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**WHAT DOES CLIMATE JUSTICE LOOK LIKE FOR THE ENVIRONMENTALLY  
DISPLACED IN A POST PARIS AGREEMENT ENVIRONMENT? POLITICAL  
QUESTIONS AND COURT DEFERENCE TO CLIMATE SCIENCE IN THE *URGENDA*  
DECISION**

*Jeremy M. Bellavia\**

I. INTRODUCTION

Environmentally induced migration is not new to the pattern of biological migration on earth.<sup>1</sup> Human migration has ebbed and flowed in response to conflict, environmental changes, and resource scarcity throughout time. For generations people moved in search of “better land, milder climate, and easier living conditions.”<sup>2</sup> Today, communities are continuing this trend.<sup>3</sup> What has changed, however, is the human influence from greenhouse gas (“GHG”) emissions on the climate.<sup>4</sup> Anthropogenic climate change is having an unprecedented and varied effect on the environment leading to slow-onset disasters

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1. Guy Gugliotta, *The Great Human Migration: Why human left their African homeland 80,000 years ago to colonize the world*, SMITHSONIANMAG.COM (July 2008), <http://www.smithsonianmag.com/history/the-great-human-migration-13561/?no-ist>.

2. Etienne Piguet, *From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies*, 103 ANNALS. ASSOC. AM. GEOGRAPHERS. 148-162 (2012), available at <http://www.tandfonline.com/doi/abs/10.1080/00045608.2012.6962> (quoting Ellen Churchill Semple, *Influences of Geographic Environment, on the basis of Ratzel's system of anthropogeography* (New York : H. Holt and co., 1911)); (for more studies of historical migration due to climate see Ellsworth Huntington, *Civilization and climate* (New Haven, CT: Yale Uni., Press, 1922)).

3. Ellsworth Huntington, *Changes of Climate and History*, 18 AM. HIST. REV. 213 (Jan. 1913), available at <http://www.jstor.org/stable/10.2307/1835325?origin=crossref>, (the relative stability of the earth's climate over the last 10,000 years has been marked with period “pulses” of instability. This author explains that these “pulses” have enabled the rise and led to the demise of civilizations. e.g., The Maya, Rome, Egypt, Greece); see also U.N. Environment Programme, *Livelihood Security: Climate Change, Migration and Conflict in the Sahel*, 22 (Dennis Hamro-Drotz & United Nations Environment Programme eds., 2011), (motivated by the variable climate of the Sahel region in Africa, herders, farmers, and even laborers have long history of seasonal migration patterns engrained in their culture. Migration in this region is a coping strategy to diversify resource generation in a variable environment).

4. See Stephanie C. Herring et al., *Explaining Extreme Events of 2014 from a Climate Perspective*, supplement to 96 BULL. AMER. METEOR. SOC. SI-SI72 (Dec. 2015), <https://www2.ametsoc.org/ams/index.cfm/publications/bulletin-of-the-american-meteorological-society-bams/explaining-extreme-events-from-a-climate-perspective/table-of-contents/high-resolution-version/>; see also *Causes of Climate Change*, WORLD METEOROLOGICAL ORGANIZATION, [https://www.wmo.int/pages/themes/climate/causes\\_of\\_climate\\_change.php](https://www.wmo.int/pages/themes/climate/causes_of_climate_change.php), (last visited Apr. 5, 2016) (anthropogenic climate change is human caused climate change).

(e.g., flooding, increased extreme weather events, droughts, rising ocean levels).<sup>5</sup> The slow-onset environmental degradation caused by climate change disrupts livelihoods, creates food insecurity, and exacerbates resource inequality.<sup>6</sup>

In developing countries and where people are heavily dependent on natural resources for survival, individuals are more vulnerable to climate change because they often lack the resources to successfully adapt.<sup>7</sup> Small Island Developing States (“SIDS”) are home to some of the most vulnerable individuals, who have nowhere to go in the case of a climate change related disaster.<sup>8</sup> In other regions where vulnerable individuals have the resources to migrate, the environmentally displaced migrate to urban areas within their home country as a result of the slow-onset effects of climate change.<sup>9</sup> Increasing migration into urban areas strains local infrastructure and increases competition for natural resources, creating social unrest and political instability.<sup>10</sup> Strict immigration policies accompanying the modern geopolitics of state sovereignty and the growing trend of border externalization<sup>11</sup> severely limit legitimate methods of migration. These policies leave those displaced by climate change to the risky channels of irregular migration, crossing sovereign borders illegally.<sup>12</sup>

Developed states are the largest historic contributors to climate change, and are not immune to the effects.<sup>13</sup> During the Conference of Parties 21 (“COP21”),<sup>14</sup>

5. Christopher B. Field et al., *Summary for Policymakers*, in *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, Part A: Global and Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change 7 (Cambridge Univ. Press, (2014) (Regions will be impacted positively and negatively).

6. Stephane Hallegatte et al., *Bad Seed: Climate Change, Agriculture, and Food Security*, in *Shock Waves: Managing the Impacts of Climate Change on Poverty*, 49, 65 (Nov. 2015), available at <http://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0673-5>.

7. Thomas Schueneman, *Blog Action Day: Poverty and Climate Change*, GLOBAL WARMING IS REAL, 2 (Oct. 15, 2008), available at <http://globalwarmingisreal.com/2008/10/15/blog-action-day-poverty-and-climate-change/>.

8. Climate Change Secretariat, *Climate Change Small Island Developing States*, U.N. Framework Convention on Climate Change 2 (2005), [http://unfccc.int/resource/docs/publications/cc\\_sids.pdf](http://unfccc.int/resource/docs/publications/cc_sids.pdf).

9. Ivan Campbell et al., *Climate change and conflict—Lessons from community conservancies in northern Kenya* 7 (Conservation Development Centre, International Institute for Sustainable Development and Saferworld, Nov. 2009).

10. Colin P. Kelley et al., *Climate change in the Fertile Crescent and implications of the recent Syrian drought*, 112 *Proc. Nat'l. Acad. Sci.* 3241, 3242, 3245 (2015), available at <http://www.pnas.org/content/112/11/3241?tab=author-info>, (referring to a nearly 50% increased urban population in Syria between 2002 and 2010, as a contributor to the country's destabilization).

11. Maribel Casas-Cortes et al., *Changing Borders, Rethinking Sovereignty: Towards A Right to Migrate*, 23 *Rev. Interdiscip. Mobil. Hum.* 47, 48-9 (2015), available at [http://www.scielo.br/scielo.php?pid=S1980-85852015000100047&script=sci\\_arttext&tlng=es](http://www.scielo.br/scielo.php?pid=S1980-85852015000100047&script=sci_arttext&tlng=es).

12. *Key Migration Terms*, INTERNATIONAL ORGANIZATION FOR MIGRATION, <https://www.iom.int/key-migration-terms#Irregular-migration> (last visited Apr. 5, 2016) (defined as: Movement that takes place outside the regulatory norms of the sending, transit and receiving countries).

13. Edward Cameron, Tara Shine & Wendi Bevins, *Climate Justice: Equity and Justice Informing a New Climate Agreement*, 8 (World Res. Inst & Mary Robinson Foundation-Climate Justice, Working Paper, 2013), [http://pdf.wri.org/climate\\_justice\\_equity\\_and\\_justice\\_informing\\_a\\_new\\_climate\\_agreement.pdf](http://pdf.wri.org/climate_justice_equity_and_justice_informing_a_new_climate_agreement.pdf)

the event that led to the adoption of the Paris Agreement (“PA”), President of the United States Barack Obama said, “[w]e know the truth that many nations have contributed little to climate change but will be the first to feel its most destructive effects.”<sup>15</sup> Developed countries are experiencing the costly market and non-market impacts of climate change, yet they have not taken the lead in drastically reducing emissions.<sup>16</sup> Highly populated coastal cities in the U.S. are experiencing the effects of storm surges, as well as impacts to marine and wetland eco-systems.<sup>17</sup>

The efforts of individual states are not enough to stem the negative impact of climate change. Because climate change is global, it requires an international response. Prior to the adoption of the PA, the international treaty governing the stabilization of the climate through reduction of global GHG emissions was the United Nations Framework Convention on Climate Change (“UNFCCC”).<sup>18</sup> The Convention on Climate Change sets forth an overall framework for intergovernmental efforts to tackle the challenge posed by climate change.<sup>19</sup> The UNFCCC recognizes that the climate system is a shared resource whose stability is affected by industrial and other emissions of carbon dioxide and other greenhouse gases.<sup>20</sup>

The PA was adopted under the UNFCCC in December 2015<sup>21</sup>, and is the first international environmental agreement ever to reference human rights.<sup>22</sup> The adoption of the PA followed two decades of capacity building, awareness, and research.<sup>23</sup> The PA was signed by 196 parties and became the first multilateral

(Developed countries contributed 70% of GHG emissions since 1950. Drastic reduction in global GHG emissions are necessary to stabilize climate change).

