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Adapting Hybrid Courts to Drive Transnational Climate Accountability

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ADAPTING HYBRID COURTS TO DRIVE TRANSNATIONAL CLIMATE ACCOUNTABILITY

by

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DECLARATION OF ORIGINALITY

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ABSTRACT

Climate change is a complex and transboundary problem poised to become increasingly worse unless concrete action is taken by all parties concerned to stem the catastrophe and dial back the levers to climate collapse. The brunt of climate change is being felt across the world but particularly in Global South countries with limited capacity to mitigate the damage caused by these changes. To respond to this challenge, governments acting in concert under the auspices of the UN as well as domestically are putting in place laws aimed at stemming the tide. However, legislation has come up short owing to a number of factors including economic and social considerations, corporate interference in the political process of rule-making, and the lacunae in the climate laws of various countries. These shortcomings underscore the place of climate litigation as a complementary tool for climate regulation as well as remediation. But even litigation, especially transnational climate litigation, has its own shortcomings represented in questions of extraterritoriality and sovereignty, issues of fora, conflict of laws, causation, standing, and enforcement of foreign judgments. For the Global South particularly, the extra challenges of weak institutions, incapacity of personnel, and partiality (whether perceived or actual) further serve to constrain effective transnational climate litigation, limiting access to justice generally and marginalizing Global South voices in the emergent legal regime on climate change being written through case laws. I propose that hybrid courts will be able to address the twin issues of extraterritoriality of cause of action, and the need to mainstream Global South voices in the emergent legal regime on climate change. I argue this possibility by contemplating the architecture of hybrid courts which integrates national and international law structures including personnel and laws, as well as the funding necessary to procure much-needed capacity to infuse legitimacy into the process and respond to the extraterritoriality questions.

DEDICATION

I dedicate this thesis to:

To God Almighty, for every time He has sanctioned my aspirations.

To my late grandmother, Cecilia ‘Akwuru enechi’ Nwokolo; for all the wisdom imparted to me over time and over those Christmases spent in the hinterland. A living library burned down on July 12, 2021, when you drew your last breath … to your memory and all you stood for.

To Africa and its people, who bear the brunt of climate change, violence and economic hardships. I pledge to you that if I should make it before my dusk, and this gambler breaks even, you shall partake in my wins.

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Introduction

"Climate change crosses borders, requires collective solutions and has the capacity to cause extraordinary losses"[1]

I. Climate Change: New Paradigm for Transnational Accountability

The impact of changes to our environment and climate are not restricted within the borders of states nor are they confined within the territory of the actors causing such changes.[2] Various actors, considering the complex, transboundary and global nature of climate change, have mobilized to stem its effects and drive climate sustainability using various tools. For instance, nations acting in concert to stem climate change, agreed in their 2015 meeting in Paris to curb global carbon emissions and save our planet.[3] In furtherance of this commitment, states enacted various climate change laws as well as developed policies toward climate sustainability. The adequacy and effectiveness of these laws and policies have become the subject of litigation and claims by climate activists focused on keeping governments accountable to their commitments in Paris, while also highlighting the implications of the climate crisis for humanity.[4]

But while the efforts of governments and other stakeholders go a long way in defining the contours of environmental and climate change policy, the interplay of economic considerations and the mainstreaming of capitalism means that states are not the only ones in the climate change

[1] Saul Holt & Chris McGrath, "Climate Change: Is the Common Law up to the Task" (2018) 24 Auckland UL Rev 10.

