due to extreme weather events, schools and educational buildings can be destroyed as a direct result of the natural disaster. This will eliminate the chances to even go to school for a lot of children and youth in these areas. Moreover, due to the adverse effects of climate change, many children in vulnerable areas may be forced to help their families in daily routines for survival instead of going to school. Clearly, this will have a decisive and unfortunate effect of the right to education.

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[158] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3).

[159] 'UN Human Rights Council, Report of the Special Rapporteur on the Right to Food, Addendum : Mission to the Syrian Arab Republic, Publication Date 27 January 2011, A/HRC/16/49/Add.2'. para, 13

[160] 'Full_Report_Vol_2_Turn_Down_The_Heat_ Climate_Extremes_Regional_Impacts_Case_for_Resilience_Print Version_FINAL.Pdf' <https://www.worldbank.org/content/dam/Worldbank/document/Full_Report_Vol_2_Turn_Down_The_Heat_%20Climate_Extremes_Regional_Impacts_Case_for_Resilience_Print%20version_FINAL.pdf> accessed 30 April 2020. page. xix

3.4.6 Right to life

The adverse effects of climate change are unfortunately making an impact on people's right to life. As discussed above, a natural disaster puts villages in ruins, destroying houses, schools and leads to lack of food, water and sanitation condition[161]. Not only natural disasters, but also air pollution, rising temperatures and lack of food production, will have decisive influence on the right to life. A natural disaster, higher temperatures or air pollution as a result of increase in GHG emissions from developed countries, results in death for vulnerable persons in developing countries. In terms of terminology, this author will not state that people are dying from a natural disaster but take a stand and say that people are being *killed* by climate change.

The Universal Declaration of Human Rights from 1948 makes explicit reference to the right to life. Article 3 of the Declaration clearly states that *"everyone has the right to life, liberty and security of person"*[162]. Furthermore, the UN International Covenant on Civil and Political Rights (CCPR) makes references to this right by stating that *"everyone has the inherent right to life"*[163]. Making use of the term "inherent", this article leaves no doubt regarding the value of every human being and their right to life on an equal basis with others without any form of discrimination. Also, the European Convention on Human Rights (ECHR) describes in Article 2 that *"everyone's right to life shall be protected by law"*[164]. Following the articles mentioned here, it is clear that the right to life are a human right that every human being shall enjoy. Unfortunately, climate change, and especially extreme weather events such as an earthquake, a tsunami or a hurricane, kills many people globally.

A case that can serve as a useful example, is the Urgenda case. The Court of Appeal needed to elaborate on the right to life. In its reasoning, the Court of Appel stated that "[*i]n short, the State*

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[161] 'The Haiti Earthquake: 10 Years Later' <https://www.unicef.org/stories/haiti-earthquake-10-years-later> accessed 16 May 2020.

[162] 'UN General Assembly, Universal Declaration of Human Rights (Adopted 10 December 1948) 217 A (III)' (n 62).

[163] 'UN General Assembly, International Covenant on Civil and Political Rights (Adopted 16 December 1966, Entered into Force 23 March 1976)'. Article 6

[164] 'Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14 (Adopted 4 November 1950, Entered into Force 3 September 1953)'.

has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible. In light of this, the Court shall assess the imminent climate dangers"[165]. The Court of Appeal also made use of the precautionary principle.

The Court of Appeal continued their elaboration on the right to life, and concluded with "[*a*]*s evident from the above, the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with the loss of lives and/or disruption of family life. As has been considered above by the Court, it follows from the Articles 2 and 8 ECHR that the State has a duty to protect against this real threat"*[166]. This statement acknowledges that climate change involves a dangerous and real threat, which will have serious consequences for the current generation.

In 2012, former Vice President for Sustainable Development Rachel Kyte, informed about some interesting numbers relating to climate change and natural disasters. During a presentation, she spoke of how natural disasters have developed and affected vulnerable States. Among other factors, two main components are essential in this discussion. First, the number of natural disasters during the last 30 years has doubled. Second, natural disasters alone have killed 2.3 million people in the same time period[167].

In the context of climate change, extreme weather events may be the most visible and most dramatic threat to the enjoyment of the right to life, but they are by no means the only threats. Climate change kills through drought, increased heat, expanding disease vectors and a numerous of

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[165] 'Urgenda v. The Dutch Government (Urgenda Climate Case) The Court of Appeal - English Translation' (n 51). para, 43

[166] ibid. para, 45

[167] https://www.youtube.com/watch?v=cWYcXhMhJF4&t=559s (2:00 – 2:55)

other ways. According to a report by the Climate Vulnerable Forum and DARA International, climate change is already responsible for approximately 400,000 deaths per year and that number is expected to rise to 700,000 by 2030[168]. 400,000 deaths per year is equivalent of over 1,000 deaths every day during a year. These numbers are massive, and they call for our highest possible attention.

The international community needs to interpret environmental conventions and principles so they can contribute not only to include climate justice, but justice for people being killed by the adverse effects that climate change is causing. This author thinks the tendency towards more nationalism around the world is an unfortunate development when the need for international cooperation is at its highest and most necessary. The shift from private ethics towards public ethics, as noted in the already mentioned Colombian case[169], will most certainly be more difficult if States are getting more and more focused on their own interests and benefits. As an illustration, the fact that the USA is pulling out of the Paris Agreement in November this year, clearly indicates the increasing nationalism around the world. When the most basic human right, the right to life, is being affected to the extent it does, international law needs to develop more strict mechanisms to avoid more people getting killed.

3.4.7 Climate Change as a Genocide?

The discussion on the right to life brings this author towards a hypothesis. The hypothesis is asking the question whether the adverse effects of climate change, particularly extreme weather events, can constitute a *"modern genocide"*. Constructing natural disasters as state crimes requires, at first glance, a considerable leap of the imagination. Earthquakes, tsunamis, volcanoes, cyclones, hurricanes and floods are elemental: they are so clearly the manifestations of geophysical activity that is seems beyond the bounds of reason to suggest that they and their consequences could be labelled as state crime. However, the consequences and sometimes the precipitants of these geophysical "extremes" are necessarily the products of social interactions with the environment.

