

Overcoming Barriers to Claims for Loss and Damage in Climate Change Litigation

Emmanuel Onyeabor^{1*} Ijeamaka Anika² Ngozi Joan Nwanta³

1.LL.B, LL.M, PhD (Env Law & Policy) B.L, B. Ed (Geog), M.Sc (Env Mgt) M.Sc (Dev Planning)
Senior Lecturer, Environmental & Planning Law, Faculty of Law, University of Nigeria, Enugu
Campus, Nigeria

2.LL.B (Lond), LL.M (Lond), BL, Doctoral candidate, Lecturer, International Law, Faculty of law, University of
Nigeria, Enugu Campus, Nigeria

3.LL.B (Nig). Aluko & Oyebo, Afri Investment House, 2nd floor, Plot 2669, Aguiyi Ironsi Street Cadastral
Zone A6, Maitama, FCT, Abuja, Nigeria

Abstract

The issue of climate change is now a familiar one. Most academics and other affiliated fields agree that climate change is or should become a mainstream issue. There is currently a lot of pressure on governments to take it seriously and legislate against actions that cause climate change. The extent to which this is in fact possible is currently debatable. Legal mechanisms are arguably at an embryonic stage. Therefore, it has become necessary to suggest the means in which loss and damage from climate change can be litigated in domestic courts and at the international level, knowing that the impact of climate change cuts through international boundaries. This issue can no longer be left to interstate diplomacy which has so far been unsuccessful in effectively tackling this matter. Litigating loss and damage against impacts caused by climate change therefore appears to be an attractive alternative and possible avenue to galvanizing greenhouse gas emitters to cut their emissions knowing that there may be some legal consequences if they renege on emission reduction targets. However, because of the international dimension of climate change impacts, litigants may not find the route very smooth. To this end, this paper examines the possible barriers that may lie in wait for potential litigants. The paper also seeks to suggest possible ways of overcoming these barriers.

Keywords: loss and damage; impact of climate change; litigation as alternative method; barriers to litigation; overcoming barriers to litigation.

1.0. Introduction

Global climate change is having observable effects on the environment. The Intergovernmental Panel on Climate Change (IPCC) forecasts a temperature rise of between 2.5 to 10 degrees Fahrenheit over the next century¹ and according to them, human-induced climate change will transform the ecological balance of our planet and lead to dramatic societal problems. According to the most recent Synthesis report (Fifth Assessment Report) of the IPCC,² “human influence on the climate system is clear and recent anthropogenic emissions of greenhouse gases are the highest in history. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years.”

Impacts of climate change include sea level rise and coastal zone flooding (as polar ice caps melt), widespread ecosystems and land use change, possible violent weather patterns, human health impacts. However, climate change, means much more than these as entire belts of arable land are likely to shift as climate patterns change permanently. Water sources, already strained, could dry up as the mountain glaciers that feed them themselves vanish. In human terms, this could mean famine, competition over remaining resources, and migration, either within countries or across national borders, creating environmental refugees. Settling environmental refugees³ is already a problem facing the international community, as inhabitants of Pacific Island states already threatened by rising sea levels are looking for alternative places to live without necessarily sacrificing their cultural identity. In turn, climate change may affect global public health as diseases move with climate changes: malaria, for instance, is already appearing in parts hitherto not prevalent.⁴ The unfortunate aspect of this scenario is that many countries, especially the developing countries, will bear more brunt of these effects.

Based on these projections, it seems natural that the international society would be doing everything in

¹ NASA, “The Current and Future Consequences of Global Change”, (5 May 2015), available at <http://climate.nasa.gov/effects/> (last assessed on April 25, 2015)

² Intergovernmental Panel on Climate Change, “Climate Change 2014 Synthesis Report, Summary for Policymakers” available at http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf (last assessed on June 20, 2015),

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³ The Darfur crisis is a case in point.

⁴ Intergovernmental Panel on Climate Change (IPCC) Reports, *op cit*

its power to combat climate change. Unfortunately, this is not the case. Due to the fact that the global economy relies so heavily on the burning of fossil fuels, the primary cause of climate change, thus, forming effective mechanisms to control and mitigate climate change is daunting. As a way out, recourse may be had to litigating loss and damage against perceived emitters of greenhouse gases (GHGs). But the pathway to this for a potential claimant is replete with thorns.

2.0. What obstacles are in wait for potential litigants

Public international law largely overlaps with international politics, and governments often fundamentally disagree about what constitutes the relevant law in a particular case. In order to address problem issues on the international plane, governments tend to rely on a variety of political means. Climate policies potentially reach all activities that burn fossil fuels and thus, go to the heart of the economy of many countries. Also, the nature of the issue of climate change impact is such that it will require a very long-term response under conditions of scientific uncertainty, and in some cases scientific denials of human induced climate change. Therefore, governments are usually cautious about making commitments under international law to limit emission of GHGs and are sensitive to whether their trade competitors will commit to undertake comparable efforts. International courts and tribunals have also been very cautious in interpreting international obligations and forcing a particular conduct upon States and interfering in their domestic affairs. They are often perceived as another forum for international diplomacy and rarely issue hard hitting judgements. All these, and many more, have laid a number of obstacles in wait for a potential litigant in claims for loss and damage arising from climate change impacts.