14. *Parties to the Convention and Observer States*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/parties\\_and\\_observers/parties/items/2352.php](http://unfccc.int/parties_and_observers/parties/items/2352.php) (the COP represents the decision making body of the United Nations Framework Convention on Climate Change. All 195 countries in the world are either Parties or members to the Convention).

15. Barack Obama, Remarks by President Obama at the First Session of COP21, 4 (Nov. 30, 2015) <https://www.whitehouse.gov/the-press-office/2015/11/30/remarks-president-obama-first-session-cop21> (President Obama expressed support at the opening of the COP21).

16. Robert Mendelsohn, *Climate Change and Economic Growth*, 9 (Comm’n on Growth & Dev., Working Paper No. 60, 2009), <https://environment.yale.edu/files/biblio/YaleFES-00000397.pdf>.

17. *Climate Impacts on Coastal Areas*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www3.epa.gov/climatechange/impacts/coasts.html> (last visited Apr. 5, 2016).

18. U.N. Framework Convention on Climate Change art. 2, May 9, 1992, S. Treaty Doc. 102-38, 1771 U.N.T.S. 107.

19. *The U.N. Framework Convention on Climate Change*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/essential\\_background/convention/items/2627.php](http://unfccc.int/essential_background/convention/items/2627.php) (last visited Apr. 5, 2016).

20. *Id.*

21. U.N. Framework Convention on Climate Change, Conference of the Parties, 21st session, Nov. 30- Dec. 11, 2015, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter UNFCCC]

22. Annalisa Savaresi, *The Paris Agreement: An Equity Perspective*, BENELEX BLOG, 5 (Jan. 29, 2016), available at <http://www.benelexblog.law.ed.ac.uk/2016/01/29/the-paris-agreement-an-equity-perspective/>.

23. UNFCCC, *supra* note 21, at 1-32.

environmental agreement referencing parties' obligations to human rights.<sup>24</sup> Once fifty-five parties responsible for fifty-five percent of global GHG emission ratify the treaty, the agreement will come into force.<sup>25</sup> The PA will commit parties to their National Determined Contributions ("NDC").<sup>26</sup> NDCs have the goal of keeping global temperatures below two degrees Celsius above pre-industrial levels.<sup>27</sup> The PA may bind parties to their voluntary commitments, but there is no enforcement or dispute settlement mechanism in the PA, nor does the PA provide procedural rights.<sup>28</sup> Accordingly, while the PA represents a step forward in addressing climate change, it does contain problematic enforcement gaps.

In the 2014 report "Achieving Justice and Human Rights in an Era of Climate Disruption," the International Bar Association ("IBA") made over fifty recommendations to strengthen climate change justice.<sup>29</sup> This report was a measure of the global awareness of climate change and provided that "climate justice links human rights and development to achieve a human-centered approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change impacts equitably and fairly."<sup>30</sup> The IBA report discussed the role that arbitration can play to fill the enforcement gaps related to the PA and influence international law related to climate change.<sup>31</sup>

Businesses also play an important role in climate change mitigation.<sup>32</sup> As such, litigation and arbitration may present important tools in climate change mitigation. The scope of this paper is limited to the state of climate justice generally and the potential role of arbitration.<sup>33</sup> Because domestic legislatures are

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24. Savaresi, *supra* note 22, at 5.

25. UNFCCC, *supra* note 21, at art. 21.

26. UNFCCC, *supra* note 21, at art. 4.

27. UNFCCC, *supra* note 21, at art. 2.

28. UNFCCC, *supra* note 21, at art. 23 (NDCs are reviewed every five years and published by the secretariat. Those who violate their obligations are named and shamed).

29. David Estrin & Baroness Helena Kennedy, *Achieving Justice and Human Rights in an Era of Climate Disruption*, Report, INTL. BAR ASS'N TASK FORCE ON CLIMATE CHANGE, JUSTICE & HUMAN RIGHTS 3, 26-31 (July 2014), available at <http://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>.

30. *Principles of Climate Justice*, MARY ROBINSON FOUNDATION-CLIMATE JUSTICE 1, <http://www.mrfcj.org/wp-content/uploads/2015/09/Principles-of-Climate-Justice.pdf>.

31. David W. Rivkin & Roger Martella, *COP21: Climate Change Related Disputes: A Role for International Arbitration and ADR*, INTERNATIONAL BAR ASSOCIATION 1-14 (Dec. 7, 2015), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=4c321f4e-315b-40be-a553-5b55da513ede> (the President of the IBA said that arbitration can provide certainty of contract with respect to state or industry imposed climate change objectives and targets).

32. Press Release, U.N. Framework Convention on Climate Change, Yale University Report Reveals Rapidly Growing Reality of Climate Action (Dec. 4, 2015) ("Yale analyzed over 10,000 climate commitments made by cities, regions, businesses and investors, many involving the cooperation of national governments, who formally recorded their pledges in the Non-State Actor Zone for Climate Action (NAZCA) and under the banner of the Lima-Paris Action Agenda (LPAA).").

33. Mitigating GHG emissions requires more than creation and enforcement of domestic legislation and arbitration is likely to play an important role. See *COP21: Climate Change Related Disputes: A Role for International Arbitration and ADR*, INTERNATIONAL BAR ASSOCIATION *supra* note 31, at 14. Arbitration provides for a flexible and delocalized (non-national) adjudicative

still slow to respond to the urgent situation presented by climate change, and the PA lacks enforcement mechanisms, litigation can be used to hold countries responsible for their GHG emissions reduction commitments.<sup>34</sup> June 2015 marked a potential turning point for climate related litigation.<sup>35</sup> In June 2015, in *Urgenda v. Staat*, a Dutch court ruled that the Netherlands has a “systemic responsibility” within its territory to reduce GHG emissions to the established national target, and that it was not on path to meeting that target.<sup>36</sup> This decision represents an important contribution to international jurisprudence relating to climate change mitigation.<sup>37</sup> The sections below will discuss this decision and others.

This paper discusses the role of climate justice to mitigate climate change following the PA. Section II briefly discusses the effects of climate change on global peace and security and the gaps current international instruments leave in protecting the environmentally displaced. Section III discusses the significance of the *Urgenda* decision and its potential as a model for climate justice in pending and future cases.

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mechanism to resolve disputes, and is governed by rules expressed in the parties’ agreement to arbitrate. This flexible dispute resolution mechanism can be designed by the parties to include third parties (e.g., NGOs, and non-parties to the dispute) and can add to the efficacy of climate justice. Akhlaq Choudhury & Khaled Moyeed, *Spotlight on International Arbitration as a Means of Settling Disputes Arising from Climate Change*, KLUWER ARBITRATION BLOG Jan. 26, 2016, <http://kluweraarbitrationblog.com/2016/01/26/spotlight-on-international-arbitration-as-a-means-of-settling-disputes-arising-from-climate-change/>. Arbitration can be helpful for private and public actors in mitigating climate change. The UNFCCC anticipated and included for the development of arbitral procedures related to climate disputes in art 14 (b). U.N., UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, art. 14(b), U.N. Docs. FCCC/INFORMAL/84 (1992) (Arbitration procedures have not yet been adopted by the UNFCCC). Arbitration is already being used by the global trade and development sectors and will continue to be used as more low carbon investments are made. See *Investor Network on Climate Risk (INCR)*, CERES, <http://www.ceres.org/investor-network/incr> (last visited July 15, 2016). The INCR comprises of at least 120 institutional investors, managing \$14 trillion committed to invest in low-carbon opportunities. The INCR Policy Working Group engages with domestic policymakers and international investor groups to promote stable economic returns. *Climate and Energy Policy*, CERES, <http://www.ceres.org/investor-network/incr/climate-and-energy-policy> (last visited July 15, 2016). Support for arbitration to resolve multiparty disputes involving investment and commercial claims relating to climate change mitigation is growing, and includes the International Bar Association. International Bar Association Climate Change Justice & Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption* 117-153 (2014).

34. The Hague Dist. Ct., The Hague, 24 juni 2015, 7196 m.nt (Urgenda/Staat) (Neth.) (The *Urgenda* decision discussed below was filed by the Urgenda group against the Government of the Netherlands. The lawsuit claimed that the Dutch government failed to effectively reduce GHG emissions to levels necessary to stabilize CO<sub>2</sub> levels. The lawsuit cited multiple international obligations in which the Netherlands committed to this stabilization by GHG emission reduction).