[2]Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?" (2016) 5.2 Transnational Environmental L at 353 (doi:10.1017/S2047102516000194)

[3] United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement, 21st Conference of the Parties*, 15 December 2015, 3156 UNTS 54113 (entered into force 4 November 2016) online: <unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>

[4] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022) online: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/06/Global-trends-in-climate-change-litigation-2022-snapshot.pdf. See for instance the case of *Chiara Sacchi & Ors v Argentina & Ors* filed at the United Nations Committee for Right of the Child by 16 young persons, (*UN Convention on the Rights of the Child*, 8 October 2021, CRC/C/88/D/104/2019)

debate. Scholars note that investor-owned companies are largely unchecked, yet are responsible for 315 gigatonnes of equivalent CO2 (GTCO2e) of emissions compared with 312 GTCO2e emitted by nation-states.[5] Developing countries – with a minimal share in the ownership of the industries and corporations responsible for climate change – especially bear the brunt as they presently do not have the economic and infrastructural capacity to adapt and mitigate the impacts of climate change as developed countries. How then do they access remedies for the damage caused by transboundary impacts of climate change as well as ensure the accountability of a largely unchecked transnational corporate polluter?

To meet the moment, climate change litigators have been instituting claims against state and non-state actors both nationally and transnationally, leveraging synergies built across countries for this purpose. According to data published in June 2022 by the Grantham Research Institute, with inputs from the Sabin Centre for Climate Change Law at Columbia University and others, about 2,002 climate cases and claims have been filed between 1986 and 2022.[6] A review of the Centre's docket reveals some interesting dynamics, challenges and barriers to climate litigation. These challenges include issues of jurisdiction, *forum conveniens, forum necessitatis*, conflict of laws, issues with enforcement owing to questions around capacity, and impartiality of proceedings.[7]

[5] Transnational carbon major companies are responsible for over 30% of the global industrial greenhouse gas emissions and exert tremendous influence over future global climate trajectories. Yet, they are not governed through top-down, stringent emissions limits, but are instead regulated largely by disclosure-only domestic requirements and market-based or voluntary corporate responsibility mechanisms… high emitting, transnational companies have arguably been afforded much more freedom to emit than nation states… cumulatively, investor-owned companies are responsible for 315 gigatonnes of equivalent CO2 (GTCO2e) of emissions compared with 312 GTCO2e emitted by nation states

[6] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022) online: <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/06/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.>. The report shows the influence of courts in climate regulation.

[7] See *Yaiguaje et al. v. Chevron Corporation et al.* (2018), (2018) ONCA 472 (CA)

These barriers limit the reach of litigation as a sole tool for climate accountability and make the case for an eclectic approach to climate sustainability efforts. It shows the need for complementarity of tools – litigation, treaties and national laws – if we are to achieve climate sustainability. In this regard, the place of adequate national laws and policies cannot be overemphasized.

This thesis reviews national legislation and government policies of various states in a bid to determine the effectiveness and lapses inherent in these systems as well as the factors contributing to the inadequacies of national legal regimes on climate change. The selected states include the United States, Canada, the United Kingdom and the Netherlands, all industrialized nations with huge energy needs. I intend to demonstrate that the existing lacuna in national laws has made room for climate litigation to complement the regulation of climate change, and vice-versa. Consequently, the research reviews how much influence courts hold as norm-setting centres as well as their regulatory role for national and transnational climate change issues. I review a number of cases including the case of *Luciano Lliuye v RWE AG* [8], *Milieudefensie et al. V Royal Dutch Shell Plc*[9] as well as the claim made to the Commission on the Human Rights of the Philippines in the *Re Greenpeace Southeast Asia* case[10] to, amongst other things, point to the extraterritorial and consequently extra-jurisdictional question that climate change raises, and how courts are responding to them. In *Luciano Lliuye v RWE AG,* although the court ruled that the claims of a Peruvian farmer before a German court for transboundary impact of climate change was admissible

[8] *Luciano Lliuya v. RWE AG*, Case No. 2 O 285/15, Essen Regional Court (Germany), online: <climatecasechart.com/non-us-case/lliuya-v-rwe-ag>
[9] *Milieudefensie etal. V Royal Dutch Shell Plc* (2021), Case No C/09/571932 / HA ZA 19-379 Hague District Court (The Netherlands), online: <climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>
[10] *In Re Greenpeace Southeast Asia & Ors*, Case No. CHR-NI-2016-0001, Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>

and could proceed to the evidentiary phase, the ultimate decision of another German court in the *Order of the First Senate*[11] case engenders cautious optimism as we await substantive hearings. In the *Order of the First Senate* case, the court considered the claims of plaintiffs from Bangladesh and Nepal who contended that the failure of the German state to better regulate climate change had an impact on them. The court although determining that their claims were admissible, insofar as they are natural persons with tangible properties, however, found that it could not make any orders as to remedies, owing to principles of sovereignty and extraterritorial limitations.[12] These constraints of extraterritoriality and sovereignty also played out in the *Re Greenpeace Southeast Asia* case.