1). The first challenging obstacle that a victim of climate change impact may face is establishing causation against an emitter or group of emitters. As Hunter and Salzman¹ noted, “climate change is essentially a global environmental tort and establishing causal links between climate change and alleged damages to the environment and the link between a party’s discrete greenhouse gas emissions and alleged damages is a thorny task.” For instance, coral reefs may face many other threats that contribute to their degradation besides attributing such degradation to impact of climate change. For example, degradation may be due to terrestrial runoff, disease and predators that may not have any causal relationship with pollution occasioned by emission of GHGs. Thus, establishing links of this nature will require very expensive research which may stretch the resources of Small Island and vulnerable States.²

Again, at the outset, there is a difficulty in actually identifying a relationship between an ascertained plaintiff (or class of plaintiffs) and an ascertained defendant (or class of defendants). This is because the class of defendants have a global and vast membership, including producers of fossil fuels, users of fossil fuels and manufacturers or marketers of products whose use contributes to climate change. In the same vein, identifying the plaintiff would also be problematic. However, since climate change is liable to affect all of humanity to varying degrees, membership of the class of plaintiffs would include all of humanity. Thus, a potential litigant need not prove that he was affected by the impact of climate change, or that he suffered loss or damage over and above others, for him to qualify as a plaintiff. It should be noted that causation has two different elements:

- (a) Cause in fact, where plaintiffs must prove that but for the breach of duty, injury would not have occurred; and
- (b) Proximate causation or legal causation where the court determines whether the injury was sufficiently foreseeable to allow for the imposition of liability.

On the first element of “cause in fact,” the traditional test requires the plaintiff to demonstrate on a balance of probabilities that, “but for” the defendant’s conduct, the plaintiff would not have been harmed.³ With multiple actors emitting greenhouse gases over a century it is difficult to attribute specific causation for harms thousands of kilometres away to any particular industrial sector let alone specific corporate defendant. This is because the contribution of any one facility or identifiable group of emitters is fairly insignificant and thus will not be substantial enough for a court to find that “but for” its emissions the alleged harm would not have occurred. This is however changing. In the case of *Massachusetts v Environmental Protection Agency (EPA)*,⁴ the EPA argued, in relation to causation, that its decision not to regulate emission of GHGs from new motor vehicles contributes so insignificantly to the petitioners’ injuries that it cannot be challenged in court. The Supreme Court held against the EPA stating that “its argument rests on the erroneous assumption that a small, incremental step, because it is incremental, can never be attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to regulatory action.”

The Canadian test of “material contribution” is the only significant departure from the traditional

¹ D. Hunter and J. Salzman: “Negligence in the Air: The Duty of Care in Climate Change Litigation,” 155 *University of Pennsylvania Law Review* (2007) 1741, at 1748

² W. G. Burns: “Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention,” 2 *International Journal of Sustainable Development and Policy*, 27 (2006) p. 50

³ *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 15.

⁴ *Massachusetts v Environmental Protection Agency* 549 US 497, 127 S.Ct. 1438, 167 L.Ed.2d. 248 (2007).

approach in recognition that the “but for” test. But this is unworkable in some circumstances.¹ However, the Supreme Court of Canada has emphasized that the “but for” approach to causation should be presumptively applied in all but the most exceptional of cases. In this vein, in *Resurface Corp. v. Hanke*,² the Supreme Court of Canada stipulated that the “material contribution” test should only be applied when two requirements are met. First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. It is also necessary to establish that there is a causal link between the activities complained of and the harm in question, posit Schwarte and Byrne.³

The problem with damage from climate change is that due to the complex and synergetic effect of the diverse pollutants and polluters involved, and the non-linearity of climate change, it may be difficult to establish a chain of causation.⁴ Contributory factors may intervene, and the complexity of the climate system can almost always be relied upon to assert a possible break in the chain.

Problems are also likely to arise in relation to reasonable foreseeability and proximity which is the second element. What risks are reasonably foreseeable and which plaintiffs are within the zone of foreseeable risk, one may be tempted to ask. Establishing the test may prove extremely hard. Is it reasonably foreseeable that a particular defendant’s conduct, such as emitting GHGs by using fossil fuels in the course of its business, could result in a specific climate change-induced event, such as greater tidal inundation that, in turn, harms a resident or his property in a coastal community? And when did such foreseeability arise?⁵ The international jurisprudence in this respect differs and the test applied has ranged from “clear and convincing” to “on the balance of probabilities.”⁶ The precautionary principle comes to the rescue in unravelling this log-jam. To this end, the principle has been used as a procedural tool to lower the standard of proof in situations where the complexity of scientific facts leads to a degree of uncertainty.⁷

The core of the precautionary principle, which is still evolving, is reflected in Principle 15 of the Rio Declaration on Environment and Development, 1992. It provides that:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

At the most general level, the principle means that states agree to act carefully and with foresight when taking decisions which concern activities that may have an adverse impact on the environment. A more focused interpretation provides that the principle requires activities and substances which may be harmful to the environment to be regulated, and possibly prohibited, even if no conclusive or overwhelming evidence is available as to the harm or likely harm they may cause to the environment. As the Bergen Ministerial Declaration on Sustainable Development, 1990⁸ put it, “lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.” Under the Rio Declaration, the requirement is stated to be mandatory: lack of full scientific certainty ‘shall not be used’ to prevent action.⁹ Under Article 4(3) (f) of the Bamako Convention, 1991,¹⁰ parties are required to strive to adopt and implement the preventive, precautionary approach to pollution which entails, *inter alia*:

preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof the appropriate measures to implement the precautionary principle to pollution prevention through the

¹ *Athey v. Leonati*, [1996] 3 S.C.R. 458.

² 2007 SCC 7 at para. 25

³ C. Schwarte and R. Byrne, “International climate change litigation and the negotiation process - Working paper”, (14 October 2010) available at http://www.google.com/url?q=http://www.caneeurope.org/resources/doc_view/1942-field-international-climate-litigation-and-the-negotiation-process-oct-2010&sa=U&ei=IPBKVarlAcH-UvangOAO&ved=0CA0QFjAA&usq=AFQjCNFpg_b4GNkQsucorxkyqwLO7VoX9A (last assessed on May 7, 2015).

⁴ Christina Voigt, ‘State Responsibility for Climate Change Damages’, *Nordic Journal of International Law*, Vol. 77 Nos. 1-2, 2008.

⁵ D. Hunter and J. Salzman, *ibid*, 1745 and 1769

⁶ *Corfu Channel case (Merits) (United Kingdom v. Albania)*, ICJ Reports 1949

⁷ *Urgenda Foundation c. s. v. The Kingdom of the Netherlands and Ministry of Infrastructure and the Environment* [2015] Case C/09/456689/HA ZA 13-1396.