35. *Id.* at 2 (June 2015 is when the *Urgenda* decision was finalized) [hereinafter *Urgenda v. Staat*]

36. *Id.* at 34.

37. Roger Cox, *A Climate Change Litigation Precedent Urgenda v The State of the Netherlands*, CIGI Papers No. 79 1, 13-14 (Nov. 2015), [https://www.cigionline.org/sites/default/files/cigi\\_paper\\_79.pdf](https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf).

II. A. CLIMATE CHANGE IS A THREAT MULTIPLIER, INCREASING POVERTY, AND DESTABILIZING FRAGILE STATES

Before discussing the state of climate justice, it is important to first understand the challenges posed by climate change with respect to global peace and security, and the devastating impact climate change can have on the global population. Climate change strains economic growth, erodes food security, and increases poverty.<sup>38</sup> The earth's climate will not stabilize even if anthropogenic emissions of GHG are stopped, the negative effects associated with climate change will continue to affect local populations for centuries.<sup>39</sup> Continued global population growth means that an increasing number of people will be vulnerable to climate change, (e.g. more people are living in low lying coastal areas vulnerable to sea level rise).<sup>40</sup>

Policies of colonialism and neoliberal trade created an unequal division of global resources between the wealthy global North and poor South.<sup>41</sup> Because states most responsible for anthropogenic climate change often have more resources than poorer states, they are better suited to reduce risks and adapt.<sup>42</sup> However, risk reduction and adaptation cannot shield even the wealthiest nations from all climate change related loss.<sup>43</sup>

Violent conflicts stemming from the effects of climate change, threaten global peace and security.<sup>44</sup> U.S. Secretary of State John Kerry said, "Make no mistake: The implications here extend well beyond hunger. This isn't only about global food security; it's about global security—period."<sup>45</sup> Land degradation from

38. Field, *supra* note 5, at 20-22

39. Rajendra K. Pachauri et. al., *Climate Change 2014: Syntheses Report*, IPCC 16 (2015), [https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf).

40. *Id.* at 16, 20 (population growth also challenge risk management because more people are reliant on available natural resources for survival).

41. Anne McNevin, *Beyond Territoriality: Rethinking Human Mobility, Border Security And Geopolitical Space From the Indonesian Island of Bintan*, 45(3) SECURITY DIALOGUE 295, 299 (2014), <http://sdi.sagepub.com/content/early/2014/04/23/0967010614530458.full.pdf+html> (discussing historical European colonialism, global trade, and exploitation of natural resources).

42. *Hurricane Sandy by the Numbers*, FEMA (recovery and mitigation numbers as of Oct. 9, 2015), [http://www.fema.gov/media-library-data/1446042082195-179d93a1d9f3ca512de588ebf4091336/Sandy\\_anniv3\\_by\\_the\\_numbers.pdf](http://www.fema.gov/media-library-data/1446042082195-179d93a1d9f3ca512de588ebf4091336/Sandy_anniv3_by_the_numbers.pdf). The Federal government has provided at least \$13 billion to assist victims of the storm. *Additional \$2.5 Billion in Federal Hurricane Sandy Aid Coming*, PRESS OF ATLANTIC CITY (May 23, 2014), available at [http://www.pressofatlanticcity.com/news/breaking/additional-billion-in-federal-hurricane-sandy-aid-coming/article\\_f91bcb6c-e2b8-11e3-9edb-001a4bcf887a.html](http://www.pressofatlanticcity.com/news/breaking/additional-billion-in-federal-hurricane-sandy-aid-coming/article_f91bcb6c-e2b8-11e3-9edb-001a4bcf887a.html).

43. Nicholas Stern, *The Economics of Climate Change*, 98 AM. ECON. REV. 5 (2008), available at <https://www.aeaweb.org/articles.php?doi=10.1257/aer.98.2.1> (climate change costs are the equivalent to 5% of global GDP).

44. Clionadh Raleigh et. al., *Assessing the Impact of Climate Change On Migration and Conflict*, at v, 34, 36 (SOC. DIMENSIONS OF CLIMATE CHANGE, WBG, Working Paper, 2008), <http://danida.vnu.edu.vn/cpis/files/References/Climate%20Change/Assessing%20the%20Impact%20of%20Climate%20Change%20on%20Migration%20and%20Conflict.pdf>. [hereinafter Raleigh].

45. Matthew Lee, *Climate Change, Food Security Key to Global Stability, Kerry Says*, ASSOCIATED PRESS (Oct. 17, 2015), available at <http://www.pbs.org/newshour/rundown/climate->

unsustainable land use and extreme weather events lead to food insecurity, disrupts livelihoods, and drives people into urban areas.<sup>46</sup> Many displaced by climate change relocate within their home state.<sup>47</sup> Migration into urban areas increases competition for already scarce resources and can challenge already fragile governments.<sup>48</sup> Conflicts stemming from the symptoms of climate change contribute to large-scale migration from the global South and developing regions, to the North.<sup>49</sup> At the COP21, President Obama said that the effects of climate change will lead to “[p]olitical disruptions that trigger new conflict, and even more floods of desperate peoples seeking the sanctuary of nations not their own.”<sup>50</sup> In this way climate change is a “threat multiplier.”<sup>51</sup> President Obama later said:

The reason is because this one trend—climate change—affects all trends. If we let the world keep warming as fast as it is, and sea levels rising as fast as they are, and weather patterns keep shifting in more unexpected ways—then before long, we are going to have to devote more and more and more of our economic and military resources not to growing opportunity for our people, but to adapting to the various consequences of a changing planet. This is an economic and security imperative that we have to tackle now.”<sup>52</sup>

Climate change is linked to economic and social disruption, which can create environments ripe for recruitment by extremist groups like ISIL, and others.<sup>53</sup> Years of severe drought and poor water management in Syria led to total crop failure in the country’s main agricultural region and eighty-five percent loss of livestock.<sup>54</sup> The loss of livelihoods forced families to migrate to already overcrowded cities, whose presence added to existing grievances with the

change-food-security-key-global-stability-kerry-says/ (writing on about the speech Secretary Kerry gave at the Milan Expo in 2015).

46. *Urgenda v. Staat*, *supra* note 34, at 14, 26.

47. U.N. High Comm’r For Refugees, *UNHCR, the Environment & Climate Change* 8 (Oct. 2015), <http://www.unhcr.org/540854f49.html> [hereinafter UNHCR].

48. Raleigh, *supra* note 44, at 5-6, 34-6 (linking climate migration to urban areas and conflict).

49. *Id.* at 2, 6.

50. *Remarks by President Obama at the First Session of COP21*, *supra* note 15.

51. FINDINGS FROM SELECT FEDERAL REPORTS: THE NATIONAL SECURITY IMPLICATION OF A CHANGING CLIMATE, THE WHITE HOUSE WASHINGTON 8 (May 2015), [https://m.whitehouse.gov/sites/default/files/docs/National\\_Security\\_Implications\\_of\\_Changing\\_Climate\\_Final\\_051915.pdf](https://m.whitehouse.gov/sites/default/files/docs/National_Security_Implications_of_Changing_Climate_Final_051915.pdf); see also Statement by the President of the Security Council, U.N. Doc. S/PRST/2011/15 (July 20, 2011), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PRST/2011/15](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PRST/2011/15).

52. Office of the Press Secretary, Press Conference by President Obama, THE WHITE HOUSE (Dec. 1, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/12/01/press-conference-president-obama>.

53. Phillip Dane Warren, *Climate Change and International Peace and Security: Possible Roles for the U.N. Security Council in Addressing Climate Change*, SABIN CENTER FOR CLIMATE CHANGE L., COLUM. L. SCH. 4-5 (July 2015), available at <http://academiccommons.columbia.edu/catalog/ac:187331>.

54. *Case Study Syria*, A NEW CLIMATE FOR PEACE, <https://www.newclimateforpeace.org/case-study/syria> (last visited Apr. 5, 2016).



government.<sup>55</sup> Without the resources to adapt to a changing environment, many people move into urban areas within their home state.<sup>56</sup> Urban migration exposes displaced individuals to increased risks and threats to safety and livelihood (e.g., forced labor, human trafficking, and violent conflict).<sup>57</sup> It also increases competition for natural resources and strains existing public services.<sup>58</sup> For instance, in Egypt issues of food security related to changes in rainfall patterns added to already existing food insecurity.<sup>59</sup> Mass protests in Egypt during 2011 were largely driven by public objection to increased poverty, soaring food prices, corruption, and high unemployment.<sup>60</sup> Egyptians are quite sensitive to food price volatility because the average Egyptian household spends over forty percent<sup>61</sup> of their incomes on food. Water scarcity in the region and low agriculture production has led to soaring food prices.<sup>62</sup> These protests eventually led to the fall of the thirty-year regime of Hosni Mubarak.<sup>63</sup> The situation in Egypt, along with many others, demonstrated that climate change and environmental displacement can and do lead to instability which threatens global peace and security. However, despite the significant issues associated with the migration of persons displaced by climate change, do current international legal instruments recognize the rights of the environmentally displaced? The next part of this section will answer this question.