In bridging the extraterritoriality question, courts in some jurisdictions of the Global North have taken up claims regarding events that happened outside their jurisdictions and have encouraged litigants from the Global South to access justice before Global North fora.[13] While this is a good development for improving access to justice for victims of climate change in the Global South, it has the implication of ensuring that the emergent legal regime on climate change through the courts is heavily developed in the Global North. This has implications in terms of what the law would look like, as legal realism and critical legal studies show that the context of judges, advocates and litigants shapes the law.[14]

[11] *Order of the First Senate of 24 March 2021* (2021), 1 BvR 2656/18 Federal Constitutional Court (Germany) <bverfg.de/e/rs20210324_1bvr265618en.html>.
[12] *Ibid*
[13] *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* [2019] UKSC 20; *Amis de la Terre and Sherpa v Perenco* (2022), Appeal No 20-22.444 Cour de Cassation (France), online: <climatecasechart.com/non-us-case/amis-de-la-terre-and-sherpa-v-perenco/>
[14] Oliver Wendell Holmes, "The Path of the Law" (1965) 45:1 BUL Rev 24.

The choice of foreign fora, however, may not be unconnected to the numerous challenges of adjudication in the Global South. The case of *Ecuador v Chevron*[15] profiles these challenges to include weak adjudicatory structures, fear of partiality, power dynamics of a strong corporation operating in the Global South, challenges of unqualified personnel, the complexity of environmental reports and problems of enforcement. In this case, involving an oil spill polluting the environment, the court in Ecuador awarded damages first in the sum of USD 18.2billion and subsequently reduced to USD 9.5billion. Attempts at enforcement spanned several countries (Canada, the United States, Argentina and Brazil) without success, and efforts to impeach the judgment included accusations that the presiding judge had an absolute lack of knowledge of the issues being adjudicated and procured a former judge sacked on allegations of corruption to write judgments. It involved accusations of evidence tampering, procurement of witnesses, racketeering and a proceeding to disbar the plaintiffs' counsel.[16] This convoluted knot that is the whole case of *Ecuador v Chevron* as well as the extraterritorial challenges reviewed in the *Re Greenpeace Southeast Asia* case amongst others, supports this research's hypothesis that existing designs of legal systems and structures (international, national and transnational) may not be able to support remediation for Global South victims of climate change in an extra-jurisdictional/transnational context. Meanwhile, questions regarding the standard of justice delivered by Global South courts will continue to constrain the effectiveness of Global South justice.

I argue that repurposing hybrid courts will certainly be able to prune out some, if not all, of the issues that have attended these cases and that is typical of cases of a transnational nature, being

[15] *Ecuador v Chevron* (2011), Ecuador No. 002-2003 (Super. Ct. of Nueva Loja).
[16] Manuel A. Gomez, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429

adjudicated by courts in the Global South. The research reviewed the architecture of various hybrid courts, including the Special Court for Sierra Leone (SCSL) in order to tease out the promise and challenges of hybrid courts, towards designing a climate court that addresses the issues raised in this research. The Special Court for Sierra Leone is considered a huge success in utilizing hybridism to solve challenges that come with trying to hold powerful defendants accountable. The court ably concluded on its mandate and has now transitioned to a Residual Special Court with jurisdiction to continue to implement the mandate of the SCSL.[17] The SCSL had both local and foreign judges adjudicating claims, with guiding laws being a blend of both international law and the domestic laws of Sierra Leone. At the conclusion of its sittings, it found several of the accused persons guilty of various crimes and sentenced them to between 15 to 52 years imprisonment (currently being served at Rwanda's Mpanga Prison).[18]

