

# HUMAN RIGHTS IN A CLIMATE CHANGED WORLD: THE IMPACT OF COP21, NATIONALLY DETERMINED CONTRIBUTIONS, AND NATIONAL COURTS

Tracy Bach\*\*†

INTRODUCTION.....	561
I. HUMAN RIGHTS ADVOCACY IN THE RUN UP TO COP21.....	567
II. THE UNFCCC NEGOTIATIONS SHIFT TO A NATIONAL EMPHASIS.....	571
III. THE NATIONALLY DETERMINED APPROACH CODIFIED IN THE PARIS AGREEMENT.....	574
A. A New Articulation of the Collective Objective .....	574
B. Nationally Determined Contributions (NDCs) .....	575
C. Transparency.....	578
D. Collective Review via “Global Stocktakes” .....	580
IV. NATIONAL CLIMATE CHANGE LITIGATION BASED ON INTERNATIONAL NORMS .....	581
A. Human Rights and Tort Litigation in the Netherlands .....	582
B. Petition for Climate Change Rulemaking in Washington State, United States.....	586
C. Pakistani Litigation Seeking National Climate Change Policy Development.....	589
D. Greenpeace Petition to the Philippines Human Rights Commission.....	591
V. WHAT NEXT? THE IMPACT OF COP21, NATIONALLY DETERMINED CONTRIBUTIONS, AND NATIONAL COURTS .....	593

## INTRODUCTION

Climate change has become an active intersection of environmental and human rights law. At the global level, the United Nations Framework Convention on Climate Change (UNFCCC) was created to respond to climate change’s impacts on humans, first by setting greenhouse gas (GHG) mitigation norms to prevent or limit atmospheric warming. More recently, the UNFCCC’s added focus on adaptation recognizes the changes already in play and their disproportionate impact on vulnerable populations. But, while the UNFCCC reflects concern for human rights, neither the original

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\* Professor of Law, Vermont Law School.

† I thank Archer Christian, VLS ’15, and Rebecca Davidson, VLS ’15, for their insightful feedback on drafts and steady fellowship on the writing journey.

framework convention nor its Kyoto Protocol contains explicit references to specific human rights or human rights laws.

Likewise, early human rights law did not express a right to a healthy environment. The 1948 Universal Declaration of Human Rights and its two covenants adopted in 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), lacked references to specific environmental rights.<sup>1</sup> The first connection between the right to life and the need for a healthy environment appears in the 1972 Stockholm Declaration, which proclaims the natural environment is “essential to . . . the right to life itself.”<sup>2</sup> Since then, many countries have codified the right to a clean and healthy environment in their national constitutions or have become parties to regional conventions that include this right.<sup>3</sup> John Knox, Special Rapporteur on Human Rights and the Environment, has observed “a rapid ‘greening’ of human rights law” as human rights bodies have interpreted the rights to life and health as requiring states to protect the environment.<sup>4</sup> Yet, despite this progress, there still is no global human rights agreement that explicitly includes a right to a healthy environment.

Climate change catalyzed the human rights community to bridge this gap. Human rights groups mounted a campaign advocating for explicit human rights protections in the international climate change agreement adopted in Paris on December 12, 2015.<sup>5</sup> Beginning with the UNFCCC’s

1. The closest comes in Article 12 of the International Covenant on Economic, Social, and Cultural Rights, which recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” International Covenant on Economic, Social and Cultural Rights art. 12.1–2., Dec. 16, 1966, 993 U.N.T.S. 3, 8. States Parties are expected to take steps to help realize this right fully, including steps needed for “the improvement of all aspects of environmental and industrial hygiene.” *Id.*

2. U.N. CONFERENCE ON THE HUMAN ENV’T, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, at 3–5, U.N. Doc. A/CONF.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (June 5–16, 1972).

3. John Knox, *Greening Human Rights*, OPEN DEMOCRACY (July 14, 2015), <https://www.opendemocracy.net/openglobalrights/john-knox/greening-human-rights>; DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 47 (W. Wesley Pue & Audrey McClellan eds., 2012).

4. Knox, *supra* note 3.

5. *See, e.g., Joint Statement by UN Special Procedures on the Occasion of World Environment Day: Climate Change and Human Rights*, UNITED NATIONS OFF. HIGH COMM’R FOR HUMAN RIGHTS (June 5, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E> [hereinafter *Joint Statement*] (explaining that human rights experts urge States to recognize that climate change threatens human rights, and “to include language in the 2015 climate agreement providing that the Parties shall respect, protect and fulfil human rights, in all of their climate change related actions”); Open Letter from Special Procedures Mandate-Holders of the Human Rights Council to the State Parties to the

sixteenth Conference of the Parties (COP16), held in Cancun, Mexico in 2010, the Convention's Parties expressly acknowledged climate change's impacts on human rights.<sup>6</sup> Beginning in 2011, negotiations opened for a new agreement to succeed the Kyoto Protocol in 2020 and they have included human rights language in multiple working drafts. The final Paris Agreement includes express reference to human rights in its preamble.<sup>7</sup> Even though references in operational provisions of the draft agreement were deleted, the Paris Agreement represents the first multilateral environmental agreement to recognize explicitly the intersection of human rights and climate change.

The Paris Agreement also embodies a sea change in international climate change governance. By focusing on "bottom up" nationally determined actions and not on "top down" global mitigation targets, it invites all countries to act on climate change domestically within a treaty architecture that carefully calibrates national sovereignty with international objectives. This evolution in the nature of the UNFCCC Parties' obligations to one another began at COP15 in Copenhagen in 2009 and gained momentum at COP16 the next year. It culminated at COP17 with the creation of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) and its mandate to "develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties" by the end of 2015 at COP21.<sup>8</sup> Thus, at the same time that the relationship of human rights to climate change was under negotiation, so too was the fundamental framework of legally binding UNFCCC commitments.

In December at COP21, the 196 Parties adopted an outcome that creates a structured process for pledging and reviewing nationally determined but

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U.N. Framework Convention on Climate Change: A New Climate Change Agreement Must Include Human Rights Protections for All 1 (Oct. 17, 2014), [http://www.ohchr.org/Documents/HRBodies/SP/SP\\_To\\_UNFCCC.pdf](http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf) [hereinafter Open Letter] (calling on the Parties to the UNFCCC to work on their human rights obligations and their efforts to address climate change); Catalina Devandas Aguilar et al. (Special Rapporteurs on the Rights of Persons with Disabilities), Off. of the U.N. High Comm'r for Human Rights, *The Effects of Climate Change on the Full Enjoyment of Human Rights*, at 2–3 (Apr. 30, 2015), <http://www.thecvf.org/wp-content/uploads/2015/05/humanrightsSRHRE.pdf> [hereinafter *Effects of Climate Change on Enjoyment of Human Rights*] (explaining that an average increase in global temperature of even 2.0° C will adversely affect a wide range of human rights, including the rights to life, health, food, and water).

6. See *infra* Part I.

7. Conference of the Parties Twenty-first Session, U.N. Framework Convention on Climate Change, *Paris Agreement*, pmb., U.N. Doc. FCCC/CP/2015/10/Add.1, annex (Dec. 12, 2015) [hereinafter *Paris Agreement*]. This Article cites both the Paris Agreement and the Adoption of the Paris Agreement in Decision 1 of the COP21 decisions; the Adoption of the Paris Agreement took further practical steps to clarify and implement the Agreement, and these two documents are in separate sections of the U.N. document provided.

8. See *infra* Part II.

internationally promised actions.<sup>9</sup> These actions go beyond mitigation to address adaptation, finance, capacity building, and technology development and transfer—essential components for developing countries to contribute to international climate change mitigation and adaptation according to their “common but differentiated responsibilities and respective capabilities.”<sup>10</sup> The Paris Agreement requires each Party to individually determine and pledge what it deems to be a “fair” contribution, which is then publicly registered on an UNFCCC website.<sup>11</sup> It also requires the Parties to collectively review these pledges, and measure the group effort against the objective of keeping global warming to at least “well below 2°C.”<sup>12</sup> Finally, in a virtuous cycle, it requires Parties to revise pledges every five years in light of collective progress on the global goal and to increase the fairness and ambition of these national pledges each time.<sup>13</sup>

Many have lauded this new approach for its ability to bring all developed and developing country parties into a common and transparent framework of balanced commitments.<sup>14</sup> At the same time, experts recognize that holding sovereign nations accountable for their treaty obligations is hard.<sup>15</sup> The

9. See *infra* Part III.

10. United Nations Framework Convention on Climate Change art. 3.1., May 9, 1992, 1771 U.N.T.S. 164, 169 (entered into force Mar. 21, 1994).

11. Conference of the Parties Twenty-first Session, U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, at para. 27, U.N. Doc. FCCC/CP/2015/10/Add.1 (Dec. 12, 2015) [hereinafter *Adoption of the Paris Agreement*].

12. *Id.*; *Paris Agreement*, *supra* note 7, at art. 2.1(a).

13. *Id.* at art. 4.9.

14. Jeffrey D. Sachs, Opinion, *The Paris Agreement, Diplomacy, and the Common Good*, BOSTON GLOBE (Dec. 13, 2015), <https://www.bostonglobe.com/opinion/editorials/2015/12/13/the-paris-agreement-diplomacy-and-common-good/UzCREsxUjgh1CtJYBkcYxH/story.html>; Elizabeth Kolbert, *Good Reasons to Cheer the Paris Deal*, NEW YORKER (Dec. 14, 2015), <http://www.newyorker.com/news/daily-comment/good-reasons-cheer-paris-climate-deal>.

15. See, e.g., Samantha Page, *No, The Paris Climate Agreement Isn't Binding. Here's Why That Doesn't Matter.*, THINKPROGRESS (Dec. 14, 2015), <http://thinkprogress.org/climate/2015/12/14/3731715/paris-agreement-is-an-actual-agreement/> (arguing that most international agreements depend on a country's need to be a well-regarded member of the international community); INT'L BAR ASS'N, *ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION: INTERNATIONAL BAR ASSOCIATION CLIMATE CHANGE JUSTICE AND HUMAN RIGHTS TASK FORCE REPORT* 64–65 (2014), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=0f8cee12-ee56-4452-bf43-cfcab196cc04> (“[A]ll of the multilateral environmental agreements face similar compliance challenges.”). For more background on this tension between international treaty engagement and enforcement, see Lavanya Rajamani, Jutta Brunnée & Meinhard Doelle, *Introduction: The Role of Compliance in an Evolving Climate Regime*, in *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME* 1, 4–5 (Lavanya Rajamani, Jutta Brunnée, & Meinhard Doelle eds., 2012); Jutta Brunnée, *Promoting Compliance with Multilateral Environmental Agreements*, in *PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME* 38 (Lavanya Rajamani, Jutta Brunnée, & Meinhard Doelle eds., 2012).