⁸ The first international instrument to treat the principle as one of general application and linked to sustainable development

⁹ Principle 15, Rio Declaration, 1992

¹⁰ Bamako Convention on the Ban of Imports into Africa and the Control of Trans-Boundary Movement and Management of Hazardous Wastes, 1991.

application of clean production methods.

The use of this principle in establishing causation is apt as approach to its interpretation tends to shift the burden of proof and requires the person who wishes to carry out an activity or who had carried out an activity to prove that such activity will not or did not cause harm to the environment, as the case may be. This interpretation would require polluters, and polluting States, to establish that their activities and the discharge of certain substances did not adversely or significantly affect the environment.

The precautionary principle has been receiving widespread support by the international community in relation to a broad range of decisions and subject areas. The practice of international courts and tribunals, and of States appearing before them, sheds some light in this respect. The principle appears to have been raised first in 1995 when New Zealand¹ made a case at the International Court of Justice (ICJ) concerning French nuclear testing. New Zealand relied extensively on the principle, which it described as ‘a very widely accepted and operative principle of international law’ and which shifted the burden onto France to prove that the proposed tests would not give rise to environmental damage.² Five ‘intervening’ states (Australia, Micronesia, the Marshall Islands, Samoa and the Solomon Islands) also invoked the principle. France responded that the status of the principle in international law was *tout a fait incertain*, but that in any event it had been complied with, and that evidentiary burdens were no different in the environmental field than any other area of international law.³ The ICJ’s order did not refer to these arguments, although Judge Weeramantry’s dissent noted that the principle had ‘evolved to meet [the] evidentiary difficulty caused by the fact [that] information required to prove a proposition’ may be ‘in the hands of the party causing or threatening the damage’, and that it was ‘gaining increasing support as part of the international law of the environment.’⁴

In the *Gabcikovo-Nagymaros case*,⁵ Hungary and Slovakia also invoked the precautionary principle. Again, the ICJ did not feel the need to address the principle, limiting itself to a passing reference to Hungary’s claim that the principle justified the termination of the 1977 treaty and its recognition of the parties’ agreement on the need to take environmental concerns seriously and to take the required precautionary measures.

The International Tribunal for the Law of the Sea (ITLOS) had also been presented with arguments invoking the principle, and has shown itself to be notably more open to its application, albeit, without express reliance. In 1999, in the Southern *Bluefin Tuna cases*,⁶ Australia and New Zealand requested the Tribunal to order ‘that the parties act consistently with the precautionary principle in fishing for Southern Bluefin Tuna pending a final settlement of the dispute.’ Japan, the respondent State, did not address the question of the status or effect of the principle. In its Order the Tribunal expressed the view that the parties should “act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna.”⁷ The Court further stated:

that there was ‘scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna, and that, although it could not conclusively assess the scientific evidence presented by the parties, measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.’⁸

In 2001, in the *MOX case*,⁹ Ireland claimed that the United Kingdom had failed to apply a precautionary approach to the protection of the Irish Sea in the exercise of its decision-making authority in relation to the direct and indirect consequences of the operation of the MOX plant and international movements of radioactive materials associated with the operation of the MOX plant. The principle was invoked by Ireland at the provisional measures phase to support its claim that the United Kingdom had the burden of demonstrating that no harm would arise from discharges and other consequences of the operation of the *MOX plant*, and to inform the assessment by the Tribunal of the urgency of the measures it is required to take in respect of the operation of the *MOX plant*. For its part, and while accepting that in assessing the level of risk in any given case considerations of prudence and caution may be relevant, the United Kingdom argued that in the absence of the evidence showing a real risk of harm precaution could not warrant a restraint of the rights of the United Kingdom to operate a plant. The Tribunal did not order the suspension of the operation of the plant, as Ireland had requested, but instead ordered the parties to co-operate and enter into consultations to exchange further

¹ Nuclear Testing cases ICJ CR/95/20 at 20-1

² *Supra*

³ *Supra*, at 78

⁴ *Supra*, at 79

⁵ (1997) ICJ Reports 7 at 78, paragraph 140.

⁶ *Australia and New Zealand v. Japan* 39 ILM 1359 (2000)

⁷ (1997) ICJ Reports 7 at 83, paragraph 77

⁸ *Supra*, paragraph 80

⁹ *Ireland v. UK*, ITLOS Order of 3th December, 2001.

information on possible consequences for the Irish Sea arising out of the commissioning of the marine environment which might result from the operation of the *MOX plant*. That Order, which has a certain precautionary character, was premised on considerations of prudence and caution.

The principle had also been addressed by the World Trade Organization (WTO) Appellate Body. In 1998, in the *Beef Hormones* case,¹ the European Community invoked the principle to justify its claim that it was entitled to prohibit imports of beef produced in the United States and Canada with artificial hormones, where the impacts on human health were uncertain. The Community argued that the principle was already ‘a general customary rule of international law or at least a general principle of law.’ It also maintained that the principle applies to both the assessment and management of a risk. The Community based this argument that the principle informed the meaning and effect of Articles 5.1 and 5.2 of the WTO’s Agreement on Sanitary and Phytosanitary Measures (the ‘SPS Agreement’). The United States denied that the principle represented a principle of customary international law, and preferred to characterize it as an ‘approach’ the content of which may vary from context to context.² Canada on the other hand referred to the principle as ‘an emerging principle of international law, which may in the future crystallize into one of the “general principles of law recognized by civilized nations”, within the meaning of Article 38(1) (c) of the ICJ Statute.’³ The WTO Appellate Body agreed with the United States and Canada that the precautionary principle did not override Articles 5.1 and 5.2 of the SPS Agreement, although it considered that it was reflected in the preamble to and Articles 3.3 and 5.7 of the SPS Agreement, which did not exhaust the relevance of the principle. Recognizing that the status of the principle in international law was the subject of continued debate, and that it was regarded by some as having crystallized into a general principle of customary international environmental law, the Appellate Body said:

Whether it has been widely accepted by Members as a principle of general of customary International law appears less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation.⁴

The principle was again raised before regional courts, such as the European Court of Human Rights. In *Balmer-Schafroth v. Switzerland*,⁵ the applicants claimed that the failure of Switzerland to provide for administrative review of a decision extending the operation of a nuclear facility violated Article 6 of the European Convention on Human rights. The claim was rejected by the majority, because the connection between the government’s decision and the applicants’ right was too remote and tenuous. The Court ruled that they had failed to

establish a direct link between the operating conditions of the power station ... and their right to protection of their physical integrity, as they failed to show that the operation of Muhleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effect on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical. Consequently, neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive.⁶

A dissenting opinion by seven judges, however, criticized this finding, on the grounds that it ‘ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident (inter alia) in ... the development of the precautionary principle.’⁷

At the national level, several decisions had arisen in addressing the status of the precautionary principle under international law. In *Vellore*⁸ case for example, the Indian Supreme Court ruled that the precautionary

¹ Report of the WTO Appellate Body, 16th January, 1998, www.wto.org/env, accessed May 29, 2015

² Report of the WTO Appellate Body, *ibid*

³ Report of the WTO Appellate Body, *op cit*

⁴ *Beef Hormones* case, paragraph 123

⁵ (1998) 25 EHRR 598

⁶ *Balmer-Schafroth v. Switzerland*, paragraph 40

⁷ *Supra*, paragraph 45.

⁸ *Vellore Citizens’ Welfare Forum v. Union of India and Others*, www.narmanda.org/sardarsarovar/sc.ruling/majority.judgment.doc, accessed 05/06/2015.

principle was an essential feature of ‘sustainable development’ and as such part of customary international law. By contrast, a United States Federal Court in the case of *Beanal v. Freeport-Mcmoran*,¹ appears more restrained in its approach, holding that the principle was not yet established in customary international law so as to give rise to a cause of action under the Allen Tort Claims Statute.

From the above one thing is clear, the legal status of the precautionary principle is evolving. There is certainly sufficient evidence of state practice to support the conclusion that the principle, as elaborated in Principle 15 of the Rio Declaration and various international conventions, has now received sufficiently broad support to allow a strong argument to be made that it reflects a principle of customary international law and could be used as a sword against a defendant in climate change induced claims. For as Ambassador Robert van Lierop, Permanent Representative² to the UN of Vanuatu (Alliance of Small Island States, a group of low-lying states), in support of the principle pointed out:

the precautionary principle is more than a semantic or theoretical exercise. It is an ecological and moral imperative. We do not have the luxury of waiting for conclusive proof, as some have suggested in the past. The proof, we fear, will kill us.

We believe that in no distant time this dream may be achieved as climate change litigation is gaining currency globally. Moreover, in the existing jurisprudence, partial causation has also been considered sufficient to establish liability under international tort. This principle was long established in the *Trail Smelter Arbitration*³ case. The case concerned a Canadian smelting company whose sulphur dioxide emissions had caused air pollution damages across the border in the United States of America (USA). The arbitral tribunal in that case determined that the government of Canada had to pay the United States compensation for damage that the smelter had caused primarily to land along the Columbia River valley in the USA. The tribunal concluded that there is an international principle that no State has the right to use or permit the use of its territory in such a manner as to cause injury in or harm to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury established by clear and convincing evidence.

Arising from the above, reliance is then placed on the general rule under international law that supports the notion that States are jointly responsible for a wrongful act and are jointly and severally liable.⁴ Therefore, each State⁵ should be separately responsible for any act by it or GHG emitters within its territorial boundaries that contributed to climate change that resulted in any loss or damage. Perhaps, a look at Principle 21 of the Stockholm Declaration, 1972, now generally recognised as a basic norm of customary international law, adds to the quest that States be responsible for any act that caused damage outside its jurisdiction. The Principle posits that:

states 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 the activities within their jurisdiction or the control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

2). Another barrier to claims in climate change litigation is determining who the victim is. The jurisprudence of standing creates great uncertainty concerning the ability of environmental litigants to challenge climate change-related activities. Victims of climate change impact can only present their claims before any judicial authority and have such claim entertained if they possess the requisite standing. Due to the dearth of supra-national cases on climate change, resort will be made to domestic decisions to properly discuss the concept of standing which is a barrier to instituting climate change litigation via international as well domestic avenues.

Locus standi is a Latin word, which means, “a place of standing; standing in court; a right of appearance in a justice or before a legislative body on a given question.”⁶ Reduced to its bare bones, it means standing to sue. The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the

¹ 969 F Supp 362 at 384 (US District Court for Eastern District of Louisiana, 9 April, 1997.

² Statement to the Plenary Session of the INC/FCCC, 5th February, 1991 at 3, www.un.org, accessed 25th May, 2015.

³ *Trail Smelter Arbitration: United States v Canada* (1931–1941) 3 UNRIAA, vol. III

⁴ Article 139(2) United Nations Law of the Sea (UNCLOS)

⁵ For our purpose, State in this context means not only a country or nation with its own sovereign independent government, but also refers to the country's government and those government-controlled institutions that are responsible for its internal administration and its relationships with other countries. It also, by implication, includes all entities that operate within it, such as state-owned companies or any other company, which is registered under its Laws for the time being in force in that State.