## II. B. GAPS IN PROTECTION, ENVIRONMENTALLY DISPLACED INDIVIDUALS ARE VULNERABLE TO INCREASED RISK OF HARM.

As described above, individuals adapting to a changing climate are more likely to move within their home state.<sup>64</sup> The Guiding Principles on Internal

55. *Id.*

56. Raleigh, *supra* note 44, at 20.

57. Henrik Urdal, *Demographic Aspects of Climate Change, Environmental Degradation And Armed Conflict* 4-7 (Peace Res. Inst. Oslo, Jan. 2008), [http://www.researchgate.net/profile/Henrik\\_Urdal/publication/228801794\\_Demographic\\_aspects\\_of\\_climate\\_change\\_environmental\\_degradation\\_and\\_armed\\_conflict/links/0fcfd50b32baa21d89000000.pdf](http://www.researchgate.net/profile/Henrik_Urdal/publication/228801794_Demographic_aspects_of_climate_change_environmental_degradation_and_armed_conflict/links/0fcfd50b32baa21d89000000.pdf).

58. Colin P. Kelley et. al., *supra* note 10, at 3241-42 (referring to a nearly 50% increased urban population in Syria between 2002 and 2010, as a contributor to the country's destabilization).

59. *Food Security And Nutritional Status In Egypt Worsening Amidst Economic Challenges*, WORLD FOOD PROGRAMME (May 21, 2013), available at <https://www.wfp.org/news/news-release/food-security-and-nutritional-status-egypt-worsening-amidst-economic-challenges>.

60. Case Study Egypt, A NEW CLIMATE FOR PEACE, <https://www.newclimateforpeace.org/case-study/egypt> (last visited Apr. 5, 2016).

61. *Id.*; see also Derek Thompson, *How Families Spend in Brazil, Russia, China, India, Egypt, Turkey, Indonesia, And Saudi Arabia*, THE ATLANTIC (Sept. 28, 2012), available at <http://www.theatlantic.com/business/archive/2012/09/how-families-spend-in-brazil-russia-china-india-egypt-turkey-indonesia-and-saudi-arabia/263023/> (citing 50% of the household income).

62. *Water Scarcity in Egypt: The Urgent Need for Regional Cooperation Among the Nile Basin Countries 2*, GOV'T OF EGYPT MINISTRY OF WATER RES. & IRRIGATION 2 (Feb. 2014), [http://www.mfa.gov.eg/SiteCollectionDocuments/Egypt%20Water%20Resources%20Paper\\_2014.pdf](http://www.mfa.gov.eg/SiteCollectionDocuments/Egypt%20Water%20Resources%20Paper_2014.pdf).

63. *Essam Sharaf Named Egypt's New Prime Minister*, THE WORLD POST (Mar. 3, 2011, updated on May 25, 2011), available at [http://www.huffingtonpost.com/2011/03/03/essam-sharaf-named-egypts\\_n\\_831029.html](http://www.huffingtonpost.com/2011/03/03/essam-sharaf-named-egypts_n_831029.html).

64. INTERNAL DISPLACEMENT MONITORING CTR., Q. UPDATE 3 (July-Sept. 2015), <http://www.internal-displacement.org/assets/publications/2015/IDMC-quarterly-update-2015-QU3.pdf>

Displacement (“GPID”) is a soft law instrument that does not create positive obligations on states for displaced individuals. It recognizes individuals displaced by *human-made* disasters,<sup>65</sup> but only applies to individuals fleeing from sudden onset disasters without addressing the specific needs of those vulnerable to climate change.<sup>66</sup> This leaves a gap in protection for those internally displaced from the more common slow onset environmental degradation scenarios related to climate change.<sup>67</sup>

For those displaced individuals who are not fleeing from sudden onset disasters, seeking refugee status may provide some protections. Environmental migrants, who can prove a recognized form of past persecution or well-founded fear of future harm on account of five specific categories, may obtain “refugee” status.<sup>68</sup> Refugee status might enable the individual to permanently relocate.<sup>69</sup> Unlike soft instruments such as the GPID, binding international law creates positive obligations on states to protect refugees. However, to be granted refugee status, a person must demonstrate that they were persecuted.<sup>70</sup> Domestic jurisprudence continues to narrow the scope of the defined categories of persecution, and does not make room for the environmentally displaced.<sup>71</sup> There is a strong nexus between human activity and climate change,<sup>72</sup> but courts have yet to define the direct impacts of climate change as a form of persecution.<sup>73</sup> In addition,

(19.3 million newly displaced people in 2014).

65. U.N. Rep. Secretary-General, *Guiding Principles on Internal Displacement*, at Annex ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998), available at <http://www.refworld.org/docid/3c3da07f7.html>; see also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), Art. 1(k), Oct. 22, 2009, 49 I.L.M. 86, available at <http://www.refworld.org/docid/4ae572d82.html> (human-made disasters like wars, industrial accidents, fires).

66. Lauren Nishimura, ‘Climate Change Migrants’: Impediments to a Protection Framework and the Need to Incorporate Migration Into Climate Change Adaptation Strategies, 27 INT’L J. REFUGEE L. 107, 115 (2015), available at <http://ijrl.oxfordjournals.org/content/early/2015/02/11/ijrl.eev002.abstract>.

67. Taylor Ackerman, *Climate Change And Forced Migration: A Gap in Protection*, PEACE PALACE LIBR. (July 31, 2015), available at <http://www.peacepalacelibrary.nl/2015/07/climate-change-and-foreced-migration-a-gap-in-protection/>.

68. Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Convention Relating to the Status of Refugees]; see UNHCR, *supra* note 47, at 9 (state practice under the Convention varies. Individuals trying to establish past persecution on account of the five categories face challenges of changing requirements and continuously evolving jurisprudence that makes proving persecution more and more difficult).

69. Convention Relating to the Status of Refugees, *supra* note 69; Nishimura, *supra* note 67, at 114.

70. Convention Relating to the Status of Refugees, *supra* note 69; Nishimura, *supra* note 67, at 114.

71. William Thomas Worster, *The Evolving Definition of the Refugee in Contemporary International Law*, 30 BERKELEY J. INT’L L. 103-06 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736547](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736547).

72. Lisa V. Alexander et. al., *Climate Change 2013 The Physical Science Basis, Summary for policymakers*, IPCC, FIFTH ASSESSMENT REPORT, 14 (2013), [https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5\\_SPM\\_brochure\\_en.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5_SPM_brochure_en.pdf).

73. Kiribati Family ‘Terrified’ of Going Home, RADIO NEW ZEALAND NEWS (Sept. 22, 2015),

because of the multi-causal and historical nature of climate change, identifying a specific perpetrator is difficult.<sup>74</sup> GHG emissions, which contribute to climate change, have been increasing since the industrial revolution.<sup>75</sup> Although it is possible to identify specific modern actors, courts have not yet been willing to assign guilt in cases involving climate change induced displacement.<sup>76</sup> In addition to the challenge of establishing the element of persecution, courts have also found that climate migrants do not receive protection under the category of a “particular social group.”<sup>77</sup> Under the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”)<sup>78</sup> and the Convention Against Torture,<sup>79</sup> states also have an obligation not to return a person to his or her country of origin where removal would subject the person to serious bodily harm or torture.<sup>80</sup> Yet many states have failed to protect those persons displaced by climate change, despite the fact that removal to their country of origin could pose serious risks to their well-being and possibly their lives.<sup>81</sup> One of the most significant arguments against broadening the scope of the definition of refugee to include those individuals, who have been displaced as a result of climate change or environmental disasters, is that it would divert attention and resources and weaken existing efforts to protect vulnerable

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available at <http://www.radionz.co.nz/news/national/284875/kiribati-family-%27terrified%27-of-going-home> (a recent challenge in New Zealand by a Kiribati family to deportation was denied for not establishing protection under the Refugee Convention).

74. Benedict Blunnie, *Climate Change And Forced Displacement: Conceptual And Legal Issues*, 4 KINGS INNS STUDENT L. REV. 87, 98 (2014), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/kingsinslr4&div=11&id=&page=> (studies would require detailed information since the start of the industrial revolution).