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[168] See DARA and the Climate Vulnerable Forum, Second edition: A guide to the cold calculus of a hot planet (DARA and Climate Vulnerability Monitor, 2012) page. 17

[169] 'Future Generations v. Ministry of the Environment and Others' (n 15).

The idea of state responsibility for natural disasters in not entirely new. The work of a small group of radical ecologists and geographers identifies state structures as the root cause of that the United Nations now euphemistically describes as "complex emergencies". Scholars are suggesting that in a great many natural disasters the state is in fact directly culpable through a series of criminal actions and negligent practices[170]. They are arguing that a less distant relationship between underlying structural causes and natural disasters exists in many catastrophic floods, famines, earthquakes, cyclones, and so on[171].

Using the term "genocide" will most likely provoke different actors within international law. A statement which involves accusing developed States of modern genocide because of their GHG emissions leading to natural disasters killing people in developing countries, is clearly a brave statement. Nevertheless, this author thinks there is a lot of substance and several interesting arguments within a discussion that talks about climate change and genocide. When talking about climate change in this section, this author thinks particularly of extreme weather events such as a tsunami or an earthquake that kills many people, but also slow onset events such as droughts kills many people[172].

In 1948, the UN adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force 12 January 1951. This convention is the most important legal tool in this discussion. The convention contains the official definition of the term "genocide". Article 2 states that *"genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the groups' conditions of life calculated to bring its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group: (e) forcibly transferring*

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[170] Penny Green and Tony Ward, *State Crime* (Pluto Press 2004) <www.jstor.org/stable/j.ctt18fs3bm> accessed 19 March 2020. page, 52

[171] ibid.

[172] Joydeep Gupta, December 5 and 2017, '"More People Die of Drought than All Other Calamities Put Together"' (*The Third Pole*) <https://www.thethirdpole.net/2017/12/05/more-people-die-of-drought-than-all-other-calamities-put-together/> accessed 21 May 2020.

children of the group to another group"[173].

From this definition, several elements need to be discussed. First, the demand of "intent" is the most difficult element to prove and determine. To qualify for a genocide, there must be a proven intent on the part of perpetrators to physically destroy a national, ethnical, racial or religious group. Cultural destruction does not suffice, nor does an intention to simply disperse a group[174]. This author is of the opinion that the distinction between "simply dispersing" a group and destroying the physically cultural livelihood of a group should be used with caution. More important is how the perpetrators are moving and relocating a group. Moreover, the victims of genocide are deliberately targeted – not randomly – because of their real or perceived membership of one of the four groups protected under the Convention (national, ethnical, racial and religious)[175]. Political groups are for example excluded, among many other forms and sorts of groups. When considering climate change as a genocide, there is a strong need to define which group(s) are being affected.

3.4.7.1 "Poor and Vulnerable Persons" as a group

This author suggests that the establishment of a group involving *"poor and vulnerable persons"* could serve as a guideline for the purpose of this discussion. To illustrate the essence of why a group of *"poor and vulnerable persons"* should be included in the international discussion in genocide, this author will make use of an example from Hurricane Katrina. In 2005, warmer water temperature in the Gulf of Mexico resulting from change in the climatic system, increased the strength of Katrina as it passed over the Gulf on its way to New Orleans, USA. Hurricane Katrina is well suited to demonstrate the adverse differences between poor and vulnerable persons, and wealthy persons. Whereas helicopters removed affected people from the roofs of private hospitals, the pleas for assistance from charity hospitals were often ignored[176]. Moreover, and importantly,

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[173] 'UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948, Entered into Force 12 January 1951)'.

[174] 'United Nations Office on Genocide Prevention and the Responsibility to Protect' <https://www.un.org/en/genocideprevention/genocide.shtml> accessed 13 April 2020.

[175] ibid.

[176] Levy, Barry & Patz, Jonathan. (2015). Climate Change, Human Rights, and Social Justice. Annals of Global Health. 81. 310-322. 10.1016/j.aogh.2015.08.008. page, 315

residents of rich neighbourhoods were able to leave New Orleans in their own vehicles, whereas poor people, often from low-lying areas, where trapped in or near their homes. If they survived, they had to seek short-term shelter in overcrowded places such as Superdome[177].

This author finds it quite appalling to see how the lack of resources and social status can sometimes be the difference between life and death. When an extreme weather event strikes, the infrastructure in the area will close down, making poor people that cannot afford a car extremely receptive for tremendous impacts. In New Orleans, the poor and vulnerable lived close to the water in houses where the construction was not solid, and definitely not insured. The homes of the rich and wealthy did not get as affected by Hurricane Katrina, and they were on top of that insured for the damages the hurricane caused. Poorer households are likely to be "trapped" in circumstances where they are at once more vulnerable to environmental change and less able to move away from it[178]. In other words, Hurricane Katrina made the difference between the poor and vulnerable, and the rich, even bigger.

This author thinks the example of Hurricane Katrina can demonstrate how poor and vulnerable persons are often left in a situation where the risk of getting killed is massive. Considering this concrete example in an international context, the seriousness becomes even more visible. People living on SIDS cannot evacuate in case of an extreme weather event. These people are trapped on an island and their houses do not have the construction needed for surviving for example a hurricane or a tsunami. The consequences can be illustrated with the Haiti earthquake in 2010. An earthquake with a magnitude of 7.0 struck Haiti, causing the death of estimated 250,000 people[179]. At the time of the earthquake, 70% of the population in Haiti lived below the poverty line[180]. This author thinks the poverty and vulnerability in Haiti was an essential factor of why so many people got killed during the earthquake.

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[177] Ibid.

[178] 'Migration and Global Environmental Change: Future Challenges and Opportunities' 234.

[179] '2010 Haiti Earthquake: Facts, FAQs, and How to Help' (*World Vision*, 25 November 2019) <https://www.worldvision.org/disaster-relief-news-stories/2010-haiti-earthquake-facts> accessed 14 April 2020.