UNFCCC and Kyoto Protocol have used consultative review of Parties' progress on their commitments<sup>16</sup> to ensure compliance. This approach aims to identify barriers to implementation, share best practices for overcoming them, and lead sovereign decisions to adopt them. But this compliance mechanism did not keep Canada from withdrawing from the Kyoto Protocol during the first commitment period when faced with not achieving its 6% reduction commitment.<sup>17</sup> Likewise, it did not stop Japan, New Zealand, and Russia from choosing not to join a second commitment period.<sup>18</sup> The question now becomes whether the Paris Agreement's nationally-focused approach can change this dynamic and lead countries to make the hard political and economic domestic changes more than the Kyoto Protocol did.

This Article argues that it can because the very nature of these nationally determined pledges offers new avenues for holding UNFCCC Parties accountable for their international contributions. Where facilitative compliance mechanisms between sovereign treaty members fall short, enforcement actions under domestic laws for the implementation of national pledges developed through international negotiations have potential to fill this accountability gap. How? By focusing on national strategies when formulating their international contributions, Parties necessarily build on national policies and laws. These domestic levers provide political and legal pressure points for advocates seeking to hold their countries responsible for honoring international commitments. For example, civil society organization leaders, like Bill McKibben, underscore the role of national citizen engagement and political activity in nationally determined contributions (NDC) implementation post-COP21.<sup>19</sup>

Recent national climate change suits in UNFCCC member countries build on this political will and show how existing domestic laws can be used to hold Parties accountable for their internationally pledged national contributions. For example, the NGO Urgenda drew on the Netherlands'

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16. U.N. Framework Convention on Climate Change Secretariat, Common Operational Procedure: Independent Assessment Report (IAR) Procedure, § 1.1 (Jan. 1, 2010), [http://unfccc.int/files/kyoto\\_protocol/registry\\_systems/independent\\_assessment\\_reports/application/pdf/iar\\_procedure\\_v4.3.pdf](http://unfccc.int/files/kyoto_protocol/registry_systems/independent_assessment_reports/application/pdf/iar_procedure_v4.3.pdf).

17. Adam Vaughan, *What Does Canada's Withdrawal from Kyoto Protocol Mean?*, GUARDIAN (Dec. 13, 2011), <http://www.theguardian.com/environment/2011/dec/13/canada-withdrawal-kyoto-protocol>.

18. Michael Bastasch, *Only 37 Countries Willing to Back Kyoto Protocol Extension*, DAILY CALLER (Dec. 10, 2012), <http://dailycaller.com/2012/12/10/only-37-countries-willing-to-back-kyoto-protocol-extension/>.

19. Bill McKibben, Opinion, *Climate Deal: The Pistol Has Fired, So Why Aren't We Running?*, GUARDIAN (Dec. 13, 2015), <http://www.theguardian.com/commentisfree/2015/dec/13/paris-climate-talks-15c-marathon-negotiating-physics>.

tradition of making human rights justiciable in court when it successfully argued that the government's international climate change pledges were below its capacity and thus failing to protect its citizens' rights to life and health under national tort law.<sup>20</sup> The June 2015 trial court decision ordering the government to increase its pledges was the first to use domestic law to hold a UNFCCC Party accountable for its international commitments. This case resonated loudly in the climate change advocacy community in the three months leading up to COP21's negotiations. It is regularly cited as one example of what Marcos Orellana described as using human rights law as a "new tool[] to address contemporary realities."<sup>21</sup> Since then, administrative and judicial actions have been filed in six other UNFCCC party countries.<sup>22</sup> There has not been such a spike in cases since the early climate change litigation boomlet in the United States and Australia in the early 2000s.<sup>23</sup> Each of these recent cases seeks different remedies, under different kinds of national laws, with some based on human rights law and some based on domestic climate change legislation. But they all share a common litigation strategy: use international climate change norms to hold individual countries accountable through their domestic courts.

This kind of national litigation will only grow as the dust settles on the Paris Agreement.<sup>24</sup> First, the new "bottom up" orientation of international climate change law places authority in nation states for determining the content of these pledges and hence opens the door for making enforcement claims based on the domestic laws and policies used to create them. Second, the absence of a world climate change tribunal or other specific enforcement mechanism in the new Agreement makes domestic courts an attractive venue for addressing non- or low-performance of national obligations. Third, the transparent submission of NDCs will provide ample, available information for bringing suit. Fourth, NDC analysis by third parties like the NGO Climate Action Tracker and the UNFCCC Secretariat, along with the IPCC's reports on mitigation pathways needed to stay within a predicted carbon budget,

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20. See *infra* note 109 (discussing a case in which the Hague District Court ordered the Netherlands to reduce its GHG emissions).

21. Marcos Orellana, Keynote Address, *15th Annual Vermont Law Review Symposium: Habitat for Human Rights*, 40 VT. L. REV. 417, 418 (2016).

22. See *infra* Part IV.

23. See *infra* Part IV.

24. For others' opinions on this trend, see Claudia Delpero, *5 Ways to Litigate on Climate Change*, ROAD TO PARIS (Oct. 26, 2015), <http://roadtoparis.info/2015/10/26/5-ways-to-litigate-on-climate-change/> (listing ClientEarth's predictions for climate change litigation based on (1) health and environmental laws, (2) market regulation, (3) loss and damage, (4) duty of care for citizens, and (5) long-term financial risk); Megan Darby, *Around the World in 5 Climate Change Lawsuits*, CLIMATE HOME, <http://www.climatechangenews.com/2015/07/08/around-the-world-in-5-climate-change-lawsuits/> (last updated Sept. 7, 2015) (listing five current cases, including some of those featured in this Article).

provide expert evidence on global norms that national courts may draw on. While threshold procedural issues may impede litigation on the merits, these suits individually—and more so en masse—place the spotlight on national efforts to achieve their NDCs.

To reach these conclusions, this Article first chronicles the growing acknowledgment of climate change's impacts on human rights and how this movement affected the COP21 negotiations. It next puts this human rights advocacy campaign into the broader context of the new Agreement architecture at the heart of the negotiations. The Article then describes the six national cases brought to date, and analyzes how they use international climate change norms when making domestic law claims. Finally, it concludes with several observations about how the Paris Agreement's NDCs may ultimately lead to greater treaty compliance via nationally determined enforcement. This method can complement the facilitative international compliance mechanisms inscribed in the new Agreement while closing the accountability gap. In doing so, it also puts into practice the aspirational human rights language in the Paris Agreement's preamble.

### I. HUMAN RIGHTS ADVOCACY IN THE RUN UP TO COP21<sup>25</sup>

Five months before the COP21 negotiations began, the United Nations Human Rights Council (UNHRC) passed a resolution enumerating how climate change can have direct and indirect impacts on a range of human rights.<sup>26</sup> The July 2, 2015 resolution was the fifth one authored by the UNHRC on climate change in the past eight years and hewed closely to past iterations by focusing on impacts to the rights to life, adequate food, enjoyment of the highest attainable standard of physical and mental health,

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25. For more detailed history on human rights advocacy at the climate change negotiations, see John H. Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Report of the Special Rapporteur*, paras. 7–22, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) (providing a detailed history of human rights advocacy at the climate change negotiations) [hereinafter *Report of the Special Rapporteur*].

26. See Human Rights Council Res. 29/15, U.N. Doc. A/HRC/RES/29/15, at 1–2 (July 2, 2015). Affirming that human rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes, [e]mphasizing that the adverse effects of climate change have a range of implications, both direct and indirect, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the right to safe drinking water and sanitation and the right to development, and recalling that in no case may a people be deprived of its own means of subsistence.

adequate housing, self-determination, safe drinking water and sanitation, and development.<sup>27</sup> Importantly, it recognized that climate change impacts and mitigation, as well as adaptation response measures, can negatively affect these rights. Thus the UNHRC resolution underscored the potential of human rights law “to inform and strengthen international, regional and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.”<sup>28</sup>

The UNHRC resolution built on the broader “greening” of human rights law chronicled by U.N. Special Rapporteur John Knox. Appointed by UNHRC as an independent expert on human rights and the environment in 2012 and named Special Rapporteur three years later, Knox produced reports in 2013 that mapped global human rights laws relating to environmental protection<sup>29</sup> and another in 2015 that described best practices.<sup>30</sup> He also produced a specific mapping report on climate in 2014 and, with other special procedures mandate holders,<sup>31</sup> sent an open letter to UNFCCC Parties on Human Rights Day 2014 to urge them to include a paragraph in the new agreement that would provide that “the Parties shall, in all climate change related actions, respect, protect, promote and fulfil human rights for all. And . . . to launch a work program to ensure that human rights are integrated into all aspects of climate actions.”<sup>32</sup>

*Id.*

27. *Id.*

28. *Id.*

29. John H. Knox (Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Mapping Report*, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013).

30. John H. Knox (Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Compilation of Good Practices*, U.N. Doc. A/HRC/28/61 (Feb. 3, 2015).

31. *Special Procedures of the Human Rights Council*, OFF. HIGH COMM’R FOR HUM. RIGHTS, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last visited Apr. 10, 2016).

The Special Procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. . . . As of [March 2015], there [were] 41 thematic and 14 country mandates[.] . . . Special procedures are either an individual (called “Special Rapporteur” or “Independent Expert”) or a working group composed of five members, one from each of the five United Nations regional groupings: Africa, Asia, Latin America and the Caribbean, Eastern Europe and the Western group.