75. Pachauri, *supra* note 39, at 124.

76. KELLY BUCHANAN, THE LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CENTER, NEW ZEALAND: “CLIMATE CHANGE REFUGEE” CASE OVERVIEW (July 2015), <https://www.loc.gov/law/help/climate-change-refugee/new-zealand-climate-change-refugee-case.pdf>.

77. *AF (Kiribati)* [2013] NZIPT 800413 at [75] (The court rejected the claim of membership of a “particular social group” because the applicant did not face fear of persecution from a specific actor but from “mother nature.” The court found that there was no evidence that the Government of Kiribati made a choice not to remedy the situation, and the applicant testified that he faced the same poor conditions common to everyone in Kiribati.). The drafters of the Convention Relating to the Status of Refugees (“Refugee Convention”), did not define the category of protection for membership in a particular social group, nor do the *travaux preparatoires* offer interpretive guidance. National courts and legal scholars indicate interpretation guided by the four listed categories of protection: race, religion, nationality, and political opinion. An analysis commissioned by the UNHCR indicates that jurisprudence regarding the interpretation often departs from national legislation and the Refugee Convention itself. See T. Alexander Aleinikoff, “Membership in a Particular Social Group”: *Analysis and Proposed Conclusions*, <http://www.unhcr.org/3b83b1c54.pdf>.

78. Convention Relating to the Status of Refugees, *supra* note 69.

79. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>.

80. Janc McAdam, International Dialogue on Migration 2011 the Future of Migration: Building Capacities for Change Intersessional Workshop on *Climate Change, Environmental Degradation and Migration* (Mar. 29-30, 2011) (Human rights law has helped expand traditional protection).

81. *Id.*

individuals currently covered by the Refugee Convention.<sup>82</sup>

Binding international law instruments require parties to develop domestic policies that originate from a state's commitment to the agreement.<sup>83</sup> Once international agreements are in place, domestic practice and implementation varies.<sup>84</sup> States find ways to avoid international obligations by externalizing border security.<sup>85</sup> Border externalization diverts people away from safety and undermines the spirit and purpose of the refugee convention.<sup>86</sup> The European migration "crisis" provides an example of this. The EU and Turkey are currently developing an agreement that would provide incentives to Turkey to prevent millions of migrants from conflict areas from entering the EU from its territory.<sup>87</sup>

Climate displaced persons who are not likely to fit into an existing category of protection often do not have an opportunity for legal migration when adapting to environmental degradation across international borders.<sup>88</sup> Without an opportunity to migrate legally, displaced individuals become vulnerable to exploitation, increased poverty, political exclusion, and violence.<sup>89</sup> Many who seek resources and opportunities for a better life across international borders outside the regulatory norms migrate irregularly.<sup>90</sup> Irregular migrants are more likely to face political and social exclusion and discrimination because of their lack of proper documentation, and are therefore more susceptible to exploitation.<sup>91</sup> Because irregular migrants have limited options for work they are also more likely to be preyed upon by smugglers and employers who can capitalize on their

82. Elizabeth Burleson, *Climate Change Displacement to Refuge*, 25 J ENVTL. L. LITIG. 19, 21 (2010), available at <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/10643/Burleson.pdf?sequence=1&isAllowed=y>.

83. Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

84. BRIAN GORLICK, IMPROVING DECISION-MAKING IN ASYLUM DETERMINATION, NEW ISSUES IN REFUGEE RESEARCH PAPER 7 (2005), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2331704](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2331704).

85. Maribel Casas-Cortes et al., *supra* note 11.

86. Maribel Casas-Cortes et al., *supra* note 11, at 55 (Memorandums of Understanding (MOUs) with neighboring states and third parties, essentially redefines political borders).

87. Jennifer Rankin, *Turkey outlines "one for one" plan to tackle Syrian refugee crisis*, THE GUARDIAN (2016), <http://www.theguardian.com/world/2016/mar/07/eu-offers-another-3bn-to-turkey-at-emergency-migration-summit> (last visited Apr. 5, 2016).

88. Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 357 COLO. J. INT'L ENVTL. L. & POL'Y, 380–388 (2011), <http://www.colorado.edu/law/sites/default/files/Mayer%20%28Corrected%29-S.pdf>.

89. GLOBAL MIGRATION GROUP, *supra* note 89, at 28–32 (migrants without proper documents to stay in a country, are much more likely than regular migrants to face increasing poverty, forced labor, political exclusion, and human trafficking).

90. *Key Migration Terms*, *supra* note 12.

91. BEATE ANDREES, FORCED LABOUR AND TRAFFICKING IN EUROPE: HOW PEOPLE ARE TRAPPED IN, LIVE THROUGH AND COME OUT (International Labour Office Geneva 2008), [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_090548.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090548.pdf).

vulnerability.<sup>92</sup> Exploitation of irregular migrants can occur through debt bondage, where individuals become indebted to a smuggler or successive holder of the debt.<sup>93</sup> Forced labor, sexual slavery, and violence are also likely outcomes for irregular migrants exploited by smugglers or employers.<sup>94</sup>

For many environmentally displaced individuals there is a risk of becoming stateless.<sup>95</sup> The Convention Relating to the Status of Stateless Persons, although not developed with this type of tragedy in mind, may provide assistance to the environmentally displaced.<sup>96</sup> A person who is stateless is no longer recognized as a national by the government.<sup>97</sup> In the context of climate change, a person becomes stateless when an individual's country of birth disappears or the individual otherwise becomes marginalized and no longer recognized by a state.<sup>98</sup> The challenges posed by statelessness are particularly acute for SIDS, where rising ocean levels encroach on low lying coastal areas, and in some cases threaten to inundate whole countries.<sup>99</sup> For example, many people who live in Kiribati, whose existence has been threatened by climate change, have relocated to Fiji.<sup>100</sup> However, the Kiribati government still recognizes those individuals as I-Kiribati nationals although they are living in Fiji.<sup>101</sup> Because these persons are still identified as nationals of their government they cannot be defined as stateless, and therefore cannot receive any protections afforded to stateless persons under international law.<sup>102</sup> As certain states' existences are threatened by climate change,

92. *Id.* at 32.

93. *Id.* at 23.

94. UNODC, COMBATING VIOLENCE AGAINST MIGRANTS 1 (2015), [https://www.unodc.org/documents/justice-and-prison-reform/UNODC\\_Combating\\_Violence\\_against\\_Migrants.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Combating_Violence_against_Migrants.pdf).

95. Chelsea Dixon, *The Modern Atlantis: 21st Century Solutions To A Legendary Problem*, VT. L. REV., available at <http://lawreview.vermontlaw.edu/staff-note-the-modern-atlantis-21st-century-solutions-to-a-legendary-problem/>.

96. U.N. Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117, available at [https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-3&chapter=5&Temp=mtdsg2&lang=en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&lang=en).

97. *Id.* art. 1.

98. U.N. High Commissioner for Refugees (UNHCR), Climate Change and Statelessness: An Overview 2 (May 15, 2009), available at <http://www.refworld.org/docid/4a2d189d3.html>.

99. *Id.* at 1; see also U.N. Convention on the Reduction of Statelessness, 989 U.N.T.S. 175 (Dec. 13, 1975).

100. Per Liljas, *The People of Kiribati Have Been Offered a Home in Fiji if Rising Seas Swamp Their Islands*, TIMES, (Feb. 12, 2014) available at <http://world.time.com/2014/02/12/kiribati-new-home-in-fiji/>.

101. *Fiji Willing to Help Kiribati From Climate Change Fallout – Bainimarama*, RADIO N.Z. (Dec. 7, 2013), available at <http://www.radionz.co.nz/international/pacific-news/230116/fiji-willing-to-help-kiribati-from-climate-change-fallout-bainimarama>.

102. U.N. Human Rights Council, Universal Periodic Review of the Republic of Kiribati, (2014), [http://www.ccig-iccg.org/wp-content/uploads/2014/07/Kiribati\\_21\\_session\\_UPR\\_submission\\_ERI\\_FI\\_WCC.pdf](http://www.ccig-iccg.org/wp-content/uploads/2014/07/Kiribati_21_session_UPR_submission_ERI_FI_WCC.pdf), (referring to the difficulty for the I-Kiribati to be recognized as a stateless person, because the definition requires the stateless person to no longer be considered a national of the state. Thus, requiring an inquiry into when a state ceases to exist).

the potential for an increase in stateless persons globally has dire implications.