[180] ibid.

An interesting analysis of the definition of genocide in article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, is that the action does not necessarily need to kill a significant amount of people. It can also constitute a genocide if the action is causing serious bodily or mental harm to members of the group. The mental strain that the poor and vulnerable persons in developing countries are bearing because of change in the climatic systems, is clearly huge. The uncertainty of relocating their livelihoods and being in areas where extreme weather events happen more frequently than other places in the world, contributes to adverse impacts on mental health.

3.4.7.2 Intent?

To qualify for a genocide, the Convention on the Prevention and Punishment of the Crime of Genocide requires the action to *"intent to destroy"*[181]. As mentioned earlier, it is extremely challenging for actors to prove that the perpetrators had an intent to destroy. On the other hand, this author will be pointing out the scientific materials and pieces of evidence that are currently available. The reports from the IPCC and others are clear when pointing out that the poor and vulnerable persons are being significantly more affected than others, and that the developing countries take the majority of impacts caused by climate change[182]. Developed countries are still emitting massive amounts of GHG into the atmosphere, making the extreme weather events strike more frequently. The results and impacts of GHG emissions are so visible and well-known nowadays, that this author wonders whether this knowledge can be put up against the requirement of "intent". When you are well aware of the negative consequences that your actions are causing to other groups of people, and still continue to practice these actions, it is reason to argue that the requirement of intent is fulfilled.

This author believes that if the adverse effects of climate change would impact the developed countries to a greater extent, the amount of GHG emissions would be dramatically and drastically

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[181] 'UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948, Entered into Force 12 January 1951)' (n 173). Article 2

[182] John Vidal, 'Climate Change Will Hit Poor Countries Hardest, Study Shows' *The Guardian* (27 September 2013) <https://www.theguardian.com/global-development/2013/sep/27/climate-change-poor-countries-ipcc> accessed 4 May 2020.

reduced for the sake of the population. When the negative impacts of their activities happen in another place of the world, the affiliation and the sense of responsibility barely exists. When an estimated number of 400,000 people are killed by climate change annually, it should not be a requirement that an intent to destroy should be 100% proven. This author thinks that the killing through climate change, and especially as a result of extreme weather events, constitutes a form of a *modern genocide.* It is clear that the group of people being killed by climate change, is the *poor and vulnerable persons.* This group can be identified by using some criterions. Examples of such criterions can by where in the world they are living, the degree of poverty, the construction materials of their livelihoods and the more exact location of their homes *(close to the sea, up in the mountains, etc.)*

3.4.8 Conclusion

The severe impact that climate change has on the enjoyment of several human rights is massive. After studying the relationship between international environmental law and international human rights law, this author has demonstrated the fact that these two areas of law need to be seen as part of each other. For the victims of climate change impacts, the argument of compensation and support will be more profound and strong if they are invoking human rights law into their reasonings. When talking about climate change impacts and human rights, it is also clear that extreme weather events such as a tsunami or an earthquake serves best as visible examples. An extreme weather event often leads to loss of clean water, sufficient food, decent sanitation condition, houses, cultural life and life itself. This author thinks the horrendous consequences of climate change can be defined as a form of "modern genocide". When the scientific date from the IPCC is so well-known, and with the establishment of a group consisting of "poor and vulnerable people", there are certainly reasons to discuss this theory.

Also, this author thinks the question on climate change impacts and human rights is a matter of perspective. For example, in Norway there are many protesters against establishing windmills in the Norwegian nature, even though these areas are not affecting livelihoods[183]. The main reason for the

[183] 'Conflicts Blow over Windmill Projects' <https://www.newsinenglish.no/2019/05/28/conflicts-blow-over-windmill-projects/> accessed 5 May 2020.

protests, is the human right claim on access to a healthy environment. Although that is in fact an important human right and a rightfully made claim, this prevent the establishment of a sustainable way of consuming energy, which will have positive effect on the international climate. For the most vulnerable developing countries, and their populations, it is critical that Norway and others moves towards more sustainable and green energy, because their human right are also affected. This is why questions on human rights and climate change often depends on which perspective the actors have.

4 State Responsibility and Obtaining Climate Justice

4.1 Introduction

This chapter will elaborate on how to obtain climate justice, using legal tools such as law, principles and case law. The case law will illuminate the close connection between Loss and Damage due to climate change, for example violations on human rights, and access to justice. This author will also bring up the discussion of an international climate fund to help obtaining climate justice for those who have suffered different types of Loss and Damage due to change in the climatic system. Moreover, this chapter will also demonstrate the difficulties associated with obtaining climate justice. Especially topics such as sovereignty, affiliation and establish a causal link will be used.

Liability as a legal notion within the climate regime has been referred to primarily in the context of Principle 13 of the Rio Declaration, which describes that *"[s]tates shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction"*[184]. Principle 13 is to be view as a springboard for further discussions and development on the issues of liability and compensation in climate change law. First and foremost, it demands that States, in their national jurisdiction, establishes laws regarding liability and compensation for the victims of environmental damages.

[184] 'United Nations Rio Declaration on Environment and Development (Adopted 14 June 1994) A/CONF.151/26' (n 48).

When it is a concern of giving their own citizens a right of compensation for environmental damages, the national governments are more than willing to do so. The tendency is opposite when there are discussions on giving foreign people a right to hold another national government liable and seek compensation. The most obvious example of this can be found in paragraph 51 of decision 1/CP.21 which confirms that the parties "[a*]grees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation"*[185]. This author finds paragraph 51 horrendous due to the limited understanding of climate justice it symbolizes. However, articles 8 of the Paris Agreement is not the only article in that document which can be used in obtaining climate justice. As this author will demonstrate below, the finance article of the Paris Agreement should be used.

Generally speaking, especially NGOs have been highly supportive of the efforts of developing countries to create a liability and compensation mechanism for Loss and Damage. Such support has its roots in climate justice considerations; for example, ECO noted at the time of COP19 that Loss and Damage is a matter of *"climate justice … its time or those who are mainly responsible for climate change to act here in Warsaw"*[186]. When making use of the formulation *"mainly responsible for climate change"*, the NGO also indicates that they are supporting of the thought of placing the liability on the historically responsible States who have contributed to the problem.