*Id.* To fulfill their mandates, they make country visits, communicate with countries about specific cases, conduct case studies and convene meetings of experts, help develop international human rights standards, raise public awareness, and advise technical cooperation. Special procedures are volunteers, serve for a maximum of six years, and report annually to the Human Rights Council. *Id.*

32. Open Letter, *supra* note 5, at 1.

The following June, on World Environment Day and during an ADP negotiation session before the UNHRC resolution, 27 special procedures endorsed a joint statement on climate change and human rights. Citing their recent report to the Climate Vulnerable Forum,<sup>33</sup> they underscored that “[c]limate change will affect most severely the lives of those who already struggle to enjoy their human rights, including women, children, the elderly and the poor.”<sup>34</sup> The statement reaffirmed that respecting human rights requires access to information and informed public participation in decisionmaking, and again urged inclusion of language in the new climate agreement that requires parties to “respect, protect, promote and fulfil human rights for all” in all climate change-related actions.<sup>35</sup>

These advocacy efforts by the human rights community took hold inside the international climate change negotiations starting in 2010. That year, in Cancun, Mexico at COP16, the Parties cited language from an earlier UNHRC resolution in the preamble of their decision—“the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights”—and declared in a shared vision that “Parties should, in all climate change related actions, fully respect human rights.”<sup>36</sup> Three years later in Warsaw, Poland, the COP19 decision on forest program safeguards referenced the procedural human rights of local populations.<sup>37</sup> It also created a loss and damage mechanism, the Warsaw International Mechanism on Loss and Damage, which acknowledges the existential threat climate change poses to vulnerable developing countries.<sup>38</sup>

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33. *Effects of Climate Change on Enjoyment of Human Rights*, *supra* note 5, at 2. See *About the Climate Vulnerable Forum*, CLIMATE VULNERABLE FORUM, <http://www.thecvf.org/web/climate-vulnerable-forum/> (last visited May 9, 2016) (“The Climate Vulnerable Forum is an international partnership of countries highly vulnerable to a warming planet.”).

34. *Joint Statement*, *supra* note 5.

35. *Id.*

36. Conference of the Parties Sixteenth Session, U.N. Framework Convention on Climate Change, *Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session*, pmbl., para. 8, U.N. Doc. FCCC/CP/2010/7/Add.1 (Dec. 10–11, 2010).

37. See Conference of the Parties Nineteenth Session, U.N. Framework Convention on Climate Change, *Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session*, decs. 10–15, U.N. Doc. FCCC/CP/2013/10/Add.1 (Nov. 22–23, 2013) (providing the full text for Decisions 10–15 of the Conference which addressed forest monitoring systems and encouraged coordination between developed and developing countries to mitigate the drivers and negative impacts of deforestation and forest degradation).

38. See *id.* at dec. 2 (providing the full text of Decision 2 from the Conference which developed the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts). “Loss and damage” refers to the impacts of climate change that cannot be avoided through adaptation, such as an island being rendered completely uninhabitable. *Id.*

More recently, as the ADP negotiations on the new agreement intensified in 2015, Parties proposed including explicit human rights language in the Geneva negotiation text's preamble, general objective provision, and adaptation provision.<sup>39</sup> Because there were many versions of this language and little agreement on them, most of these proposals were in brackets. Yet this text was accepted by consensus as the starting point for negotiating the final form and language of the new Paris Agreement. As the Parties continued their negotiations during four more ADP sessions in 2015 (ending with the ADP2-11 meeting in October 2015), the human rights language changed with each draft.<sup>40</sup> At the same time, human rights references appeared in some countries' Intended Nationally Determined Contributions (INDCs) published between March and October 2015.<sup>41</sup> The penultimate COP21 draft agreement text included human rights references in the preamble as well as in Article 2's general objective provision.<sup>42</sup> In the final version, human rights language remained in the preamble only:

*Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.*<sup>43</sup>

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39. Ad Hoc Working Group on the Durban Platform for Enhanced Action, U.N. Framework Convention on Climate Change, *Negotiating Text*, U.N. Doc. FCCC/ADP/2015/1 (Feb. 25, 2015).

40. For more detail on these text negotiations, see *Report of the Special Rapporteur, supra* note 25, paras. 20–22; .

41. See, e.g., GOBIERNO DE LA REPÚBLICA DE MÉXICO, INTENDED NATIONALLY DETERMINED CONTRIBUTION 1–4 (2015), <http://www4.unfccc.int/submissions/INDC/Published%20Documents/Mexico/1/MEXICO%20INDC%2003.30.2015.pdf> (selecting mitigation actions that provide health and wellbeing, and prioritizing the inclusion of women as a part of the cross-cutting human rights effort).

42. See *Draft Paris Outcome*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Dec. 10, 2015, 9:00 PM), <http://unfccc.int/resource/docs/2015/cop21/eng/da02.pdf> (asserting, in the preamble to the Draft Agreement, that policies and actions addressing climate change should “promote, protect, respect, and take into account” human rights).

43. *Adoption of the Paris Agreement, supra* note 11, at pmb1. (emphasis added).

## II. THE UNFCCC NEGOTIATIONS SHIFT TO A NATIONAL EMPHASIS

In 1992, UNFCCC declared climate change a “common concern of mankind”<sup>44</sup> and committed 166 countries to tackling it.<sup>45</sup> Most of these UNFCCC Parties were developing countries who had contributed relatively few emissions given their pre-industrial poverty. They were nonetheless already experiencing the irreversible, negative effects of climate change, like decreasing potable water and land surface area due to sea level rise. Under the Convention’s principle of “common but differentiated responsibilities and respective capabilities” (CBDRRC), developed countries and top GHG emitters, like the European Union and the United States, agreed to take the lead.

Yet progress was slow. Fifteen years later, in 2007, this leadership took the form of the UNFCCC’s Kyoto Protocol, which placed clear GHG emission limits on developed countries while imposing none on developing countries. When the United States refused to ratify, its emissions escaped international regulation along with those from rapidly industrializing, developing countries like China, India, and Brazil. Consequently, when negotiations for continuing the Kyoto Protocol beyond its first commitment period (2008–2012) faltered at COP15 in Copenhagen, a new approach to international limits on GHG emissions began to take shape. It would focus more on “bottom up” nationally determined actions and less on “top down” global mitigation targets in order to invite all countries to act on climate change domestically within their respective capabilities. It gained momentum at the next two COPs, culminating in COP17’s Durban Mandate to “develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” by the end of 2015.<sup>46</sup> This new agreement is intended to take the place of the Kyoto Protocol when its second commitment period ends in 2020.

During five negotiation sessions in 2015, the Parties drafted a “Paris Package” that consisted of a core legal agreement based on a system of NDCs and COP decisions addressing implementation and political issues. From the Geneva negotiation text’s hundreds of pages and thousands of brackets to

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44. United Nations Framework Convention on Climate Change, *supra* note 10, 1771 U.N.T.S. at 165.

45. *Status of Ratification of the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php) (last visited May 9, 2016).

46. Conference of the Parties Seventeenth Session, U.N. Framework Convention on Climate Change, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, at para. 2, U.N. Doc. FCCC/CP/2011/9/Add.1 (Dec. 11, 2011).

ADP2-11's 31-page draft agreement with hundreds of brackets, the Parties clarified how their individual contributions would be internationally measured, reviewed, and verified. These pledges no longer focus solely on mitigation. Consistent with appeals from the developing world, the draft agreement paid almost equal attention to adaptation and finance actions. Likewise, it set out conditions for transparent international reporting. Finally, it required periodic "stocktaking" of progress to determine whether national efforts were collectively keeping global temperature rise below the Intergovernmental Panel on Climate Change (IPCC)'s recommended upper limit of 2°C.<sup>47</sup>

While these intensive negotiations were taking place, this new system of national pledges—that are internationally made and scrutinized for sufficiency—had a trial run. In December 2014, the COP20 decision had invited Parties to submit their INDCs before COP21.<sup>48</sup> By October 1, 2015, 147 Parties had done so, covering approximately 86% of total global emissions.<sup>49</sup> While each INDC derived from national priorities, collectively they included substantive contributions on mitigation, adaptation, and finance, as well as important process pledges on reporting and verification, technology transfer, and capacity building. Developed countries pledged absolute mitigation targets and resources for vulnerable developing countries.<sup>50</sup> Higher income developing countries like Brazil, China, and

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47. Fred Pearce, *Turning Point: Landmark Deal on Climate Is Reached in Paris*, YALE ENV'T 360 (Dec. 12, 2015), [http://e360.yale.edu/feature/a\\_landmark\\_agreement\\_on\\_climate\\_is\\_reached\\_in\\_paris\\_to\\_cap\\_warming/2939/](http://e360.yale.edu/feature/a_landmark_agreement_on_climate_is_reached_in_paris_to_cap_warming/2939/).

48. See Conference of the Parties Twentieth Session, U.N. Framework Convention on Climate Change, *Lima Call for Climate Action*, at para. 13, U.N. Doc. FCCC/CP/2014/10/Add.1 (Dec. 14, 2014) (reiterating an "invitation to all Parties to communicate their intended nationally determined contributions well in advance of the twenty-first session of the Conference of the Parties . . . in a manner that facilitates the clarity, transparency and understanding of the intended nationally determined contributions"). See also Tracy Bach & Rebecca Davidson, *Turning the Corner in Lima: The Language of Differentiation and the 'Democratization' of Climate Change Negotiations*, 18 ETHICS, POL'Y & ENV'T 2 (2015) (discussing COP 20's negotiations over reporting requirement for INDCs).

49. U.N. Framework Convention on Climate Change Secretariat, *Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions*, at para. 8, U.N. Doc. FCCC/CP/2015/7 (Oct. 30, 2015). By the time COP21's negotiations started on November 30, 2015, these numbers had increased to 183 countries covering 95% of global greenhouse gas emissions. Laurent Fabius, French Minister of Foreign Affairs and International Development and President of COP21, *Address to the Leaders and Delegates of the Paris Climate Conference* (Nov. 30, 2015), <http://www.diplomatie.gouv.fr/en/french-foreign-policy/climate/2015-paris-climate-conference-cop21/article/paris-2015-cop-21-speech-by-laurent-fabius-french-minister-of-foreign-affairs>.

50. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, COMPILATION OF ALL INTENDED NATIONALLY DETERMINED CONTRIBUTIONS (INDCs) (2015),

Mexico made concrete GHG mitigation pledges.<sup>51</sup> Other developing countries described their mitigation and adaptation efforts and goals, but made them conditional on receiving financial assistance.<sup>52</sup> This pledging process prioritized transparency: INDCs were submitted to the UNFCCC, made publicly available at the UNFCCC website, and have been analyzed by the UNFCCC Secretariat, non-governmental organizations (NGOs), and the press.<sup>53</sup>

This transparency led to the understanding before COP21 that, despite near unanimous participation by Parties, these intended contributions fell short of the IPCC's goal. The November 1, 2015, UNFCCC Secretariat report concluded that the INDC pledges—if fulfilled—would slow down the global rate of GHG emissions but not keep the global temperature increase below 2°C.<sup>54</sup> Likewise, NGOs, like Climate Action Tracker (CAT) and Climate Interactive, reached the same conclusion. CAT calculated that achieving the unconditional INDC pledges would still likely lead to a 2.7°C increase,<sup>55</sup> while Climate Interactive estimated a 3.5°C increase.<sup>56</sup>

This gap can be seen as a failure of ambition: UNFCCC Parties did not pledge enough in their INDCs to achieve the science-based goal. But knowing this shortfall before the Paris negotiations began was actually a success. The COP19 and COP20 decisions creating INDCs and timing their public submission before COP21 had highlighted the weaknesses of the nationally-determined approach. The Parties then knew that, when negotiating the final form of the new agreement, creating a system for public reporting and regular review would be critical to incentivizing individual countries to contribute more and do their fair share of mitigation, adaptation, finance, technology transfer, and capacity building.

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[http://unfccc.int/files/adaptation/application/pdf/all\\_\\_parties\\_indc.pdf](http://unfccc.int/files/adaptation/application/pdf/all__parties_indc.pdf) (listing all INDCs pledged prior to October 1, 2015 as they appeared on that date).

51. *Id.*

52. *Id.*

53. *INDCs as Communicated by Parties*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://www4.unfccc.int/submissions/INDC/Submission%20Pages/submissions.aspx> (last visited May 9, 2016) (listing the latest versions of submitted INDCs).

54. U.N. Framework Convention on Climate Change Secretariat, *supra* note 49, at paras. 36, 40.

55. *Climate Pledges Will Bring 2.7° of Warming, Potential for More Action*, CLIMATE ACTION TRACKER (Dec. 8, 2015), <http://climateactiontracker.org/news/253/Climate-pledges-will-bring-2.7C-of-warming-potential-for-more-action.html>.

56. *Climate Scoreboard: UN Climate Pledge Analysis*, CLIMATE INTERACTIVE, <https://www.climateinteractive.org/tools/scoreboard/> (last visited May 9, 2016).

### III. THE NATIONALLY DETERMINED APPROACH CODIFIED IN THE PARIS AGREEMENT

The Paris Agreement sets up a process for all country Parties to work nationally and collectively toward a global goal. The key building blocks for achieving it are the NDCs that are devised by each country based on its domestic climate change agenda. International submission of these NDCs for scrutiny by fellow Parties, civil society organizations, and the press is the next critical step. This transparent revealing of domestic climate change plans sets up the dynamic for accountability. The Agreement requires a “global stocktake” every five years to determine how Parties have collectively progressed toward the global objective. Finally, it requires Parties to commit to new, more ambitious NDCs after each review cycle.

The Agreement also established a mechanism to facilitate implementation and compliance. It consists of an expert-based committee that is “facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.”<sup>57</sup> This committee is required to “pay particular attention to the respective national capabilities and circumstances of Parties.”<sup>58</sup> Other compliance options, like a climate change tribunal, were proposed during the negotiations but not included in the final outcome. The adopted mechanism is in line with the UNFCCC’s tradition of using facilitated review of treaty performance in order to achieve full implementation and compliance by member states. The Paris Agreement’s added focus on transparency, in light of the recent experience with the INDCs’ submission, underscores how important this aspect is in promoting accountability.

#### *A. A New Articulation of the Collective Objective*

The Paris Agreement is made under the UNFCCC, which established the “ultimate objective” of “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>59</sup> The new Agreement offers a refined objective that reflects the IPCC’s findings. It focuses on two priorities: first, staying within a specified degree of warming, and, second, peaking GHG emissions and progressing to carbon neutrality not long thereafter. The first part, located in Article 2, aims to keep “the increase in the global average

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57. *Paris Agreement*, *supra* note 7, at art. 15.2.

58. *Id.*

59. United Nations Framework Convention on Climate Change, *supra* note 10, 1771 U.N.T.S. at 169.

temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.”<sup>60</sup> The second part, found in Article 4, recognizes that to stay within these limits,

Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.<sup>61</sup>

### *B. Nationally Determined Contributions (NDCs)*

NDCs are the core building block of the Paris Agreement’s structure. Defining them as “nationally determined contributions to the global response to climate change,”<sup>62</sup> the new Agreement codifies that “all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13.”<sup>63</sup> This short sentence lays out three critical aspects of NDCs. First, it underscores that all Parties, developed and developing countries alike, are to create and share their NDCs. Second, it expects NDCs to be ambitious. Third, it sets out one way to measure ambition in terms of the content of each country’s contribution: the baseline includes mitigation (Article 4), adaptation (Article 7), finance (Article 9), technology development and transfer (Article 10), capacity building (Article 11), and transparency (Article 13). A second, longitudinal measurement of ambition comes from the Agreement’s expectation that “the efforts of all Parties will represent a progression over time.”<sup>64</sup>

In terms of mitigation contributions, Article 4.2 states that each Party “shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.”<sup>65</sup> The use of “shall” indicates a binding legal obligation. The required actions of preparing, communicating, and maintaining apply to the first NDC and all successive ones. Finally,

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60. *Paris Agreement*, *supra* note 7, at art. 2.1(a).

61. *Id.* at art. 4.1.

62. *Id.* at art. 3.

63. *Id.*

64. *Id.*

65. *Id.* at art. 4.2.

Parties' NDCs must be achievable. This last requirement is reinforced by the second sentence of Article 4.2: "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."<sup>66</sup>

While each Party is expected to submit progressive NDCs that "reflect its highest possible ambition,"<sup>67</sup> the Paris Agreement recognizes differentiation of expectations for developed and developing countries. Developed country Parties are expected to continue making economy-wide and absolute reductions. In contrast, developing country Parties should "continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."<sup>68</sup> Nonetheless, all Parties are legally bound to communicate their NDCs every five years.<sup>69</sup> When doing so, they "shall account for their nationally determined contributions," which requires "environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensur[ing] the avoidance of double counting" when accounting for both emissions and sinks.<sup>70</sup> Finally, all NDCs "shall be recorded in a public registry maintained by the secretariat."<sup>71</sup>

In terms of adaptation, the Paris Agreement mandates fewer legally obligated actions than with mitigation. The Paris Agreement sets a global adaptation goal: "enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response" per Article 2's temperature goal.<sup>72</sup> It also establishes unanimous recognition that "the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs."<sup>73</sup> The Parties legally obligate themselves to "engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions."<sup>74</sup> Finally, although the Paris

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66. *Id.*

67. *Id.* at art. 4.3.

68. *Id.* at art. 4.4. Least developed countries and small island states are excepted from this requirement. *See id.* at art 4.6 (explaining that these countries "may" prepare strategies, as compared to developed nations in art. 4.4 that "shall" develop absolute emission reduction targets).

69. *Id.* at art. 4.9.

70. *Id.* at art. 4.13.

71. *Id.* at art. 4.12.

72. *Id.* at art. 7.1.

73. *Id.* at art. 7.4.

74. *See id.* at art. 7.9(a)–(e) (explaining that these actions may include formulating and implementing national adaptation plans; formulating nationally determined prioritized actions taking into

Agreement does not mandate communication of these plans by using “shall,” it expresses that Parties should do so, either in conjunction with their NDCs, national adaptation plans (NAPs), or national communications.<sup>75</sup> Regardless of their submission form, the Agreement states that these adaptation communications “shall” be recorded at the public registry, just as with mitigation communications.<sup>76</sup>

In terms of finance, the Paris Agreement unequivocally states that “developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.”<sup>77</sup> It also encourages other country Parties to voluntarily provide finance support.<sup>78</sup> The Agreement recognizes that developed countries will mobilize these funds from a variety of sources, but emphasizes the “significant role of public funds.”<sup>79</sup> While Article 9 does not address communicating financial resource support as part of an NDC, it does obligate developed country Parties to “biennially communicate indicative quantitative and qualitative information . . . including, as available, projected levels of public financial resources to be provided to developing country Parties.”<sup>80</sup> The global stocktake “shall take into account the relevant information provided by developed country Parties and/or Agreement bodies on efforts related to climate finance.”<sup>81</sup>

In terms of technology development and transfer, the Parties to the Paris Agreement agree on a long-term vision of using technology to improve resiliency and reduce GHG emissions.<sup>82</sup> To achieve it, the Parties “shall strengthen cooperative action on technology development and transfer.”<sup>83</sup> As with finance, the technology transfer article does not address communicating these contributions as part of an NDC, but instead mandates the global stocktake to “take into account available information on efforts related to

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account vulnerable people, places, and ecosystems; monitoring and evaluating adaptation plans, policies, programs, and actions; and building the resilience of socioeconomic and ecological systems).

75. *Id.* at art. 4.10–11.

76. *Id.* at art. 4.12.

77. *Id.* at art. 9.1.

78. *Id.* at art. 9.2.

79. *Id.* at art. 9.3.

80. *Id.* at art. 9.5. This also extended to actual funds provided. *See id.* at art. 9.7 (providing that developed country Parties shall transparently and consistently provide information on their financial support for developing countries).

81. *Id.* at art. 9.6.

82. *Id.* at art. 10.1.

83. *Id.* at art. 10.2.

support on technology development and transfer for developing country Parties.”<sup>84</sup>

In terms of capacity building, the Paris Agreement restates the goal of enhancing the capacity of developing country Parties, emphasizes the importance of cooperation, and affirms that “[d]eveloped country Parties should enhance support for capacity-building actions in developing country Parties.”<sup>85</sup> As with finance and technology transfer, this article does not address communicating these capacity-building contributions as part of an NDC, but instead states that Parties “shall regularly communicate on these actions or measures.”<sup>86</sup> Interestingly, of these three means of support, capacity building is the only one that is not required to be factored into the global stocktake.

### *C. Transparency*

The Paris Agreement announces “an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties’ different capacities and builds upon collective experience.”<sup>87</sup> It also unequivocally states why the framework is needed: “[i]n order to build mutual trust and confidence and to promote effective implementation.”<sup>88</sup> In a system that permits countries to nationally determine their mitigation, adaptation, and means of implementation pledges, making this information apparent to all Parties is essential for assuring individual and collective ambition.