Climate change has a direct impact on human rights.<sup>103</sup> The International Covenant on Economic, Social and Cultural Rights<sup>104</sup> and The International Covenant on Civil and Political Rights,<sup>105</sup> among others provide for rights directly related to climate change (e.g., improvement of environmental and industrial hygiene, life, work, culture). Environmental degradation caused by climate change affects people's ability to exercise these rights. In litigation however, courts have taken differing positions on whether climate change directly impacts the enjoyment of human rights and what the appropriate remedy should be. A 2014 decision by a New Zealand court acknowledged that climate change likely impacts the enjoyment of human rights.<sup>106</sup> It declined to reach the question of granting immigration visas to a family from Tuvalu on the basis of these impacts.<sup>107</sup> In 2015, the Lahore High Court Green Bench in Pakistan, however, found that domestic legislation did protect the fundamental rights from further delay of the country's implementation of its National Climate Policy and Framework.<sup>108</sup>

The International Court of Justice ("ICJ") could also provide guidance in relation to the damage caused by climate change and human rights. Petitions by the governments of Palau, Maldives, and others are requesting the United Nations General Assembly ("UNGA") to request the ICJ to issue an advisory opinion on states' and other actors' obligations to future generations regarding climate change.<sup>109</sup> The ICJ has issued an advisory opinion in the past regarding threats to human safety, in its opinion on the "Legality of the Threat or Use of Nuclear Weapons."<sup>110</sup> The state's request to the UNGA still stands.<sup>111</sup> ICJ advisory opinions are not binding,<sup>112</sup> but the ICJ explains:

103. Center for International Environmental Law [CIEL], *Climate Change & Human Rights: A Primer* (2011), [http://www.ciel.org/Publications/CC\\_HRE\\_23May11.pdf](http://www.ciel.org/Publications/CC_HRE_23May11.pdf).

104. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force 1976), <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>.

105. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force 1976), <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

106. *AD (Tuvalu)*, [2014] NZIPT 501370-371, [https://forms.justice.govt.nz/search/IPT/Documents/Deportation/pdf/rem\\_20140604\\_501370.pdf](https://forms.justice.govt.nz/search/IPT/Documents/Deportation/pdf/rem_20140604_501370.pdf).

107. *Id.*

108. *Leghari v. Federation of Pakistan* (2015), Case No WP No 255012015 (Pak.) <http://edigest.elaw.org/sites/default/files/pk.leghari.091415.pdf>.

109. DOUGLAS A. KYSAR, CLIMATE CHANGE & THE INTERNATIONAL COURT OF JUSTICE 9-18, (Yale Center for Envtl. L. & Pol'y, 2013), *available at* [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2309943](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2309943) (explaining that the UNGA is empowered to request the ICJ to issue advisory opinions).

110. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. GL No 95 (Jul. 8, 1996), <http://www.icj-cij.org/doCKET/files/95/7495.pdf>.

111. Phillip Sands, *Climate Change and The Rule of Law: Adjudicating the Future in International Law*, <https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf> (stating that Professor Sands supports the UNGA to make an official request to the ICJ).

112. *Advisory Jurisdiction*, I.C.J., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Apr. 25, 2016).

Although without binding effect, the advisory opinions of the Court nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues. Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States. [The ICJ's, decisions could have a lasting effect on climate justice].<sup>113</sup>

International and domestic courts have in many cases declined to address climate change related claims because of "political questions" contained therein.<sup>114</sup> One such case is one in which, the Ninth Circuit Court of Appeals dismissed a claim by a Native American village, who were alleging global warming, caused by fossil fuel companies, harmed them.<sup>115</sup> The claim was dismissed because to "adjudicate its claims, the Ninth Circuit would have to determine the point at which greenhouse gas emissions become excessive without guidance from the political branches."<sup>116</sup> The Ninth Circuit also found that the petitioner did not have standing because they could not produce facts linking the petitioner's injuries to the actions of the defendants who were fossil fuel companies.<sup>117</sup> The U.S. Supreme Court also later denied certiorari.<sup>118</sup>

Momentum within the international legal community is shifting, however, as courts begin to address climate justice directly.<sup>119</sup> Global awareness of the dangers of climate change is widespread as indicated by the 24,000 government and non-governmental observers who participated at COP21.<sup>120</sup> The 196 parties who voluntarily committed to reducing GHG emissions indicates global consensus on that single issue.<sup>121</sup> If deferred to by domestic and international judicial bodies, climate science produced by the Intergovernmental Panel on Climate Change ("IPCC") and others scientific bodies would relieve the courts of having to make factual findings related to climate change attribution.<sup>122</sup> The Fifth Assessment Report of the IPCC stressed that the "Human influence on the climate system is

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113. *Id.*

114. *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849, 857 (9th Cir. 2013).

115. *See id.*

116. *Id.* at 854.

117. *Id.* at 855.

118. *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849 (9th Cir. 2013), *cert. denied*, 81 U.S.L.W. 3649 (U.S. May 20, 2013) (No. 12-1072).

119. *See generally Achieving Justice and Human Rights in an Era of Climate Disruption: Climate Change Justice and Human Rights Task Force Report*, INT'L BAR ASS'N (Sept. 22, 2014), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A25BC045-B6F9-4E05-BD17-E2E9FB14EAD9> (the International Bar Association supports climate change justice, for example, through the International Court of Justice, and other arbitral bodies).

120. *See Participation and Accreditation*, U.N., (April 8, 2015, 5:20 PM), <http://newsroom.unfccc.int/cop21parisinformationhub/cop-21cmp-11-information-hub-participation-and-accreditation/> (last visited Apr. 25, 2016).

121. *Historic Pairs Agreement on Climate Change*, UNITED NATIONS, (April 8, 2015, 5:20 PM), available at <http://newsroom.unfccc.int/unfccc-newsroom/finale-cop21/>.

122. Field, *supra* note 5, at 12.

clear.”<sup>123</sup> Because of the nexus between human actors and climate change, it is important for courts to start holding actors responsible for climate change accountable. A notable case that illustrates this very outcome is discussed in the proceeding section.

### III. A. A POLITICAL QUESTION ANSWERED, WHERE THE LEGISLATURE HAS BEEN TOO SLOW TO ACT ON THE URGENCY OF CLIMATE CHANGE

Where governments fail to act on agreed emissions targets or fail to act on climate change in spite of public support, states become ruled by diktat and not democracy.<sup>124</sup> Some recent climate justice cases reflect that the global judiciary has declined to address climate justice claims either by invoking the political question doctrine or out of fear of opening the floodgates to litigation.<sup>125</sup> But the global judiciary represents a critical role in addressing climate change because the judiciary has a long history of significant contributions aimed at creating policy change in other areas that affect human rights.<sup>126</sup> Climate change as a human rights issue<sup>127</sup> is not different from social and political movements in the past. Consider the evolution of the Civil Rights Movement in the United States. During the Civil Rights Movements, elected officials in the federal government stalled in taking action to address policies of racial segregation and inequality in the face of social unrest and overwhelming public want. The Supreme Court’s 1954 ruling *Brown v. Board of Education*<sup>128</sup> preceded the civil rights bills of 1957<sup>129</sup> and 1960.<sup>130</sup> The Supreme Court decision<sup>131</sup> against the Defense of Marriage Act<sup>132</sup> reflected the growing social support for marriage equality against the will of the legislature. Writing on the topic of judicial activism, Peter Irons performed a historical survey of cases where the U.S. judiciary in fact responded to political questions with an answer, not a dismissal.<sup>133</sup> He wrote, “functional flaws in the

123. *Id.*

124. Rebecca Lowe, *Climate Justice: Lawyers Make a Stand*, INT’L BAR ASS’N (Oct. 15, 2015) (NGO ClientEarth CEO James Thornton explains his organization’s argument in suit against the European Union (EU) for missing its targets on nitrogen dioxide. “Our argument is, if the government can just choose whether it abides by laws or not then we no longer have a democracy under the rule of law. It’s rule by threat and diktat.”), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=B34332B6-8310-42BB-A3AD-9D39320D8AFF>.

125. See generally *id.*; see also, e.g., *Native Village of Kivalina*, *supra* note 115.

126. See Matt Grossmann & Brendon Swedlow, *Judicial Contributions to US National Policy Change since 1945*, 3 JOURNAL OF LAW AND COURTS 1–35, 17 (2015) (arguing US courts have had a significant indirect and direct effect on policy making in all branches of the government), <http://matthewg.org/judicialcontrib.pdf>.

127. CIEL, *supra* note 104.

128. *Brown v. Board of Education of Topeka*, 348 U.S. 886, 886 (1954).

129. The Civil Rights Act of 1957, 42 U.S.C. § 1975 (2012).

130. The Civil Rights Act of 1960, 52 U.S.C. § 10101 (2012).

131. *United States v. Windsor*, 133 S. Ct. 2675, 2682–720 (2013).