⁶ H.C. Black: *Black's Law Dictionary* 6th (edn) (St. Paul Mina: West Printing Co, 1990)941

court and not on the issues he wished to have adjudicated.¹ The concept of *locus standi* therefore concerns the capacity of a person to institute legal proceedings in a court of law or other competent tribunal. It follows that such person must have an interest which is sufficiently affected by the action.² Thus, it is not enough that a person merely claims to fall within the class of persons for whose general interest that statute was passed. He must in addition show that he has some personal interest that has been, or is most likely or certain to be affected by the action complained.³

The implication of questioning the *locus standi* of the plaintiff is to ascertain whether the plaintiff is the proper person to request adjudication of the issues and not whether the issues are justifiable.⁴ *Locus standi* therefore entails the legal capacity to institute, initiate or commence an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever including the provisions of any existing law.⁵ According to a Nigerian court in the case of *James Osadolor v. Honourable Minister FCT and others*,⁶ for a plaintiff to have *locus standi*, the statement of claim must be seen to disclose a reasonable cause of action vested on the plaintiff, and an established legal rights and obligation or interest of the plaintiff which has been or about to be violated. To this end, a court is willing to allow any individual, or group of individuals, gain entry into its sanctuary, if he has sufficient interests to warrant the attention of the court. In determining whether a person has standing or not, a court in Nigeria in the case of *Elendu v. Ekwoaba*⁷ set out the following factors that may serve as guidelines:

- i For a person to have *locus standi* in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed.
- ii The fact that a person may not succeed in an action does not have anything to do with whether or not he has a standing to sue.
- iii Whether a person's civil rights and obligations have been affected, depends on the particular facts of the case.
- iv The court should not give an unduly restrictive interpretation to the expression *locus standi*.

In furtherance to the above, the Constitution of the Federal Republic of Nigeria, 1999, as amended (the Nigerian Constitution) has vested in the courts with the powers to determine any question as to civil rights and obligations between government or authority and any person in Nigeria.⁸ What this means is that the provisions have removed the obstacles erected by *locus standi* which is common law requirement against individuals bringing actions before the court against government and its institutions,⁹ and by extension, against government agencies charged with environmental protection and also emitters of GHGs. To this end, section 6(6)(b) of the Nigerian Constitution gives a litigant, especially in environmental matters, the necessary standing to institute an action against environmental violators even if he has not been affected personally as environmental problems may likely have a deleterious effect on the environment in general.

The observations of Oputa JSC, in the case of *A.G. of Kaduna State v Hassan*,¹⁰ is worthy of note. According to him:

There is perhaps no question more fundamental in the whole process of adjudication than that of access to justice, access to the courts. He who cannot even reach the court cannot talk of justice from these courts. It is in this context and for the fundamental reason that many legal systems are now relaxing the erstwhile severity of their rules governing *locus standi*.

Where numerous individuals are harmed, many jurisdictions allow class actions to be filed by one or more members of the group or class of persons who have suffered a similar injury or have a similar cause of action. For instance, in the case of *Urgenda Foundation c. s. v The Kingdom of the Netherlands*,¹¹ Urgenda and

¹ Obaseki (J.SC) in *Thomas v. Olufosoye* (1986) 2 S.C 325 at 350

² Emmanuel Onyeabor: "Expanding the Scope of *Locus Standi* in Environmental Litigation." *Nnamdi Azikiwe University Law Journal* Vol. 7, No.1, 2010, 68

³ M. Adekunle Owoade, "*Locus Standi*, Criminal Law and the Rights of the Private Prosecutor in Nigeria: *Fawehinmi v. Akilu and Togun* Revisited;" *Nigerian Juridical Review* Vol. 4 1989 – 1999, 111.

⁴ (2003) 8 NWLR (Pt. 821) 163 at 184, para E. See also *Union Bank of Nigeria PLC v. Ntuk* (2003) 16 NWLR (Pt. 845) at 183

⁵ Emmanuel Onyeabor, *ibid*, 69

⁶ Unreported, Suit No FCT/HC/CV/5138/11 by Justice Y. Halilu.

⁷ (1995) 3 NWLR (pt 386)

⁸ section 6(6)(b)

⁹ *NNPC v. Fawehinmi & ors*, (1998) 7 NWLR (pt 559) 602

¹⁰ (1985) 2 NWLR (pt. 8) 522

¹¹ *Urgenda Foundation c. s. v. The Kingdom of the Netherlands and Ministry of Infrastructure and the Environment* [2015] Case C/09/456689/HA ZA 13-1396, decided on June 24, 2015.

Nine Hundred (900) others were allowed to institute an action against the Netherlands. The main demand of Urgenda and co. was that the Dutch state is acting unlawfully by not contributing its proportional share to preventing a global warming of more than 2 degrees Celsius. They sought from the court, an order that the Dutch State drastically, and no later than 2020, reduce carbon dioxide (CO₂) emissions coming from within the boundaries of the Netherlands, to the level that has been determined by scientists to be in line with less than 2 degrees Celsius of global warming. The district court in The Hague granted the plaintiffs' claims, and the government is now required to take more effective climate action to reduce the Netherlands' considerable share in global emissions of CO₂.

Also, environmental statutes and regulations allowing *citizen suits*, either against an administrator for failure to perform a required act or against a person who is allegedly in violation of an environmental regulation, have served to enlarge the standing of citizens who seek redress through the courts.

The status of standing to sue is expanding in other jurisdictions, even in the US where Article III of the U.S. Constitution limits the authority of Federal courts to hear only "cases or controversies." Although Article III itself does not define a case or controversy, the Supreme Court has interpreted Article III as requiring plaintiffs to show they have a genuine interest and stake in a case by demonstrating they have standing to sue.¹ According to the court in the case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*,² to satisfy Article III's standing requirement, a plaintiff must show:

- (a) 'an injury in fact' that is:
 - i. concrete and particularized and
 - ii. actual or imminent and not conjectural or hypothetical;
- (b) that the injury is fairly traceable to the challenged action of the defendant; and
- (c) it is likely, as opposed to merely speculative, that the injury will be redressed by a favourable decision.