The transparency framework makes clear that the Paris Agreement contains two kinds of pledges: those of action and those of support. In doing so, it cuts across, clarifies, and reaffirms the public nature of NDCs laid out in the mitigation and adaptation provisions (categorized as action) and in the finance, technology development and transfer, and capacity building provisions (categorized as support). This two-part structure also confirms the UNFCCC’s principle of differentiation, as applied post-Kyoto Protocol, and how it factors into the Paris Agreement’s measurement of accountability.

The purpose of the framework for transparency of action is to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2,

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84. *Id.* at art. 10.6.

85. *Id.* at art. 11.3.

86. *Id.* at art. 11.4.

87. *Id.* at art. 13.1.

88. *Id.*

including, clarity and tracking of progress towards achieving Parties' individual nationally determined contributions under Article 4, and Parties' adaptation actions under Article 7, including good practices, priorities, needs and gaps, to inform the global stocktake under Article 14.

The purpose of the framework for transparency of support is to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions under Articles 4, 7, 9, 10 and 11, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stocktake under Article 14.<sup>89</sup>

Regarding transparency of action, all Parties "shall regularly provide" a national inventory of sources and sinks, and "[i]nformation necessary to track progress made in implementing and achieving its nationally determined contribution" for mitigation.<sup>90</sup> They should also provide adaptation information "as appropriate."<sup>91</sup> In contrast, only developed country Parties are obligated to "provide information on financial, technology transfer and capacity-building support provided to developing country Parties."<sup>92</sup> Developing country Parties, instead, should provide information on support needed and received.<sup>93</sup>

The Paris Agreement's transparency framework builds on the facilitative and non-punitive compliance tradition developed under the UNFCCC and Kyoto Protocol.<sup>94</sup> It continues this approach to maintain trust in the communicated information and build capacity in the Parties to provide pertinent information. Importantly, Article 13 emphasizes the critical role that transparency in mitigation and support plays in building confidence that all NDCs will be fully implemented.<sup>95</sup> Each Party "shall participate in a facilitative, multilateral consideration of progress" on their financial efforts under Article 9, and their "respective implementation and achievement" of

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89. *Id.* at arts. 13.56.

90. *Id.* at art. 13.7.

91. *Id.* at art. 13.8.

92. *See id.* art. 13.9 (explaining that all Parties providing financial support should provide financial, technology, and capacity-building information).

93. *Id.* at art. 13.10.

94. *See id.* at art. 13.3–4 (providing that the transparency framework should be implemented in a non-intrusive and non-punitive manner).

95. *See id.* at art. 13.11 (explaining the multilateral and facilitative process of considering the progress of each Party's nationally determined contributions).

their nationally determined contribution.<sup>96</sup> This review “shall also identify areas of improvement for the Party, and include a review of the consistency of the information.”<sup>97</sup> In this non-punitive, informational manner, the Paris Agreement Parties collect the necessary information on pledge progress, vet it, and then share it with all Parties and the public. Article 13 thus sets the stage for the Parties to hold themselves and each other accountable.

#### *D. Collective Review via Global Stocktakes*

NDC review and assessment is the final component of the new agreement’s process for enabling all country Parties to work nationally and collectively toward the global objective. In the Paris Agreement, the Parties agree that they “shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals.”<sup>98</sup> Parties shall conduct global stocktakes “in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.”<sup>99</sup> The Paris Agreement notes that the first global stocktake will take place in 2023 and then again every five years.<sup>100</sup> Importantly, the global stocktake also provides information to the Parties: “The outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support.”<sup>101</sup>

Taken together, these components of the Paris Agreement’s nationally determined approach have the potential to produce results that the Kyoto Protocol could not. Most obviously, while the Kyoto Protocol only governed emissions mitigation in the developed countries that ratified it, the Paris Agreement applies to all 196 UNFCCC Parties, extending its jurisdiction five-fold. Beyond the benefits of universal participation, the Paris Agreement also derives benefits from the quality of participation, or a country’s ambition. Here, the new approach has potential because its very nature recognizes that “[t]he main barriers to strong [climate change] action are domestic, not international.”<sup>102</sup> Through the process of determining their

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96. *Id.*

97. *Id.* at art. 13.12.

98. *Id.* at art. 14.1.

99. *Id.*

100. *Id.* at art. 14.2.

101. *Id.* at art. 14.3.

102. Michael Levi, *Two Cheers for the Paris Agreement on Climate Change*, COUNCIL ON FOREIGN REL. (Dec. 12, 2015), <http://blogs.cfr.org/levi/2015/12/12/two-cheers-for-the-paris-agreement-on-climate-change/>.

pledges, country Parties have the opportunity to thrash out political and economic stumbling blocks to national and subnational actions. Though not a perfect process, what is discussed and included (or not) in NDCs is a matter of record. The UNFCCC's facilitative and non-punitive approach to compliance embodied in the Paris Agreement advances accountability by requiring national transparency and global review. By shining light on individual countries' successes and shortfalls, it not only creates international pressure to comply but also domestic pressure from "political forces that favor stronger and more effective action on climate change . . ." <sup>103</sup> This national pressure can come in many forms, including domestic legal action to hold national governments accountable for their international promises.

#### IV. NATIONAL CLIMATE CHANGE LITIGATION BASED ON INTERNATIONAL NORMS

Since the early 2000s, climate change litigation has taken place in an ad hoc fashion in both developed and developing countries. <sup>104</sup> A peak in cases occurred in the late 2000s, with litigation outside the United States dropping off acutely. <sup>105</sup> In the United States and Australia, where most of this "boomlet" took place, plaintiffs sought to hold both individual polluters and governmental regulators accountable for climate change impacts. <sup>106</sup> This first wave of national litigation used national laws and norms to make their cases.

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103. *Id.*

104. See INT'L BAR ASS'N, *supra* note 15, at 6 (noting some avenues of redress explored including "class actions, targeting major groups of emitters or holding public officials responsible for failures of due diligence"); see generally *id.* at 76–83 (providing an overview of climate change litigation cases from the United States, Canada, South America, Australia, Asia, Europe, Africa, and the Middle East). The International Bar Association analyzes the weaknesses of an ad hoc approach and proposed the creation of a Model Statute on Legal Remedies for Climate Change that would address procedural and substantive components ranging from standing and causation to remedies and statutes of limitation. *Id.* at 127–36.

105. MEREDITH WILENSKY, SABIN CTR. FOR CLIMATE CHANGE LAW, CLIMATE CHANGE IN THE COURTS: AN ASSESSMENT OF NON-U.S. CLIMATE LITIGATION 15–16 (2015), [https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white\\_paper\\_-\\_climate\\_change\\_in\\_the\\_courts\\_-\\_assessment\\_of\\_non\\_u.s.\\_climate\\_litigation.pdf](https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white_paper_-_climate_change_in_the_courts_-_assessment_of_non_u.s._climate_litigation.pdf).

106. See, e.g., JUSTIN R. PIDOT, GEORGETOWN ENVTL. LAW & POLICY INST., GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES 1 (2006) ("This 'boomlet' in global warming cases partly reflects the increasing scientific evidence that global warming is a serious environmental, economic, and social problem. It also reflects the growing public awareness of the global warming issue, and the tendency of interest groups in our country to enlist the courts to help resolve public controversies within the existing legal framework."); Tracy Bach & Justin Brown, *Recent Developments in Australian Climate Change Litigation: Forward Momentum from Down Under*, 8 SUSTAINABLE DEV. L. & POL'Y 39, 39–44, 86–87 (2008), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1179&context=sdlp> (describing

In contrast, the current wave of climate change litigation analyzed in this Article increasingly relies on international norms and data developed via the UNFCCC and IPCC when seeking relief under domestic laws. Analysis of this first wave has led legal advocates to make more connections between international and national laws. For example, a global group of legal experts adopted the Oslo Principles in March 2015, which set out an array of existing obligations regarding the climate, drawn from joint interpretation of international law, human rights law, national environmental law, and tort law.<sup>107</sup> They declared:

No single source of law alone requires States and enterprises to fulfil these Principles. Rather, a network of intersecting sources provides States and enterprises with obligations to respond urgently and effectively to climate change in a manner that respects, protects, and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere.<sup>108</sup>

In that vein, the half-dozen “second wave” climate change cases filed to date draw on both international and domestic legal resources. This Article analyzes four of them in terms of their domestic legal claims, requested remedies, and international climate change norms and data used.

#### *A. Human Rights and Tort Litigation in the Netherlands*

In June 2015, the Hague District Court ordered the Netherlands to reduce its GHG emissions by 25% from 1990 levels by 2020, concluding that the 14–17% reduction pledged by the Netherlands was insufficient.<sup>109</sup> Two years earlier, the NGO Urgenda had filed a 900-member class-action suit in

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how conservation foundations in Australia tried to use the courts to force governmental actors into taking responsibility for climate change).

107. See ANTONIO BENJAMIN ET AL., OSLO PRINCIPLES ON GLOBAL CLIMATE CHANGE OBLIGATIONS 2–4, 7 (2015), <http://globaljustice.macmillan.yale.edu/sites/default/files/files/OsloPrinciples.pdf> (noting that the Oslo Principles build on the precautionary principle, duties to cooperate, and duties to avoid transboundary harm; rely on international human rights, national environmental laws, and national tort laws; prove an existing duty to set per capita emissions standards and emphasize efficiency; affect enterprises as well as governments and individuals; and require disclosure to investors and compliance with enforcement actions).

108. *Id.* at 3.

109. RB-Den Haag [Hague District Court] 24 juni 2015, ECLI:NL:RBDHA:2015:7196 (Stichting Urgenda/Nederlanden) [Urgenda Found. v. Netherlands], <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7145>, translated in <http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf>.

*Urgenda Foundation v. State of the Netherlands*, claiming under human rights and tort law that the national government had not adequately protected its citizens from climate change.<sup>110</sup> The human rights claim drew on the case law of the European Court of Human Rights, which has interpreted the right to life as needing a healthy environment to secure it.<sup>111</sup> The tort claim rested on national law that imposes a duty on the government to protect its citizens from foreseeable harm. *Urgenda* argued that by emitting GHGs that contribute to surpassing a 2°C cap on warming, the government had breached this duty.<sup>112</sup>

When ruling for *Urgenda*, the trial court relied on the intersection of international human rights and domestic tort law. It specifically took Articles 2 and 8 of the European Charter on Human Rights as a “source of interpretation when detailing and implementing . . . the unwritten standard of care of . . . the Dutch Civil Code.”<sup>113</sup> In this way, the Netherlands court adopted the European Court on Human Rights’ view that “human rights law and environmental law are mutually reinforcing.”<sup>114</sup> The district court relied on international standards laid out in the UNFCCC when determining negligence under domestic law. It stated that:

[D]ue to the nature of the hazard (a global cause) and the task to be realized accordingly (shared risk management of a global hazard that could result in an impaired living climate in the Netherlands), the objectives and principles, such as those laid down in the UN Climate Change Convention and the TFEU, should also be considered in determining the scope for policymaking and duty of care.<sup>115</sup>

While conceding that these international commitments did not have a direct effect, the court reasoned that they provide the framework for how the government will exercise its powers: “Therefore, these objectives and principles constitute an important viewpoint in assessing whether or not the State act[ed] wrongfully towards *Urgenda*.”<sup>116</sup> Relying on IPCC data, the district court concluded that “given the high risk of hazardous climate

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110. *Id.* at paras. 2.1, 2.4, 2.6, 3.2, 4.1.