132. The Defense of Marriage Act, 1 U.S.C. § 1 (1996).

133. Peter H. Irons, *Making Law: The Case for Judicial Activism*, 23 VAL. UNIV. L. REV. 35–52, 39 (1988) (referring to civil rights cases, where the legislature failed to respond to public momentum to



political system leads me to argue that judicial activism is an essential antidote to some of the toxins that have poisoned that system.”<sup>134</sup> The urgency to address the problems posed by climate change compels the same level of judicial activism.

Climate change litigation in U.S. domestic courts and international courts has so far involved claims such as the common-law tort claim of nuisance,<sup>135</sup> duty of care,<sup>136</sup> and public trust doctrine.<sup>137</sup> Until recently, climate justice claims brought in the U.S. have been dismissed.<sup>138</sup> The section below will first discuss a recent decision by a Dutch court finding in favor of the petitioner against the Dutch government’s failure to maintain the duty of care prescribed for by the Constitution of the Netherlands.<sup>139</sup> It will then discuss pending lawsuits filed in the U.S. states of Oregon and Washington.

### III. B. THE *URGENDA* CASE

In *Urgenda*, the Urgenda Foundation and nearly 900 co-plaintiffs filed suit against the Dutch government for not taking sufficient action to reduce its GHG emissions, alleging that the Dutch government knew that inaction would cause harm to its current and future citizens.<sup>140</sup> The plaintiffs did not ask for damages, but rather asked for the government to reduce its GHG emissions to forty percent below the 1990 levels by 2020.<sup>141</sup>

The court in *Urgenda* considered three main questions: (1) the severity of alleged danger of climate change, and what reductions are necessary to avert the danger; (2) whether the Netherlands has a legal obligation to the Urgenda Foundation and co-plaintiffs to take further reductions measures in the face of the danger posed; and (3) is the court the appropriate institution to decide this issue.<sup>142</sup>

The Dutch government did not dispute the attribution science and the scientific findings by the IPCC and other international organizations (i.e., United Nations Environment Programme (“UNEP”) and the International Energy Agency (“IEA”)). Nor did the state dispute findings by Dutch national agencies.<sup>143</sup> This

end segregation), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2033&context=vulr>.

134. *Id.*

135. *An Overview of Nuisance*, LAWS.COM, (April 8, 2015, 11:45 PM) (nuisance is harm arising from one’s use of property), available at <http://tort.laws.com/nuisance>.

136. Roger Cox, CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, *A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands* 4, (Nov. 2015), [https://www.cigionline.org/sites/default/files/cigi\\_paper\\_79.pdf](https://www.cigionline.org/sites/default/files/cigi_paper_79.pdf).

137. *Public Trust Doctrine*, LEGAL INFO. INST., (Nov. 7, 2015), available at [https://www.law.cornell.edu/wex/public\\_trust\\_doctrine](https://www.law.cornell.edu/wex/public_trust_doctrine).

138. See generally *U.S. Climate Change Litigation Chart*, SABIN CTR. FOR CLIMATE CHANGE COLUMBIA LAW SCH., (Sept. 11, 2015), available at <http://web.law.columbia.edu/climate-change/resources/us-climate-change-litigation-chart>.

139. *Urgenda v. Staat*, *supra* note 34.

140. *Climate Case*, URGENDA, (April 9, 2015, 12:17 AM), available at <http://www.urgenda.nl/en/climate-case/>.

141. *Id.*

142. Cox, *supra* note 137, at 6.

143. *Urgenda v. Staat*, *supra* note 34.

allowed the court to defer to the attribution science to respond to the first question. The scientific findings make clear that if global warming exceeds two degrees Celsius to preindustrial levels, the environment will be highly hazardous to humans.<sup>144</sup> The court found that it is necessary to stabilize GHG emissions by reducing human GHG emissions, and that the government's current policy of seventeen percent reduction was not sufficient to avoid the danger.<sup>145</sup> The court found that at least a twenty-five to forty percent reduction of 1990 emissions levels were necessary by 2020.<sup>146</sup>

Responding to the duty of care owed to the *Urgenda* plaintiffs, the court did not find that the State owed a duty of care to the *Urgenda* plaintiffs based on the Dutch Constitution<sup>147</sup> or the European Convention on Human Rights<sup>148</sup> ("ECHR").<sup>149</sup> However, the court did find that the as a signatory to the UNFCCC, the Netherlands and other signatories' reductions targets were "insufficient to realize the two degrees Celsius target."<sup>150</sup> This insufficiency could have dangerous consequences to both humans and the environment.<sup>151</sup> Because the government is crucial in the transition to a "more sustainable society," it has a significant responsibility to establish an adequate and effective statutory and instrumental framework to reduce GHG emission in the Netherlands.<sup>152</sup> Considering the principle of fairness and costs associated with further reductions or maintaining the current policy, the court found that taking immediate action on further reductions are far more cost effective.<sup>153</sup> The court did not apply a traditional "but for" causation analysis, but found a "sufficient causal link" between the GHG emissions from the Netherlands and global climate change.<sup>154</sup> The fact that Dutch emissions are limited on a global scale does not change that Dutch emissions contribute to climate change.<sup>155</sup>

As to the third question, the court decided its own role in climate policy. While the state argued that climate policy was political and did not belong to the court, the court found that its role is to provide legal protection and settles legal disputes.<sup>156</sup> Because *Urgenda's* claim concerns the legal protection provided by the state, "it therefore requires a judicial review."<sup>157</sup> The political power of the state is not diminished by the court's decision, because the state retains full power

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144. IPCC, *supra* note 38, at 12.

145. *Urgenda v. Staat*, *supra* note 34.

146. *Id.*

147. Gw. [Constitution].

148. European Convention on Human Rights, art. 2, art. 8, Sept. 3, 1953, C.E.T.S. 149.

149. *Id.*

150. *Urgenda v. Staat*, *supra* note 34.

151. Cox, *supra* note 137, at 11.

152. *Urgenda v. Staat*, *supra* note 34, at 4.66, 4.74.

153. Cox, *supra* note 137, at 11.

154. *Urgenda v. Staat*, *supra* note 34, at 4.90.

155. *Id.* at 4.79, 4.90.

156. *Id.* at 4.98.

157. *Id.* at 4.98.

to decide how to comply with the order.<sup>158</sup> The court found that it was necessary for the State to reduce emissions at a minimum of twenty-five percent of 1990 levels by 2020.<sup>159</sup> Although the Dutch government is appealing the decision based on the court's decision on the State's duty of care, it is complying with the reduction order.<sup>160</sup>

This case is significant in that it could provide a model for future climate justice cases deciding a state's obligation to its citizens in relation to its international obligations.<sup>161</sup> Attribution science played a major role in the court's decision of the risk of danger to human from increasing global temperatures.<sup>162</sup> Also significant is the duty of care owed by the state in such cases. In the *Urgenda* decision, the court looked to the Dutch Constitution as well as, other international agreements.<sup>163</sup> Finding a duty of care from the international law "no harm" principle, and from the State's individual commitment under the UNFCCC and Treaty on the Functioning of the European Union ("TFEU").<sup>164</sup>

Because states have not adequately responded to climate change, the judiciary's role in mitigating climate change is becoming more important.<sup>165</sup> A case based on similar claims is currently pending against Belgium in The Court of First Instance in Brussels.<sup>166</sup> In the U.S. state of Washington, eight youths petitioned the King County Superior Court and the Washington Department of Ecology to write carbon emissions rules that would protect the atmosphere and the future generations.<sup>167</sup> As of November 2015, the Judge in the court ordered the Washington Department of Ecology to write such rules because "very survival depends upon the will of their elders to act now, decisively and unequivocally, to stem the tide of global warming."<sup>168</sup> In late 2015, Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement filed a petition asking the Philippines Human Rights Commission ("CHR") to investigate and acknowledge the complicity of fifty investor-owned fossil fuel companies in causing extreme weather events.<sup>169</sup>

158. *Id.* at 4.101.

159. *Id.* at 4.93.

160. *Cabinet Begins Implementation of Urgenda Ruling but will File Appeal*, GOVERNMENT OF THE NETHERLANDS (2015), <https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal> (the appeal is not available at the time of this writing).

161. Cox, *supra* note 137, at 14.

162. *Id.* at 6, 7.

163. *Urgenda v. Staat*, *supra* note 34, at 3.2.

164. Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, O.J. (C 326) 49.

165. Cox, *supra* note 137, at 14.

166. Une Action En Justice Pour L'Avenir [Future Legal Action], *available at* <http://klimaatzaak.eu/fr/> (the case is pending and litigation documents are not yet available).