The issue of standing in relation to climate change litigation reared up in the US in the case of *Massachusetts and ors v Environmental Protection Agency (EPA)*.³ In that case the State of Massachusetts, together with 11 other States, three cities, two United States territories and several environmental groups sought review of the denial by EPA of a petition to regulate the emissions of four GHGs, including carbon dioxide, under s. 202 (a)(1) of the *Clean Air Act*, 1990. When litigation commenced, the EPA, *inter alia*, challenged the petitioners' standing. The Court upheld the position that the plaintiffs lacked standing to challenge the EPA's denial of its rule-making petition. On appeal to the US Supreme Court, the Court applied the three-part test for standing enunciated in the case of *Lujan v Defenders of Wildlife*,⁴ that is, that:

- (a) The plaintiff has suffered "an injury in fact" which is both concrete and particularised, and actual and imminent, as opposed to conjectural or hypothetical.
- (b) The injury is fairly traceable to the challenged action of the defendant.
- (c) There is a likelihood that the injury can be redressed by a favourable decision, as opposed to this being merely speculation.

The Court then held that Massachusetts had suffered an injury in fact as owner of the State's coastal land which is and will be affected by climate change-induced sea level rise and coastal storms. The fact that other States suffered similar injuries did not disqualify Massachusetts.

However, under international law, it is difficult to establish standing for climate change cases. Although a broader construction of standing is developing in the international legal process, decisions are still largely based on promoting the interests of the state party.⁵ The US which is the worst emitter has not submitted itself to the compulsory jurisdiction of the ICJ and on this note, the ICJ can barely assume jurisdiction in any suit brought against the US before it. Equally problematic is the fact that the ICJ has never condemned a country for damaging the environment and this may cause in the future, a dimension that is at the core of climate change litigation.⁶

If we are to achieve an enduring environmental protection our position however is that any person or organizations by virtue of living or carrying out activities within a well- defined confines of a particular locality should be deemed to have sufficient interest to institute actions against any environmental violations that impacted on his person or property or his environment. This is premised on the dictum of Lord Diplock who in the case of *R v. Inland Revenue Commissioner. Ex parte National Federal of Self-employed and Small Businesses Ltd*,⁷ maintained that there would be a grave lacuna in our legal system of law if we needlessly adhere to *locus*

¹ C. World, et al, *Climate Change and the Law*, (Lexis Nexis: San Francisco, 2009), 3

² *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)

³ *Supra*

⁴ *Lujan v Defenders of Wildlife*, 504 US 555, 112 S.Ct.2130, 119 L.Ed.2d 351 (1992).

⁵ Timo Koivurova: "International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects," *Journal of Environmental Law & Litigation*, Vol. 22, 2007, 280

⁶ Timo Koivurova, *ibid.*

⁷ (1982) AC 617

standi. To this he posits:

If a pressure group or even a single public-spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

What is therefore being advocated is that in order to overcome the burden of standing to sue the courts should encourage public interest litigation or citizens' suit.¹ Public interest litigation can be initiated by any public spirited person who may feel the wrongful act being complained of affected him or others. Action may also be initiated by a voluntary organization or association which has dedicated itself to work for the protection of the rights of the people in particular locality. Courts in some jurisdictions appear to be amenable to the proposition of public litigation and have opened their doors to citizen to enforce laws and treaties signed by a State. In *Shela Zia and Others v. WAPDA, PLD*,² the Supreme Court of Pakistan held that the right to a clean environment is a fundamental right of all citizens of Pakistan covered by the right to life and the right to dignity in Articles 6 and 14 of the Pakistani Constitution of 1973. The judgement clarified that public interest litigation could be brought without the necessary rule of standing to sue or of being directly affected as an "aggrieved person."

In *Juan Antonio Oposa and ors v. the Honourable Fulgencio Factoran and Anor*,³ a class action was brought on behalf of group of Filipino minors through their parents under Philippine Ecological Network Inc, claiming that as citizens and tax payers they are entitled to the full benefit, use and enjoyment of the natural resource treasure that is the county's rain forest and therefore prayed the court for an order directing the Secretary to the Department of Environmental and Nature Resources to cancel all existing timber license agreements and cease from accepting or approving new agreements. Although the court of first instance dismissed the action based on *locus standi* and the political question, on appeal to the Supreme Court of Philippines held that the plaintiffs had the right to sue on behalf of succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthful ecology.⁴

To this end, as Rt.Hon.Justice A.T.M.Afzal, the Chief Justice of Bangladesh, pointed out "citizens suits must be encouraged as the role of the judiciary can be undermined if vigilant civil society does not play the role of watch dog."⁵

What is being advocated is not an illusion. At international level Principle 10 of the Rio Declaration provides as follows:

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 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.⁶

¹Citizens Suit could mean a suit through which any person or group of persons or organisation is allowed to bring a civil action against any alleged violator of any law on GHG emission, enforce statutory, regulatory and permit requirements or bring a suit against a government Agency or its agents for failure to perform a non-discretionary duty. Such a litigant need not show he had suffered any loss or damage over and above other members of his community.

² [1994] SC 693

³ GR. No. 101083: Supreme Court of Philippines

⁴ See also the South African case of *Wildlife Society of Southern Africa & Ors v. Minister of Environmental Affairs & Tourism & Ors*, Case No. 1672, 1995, Bangladesh case of *Dr. M. Farooque v. Bangladesh*, Civil Appeal No. 24 of 1995. In all these environmental cases, the traditional position on *locus standi* was rejected; instead a more liberalized view was taken. See the Indian case of *Vellore Citizens Welfare Forum v. Union of India*, where an injunction was granted against a leather factory in the State of Tamilnadu to stop operations until it stopped discharging untreated effluents from the factory into the agricultural fields, waterway and open lands of the community.

⁵ U.N.E.P. Biannual of Environmental Law Special Issue No. 2, p. 3.

⁶ Avi Brisman: "The Violence of Silence: some Reflections on Access to Information, Public Participation in Decision-making and Access to Justice in Matters Concerning the Environment" (2013) 59 *Crime, Law and Social Change* 291, 292.