The foregoing provides a vista into what is possible with hybrid courts in the context of transnational climate change litigation. The SCSL's decisions, especially with indicting Charles Taylor[19] extraterritorially as well as the universal jurisdiction inherent in the designs of the hybrid court in Senegal provide reassurances for transnational accountability. Whether this system can work and how far it can go in ensuring accountability of corporations for climate change in transnational contexts is what this research will seek to interrogate by considering the question: ***Can hybrid courts be used to ensure access to justice in transnational climate change claims, while mainstreaming Global South voices in the emergent legal regime on climate change?***

[17] The Residual Special Court for Sierra Leone and the SCSL Public Archives, "Special Court for Sierra Leone Residual Special Court for Sierra Leone", online: < rscsl.org/>
[18] *Ibid*
[19] Decision on Immunity from Jurisdiction in "*Prosecutor v. Charles Ghankay Taylor*" (2014), Case No. scsl-2003-01-i Special Court for Sierra Leone (Sierra Leone).

My hypothesis is in two parts coinciding with the research question:

1. Climate change impacts are ubiquitous and seep into territories where there is no direct causal link, yielding an extra-jurisdictional question and creating a gap on how to proceed in the circumstance.[20] I argue that the question of extraterritoriality may be addressed by utilizing hybrid courts such as the SCSL's ability to reach beyond national borders as demonstrated in the indictment of Charles Taylor who was outside Sierra Leone, the site of the SCSL. Also, the participation of foreign judges and the UN will most likely ensure the extraterritorial enforcement of the court's decisions.

2. The cases of *Ecuador v Chevron*[21] and *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors*[22] show the challenges that attend adjudication of transnational climate and environmental claims involving a large corporation in the Global South. Perceptions of weak systems, corruption, lack of expertise, barriers to access to justice, and enforcement challenges abound, driving parties to Global North fora. A court system that takes into consideration domestic legal systems, is close to the victims while standardizing adjudicatory procedure and outcome will ensure access to justice. Hybrid courts are able to achieve these as they combine the architecture of the domestic legal system and an internationally designed court system to ensure access to justice for all parties. It does this by bridging the gap between international notions of fair adjudication and the local contexts and special circumstances of the people.

[20] See the cases of *Native Village of Kivalina v ExxonMobil* on one hand, and *Luciano Lliuye v RWE AG and Order of the First Senate* case on the other.
[21] *Ecuador v Chevron* (2011) Ecuador No. 002-2003 (Super. Ct. of Nueva Loja)
[22] *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* [2019] UKSC 20

II. Hybrid Courts: A Novel Approach to Transnational Climate Accountability

The novel contribution that this research makes is to design a system for holding corporations accountable for the extraterritorial impact of climate change arising from their activities.[23] This system will also ensure the mainstreaming of Global South voices in the design of the emergent legal regime on climate change now being written through litigation. What I have done, which has not been done elsewhere, is to take hybrid courts, an international law tool designed for application in transitional criminal justice settings, and apply it to climate change litigation, seeing that it has the potential to solve the most intractable challenges that exist in transnational climate accountability efforts, especially in the Global South. These challenges include sovereignty and extraterritoriality questions, forum, causation, standing, conflict of laws, and enforceability issues on one hand and challenges of weak adjudicatory systems on the other. These issues combine to make litigation of transnational climate change claims less straightforward than it would be for national claims.

For developing countries which bear the brunt of climate change, weak institutions and concerns over partiality and independence of the judiciary[24] often times mean that access to justice in relation to extraterritorial activities of corporations causing climate change is constrained.[25] Meanwhile, the United Nations Committee on the Rights of the Child insists in the case of *Chiara*

[23] An issue that the Commission on the Human Rights of the Philippines as well as the German Court grappled with in the cases of *Re Greenpeace Southeast Asia and the Order of the First Senate*.