Article 4 (8) of the UNFCCC provides some essential starting points when describing how the commitments of the article should be interpreted. The article states that *"in the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures,*

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[185] 'Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 11 December 2015. Addendum. Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session.' 36.

[186] Calliari E., Surminski S., Mysiak J. (2019) The Politics of (and Behind) the UNFCCC's Loss and Damage Mechanism. In: Mechler R., Bouwer L., Schinko T., Surminski S., Linnerooth-Bayer J. (eds) Loss and Damage from Climate Change. Climate Risk Management, Policy and Governance. Springer, Cham. Page. 162

especially on: (a) Small island countries; (b) Countries with low-lying coastal areas"[187]. Even though article 4 (8) stresses the Parties to give full consideration relating to funding to meet the needs of developing country Parties, little have been done financially and institutionally for making the developed country Parties liable for the damages. However, reading this article isolated, it can definitely serve a good purpose for achieving climate justice. The main obstacle, as often in international law, is the willingness of the States to come forward.

4.2 Article 9 of the Paris Agreement

An important step in the development of creating some strict financial obligation on developed States, came with the introduction of article 9 in the Paris Agreement. This article says that *"developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention"*[188]. Opportunities for racketing up support for Loss and Damage are somewhat limited by the fact that the Paris Agreement does not mention Loss and Damage in its finance article or call for Loss and Damage to be included in the Agreement enhanced transparency framework[189]. However, this author does not think the financial obligation is depended on the lack of mentioning on Loss and Damage in article 9. Both mitigation and adaptation efforts shall be supported by developed country Parties, and the developing countries should make more arguments based on this. For example, the above-mentioned case of Kiribati buying land on Fiji can definitely be viewed as an adaptation effort. Adaptation is a process, and Loss and Damage symbolises an outcome. Therefore, the financial article could serve as an umbrella for many initiatives that developed countries need to make for minimize the degree of Loss and Damage.

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[187] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3). Article 4 (8)

[188] 'Paris Agreement under the United Nations Framework Convention on Climate Change (Adopted 12 December 2015, Entered into Force 4 November 2016) Conference of Parties Decision 1/CP.21' (n 6). Article 9 (1)

[189] '(PDF) Financing Loss and Damage: Reviewing Options under the Warsaw International Mechanism' (*ResearchGate*) <https://www.researchgate.net/publication/323917287_Financing_loss_and_damage_reviewing_options_under_the_Warsaw_International_Mechanism> accessed 2 March 2020.

4.3 Establishment of a Climate Disaster Response Fund

Speaking of compensation and who should be responsible for paying, Rosemary Lyster makes some interesting observations. She proposes the establishment of a fossil fuel-funded Climate Disaster Response Fund to compensate the victims in developing countries, who are particularly vulnerable. People affected in all developing countries particularly vulnerable to climate change should be able to make a claim on this Fund. It is suggested that the claim should be brought against the Fund by a State Party claiming on behalf of its affected citizens[190]. This fund should be established under the WIM and should hold the top 200 fossil fuels companies liable and responsible for the Loss and Damage occurring because of climate change. These companies have produced, will continue to produce, and hold the reserves of, most of the feedstock used in the international energy system. Moreover, it is not a problem to control the GHG emissions. Inspiration of this Fund is derived from international and domestic legal precedents where Funds have been established to compensate for damage cause by for example oil pollution[191].

This author is pleased with the idea of a Climate Disaster Response Fund. First of all, the Fund will be able to present an effective way of compensating victims of climate disasters. Second, the Fund will be a highly ethical and fair reaction to the financial damages that vulnerable countries and their citizens suffer from climate change caused by the GHG emissions. Moreover, this author is trigged by the idea of an establishment of carbon tracker. To have a system that can control and see where the majority of GHG on a global scale is released, will definitely be a huge benefit for dividing financial risk within this Fund.

4.4 Difficulties

In the following, this author will present some of the main difficulties of making an historically responsible State liable for the adverse effects of climate change. It will be elaborated about the challenge of establishing a causal link between the action and the damage, how sovereignty can work as an obstacle for justice and that the lack of affiliation to foreign persons can be decisive in

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[190] 'Lyster R, Climate Justice and Disaster Law (Cambridge University Press 2016)' (n 28). page, 340-341

[191] ibid. page, 285

this discussion.

4.4.1 The "link" requirement

The "link" requirement has been characterised in different ways depending on the legal context. The ECtHR refers, in the context of Article 8, to a "direct" link between environmental degradation and on encroachment on a human right of a "certain minimum level of severity"[192]. The degree of the interference must be assessed in the light of a variety of factors: The assessment of what is the minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city[193].

In order to use a personal-injury-based system such as human rights law to prompt States to take mitigation and adaptation measures, the wording of a potential right to an environment of a certain quality, must be carefully set[194]. It is particularly challenging to bring climate change under the "link" requirement discussed in the previous section, because the applicant must establish that acts or omissions of the State have resulted in interference with the climatic system that has triggered a specific extreme (or slow onset) weather event, which in turn, has affected his/her rights. Conceptually, establishing causality in such circumstances requires three steps: (i) the State (through acts or omissions) interferes with the climatic system; (ii) such interference causes an extreme weather event (e.g. a hurricane, a heat wave, a drought) or a slow onset event (e.g. melting of polar ice or rise of the sea level); and (iii) such an extreme or slow onset event results in a specific and sufficiently severe impairment of a human right[195].

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[192] Fadeyeva v. Russia, supra footnote 57, paras 68-70

[193] Ibid. para, 69

[194] PM Dupuy and JE Viñuales, *International Environmental Law* (Cambridge University Press 2015) <https://books.google.no/books?id=C1vHCgAAQBAJ>. page, 328

[195] 'Dupuy P-M and Viñuales JE, International Environmental Law (2nd EdnCambridge University Press 2018)' (n 45). page, 396

There are different ways to overcome this important obstacle. *The first way* is of a scientific nature. Instead of changing the legal requirements, one would have to wait until it is scientifically possible to attribute a specific weather event to climatic change[196]. The IPCC has tried to gather scientific evidence in the last several years to do precisely this type of specific attribution, but whereas this link may eventually become well established for some high-profile weather events, it is unlikely that such will be the case for any extreme weather event that may arise in litigation.