Again, at regional level, the African Charter on Human and People's Right in Article 24 provides that "all peoples shall have the right to a general satisfactory environment favourable to their development." Even at the national level, many States' Constitutions have given environment protection a stronger human rights focus. For instance, Section 20 of the Constitution of the Federal Republic of Nigeria, 1999, as amended, provides for "the protection and improvement of the environment and safeguarding the water, air and land, forest and wildlife in Nigeria." Article 45 of the Spanish Constitution declares that everyone has "the right to enjoy an environment suitable for the development of the person..." Article 5 of the Brazilian Constitution provides that "any citizen is a legitimate party to file a people's legal action with a view to nullifying an act injurious to the public property or to the property of an entity in which the State participates, to the administrative morality, to the environment and to the historic and cultural heritage..." It further in Article 225 declares that "everyone has the right to an ecologically balanced environment which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations." In the same vein, Article 42 of the Russian Constitution, 1993, confers on everyone "the right to a favourable environment, reliable information about its condition and to compensation for the damage caused to his or her health or property by ecological violations." All these provisions are veritable legal instruments to be used in suits against environmental damage under public interest litigation.

To this effect, any individual or body can use the public interest litigation to institute a claim on climate change as it violates environmental rights. Where a Constitution includes a right to a clean and healthy environment, courts have often allowed public interest litigation. In *Antonio Horvath Kisy Otros v. National Commission for the Environment*¹ the Supreme Court of Chile granted standing to citizens not directly affected because it found that the constitutional right to a healthy environment does not impose a requirement that the affected people themselves present the action.² The inclusion of environmental rights in the South African constitution has expanded standing.³

3). A potential claimant will also need to tackle the issue of subject matter jurisdiction when making a claim. The most promising court for a potential claimant may not be able to adjudicate the case because the subject matter that is being brought is not one that it can properly determine within its jurisdiction. The litigant will need to ensure that the court in which it is seeking its remedy is one that is properly able to handle the dispute. So far, the US courts by virtue of the Alien Torts Claim Statute are able to determine cases where US corporations and government officials have violated treaties and customary international law. This avenue for redress has been somewhat effective given that it has produced successful awards in the litigation of international human rights abuses and could quite possibly produce similar results in climate change litigation.

4). Even where a litigant was able to establishing causation against an emitter or group of emitters and showed that he has a standing to sue, he still needs to establishing the duty and standard of care owed to him by the emitters. When considering duty of care, Hunter and Salzman⁴ opined that this focus helps us to look beyond a sector-wide approach to defendants--for example, all utilities, oil and gas producers, or automobile manufacturers--to a focus on those companies within a sector that are lagging behind the industry leaders in responding to climate change. The question in climate change litigation is how wide the duty of care net will be cast; how big the zone of foreseeable risk is and importantly, the standard of care every individual has to another. Though it can be argued that the defendants in global environmental tort cases owe a duty of care to all people in the world but the real questions are: What is the standard or level of such duty of care? Is it strict standard of care?

The court in *Urgenda Foundation v. Kingdom of the Netherlands*⁵ ordered the Dutch state to limit annual greenhouse gas emissions from the country to 25% below 1990 levels by 2020. The government had pledged a 17% reduction, but the court found that insufficient. The court concluded that due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring, the State has a duty of care to take mitigation measures. To the court, the 17% reduction promised by the country was not enough to mitigate climate change. It undertook a detailed examination of reports of the Intergovernmental Panel on

¹ *Antonio Horvath Kisy Otros v. National Commission for the Environmental* (March 19, 1997) available at <http://www.unep.org/delc/Portals/119/UNEPCompendiumSummariesJudgementsEnvironment-relatedCases.pdf&sa=U&ei=UideVZqLC4vtUtuPgMAK&ved=OCBEQFjAC&usg=AFQjCNFnJVYqbh6QY7r8u98wnhcTCBVDw> (last assessed on May 20, 2015).

² See also *The Environmental Action Network Ltd v. The Attorney General and the National Environment Management Authority* (High Court of Uganda at Kampala, Misc. App. 39/2001) (holding that article 50 of the Uganda Constitution allows public interest litigation).

³ See *Wildlife Society of Southern Africa & Others v. Minister of Environmental Affairs & Tourism & Others*, Case 1672/1995 (South Africa) (allowing members of environmental groups to compel enforcement of Decree 9 (Environmental Conservation) (1992) promulgated by the Government of Transkei).

⁴ David Hunter and James Salzman, *op cit*, 1741

⁵ *Supra*

Climate Change, the United Nations Environment Programme, and various Dutch institutions, and concluded that the mandated 25% reduction was the level needed to meet the country's fair contribution toward the United Nation's goal of keeping global temperature increases within two degrees Celsius of pre-industrial conditions.

While the UNCLOS establishes an obligation on the part of its parties to "protect and preserve the marine environment," this does not impose an absolute prohibition against pollution. Rather, this provision has been interpreted as a due diligence obligation to minimize pollution and to act with appropriate care.¹ Indeed, as Hassan has noted, Article 194 of the UNCLOS imbues the parties with "wide discretion" in fulfilling their obligations by including references to "the best practicable means at their disposal" and "in accordance with their capabilities."² Burns is of the view that Article 235 of UNCLOS may impose a more stringent standard of care as it mandates that States are responsible for fulfilling international obligations that contribute to the protection and preservation of the marine environment.³ He further opined that Article 197 of UNCLOS is also pertinent, requiring Parties to cooperate through competent international organizations to formulate rules, standards, and practices to protect and preserve the marine environment.⁴

Even under the UNFCCC, the standard of care was not fixed as it gives wide discretion to Annex I parties. One of the core obligation provisions of the UNFCCC uses hortatory rather than mandatory language, merely calling on Annex I Parties⁵ to "aim" to reduce their greenhouse emissions back to 1990 levels by 2000.⁶ The foreseeability of harm has increased dramatically in the past year as the scientific understanding of the impact of climate change has increased.