167. *Washington Legal Updates*, OUR CHILDREN'S TRUST (2015), *available at* <http://ourchildrenstrust.org/state/Washington>.

168. *Id.*

169. Kumi Naidoo, *Exxon set to be investigated in the Philippines as well as New York*, GREENPEACE INT'L (Nov. 9, 2015), *available at*

The President of the IBA said during the COP21 that arbitration would play an increasingly important role “in encouraging business and government commitments on climate change and sustainability by providing an effective mechanism to resolve disputes.”<sup>170</sup> The effect arbitration will have on climate justice is highly dependent on the arbitration clause contained within the agreement being interpreted by an arbitral tribunal.<sup>171</sup> Agreements to arbitrate will guide the tribunal’s analysis and likely include the specific remedies available. For instance, a claim was brought by an investor against Barbados under the Canada-Barbados Bilateral Trade Agreement (“BIT”), which limits the tribunal to award money damages or restitution due to expropriation,<sup>172</sup> for failing to implement and enforce environmental protections under its domestic and international obligations.<sup>173</sup> The claims concern the state’s obligations to an international treaty and its own domestic law.<sup>174</sup> This particular agreement does not give the tribunal authority to force Barbados to implement or enforce environmental regulations.<sup>175</sup> Because international arbitration typically involves violations of international law under relevant treaties, tribunals can advance climate change mitigation through interpretation of the relevant law.

### III. C. THE FUTURE OF CLIMATE JUSTICE

Climate change is an urgent global problem that will continue to have a severe impact on the environment, people, economies, and governments. The impact of climate change is not limited to the most vulnerable people who live in low lying coastal zones<sup>176</sup> or who directly depend on natural resources for livelihoods.<sup>177</sup> Climate change has a widespread impact globally, and disrupts

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<http://www.greenpeace.org/international/en/news/Blogs/makingwaves/Climate-Justice-Philippines-Human-Rights-Commission-Exxon/blog/54690/> (a copy of the Complaint can be found here <http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf>).

170. *Arbitration has a Greater Role to Play in Climate Change Disputes, Says IBA President*, INTERNATIONAL BAR ASSOCIATION (Dec. 7, 2015), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5bac3a2d-de37-4d69-992a-aa974fb4fabb>.

171. See generally Annette Magnusson, *How the Investment protection regime can contribute to a better environment*, ATTRIBUTION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (May 29, 2015), <http://isdsblog.com/wp-content/uploads/sites/2/2015/08/Magnusson-Warsaw-29-May-2015.pdf> (Annette Magnusson is the SCC Secretary General).

172. Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, Can.- Barb., arts. VIII, XIII, May 29, 1996, WORLD INTELL. PROP. ORG., available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/280>.

173. Allard v. Barbados (Can. v. Bar.), Case No. 2012-06 (Perm. Ct. Arb. 2010), available at <http://investmentpolicyhub.unctad.org/ISDS/Details/505> (pending).

174. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245, [http://www.ramsar.org/sites/default/files/documents/library/scan\\_certified\\_e.pdf](http://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf).

175. Allard v. Barbados, *supra* note 174.

176. *Poverty and Climate Change: Reducing the Vulnerability of the Poor Through Adaptation*, OECD IX, <http://www.oecd.org/env/cc/2502872.pdf>.

177. *Id.* at V.

agricultural production, forces people from their homes, and compounds civil and political strife.<sup>178</sup> These conditions affect the price of food and threaten global peace and security.<sup>179</sup>

Prior to the *Urgenda* decision, courts were reluctant to address climate change in any real way.<sup>180</sup> To ensure continued functioning of global systems, such as global trade, a concerted approach to climate justice is required. International response to mitigating climate change should not simply be left in the hands of the politicians and business leaders alone. Climate justice and the rule of law can speed up regulatory measures and put pressure on legislatures and private actors for higher GHG emissions reductions. Climate justice can also add to new and developing ways of improving global environmental uses and human rights.

The international legal community is taking an increasingly active role to initiate policy change with climate justice.<sup>181</sup> Another example of this active role comes from the drafting of The Oslo Principles on Global Climate Change Obligations (“Principles”) released in March of 2015.<sup>182</sup> The Principles were drafted by international attorneys, jurists, and academics, which identify existing law and provide legal means to compel countries and non-state actors to limit GHG emissions.<sup>183</sup> These Principles and other documents (e.g., the IBA Climate Task Force Report, the PA) contribute to enhance the knowledge of international and domestic courts and tribunals about climate justice and the importance of their role in achieving it. The *Urgenda* decision adds the evolving international jurisprudence and is a sign that blanket dismissals of climate related claims are becoming a thing of the past. The political question doctrine as applied to climate justice is likely to fall out of use as judiciaries become more exposed to science and the claims science supports.

Legal systems continue to evolve to the changing needs of the people and environment they serve. The goals of the civil rights movement were not achieved by a single case. Given the scope of the damages presented by climate change, we cannot expect that a favorable ruling in a single climate justice case will result in the recognition and protection of the rights of the environmentally displaced and the protection of natural resources for future generations. Still, the decision in *Urgenda* presents an important step forward. In *Urgenda*, the state did not dispute

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178. *Id.* at 6, 8.

179. *Id.* at IX, 8.

180. *The Urgenda Judgment: A “Victory” for the Climate that is Likely to Backfire*, ENERGYPOST (Sept. 9, 2015), available at <http://www.energypost.eu/urgenda-judgment-victory-climate-likely-backfire/>.

181. See generally *Principles of Climate Change*, MARY ROBINSON FOUNDATION CLIMATE JUSTICE, <http://www.mrfcj.org/principles-of-climate-justice/> (last visited Nov. 5, 2015); *Presidential Task Force on Climate Change and Human Rights*, INTERNATIONAL BAR ASSOCIATION (2014), <http://www.ibanet.org/PresidentialTaskForceCCJHR2014.aspx>; see generally Roger Cox, *supra* note 137.

182. Antonio Benjamin et al., *Oslo Principles on Global Climate Change Obligations*, GLOBAL JUSTICE PROGRAMS (2015), <https://www.socialeurope.eu/wp-content/uploads/2015/10/OP8-final.pdf>.

183. *Id.*

the science submitted by the IPCC and relied on by the UNFCCC.<sup>184</sup> This made it easier for the court to defer to the science presented by the IPCC without having to make a lengthy finding of fact or dismissing the claim on political question issue.<sup>185</sup> Additionally, *Urgenda* did not seek damages, which alleviated the court of the need to attribute harm to a specific perpetrator.<sup>186</sup> Relying on international commitments to reduce GHG emissions and the Netherlands' Constitution, the court was able to find that the Dutch government had a duty of care.<sup>187</sup> Following *Urgenda*, a lawsuit was filed against the U.S. Federal Government in the U.S. state of Oregon in the U.S. District Court of Oregon, against the federal government for its failure to protect their constitutional rights of life, liberty, and property by promoting the development and use of fossil fuels and for failing to protect the public trust.<sup>188</sup> The court is currently hearing oral arguments by fossil fuel company representatives to dismiss the claims.<sup>189</sup> These cases are significant in carrying the momentum for climate justice, as they all carry the potential of mitigating climate change while recognizing human and constitutional rights provided domestically and internationally.

Existing international investment agreements (“IIAs”) should also be reviewed by the parties to make sure the IIAs contain language that both allows states to regulate environmental matters necessary to mitigate climate change while respecting human rights. IIAs should also allow for investors to request arbitral proceedings to hold states accountable for failing to implement environmental and human rights protections. The overwhelming participation by international leaders and non-governmental observers during the COP21 indicate that more people than ever, are concerned with mitigating climate change. This momentum is likely to strengthen climate justice litigation and arbitration claims, because the world supports climate justice.

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184. *Urgenda v. Staat*, *supra* note 34.

185. *Id.*; *see generally* NATIVE VILLAGE OF KIVALINA ET AL. V. EXXONMOBIL CORP. ET AL., *supra* note 115.

186. *Urgenda v. Staat*, *supra* note 34,

187. *Id.* at 4.65, 4.73, 4.83.

188. *Pending Federal Climate Change Lawsuit*, OUR CHILDREN'S TRUST, available at <http://ourchildrenstrust.org/us/federal-lawsuit>; *see generally* Summary of Constitutional Climate Change Lawsuit Against the United States Government, OUR CHILDREN'S TRUST, <http://ourchildrenstrust.org/sites/default/files/Summary-ConstitutionalClimateChangeLawsuit.pdf> (summary of the complaint).

189. *Id.*