The second way would be to establish a compensation fund based on the contributions of States and companies that emit large amounts of GHG[197]. This solution involves, in fact, overcoming the aforementioned obstacle in a legal manner by setting out a system that treats the emissions of GHG on the same footing as some hazardous but tolerated activities, as is the case with nuclear energy production or the transportation of oil[198]. Such a question could potentially fall under the remit of the "Loss and Damage" negotiations conducted under the UNFCCC or the Paris Agreement, although developed countries have strongly opposed attempts at framing this negotiation agenda from a "compensation" perspective.

A third possibility would be to overcome this obstacle legally by recognising a right to an "ecologically balanced" or "generally satisfactory" environment with the understanding that significant interference with the climatic system may, as such, amount to a breach of such a right because it unbalances the environment or makes it generally unsatisfactory[199]. This possibility has not been explored yet, and it may well remain unexplored until the implications of choosing the appropriate "adjective" to characterise the right to an environment of a certain quality are well understood[200].

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[196] ibid. page, 398

[197] ibid.

[198] ibid.

[199] ibid. page, 399

[200] ibid.

In order to establish a tort, negligence must be established in the sense that the defendant must have foreseen the risk of harm and yet failed to take steps to guard against the risk. Also, the harm suffered must be causally linked to the action, or omissions, which caused the harm[201]. There are clearly some obstacles to overcome when talking about proving a causal link. Some legal obstacles include that the climate change impacts are diffuse and disparate in origin and the necessity of establishing foreseeability of the risk of climate change in a way that does not strain liberal notions of limited obligation beyond breaking point[202].

This author does not think it is reasonable to expect victims to prove 100% where the damage stems from. In this discussion, concerning the necessity of proving where the damage stems from 100% or thereabout, the international environmental law principles of prevention, precaution and no-harm makes itself relevant. The IPCC creates enough certainty when discussing where in the world the majority of GHG emissions stems from, and which effect this have on the vulnerable developing countries. Knowing about the effect, the prevention principle obliges the States to reduce their GHG emissions and no causing harm to the common atmospheric space or developing countries. This author admits that it will be almost impossible to track an activity to a damage when talking about transboundary consequences. Therefore, the discussion on the link requirement should be focused on the *areas* where GHG emissions comes from, and not strictly one company or one country.

4.4.2 Sovereignty

The sovereignty of states represents an enormous and massive challenge when it comes to holding different states, and their actors, responsible and liable for the damages their activities are causing on the climatic system. State sovereignty is the concept that States are in complete and exclusive control of all the people and property within their territory[203]. It also includes the idea that all states are equal as states, and this feature of sovereignty has impacts on international law. In other words, despite their different land masses, population sizes, or financial capabilities, all states have an

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[201] 'Lyster R, Climate Justice and Disaster Law (Cambridge University Press 2016)' (n 28). page, 320-321

[202] ibid.

[203] 'The Issue of Sovereignty | Globalization101' <http://www.globalization101.org/the-issue-of-sovereignty/> accessed 21 April 2020.

equal right to function as a state and make decisions about what occurs within their own national borders[204]. Since all states are equal in this sense, it is generally accepted that one state cannot interfere with the internal affair of another state. The concept of states' sovereignty causes uncertainty and inefficiency when actors wants to hold another State liable for Loss and Damage, even though the link requirement has been proven.

The difficulties here can be traced to Bodin's statement that sovereigns who makes the law cannot be bound by the laws they make *(majestas est summa in cives ac subditos legibusque solute potestas)*[205]. This author thinks this statement made by Bodin is inaccurate and, if understood strict literally, gives a wrong picture of what sovereignty actually is. If the government cannot be convicted of abuse of authority, their citizens would not have sufficient protection from the law. The government have legislative powers, but they need to act within the limits of the current law.

The UNFCCC also makes explicit reference to states' sovereignty within the international community. The preamble to the UNFCCC *"recalling also that States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other State or of areas beyond the limits of national jurisdiction"*[206]. Moreover, the preamble reaffirms the principle of sovereignty of States in international cooperation to address climate change[207].

This author thinks it is highly unfortunate that the principle of sovereignty stands in the way of making the right perpetrators liable and responsible for the harm they are causing to other areas and/or peoples. If not stands entirety in the way, the principle makes it much more difficult to

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[204] ibid.

[205] 'Sovereignty - Sovereignty and International Law' (*Encyclopedia Britannica*) <https://www.britannica.com/topic/sovereignty> accessed 21 April 2020.

[206] 'United Nations International Framework Convention on Climate Change (Adopted 9 May 1992, Entered into Force 21 March 1994) A/RES/48/189 (UNFCCC)' (n 3). Recital 8

[207] ibid. Recital 9

enforce that a fair compensation should be given to the victims of the damages. I wonder whether, and to what possible extent, this can be qualified or defined as an *"abuse of State sovereignty"*. Clearly, humanity existed before regions were divided into States. Many of the present states have their origins during the 1990s, such as Czech Republic (1993), Croatia (1991) and Macedonia (1991). Different States come and go throughout the history, but humanity is constant. Therefore, this author thinks the principle of sovereignty, when talking about climate change in international law, has a way too dominant and decisive role on the effectiveness and justice. The principle of sovereignty should be something that contributes to sustainable and positive development, and not something to hide behind and use as a protection wall against claims.