111. *Id.* at paras. 3.2, 4.35, 4.49.

112. *Id.* at paras. 3.2, 4.35.

113. *Id.* at paras. 4.45–4.46.

114. *Id.* at para. 4.48.

115. *Id.* at paras. 4.52, 4.55.

116. *Id.* at para. 4.63.

change, the State has a serious duty of care to take measures to prevent it.”<sup>117</sup> Moreover, it reasoned that “when it became a signatory to the UN Climate Change Convention and the Kyoto Protocol, the State expressly accepted its responsibility for the national emission level and in this context accepted the obligation to reduce this emission level as much as needed to prevent dangerous climate change.”<sup>118</sup>

Several aspects of the court’s reasoning stand out. First, the trial court pointed to the Netherlands’ knowledge of the severity of climate change threats to human welfare as demonstrated through its engagement in the UNFCCC negotiations. The Netherlands is a Party to the UNFCCC and the Kyoto Protocol, both as an individual state and as a member of the European Union. As a Party, it ratified the UNFCCC’s Article 3 principles and Article 4 commitments, and these were cited by the court as evidence of the government’s duty and breach.<sup>119</sup> Second, the court relied on the IPCC’s determination of the CO<sub>2</sub> reductions needed to keep global warming within the 2°C cap and the Netherlands’ knowledge of it when assessing both duty and breach.<sup>120</sup> It devoted five pages of the decision’s fact section to IPCC data alone.<sup>121</sup> Third, the court looked to the Netherlands’ voluntary pledges under the UNFCCC’s Copenhagen Accord and Cancun Agreement—both precursors to the country’s 2015 INDC submission—when determining insufficient action that would breach its duty of care to its citizens.<sup>122</sup> By defining the duty of care under domestic law and weighing facts that show breach of it, the Hague District Court decision embodies the Oslo Principle’s vision of “a network of intersecting sources” of climate change law.<sup>123</sup>

In September, the government appealed the district court ruling, but is nonetheless implementing it while the appeal is pending.<sup>124</sup> Regardless of the appeal’s outcome, the district court’s decision is significant. Dennis van Berkel, legal counsel for Urgenda, summed up the international impact of the decision:

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117. *Id.* at paras. 2.8–2.21, 4.14–4.15, 4.65.

118. *Id.* at para. 4.66.

119. *Id.* at paras. 2.38–2.40, 2.42, 4.56, 4.63, 4.65, 4.93. The fact section of the opinion devoted 5 of its 24 pages to describing the specific articles of the UNFCCC and Kyoto Protocol. *Id.* at paras. 2.35–2.46.

120. *Id.* at paras. 4.12, 4.14, 4.65, 4.84, 4.93.

121. *Id.* at paras. 2.8–2.21, 4.14–4.15, 4.65, 4.84, 4.93.

122. *Id.* at paras. 2.49, 2.63, 4.25, 4.33, 4.63.

123. BENJAMIN ET AL., *supra* note 107, at 3.

124. *Dutch Government to Appeal Against Carbon Emissions Ruling*, GUARDIAN (Sept. 1, 2015), <http://www.theguardian.com/environment/2015/sep/01/dutch-government-to-appeal-against-carbon-emissions-ruling>.

Before . . . the only legal obligations on states were those they agreed [upon] among themselves in international treaties. . . . This is the first a time [sic] a court has determined that states have an independent legal obligation towards their citizens. That must inform the reduction commitments in Paris because if it doesn't, they can expect pressure from courts in their own jurisdictions.<sup>125</sup>

Notably, Urgenda's success in the trial court has inspired similar litigation in other countries. In November 2015, a recent law graduate filed an action against the New Zealand government for its INDC pledges, claiming that they were "unreasonable and irrational" under domestic law.<sup>126</sup> The suit specifically argues that the Minister for Climate Change did not follow the process stipulated by New Zealand's Climate Change Response Act 2002 when setting emissions reduction targets.<sup>127</sup> Under the Act, the minister must review the government's emissions reduction targets when the IPCC updates its scientific reports, to ensure that they are in line with current scientific consensus on mitigation pathways.<sup>128</sup> In addition, a Belgian NGO has promised to file an action similar to the Netherlands case.<sup>129</sup> Both continue Urgenda's strategy of connecting international climate change norms developed through the UNFCCC and IPCC to national laws and policies.

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125. Arthur Nelsen, *Dutch Government Ordered to Cut Carbon Emissions in Landmark Ruling*, GUARDIAN (June 24, 2015), <http://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>.

126. *Government Sued for "Unreasonable and Irrational" Emissions Target*, HUM. RIGHTS FOUND., <https://humanrightsfoundation.wordpress.com/2015/11/12/government-sued-for-unreasonable-and-irrational-emissions-target/> (last visited Apr. 10, 2016).

127. *Id.*

128. *Id.*

129. This Article does not address these cases in more detail because no domestic court filings are available. For reporting on the Belgian litigation, see Faiza Oulahsen, *Comment: Now There is a New Way to Force Action on Climate Change—The Courts*, GREENPEACE (June 25, 2015, 4:48 PM), <http://energydesk.greenpeace.org/2015/06/24/comment-now-there-is-a-new-way-to-force-action-on-climate-change-the-courts/> (explaining that cases are being brought in Belgium and the Netherlands); Nelsen, *supra* note 125 (explaining that the Klimaats Zaat is bringing a similar case to Urgenda's in Belgium); *Une Action En Justice Pour L'Avenir [Legal Action for the Future]*, KLIMAATZAAK, <http://klimaatzaak.eu/fr/> (last visited Apr. 10, 2016) (explaining that a Belgian group is bringing a climate change lawsuit against the Belgian government and indicating that they are fundraising to bring suit).

*B. Petition for Climate Change Rulemaking in Washington State, United States*

In June 2015, the King County Superior Court of Washington State ordered the Washington Department of Ecology to reconsider a rulemaking petition that asked the Department to use best available science, including that of the IPCC, when making carbon dioxide reduction recommendations to the state legislature.<sup>130</sup> This state administrative law case, *Foster v. Washington Department of Ecology*, was brought by an NGO, Our Children's Trust, on behalf of eight young citizens.<sup>131</sup> The petitioners argued that a Washington state statute creates "a fundamental and inalienable right of the people of the state of Washington to live in a healthful and pleasant environment and to benefit from the proper development and use of its natural resources."<sup>132</sup> This statute also names the Department of Ecology as the state agency charged with implementing the law.<sup>133</sup> In addition, the Washington legislature enacted the Greenhouse Gas Emission Limits Statute that sets specific GHG emission limits to be achieved by 2020, 2035, and 2050.<sup>134</sup> Governor Inslee issued an executive order in 2014 requiring the Department of Ecology to review these GHG limits and recommend updates.<sup>135</sup> This executive order acknowledges specific climate change impacts on Washington, including "changes in the natural timing of water availability, sea level rise and ocean acidity, and increased forest mortality."<sup>136</sup> In line with this executive order, petitioners asked the Department to issue a rule that specifically sets a CO<sub>2</sub> emissions reduction trajectory of 4% per year, and achieves at least an 80% reduction in CO<sub>2</sub> emissions from 1990 levels by 2050, based on scientific evidence provided by the IPCC, national, and Washington state authorities.<sup>137</sup>

The Department denied the petition without disputing the underlying scientific basis for the petitioners' request.<sup>138</sup> The petitioners appealed,

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130. *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, slip op. at 4 (Wash. Super. Ct. June 23, 2015), [http://ourchildrenstrust.org/sites/default/files/Order\\_Fosterv.Ecology.pdf](http://ourchildrenstrust.org/sites/default/files/Order_Fosterv.Ecology.pdf).

131. Petition from Andrea Rodgers Harris on Behalf of Youth Petitioners to Wash. Dep't of Ecology 3-7 (June 17, 2014), [http://ourchildrenstrust.org/sites/default/files/Petition.Final\\_.6.17.14.pdf](http://ourchildrenstrust.org/sites/default/files/Petition.Final_.6.17.14.pdf).

132. *Id.* at 2 (quoting WASH. REV. CODE § 43.21A.010 (2014)).

133. *Id.*

134. *Id.* at 51 (citing WASH. REV. CODE § 70.235.020(1)(a) (2014)).

135. *Id.* at 52.

136. *Id.* at 23 (quoting Wash. Exec. Order No. 14-04 at 1 (2014)).

137. *Id.* at 52.

138. See Letter from Maia D. Bellon, Dir., Wash. Dep't of Ecology, to Andrea Rodgers Harris, Counsel for Youth Petitioners (Aug. 14, 2014),

arguing that they have a fundamental right to a healthy environment and that they are faced with increasing harms posed by climate destabilization and ocean acidification.<sup>139</sup> The trial court remanded the rulemaking petition to the Department for further analysis.<sup>140</sup> The court rejected the state agency's plan to delay action until after COP21, relying on the agency's own December 2014 report that listed multiple potential harms to Washington's coastal communities, fishing industry, and water sources.<sup>141</sup> The trial court judge specifically reasoned:

Ecology suggests no change in greenhouse gas reduction standards until after an international climate conference scheduled in Paris in December 2015, thus delaying action for at least a year from the date of the report or one year and five months after the report's original due date. Neither in its briefing nor in oral argument of this appeal did the Department seek to justify this suggested delay.<sup>142</sup>

The Department eventually proposed a draft rule that aimed to reduce emissions from the state's major industries, including power generators, refineries, and manufacturers.<sup>143</sup> The Department withdrew its proposed rulemaking in February 2016, stating that it needed more time to consult with business and environmental advocacy stakeholders. The trial court ruled again in April 2016, ordering the Department to promulgate an emissions reduction rule by the end of the year and to recommend science-based greenhouse gas reductions to Washington policymakers in the 2017 legislative session. When announcing the decision, King County Superior Court Judge Hill noted the extraordinary circumstances of the climate crisis, saying:

The reason I'm doing this is because this is an urgent situation. . . .  
These children can't wait, the polar bears can't wait, the people of

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<http://ourchildrenstrust.org/sites/default/files/WA.EcologyDecision.pdf> (stating continued commitment to current strategy to reduce greenhouse gas emissions).