3.0. The Way Forward

There is a long history of looking towards the judicial branches of government, both nationally and internationally, to serve as a gap-filler where legislative and regulatory efforts or even diplomatic efforts failed. But as stated and discussed earlier litigating loss and damage from climate change impact is replete with a number of obstacles. However, these litanies of likely setbacks inherent in any climate change suit are not insurmountable. To this end, a number of ways of circumventing these pitfalls are herein under proffered.

i). Application of the principle of *pacta sunt servanda*. The obligations under the UNFCCC are overly open-ended; precluding a finding of a breach and one of the core obligation provisions of the UNFCCC uses hortatory rather than mandatory language, merely calling on Annex I Parties⁷ to "aim" to reduce their greenhouse emissions back to 1990 levels by 2000.⁸ However, when obligation of this nature is interpreted in the light of Article 31 of the Vienna Convention on Law of Treaties (VCLT), which requires that treaty obligations must be performed in good faith, a cause of action can arise from it.⁹ This principle of *pacta sunt servanda* has also been recognized as a principle of customary international law. Moreover, while the U.S. has not ratified the Vienna Convention, it has recognized the principle of *pacta sunt servanda* as "perhaps the most important principle of international law."¹⁰ Flowing from this, a state party can bring an action against the U.S. for emitting greenhouse gas and not reducing its emission in line with the UNFCCC which US ratified but not the Kyoto Protocol.

ii). Treating climate change reduction obligations as obligation *erga omnes*. In the *Barcelona Traction* case (Belgium v. Spain);¹¹ the court held that an essential distinction should be drawn between the obligations of a state towards the international community as a whole and those owed to other states in the field of diplomatic protection. According to the court, the former are of concern to all states and are called obligations *erga omnes*. This obligation *erga omnes* would be of relevance when global environmental problems arise such as climate change. In the enforcement of an *erga omnes* obligation, Article 41 of the Draft Article on Responsibility of

¹ W. G. Burns, *op cit*, p. 46

² D. Hassan, "International Conventions Relating to Land-Based Sources of Marine Pollution Control: Applications and Shortcomings" (2004) 16 *Geo. Int'l Envtl. L. Rev* 657 at 669

³ W. G. Burns, *op cit*, p. 46

⁴ *Op cit*.

⁵ Under the UNFCCC, Annex I Parties "include the industrialized countries that were members of the OECD (Organisation for Economic Co-operation and Development) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States, and several Central and Eastern European States." Quoted in W. G. Burns, *op cit*, p. 47

⁶ Article 4(2)(a)(b), UNFCCC

⁷ Under the UNFCCC, Annex I Parties "include the industrialized countries that were members of the OECD (Organisation for Economic Co-operation and Development) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States, and several Central and Eastern European States." Quoted in W. G. Burns, *ibid*, 47

⁸ Article 4(2) (a) (b). UNFCCC

⁹ Vienna Convention on the Law of Treaties, 27 January 1980, U.N.T.S. 1155, at 331.

¹⁰ Restatement, Third, of the Foreign Relations Law of the United States (1987) Pt. III, Introduction.

¹¹ *Barcelona Traction* case (*Belgium v. Spain*) ICJ Reports 1970, 32

States for Internationally Wrongful Acts provide that all states are to cooperate to bring an end, through lawful means, any serious breach by a state of an obligation arising under a peremptory norm of general international law and States are not to recognize as lawful a situation created by a serious breach. Thus, actions leading to climate change should not be recognised but denounced by States and States are to cooperate to bring climate change to an end.

iii). Addressing climate change law as customary international law. According to the Statute of the International Court of Justice in Article 38 (1) (b), customary international law means evidence of a general practice accepted as law. It is determined through general practice of States and what states have accepted as law. By this, customary international law is binding on all states. Article 35 of the VCLT provides that an obligation arises for a third party state (i.e. a state that is not a party to a treaty) from the provisions of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third state expressly accepts the obligation in writing. The exception to this principle here is where the rule expressed in a treaty becomes part of customary international law. In such situation, the rule may become binding on the third state. The principles of state responsibility, no harm rule, precautionary principle, the principle of good faith and host of others are part of customary international law. Thus, addressing climate change through the principle of state responsibility can bring violating states under the law whether they are parties to the treaty or not. The UNFCCC, Kyoto Protocol, UNCLOS and other Treaties that reflect the moves combating climate change all encompass these principles. For example, both the prevention principle and the precautionary principle are laid down in Article 3(3) of the UNFCCC.

Furthermore, with respect to the Kyoto Protocol, due regard is given to Article 30 (4) (b) of the VCLT. It provides that where the parties to the later treaty do not include all the parties to the earlier one as between a state party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties govern their mutual rights and obligations. Thus, a country that is a state party to the UNFCCC and Kyoto Protocol can, for example, bring an action against the U.S. on climate change even though the U.S. has not ratified the Kyoto Protocol. Therefore, going by the principles of customary international law reflected in the UNFCCC, an action can be brought against any state in default.

iv). Legal sanction by the United Nations. According to the Preamble to the UNFCCC, signatories declared and agreed that “States 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 and developmental policies....” This declaration was made in accordance with the United Nations (UN) Charter. Article 2(6) of the same UN Charter provides that the UN shall ensure that third party states act in accordance with the principles of the United Nations as may be necessary for the maintenance of international peace and security. It is no doubt that climate change poses big threat to international peace and security. To this effect, matters of climate change, as enforced under the UNFCCC, should be given adequate attention by the UN for the purpose of maintaining international peace and security.

4.0. Conclusion

It is hoped that litigating loss and damage from climate change impacts may help to create the political pressure and third-party guidance required to re-invigorate the international negotiations necessary for climate change regulation. This concept of climate change litigation becomes so important because protection of the earth and its inhabitants is a collective action for the common good. This notion of the common good also extends to future generations. Therefore, if a State is found responsible for committing an unlawful act under international law, it is obliged to discontinue the wrongful act, offer guarantees of non-repetition and provide full reparation for the consequences of the breach it has committed. Therefore, if anyone wants to cultivate peace, he should protect creation.