4.4.3 Geography and affiliation

The last difficulty that will be mentioned here concerns both geography and affiliation. This author thinks that the lack of proximity towards these two elements, geography and affiliation, contributes to less measures by States on precaution and prevention. As shown, the majority of Loss and Damage, such as extreme weather events, droughts, human rights violations and deforestation, is occurring in SIDS and developing countries. Even though there is sufficient coverage of the climate change impacts in the media, people are noticing that the damages do not affect their lives and livelihoods to such a degree that they understand the seriousness of the consequences. For example, Norway is a massive producer of oil, and the majority of the economical income originates from this industry. The consequences occurring from their oil productivity is not causing visible damages to the population in Norway, only benefits, among other things the high standard of living. This author is convinced that if the losses and damages have been more visible in Norway, for example by causing a significant increase in extreme weather events such as tsunamis or earthquakes, the Norwegian government would have decreased their oil activity and stressed the importance of developing new sustainable ways.

4.5 Access to justice

Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-

makers accountable for wrongful acts[208]. Therefore, it is clear that access to justice is relevant for how to hold developed States liable for the consequences of climate change. The citizens' right to information, awareness and participation is a crucial element when pursuing climate justice. The UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels from 2012, makes it clear that *"we emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid"*[209]. This symbolizes an ideology that is built upon the self-evident theory that states that every human being is worth the same and should have the same access to justice as everybody else. Moreover, this statement provides important information about the right of access to justice, when pointing out that the costs and effectiveness should be manageable for everyone.

In principle 10 of the Rio Declaration, access to justice is thoroughly described. The principle states that "*environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by the public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided"*[210]. The Rio Declaration reaffirms how important the public awareness and information is for people if they are going to make use of their access to justice. It is actually quite essential for the right of access to

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[208] Norul Mohamed Rashid, 'Access to Justice' (*United Nations and the Rule of Law*) <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> accessed 23 April 2020.

[209] 'A-RES-67-1.Pdf' <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf> accessed 23 April 2020. Para, 14

[210] Lance N Antrim, 'The United Nations Conference on Environment and Development' in Allan E Goodman (ed), Allan Goodman, *The Diplomatic Record 1992-1993* (1st edn, Routledge 2019) <https://www.taylorfrancis.com/books/9781000244090/chapters/10.4324/9780429310089-10> accessed 23 April 2020.

justice, that people are provided sufficient and important information about the practices and how their right may be violated.

A document which provides opportunities to claim access to justice, is the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). This author is well aware of the fact that this convention is not ratified by all countries. However, it terms of access to justice based on human rights violation due to climate change, this instrument should serve as inspiration for how to create effective procedures.

Article 1 of the convention states that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, *"each Party shall guarantee the right to access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention"*[211]. This article contains a strong obligation for the contracting Parties. By using both "shall", and "guarantee", the article clearly gives rise to a binding obligation for States to provide their citizens these rights.

The right of access to justice is written down in article 9 of the Convention. Article 9 ensures that *"[e]ach Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provision of that article, has access to a review procedure before a court of law of another independent and impartial body established by law"*[212]. In order to further strengthen the effectiveness, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall *"consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to*

[211] 'United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, Entered into Force 30 October 2001)'.
[212] ibid.

justice"[213]. These articles underline the fact that the Parties need to facilitate the access to justice by provide sufficient information and awareness for their citizens on how to claim their rights and should enable everyone to pursue a claim by making the process cost-effective and reducing financial or other barriers.

Article 9 (2) of the Aarhus Convention states that each Party shall, within the framework of its national legislation, ensure that members of the public concerned *"[h]aving a sufficient interest have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedure legality of any decision, act or omission"*[214]. What constitutes a sufficient interest and impairment shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of the Aarhus Convention[215].

When it comes to NGO, the Convention ensures that any non-governmental organisation meeting the requirements referred to in article 2 (5), *"shall be deemed sufficient for the purposes of having a sufficient interest"*[216]. Article 2 (5) provides a definition of "the public concerned" and states that this means the *"public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest"*[217]. In the discussion of access to justice in environmental cases, NGOs has an important role in being a plaintiff, providing information to the public and raising the awareness on environmental issues across the society. In the following, this thesis will briefly present three cases relevant for the discussion on access to justice and include a possible solution of the issue of holding historically developed States liable for the consequences of climate change in developing States.

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[213] ibid. Article 9 (5)

[214] ibid. Article 9 (2) (a)

[215] ibid. Article 9 (2)

[216] ibid.

[217] ibid.

4.5.1 Case law

In the following, two important and essential cases when discussing access to justice and climate justice, will be presented. These cases are the Norwegian Climate Case, which in going to the Supreme Court in Norway, and the Urgenda case. By including these cases, this author will demonstrate how different plaintiffs are claiming violations on human rights, by making use of arguments from climate change. They have the opportunity to do so, because they make use of their access to justice.

4.5.1.1 Norwegian Climate Case

This lawsuit, called "Klimasøksmålet Arktis", is Norway's first climate lawsuit. It concerns ten new licenses for oil exploration in the Barents Sea, which were granted by the Norwegian government in June 2016[218]. In October 2016 Greenpeace and an organisation called Nature and Youth sued the Norwegian state for granting these licenses for areas further north and further east than ever before. Article 112 of the Norwegian Constitution gives youth of today and future generations every right to a liveable environment, which also includes a liveable climate[219]. This paragraph declares a right which orders the State to protect the environment and climate against unjustifiable risk and damage, both through taking active measures and to refrain from actions threatening the climate[220]. The environmental organisation lost in both the District Court and the Court of Appeal. However, this case will be presented before the Supreme Court in Norway. Relevant for this thesis, and the right of access to justice, the Court of Appeal made some interesting considerations.

After concluding that the NGOs have a sufficient interest in this case, the Court of Appeal concluded that article 112 of the Norwegian Constitution, must be understood in a way *"that the provision grants substantive rights that can be reviewed before the courts and that it applies to all*

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[218] 'About The People vs. Arctic Oil' (*Klimasøksmål*) <http://www.xn--klimasksml-95a8t.no/en/about-the-people-vs-arctic-oil/> accessed 6 May 2020.

[219] 'Why We Are Taking the State to Court' (*Klimasøksmål*) <http://www.xn--klimasksml-95a8t.no/en/why-we-are-taking-the-state-to-court/> accessed 6 May 2020.