139. Petition for Review, *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1U (Wash. Super. Ct. Sept. 15, 2015), <http://ourchildrenstrust.org/sites/default/files/WA.PetitionForReview.pdf>.

140. *Foster v. Wash. Dep't of Ecology*, No. 14-2-25295-1 SEA, slip op. at 4 (Wash. Super. Ct. June 23, 2015), [http://ourchildrenstrust.org/sites/default/files/Order\\_Fosterv.Ecology.pdf](http://ourchildrenstrust.org/sites/default/files/Order_Fosterv.Ecology.pdf).

141. *Id.* at 2-3.

142. *Id.* at 3 n.1.

143. Jim Brunner, *State Withdraws Inslee's Proposed Carbon Emissions Rule*, SEATTLE TIMES (Feb. 27, 2016, 2:40 AM), <http://www.seattletimes.com/seattle-news/politics/state-withdraws-inslees-carbon-limit/>.

Bangladesh can't wait. I don't have jurisdiction over their needs in this matter, but I do have jurisdiction in this court, and for that reason I'm taking this action.<sup>144</sup>

This rulemaking petition is part of an overall litigation strategy of Our Children's Trust to have state courts declare that the public trust doctrine requires intergenerational protection against climate change harms.<sup>145</sup> Overall, most cases brought have been dismissed on procedural grounds, either for lack of standing or based on the political question doctrine.<sup>146</sup> But *Foster* proceeded to a hearing on the merits, given the state's climate change statute and the reporting requirements it imposed on the Department of Ecology.<sup>147</sup> By asking that this report take into account climate change science as reported by the IPCC, the suit essentially asked the state government to act on the scientific norms established in the global climate change negotiations. In fact, the description of the case by one of its plaintiffs mirrors the Urgenda plaintiffs' theory of their case: "The government isn't doing the best to assure that we have the best quality of life."<sup>148</sup>

It is noteworthy that the Washington Department of Ecology chose to rely on the Paris conference outcome when seeking delay in delivering this report, saying that after COP21 it "would be better informed how the state's limits should be adjusted."<sup>149</sup> As a subnational government, it does not have the sovereign authority to enter into treaties like the UNFCCC or

144. Sydney Brownstone, *King County Judge Makes Historic Ruling Against Washington State in Climate Change Case*, STRANGER (Apr. 29, 2016, 12:30 PM), <http://www.thestranger.com/slog/2016/04/29/24025118/king-county-judge-makes-historic-judgment-against-washington-state-in-climate-change-case>; see also Press Release, Our Children's Tr., Youths Secure Second Win in Washington State Climate Lawsuit (Apr. 29, 2016), <http://ourchildrenstrust.org/sites/default/files/2016.04.29WAFinalRulingPR.pdf>.

145. *State Lawsuits*, OUR CHILDREN'S TR., <http://ourchildrenstrust.org/US/LawsuitStates> (last visited Apr. 18, 2016).

146. See, e.g., *Kanuk v. State of Alaska*, 335 P.3d 1088, 1100–01 (Alaska 2014) (affirming the lower court's decision to dismiss the plaintiff's lawsuit because it lacked the "controversy" necessary to avoid application of the political question doctrine); *Butler v. Brewer*, No. 1 CA–CV 12–0347, slip op. at 17–19, 21 (Ariz. Ct. App. Mar. 14, 2013), [http://ourchildrenstrust.org/sites/default/files/AZ\\_Appeal\\_Decision\\_2013.pdf](http://ourchildrenstrust.org/sites/default/files/AZ_Appeal_Decision_2013.pdf) (deciding the plaintiff lacked standing).

147. *Foster*, No. 14-2-25295-1 SEA, slip op. at 1–2. In the end, even though the petitioners lost their next round of appeals when the Department again denied their rulemaking petition, the Department chose to initiate rulemaking to review the statutory mitigation targets by the close of 2016. See *id.* at 10 (denying the petition for review because the Department of Ecology had commenced the rulemaking process).

148. George Zapo, *Youth Suing U.S. Federal Government Over Climate Change*, INQUISITR (Nov. 11, 2015), <http://www.inquisitr.com/2556611/youth-suing-government-over-climate-change/>.

149. *Foster*, No. 14-2-25295-1 SEA, slip op. at 3 n.1.

intergovernmental bodies like the IPCC. As a state subject to federal law, it is bound by the United States' ratification of the UNFCCC. Yet using its state health and welfare powers, the Washington legislature enacted a climate change statute committing it to mitigation and adaptation actions supported by the current science. It is significant that the Washington legislature looked to the IPCC's reports and to COP21's legal and political outcomes for standard-setting guidance. In doing so, the Washington legislation provides another example of that "network of intersecting sources" of climate change law.

### *C. Pakistani Litigation Seeking National Climate Change Policy Development*

In September 2015, the Lahore High Court ruled twice in *Leghari v. Federation of Pakistan* that the government of Pakistan must do more to implement its National Climate Change Policy.<sup>150</sup> This case began when a farmer in Pakistan brought suit challenging "the inaction, delay and lack of seriousness on the part of the Federal Government and the Government of the Punjab to address the challenges and to meet the vulnerabilities associated with Climate Change."<sup>151</sup> He argued that "climate change is a serious threat to water, food and energy security of Pakistan which offends the fundamental right to life under article 9 of the Constitution," and that despite the government's adoption of a 2012 National Climate Change Policy and the accompanying Framework for Implementation of Climate Change Policy (2014–2030), "there is no progress on the ground."<sup>152</sup> Responding for the national government, the Joint Secretary for the Ministry of Climate Change explained that while his federal ministry had been created in early 2015 and held meetings and issued reminders through midyear, "by and large the response of the various departments has not been very positive . . . ."<sup>153</sup>

Reasoning that "[c]limate [c]hange is a defining challenge of our time and has led to dramatic alterations in our planet's climate system,"<sup>154</sup> including the heavy floods and droughts that have affected Pakistani water

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150. See *Leghari v. Federation of Pakistan*, W.P. No. 25501, slip op. at 6–7 (Lahore High Court Sept. 4, 2015) (Pak.), <http://edigest.elaw.org/sites/default/files/pk.leghari.090415.pdf> (directing action in addition to the National Climate Change Policy); *Leghari v. Federation of Pakistan*, W.P. No. 25501, slip op. at 4 (Lahore High Court Sept. 14, 2015) (Pak.), <http://edigest.elaw.org/sites/default/files/pk.leghari.091415.pdf> (building on the first order).

151. *Leghari v. Federation of Pakistan*, W.P. No. 25501, slip op. at 2 (Lahore High Court Sept. 4, 2015), <http://edigest.elaw.org/sites/default/files/pk.leghari.090415.pdf>.

152. *Id.*

153. *Id.* at 4.

154. *Id.* at 5.

and food security, the Lahore High Court concluded that Pakistani human rights and constitutional law supported ruling against the government. It specifically pointed to:

Fundamental rights, like the right to life (article 9) which includes the right to a healthy and clean environment and right to human dignity (article 14), read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a center stage in the scheme of our constitutional rights.<sup>155</sup>

These rights and principles gave the court the “necessary judicial toolkit” to address the government’s lackluster climate change response because “the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded.”<sup>156</sup>

The Lahore High Court ordered government ministries to take specific actions, like nominating “a climate change focal person” to coordinate with the Ministry of Climate Change, and presenting a list of adaptation action points by the end of 2015.<sup>157</sup> The Court also ordered creation of a Climate Change Commission to monitor progress on the Framework and report it to the Court; it required that this Commission include representatives of key ministries, civil society, and technical experts.<sup>158</sup> Ten days later, the Court issued a second order naming 21 individuals to the Commission and delineating its objective, powers, operating rules, and ongoing relationship with the court.<sup>159</sup> Notably, since these two court orders, the Pakistani government has chosen to publish this Commission’s meeting minutes on a website.<sup>160</sup>

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155. *Id.* at 5–6.

156. *Id.* at 6.

157. *Id.* at 6–7.

158. *Id.* at 7.

159. *Leghari v. Federation of Pakistan*, W.P. No. 25501, slip op. at 11–14 (Lahore High Court, Sept. 14, 2015) (Pak.), <http://edigest.elaw.org/sites/default/files/pk.leghari.091415.pdf>.

160. *See Details of Writ Petition No. 25501/2015 in the Lahore High Court (Asghar Leghari vs Federation of Pakistan)*, MINISTRY CLIMATE CHANGE, PAK., <http://www.mocc.gov.pk/gop/index.php?q=aHR0cDovLzE5Mi4xNjguNzAuMTM2L21vY2xjL2ZybURldGFpbHMuYXNweD9vcHQ9cHVibGljbm90aWNlcyZpZD02> (last visited May 11, 2016) (providing direct links to the Climate Change Commission’s meeting minutes).

This case shares similarities with the Washington state and Netherlands actions. Like the *Foster* case, *Leghari* seeks judicial enforcement of a government's domestic legislative promise to take specific actions on climate change. Both cases rely on climate change science and norms about the importance of GHG mitigation and adaptation actions developed at the international level. But the Pakistani case differs in that the 2012 National Climate Change Policy and the framework created to implement it are direct outgrowths of the country's UNFCCC Party commitments. As a developing country Party, Pakistan agreed to develop Nationally Appropriate Mitigation Actions (NAMAs) under the Bali Action Plan<sup>161</sup> and National Adaptation Plans under the Cancun Agreement,<sup>162</sup> both of which entail creating domestic climate change policies and a framework for implementing them. Thus, when the Lahore High Court ordered the government to take concrete steps to implement them domestically, it was also enforcing compliance with these international commitments. Like the *Urgenda* case, the *Leghari* case outcome relies on a blend of international law and domestic constitutional norms that the Court viewed as supporting one another. Likewise, *Leghari* has a firm footing in human rights secured by national law and have been made justiciable by domestic courts.