[220] ibid.

environmental harm that has been cited – local environment harm, greenhouse gas emission that occur in connection with the production of petroleum and greenhouse gas emissions that occur in connection with combustion"[221]. The Court of Appeal further notes that the environmental harm must be assessed against the measures taken, and the *"threshold for review will be high"*[222]. This author finds it satisfactory that article 112 of the Norwegian Constitution, can be used in a claim where the plaintiffs invoke arguments of their substantive rights. However, the statement about the threshold for review demonstrates how much respect the Court of Appeal has for the principle of sovereignty and the government.

Concerning how significant the environmental harm needs to be, the Court of Appeal notes that a threshold must be added. The severity of the environmental harm is a key criterion, based on the significance and importance for human health, the productive capacity and diversity of the natural environment. Based on the purpose, the Court of Appeal states that "*it cannot be required that these values are already affected – a risk must be sufficient, which is in keeping with the precautionary principle in environmental law"*[223]. The Court of Appeal clearly reaffirms the principle of precaution when pointing out the threshold of damage sufficient for claims.

The most interesting aspect of this case, and relevant for this thesis, is the Court of Appeal's elaboration on the international effects of the Norwegian petroleum industry. The Court of Appeal acknowledges that the *"international aspect of the climate issue lead to another question: Is it only the effects of the climate change in Norway that are relevant, or the global effects as well?"*[224]. This author is highly supportive of courts making this an international discussion, instead of limiting the case only to the national concerns and effects. The Court of Appeal notes that the wording in article 112 of the Norwegian Constitution, *"every person has the right to an environment […]"* is entirely general in nature[225]. When discussing the possible international effects of the petroleum industry

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[221] 'Judgement_Peoplevs_ArcticOil_Appeal_Jan2020.Pdf' <http://www.xn--klimasksml-95a8t.no/wp-content/uploads/2019/10/judgement_Peoplevs_ArcticOil_Appeal_Jan2020.pdf> accessed 23 April 2020. page, 10

[222] ibid.

[223] ibid. page, 18

[224] ibid.

[225] ibid. page, 22

and article 112, the Court of Appeal is of the opinion that article 112 protects against *"the consequences environmental harm may have for human health and the productive capacity and diversity of the natural environment in Norway"*[226].

Crucial for the discussion of liability for historically developed States, is the Court of Appeal's mention of activities in Norway that result in environmental harm in other countries. In its reasoning regarding this issue, the Court of Appeal notes that the international environmental law principle of no-harm means that a State is obliged to prevent damage in other countries. However, the principle has been developed *"with the intention of assigning responsibility for harmful actions, whereas Article 112 of the Norwegian Constitution involves an individual right to an environment"*[227]. This author thinks that this interpretation by the Court of Appeal is extremely limited. It is well proven that the GHG emissions are in fact causing severe Loss and Damage and should be defined as a harmful action on the international climate.

Domestic legal provisions state that environmental harm beyond a country's jurisdiction, is to be taken into account as an expression of a solidarity principle[228]. The Court of Appeal notes that this involves, in the same way as the principle regarding solidarity across generation, *"a moral principle that can have major significance in the work of reducing climate change"*[229]. However, after pointing out the moral principle, the Court of Appeal makes a disappointing argument regarding the international effects and solidarity. In its reasonings the Court of Appeal notes that, in contrast to the principle of solidarity with future generations, *"the principle has not been expressed in the wording of Article 112, nor have any clear references been made to the principle in the preparatory works"*[230].

This author thinks the Court of Appeal is unwilling to see the broader picture concerning this case

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[226] ibid.

[227] ibid.

[228] See Backer, Innføring i naturressurs- og miljørett («Introduction to natural resources and environmental law») (2012) page 64-65

[229] 'Judgement_Peoplevs_ArcticOil_Appeal_Jan2020.Pdf' (n 221). page, 22

[230] ibid.

and the international effects. Even though the principle of solidarity is not mentioned in article 112, it should definitely be applied in this discussion. The Court of Appeal should have taken more of a solidarity approach than they did and acknowledged the climate as a common concern. To demonstrate this narrow and limited understanding of the Court of Appeal, the court made reference to, and emphasized, that *"the total emissions from Norwegian petroleum activities are marginal when compared with the total global emissions"*[231]. This is a provocative statement by the Court of Appeal. If all courts within the high emitting countries hide behind this kind of reasoning, the overall GHG emissions will continue to rise. The Court of Appeal ruled in favour of the Norwegian government.

4.5.1.2 Urgenda

The Urgenda Climate Case against the Dutch Government was the first e.g. case in the world in which citizens established that their government has a legal duty to prevent dangerous climate change[232]. This case, which was brought on behalf of 886 Dutch citizens, made climate change a major political and social issues in the Netherlands and transformed domestic climate change policy[233]. The NGO, Urgenda, could be a party to the lawsuit in the power Book 3 Section 305a of the Dutch Civil Code[234]. Concerning the question on access to justice, the Supreme Court of the Netherlands notes that Urgenda could rightfully bring claims based on ECHR articles 2 (right to life) and 8 (respect for private and family life). The Supreme Court, using case law from the ECtHR, states that article 2 *"encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction"*[235]. Moreover, the Supreme Court noted that the Dutch state is obligated to take appropriate steps if there is a real and immediate risk to persons and the state is aware of that risk. The term "real and immediate" must be understood to refer to a risk that is both genuine and imminent. Furthermore, the term "immediate"

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[231] ibid. page, 20

[232] 'Climate Case' (*Urgenda*) <https://www.urgenda.nl/en/themas/climate-case/> accessed 7 May 2020.

[233] ibid.

[234] 'Urgenda v. The Dutch Government (Urgenda Climate Case) The Court of Appeal - English Translation' (n 51). para, 35

[235] 'ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.Pdf' <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf> accessed 7 May 2020. (5.2.2)

does not refer to imminences in the sense that the risk must materialise within a short period of time, but rather that the risk in question is directly threatening the persons involved[236]. In other words, the protection of article 2 ECHR also applies to risks that may only materialise in the longer term, such as sea level rise.

Concerning article 8 of the ECHR, the Supreme Court states that this provision also relates to environmental issues. Article 8 ECHR encompasses the Dutch state's positive obligation to take reasonable and appropriate measures to protect individuals against possible serious damage to their environment[237]. The obligation to take measures exists if there is a risk that serious environmental contamination may affect individuals' well-being and prevent them from enjoying their homes and family life adversely. That risk does not need to only exist in the short term[238].

Based on the content of articles 2 and 8 ECHR, the Supreme Court states that *"no other conclusion can be drawn but that the State is required to take measures to counter the genuine threat of dangerous climate change. Climate change constitutes a "real and immediate" risk, and it entails the risk that the lives and welfare of Dutch residents could be seriously jeopardised. The same applies to, inter alia, the possible sharp rise in the sea level, which could render parts of the Netherlands uninhabitable"*[239]. The Supreme Court did uphold the judgement of the Court of Appeal, confirming the order that the Netherlands need to reduce its emissions by a minimum of 25% before 2020 compared to 1990 levels[240].

4.5.1.3 Conclusion

This author thinks the above-mentioned cases provide interesting material when discussing the access to justice and if there are any successful ways of holding historically responsible states liable for the adverse effects in developing countries. The most interesting aspect is the elaboration of the

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[236] ibid.

[237] ibid. (5.2.3)

[238] ibid.

[239] ibid. (5.6.2)

[240] 'Climate Case' (n 232).

Norwegian Court of Appeal on extraterritorial effects. Although the Court of Appeal does not conclude with an obligation for the State to reduce the GHG emissions due to international considerations, it points out how the principle of solidarity serve as a guideline. Obviously, no real effect is granted by pointing out a principle in the way that the Court of Appeal did, however it gives some relevance to the damages occurring elsewhere.

Moreover, the Urgenda climate case presents some interesting elements. An NGO, consisting of over 800 individual human beings, were given permission to claim their right to life and family life from article 2 and 8 ECHR. Not only could they successfully bring these claims to the Supreme Court, they also won the case and got acknowledgement for the serious and immediate threat which climate change involves. This author finds it interesting that human rights claims were decisive for making the Dutch government obligated to reduce the GHG emission dramatically. As already thoroughly showed in this thesis, people in developing countries are suffering massively from the adverse effects of climate change, and their human right is being violated each day. In the Netherlands, sea level rise is a major concern, and rightfully so, the Supreme Court rules in the favour of Urgenda. Nonetheless, this should apply for the population in developing countries as well. If they cannot get recognition and support from their own courts, they should be provided the opportunity to seek justice in either another national court, or an international court. Everyone has the same basic human rights and should therefore have the same access to justice when these rights are violated.

5 Conclusion

The main purpose of this thesis has been to illuminate how the historically responsible countries can be held liable for the consequences of climate change in developing countries. Throughout this thesis, the author has particularly been using articles from convention, environmental law principles, case law and ethical considerations.

The international community have definitely made some progress what concerns the issues of Loss and Damage. However, the fact that article 8 of the Paris Agreement do not involve or provide a basis for any liability or compensation, marks a major limitation. This author thinks article 9 of the Paris Agreement, the finance article, should be focused more upon. The developed state Parties are

obligated to provide financial support for developed state Parties for both their mitigation and adaptation efforts. This is relevant when thinking of all the persons in developing countries that have to relocate due to the adverse effects of climate change. The developed states should definitely take the costs of this form for migration. Moreover, international environmental law principles should serve be more frequently used in the discussion of liability for historically responsible states. Of particular relevance, the principles regarding prevention, no-harm and precaution should create some obligations for states to reduce their GHG emissions, given the science on how GHG emissions leads to adverse effects of climate change.

This author thinks claims on human rights violation due to climate change, will serve as the most efficient way of making historically responsible states liable for the consequences of climate change in developing states. Looking at the massive impacts that climate change has on the different human rights, such as the right to life, this author thinks climate change contributes to a modern genocide. Moreover, climate change makes millions of people leave their homes and heritage each year. There is no doubt that climate change adversely affects the poor and vulnerable persons, most of them living in developing countries. The international community needs to step up their action in reducing the GHG emissions, and take responsibility of the climate which is, after all, a common concern of humankind. Moreover, this author thinks the international negotiation loses its essence when discussion Loss and Damage. Using so much resources and arguments on whether or not Loss and Damage is a part of adaptation or mitigation, the international negotiations is missing the bigger picture. Climate justice and doing what is right should not be depended on strict definitions.

This author is highly supportive of the establishment of a Climate Disaster Response Fund. Regarding the question on contribution to this fund, this should be based upon the beneficiary principle and the contribution to the problem approach. Using those two elements in deciding who shall contribute the most, this fund will mark a significantly positive development towards more climate justice.

The increase in number of climate change litigation and cases, marks a positive development for how to hold the historically responsible states liable for their GHG emissions. The fact that NGOs are suing governments for their omissions on reduction of GHG emissions, marks a trend within climate change litigation that this author is supportive of. Therefore, the right to information,

participation and access to justice provides important elements in pursuing climate justice. A challenge of climate litigation and access to justice, is the fact that people in for example Bangladesh will not succeed in suing USA for their emissions. This is a limitation for the global climate justice. In both the Norwegian Climate Case and the Urgenda Case, it was national citizens and NGOs which claimed their right. Clearly, this constitute a positive development for reduction of GHG emissions, however it does not give rise to climate justice. This author thinks the international community should be open to discuss the possibility of giving the people in developing countries, access to pursue their right to a health environment before another national court. Even though it will be difficult to succeed due to sovereignty of States and the link requirement, it will constitute a positive development for climate justice.

Even though climate justice could be achieved by making use of conventions, principles and case law, the research question is a victim of international law. This author finds it unfortunate that international law and enforcement is so ineffective, especially when the impacts of climate change is so severe. Affiliation should not only be focused on people living within the governments area of legislation and sovereignty, it should also apply for all humans.

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