#### *D. Greenpeace Petition to the Philippines Human Rights Commission*

In September 2015, Greenpeace Southeast Asia and the Philippine Rural Reconstruction Movement petitioned the Commission on Human Rights of the Philippines on behalf of 13 organizations and 20 individuals.<sup>163</sup> The Petition alleges that some 50 companies, referred to as the Carbon Majors—including Chevron, ExxonMobil, Rio Tinto, Lukoil, and Massey Coal—knowingly contributed to the root causes of climate change and thus violated the human rights of Filipinos.<sup>164</sup> The Petition asserts that the Filipino

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161. *Submission by Pakistan, Nationally Appropriate Mitigation Actions by Developing Countries (Bali Action Plan 1bii)*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [https://unfccc.int/files/meetings/ad\\_hoc\\_working\\_groups/lca/application/pdf/submission\\_by\\_pakistan\\_on\\_namas\\_ghh.pdf](https://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/submission_by_pakistan_on_namas_ghh.pdf) (last visited May 11, 2016).

162. *Cancun and Pakistan*, DAWN (Dec. 18, 2010, 8:00 PM), <http://www.dawn.com/news/591850/cancun-and-pakistan>.

163. Justin Gundlach, *Petition to Philippines Human Rights Commission Seeks Investigation into "Carbon Majors" for Human Rights Violations*, COLUM. L. SCH. (Sept. 25, 2015), <http://blogs.law.columbia.edu/climatechange/2015/09/25/petition-to-philippines-human-rights-commission-seeks-investigation-into-carbon-majors-for-human-rights-violations/>.

164. *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* 3–5 (Sept. 22, 2015)

Constitution authorizes the Commission to investigate alleged human rights violations and to recommend to the executive and legislative branches appropriate responses to identified harms.<sup>165</sup> It focuses on the individual human rights affected by climate change listed in the U.N. Human Rights Council resolution,<sup>166</sup> and that the Carbon Majors violated the human rights of Filipinos by failing to prevent climate change. The petition also relies on international recognition of the intersection of human rights and climate change, including the Human Rights Council resolutions, Special Procedures Joint Letter, and the Climate Vulnerable Forum reports developed as part of the campaign to include human rights obligations in the Paris Agreement.<sup>167</sup>

To establish that these Carbon Majors breached a duty to respect Filipinos' human rights by knowingly contributing to climate change, the petition asks the Commission to apply a novel approach to assigning liability. Patterned on market share liability used in products liability cases when multiple entities contribute to a problem over time, the petition relies on GHG emissions data compiled by Richard Heede that calculates responsibility for climate change in gigatons of carbon dioxide-equivalent emissions since industrialization.<sup>168</sup> Heede estimates that he can attribute almost 65% of emissions to specific emitters.<sup>169</sup> In terms of remedies, the petition asks the Commission to investigate "the human rights implications of climate change and ocean acidification" and specific violations of them by investor-owned Carbon Majors located in the Philippines.<sup>170</sup> The petition does not seek injunctive or compensatory relief, but rather focuses on channeling the Commission's work into legislative action.<sup>171</sup>

This litigation contrasts sharply with the other cases analyzed here in that it is directly framed as a human rights case that is pled to a human rights commission rather than an environmental case argued to a court of general jurisdiction. While this pleading forum limits the relief requested, it does not

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<http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf> [hereinafter Philippines Petition].

165. *Id.* at 6–7.

166. Human Rights Council Res. 29/15, *supra* note 26, at 2.

167. Philippines Petition, *supra* note 164, at 7–8.

168. *Id.* at 3–4.

169. *Id.* at 12. Heede leads an NGO called the Climate Accountability Institute, which has focused on tracing the sources of cumulative global CO<sub>2</sub> and methane emissions since the industrial revolution. He concludes that two-thirds of these emissions can be linked to the 90 largest multinational and state-owned producers of crude oil, natural gas, coal, and cement. He calls these producers the "Carbon Majors." *Carbon Majors: Accounting for Carbon and Methane Emissions*, CLIMATE ACCOUNTABILITY INST., [http://www.climateaccountability.org/carbon\\_majors.html](http://www.climateaccountability.org/carbon_majors.html) (last visited May 11, 2016).

170. Philippines Petition, *supra* note 164, at 31.

171. *Id.*

undermine the litigation's capacity for achieving outcomes similar to those requested in Washington state and Pakistan. In both of these cases, the plaintiffs sought to spur legislative and executive branch implementation of climate change policy already in place. The Philippines action also seeks to translate the Human Rights Commission's findings into legislative action on climate change.

But this case is similar to the other second wave cases in that it links national to international law and draws climate change facts from international bodies. For example, the Philippines Human Rights Commission petitioners base their arguments in national human rights and torts law akin to the *Urgenda* plaintiffs in the Netherlands, but draw on international human rights treaties and norms for context.<sup>172</sup> Likewise, when framing the domestic law duty to refrain from knowingly causing climate change, the petition asserts principles of equity and precaution expressed in the UNFCCC.<sup>173</sup> Finally, it also relies on data collected through the UNFCCC national communications process and IPCC analysis of it when apportioning responsibility to individual defendants.<sup>174</sup>

#### V. WHAT NEXT? THE IMPACT OF COP21, NATIONALLY DETERMINED CONTRIBUTIONS, AND NATIONAL COURTS

The lawsuits described in this Article were all initiated before the Paris Agreement was adopted on December 12, 2015. Thus, they were not based on specific provisions of the new agreement. Yet each one draws on concepts that have been codified in the new agreement—nationally determined contributions, science-based standards supported by IPCC research, international and transparent reporting requirements, regular reviews of collective progress or stocktakes—that will come into force in 2020, but have roots in the bottom-up process that has developed since the Durban Mandate of 2011.

Few of these suits are final. While the administrative actions seeking rulemaking in Washington state and implementation of the national government's climate change plan in Pakistan have produced governmental responses, appeals are pending in the Netherlands on the fundamental separation of powers and tort liability questions. The human rights claims in the Philippines, based on a novel causation and accountability methodology, have not yet produced a decision. As these filed cases proceed, they will

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172. *Id.* at 7, 27–28, 30.

173. *Id.* at 10, 24–25.

174. *Id.* at 4–5.

undoubtedly produce insights into how to construct new cases. As Kurt Winter of ClientEarth observes:

The idea that every government will be presenting a lot more information about how their economies operate and the scale of their emissions is quite an important development . . . . It can help with actually coordinating evidence of whether or not governments are complying with targets, and whether a case can be launched.<sup>175</sup>

Thus, the table has been set by these first cases. Potentially, this second wave of climate change litigation, focused on connecting international pledges with national law, will grow as the COP21 agreement is ratified and comes into force during the next four years.

Recent activity by NGOs and academics already confirms that they are investing time and energy into filing more lawsuits based on the Paris Agreement. The post-*Urgenda* attention is now turning to other European countries, like Belgium.<sup>176</sup> Greenpeace plans a global campaign patterned on the Philippines case.<sup>177</sup> The June 2016 Colloquium of the International Union for the Conservation of Nature's Academy of Environmental Law will focus on "[e]nvironmental protection in national and international courts, tribunals, and compliance mechanisms."<sup>178</sup> In the United States, a paper co-authored by law professors from the Columbia, UCLA, and NYU Law Schools argues that the COP21 outcome should enable the United States Environmental Protection Agency (EPA) to use Section 115 of the Clean Air Act to regulate GHG emissions.<sup>179</sup> This provision, titled International Air Pollution, allows EPA to require states to address air pollution that endangers the public health or welfare of other countries if those countries provide the United States with reciprocal protections.<sup>180</sup> It gives EPA and the states the discretion to address

175. Sara Stefanini, *Next Stop for Paris Climate Deal: The Courts*, POLITICO (Jan. 11, 2016, 8:49 PM), <http://www.politico.eu/article/paris-climate-urgenda-courts-lawsuits-cop21/>.

176. *Id.*

177. Oulahsen, *supra* note 129.

178. *14th Annual Colloquium of the IUCN Academy of Environmental Law, Oslo, 2016: The Environment in Court*, IUCN ACAD. ENVTL. L., <http://www.iucnael.org/en/news/latest-news/225-general-news/513-14th-annual-colloquium-of-the-iucn-academy-of-environmental-law-oslo-2016> (last visited May 22, 2016).

179. MICHAEL BURGER ET AL., LEGAL PATHWAYS TO REDUCING GREENHOUSE GAS EMISSIONS UNDER SECTION 115 OF THE CLEAN AIR ACT i (2016), [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal\\_pathways\\_to\\_reducing\\_ghg\\_emissions\\_under\\_section\\_115\\_of\\_the\\_caa.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/legal_pathways_to_reducing_ghg_emissions_under_section_115_of_the_caa.pdf).

180. *Id.* at i, iii.

international air pollution comprehensively through the Act's State Implementation Plans.<sup>181</sup> The authors of this academic paper argue that using this lesser known provision could provide an effective way of regulating climate change pollution in the United States through economy-wide, market-based approaches rather than through specific sector and source approaches.<sup>182</sup> Importantly, for the purposes of this Article, their theory of the case relies on the Paris Agreement when analyzing the second part of Section 115's two-part test regarding other countries providing reciprocal protection. It reasons that

[a]lthough there are numerous bilateral and multilateral agreements on which EPA might rely, the strongest evidence may be found in the procedural rights provided and the substantive commitments made through the United Nations Framework Convention on Climate Change (UNFCCC) and the international efforts to address climate change which recently coalesced in Paris in December 2015. Indeed, the Paris Agreement provides for both an 'enhanced transparency framework,' through which the U.S. can comment on other countries' climate action, and the submission of Intended Nationally Determined Contributions (INDCs), which include significant pledges to mitigate GHG emissions. At the time of this writing, nearly 190 countries have made emissions reductions pledges through the INDC process, accounting for over 93% of current global GHG emissions.<sup>183</sup>

If taken up in the United States courts, this litigation could firmly plant the connections between international climate change norms and domestic law. While not a panacea for ensuring compliance with the Paris Agreement, domestic litigation provides a potentially potent route for assuring national accountability for the NDCs pledged under international law. These domestic lawsuits can complement the facilitative international compliance mechanisms inscribed in the Paris Agreement to close the accountability gap. In doing so, they act on the aspirational human rights language in the Paris Agreement's preamble.

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181. *Id.* at i.

182. *Id.* at v–vi.

183. *Id.* at ii–iii.