[24] In the *Vedanta v Lungowe* case, the Supreme Court in England refused to remit a case back to Zambia concerned that within Zambia there were not "sufficiently substantial and suitably experienced legal teams" to manage litigation of this size and complexity particularly against KCM which had a track record suggesting that it would prove "an obdurate opponent". The UK courts had previously questioned the ability of Zambian courts to hear the case impartially. See Carmel Rickard, "Zambian Farmers Head to UK Courts for Fight with International Company over Polluted Water", online: <africanlii.org/article/20190410/zambian-farmers-head-uk-courts-fight-international-company-over-polluted-water>

[25] The cases of *Ecuador v Chevron, Vedanta v Lungowe and Re Greenpeace Southeast Asia & Or*s previewed above demonstrate the challenges of climate change litigation for victims in the global South.

Sacchi & Ors v Argentina & Ors.[26], that claimants must exhaust local remedies before approaching such international fora as the committee; creating a catch-22 situation. This not only affects access to justice in the Global South but has provided an incentive for devising legal mechanisms to ship transnational climate and environmental claims to the Global North.

In answering the research question, I utilize a legal realist and critical/reformist Third World Approach to International Law framework.[27] At the core of my argument is that existing legal principles and systems in international and transnational contexts are largely designed and continue to be designed within the prisms of the Global North.[28] In the context of climate change, scholars note that cases and articles are heavily skewed to Global North perspectives with the Global South occupying a marginal position.[29] Even some of the definitions of climate litigation screen out the types of rights-based climate litigation that typically occur in the Global South. The result is a marginalization of climate change regulation through litigation from the Global South. This research suggests that a modified hybrid court system that takes into consideration the input of the adjudicatory systems of the Global South will ensure effective justice and accountability while infusing the contexts of the Global South as well.

The research will take a doctrinal, analytical, socio-legal/political, and comparative approach in interrogating the question I have set out to answer. In chapter one, I review the legal regime of

[26] *Chiara Sacchi & Ors v Argentina &* Ors, CRC/C/88/D/104/2019 (UN Committee on Rights of the Child)
[27] TWAIL scholars (or "TWAILers") are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order... a commitment to centre the rest rather than merely the west, thereby taking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case. See Obiora Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall LJ 171
[28] James Thuo Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 Am U Intl L Rev 377.
[29] Joana Setzer & Lisa C. Vanhala, "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance", (2019) 10 Wires Climate Change 1

selected countries including the United States, Canada, the United Kingdom and the Netherlands with a view to determining the effectiveness of legislation and government policy response to climate change. I argue that government efforts have failed to provide a comprehensive and robust response owing to economic considerations and corporate political activity influencing the regulatory process. Subsequently, I review selected case laws to demonstrate how climate litigation complements legislation in regulating climate change, as well as access to justice barriers in climate change litigation. Using a socio-legal/political analysis I explore how lived experience, the subjectivity of rights arguments and legal realism in adjudication is mainstreaming Global North contexts with potential marginalization of Global South voices as the laws on climate change develop. In chapter three, I argue for adapting the designs of hybrid courts to address the barriers to transnational climate litigation while mainstreaming Global South voices in the emergent climate change law regime. I make some recommendations and conclude by noting the promise of hybrid courts for climate accountability.

III. Situating my Proposition within the General Conversation

The effects of climate change and the role of non-state actors, particularly corporations, have engaged the attention of scholars writing from different perspectives. Lisa Benjamin in her work, "The Responsibilities of Carbon Major Companies: Are they (and is the Law) Doing Enough",[30] points out that the law and economics movement has dominated the corporate law theory for some time now and views the company in private terms as a nexus of contracts between private actors. Benjamin demonstrates that short-term profitability and shareholder maximization – favoured by contractarians – which underlies many corporate approaches to business is often incompatible with environmental considerations and regulations. She points to strong contractarian influence in the

[30] Lisa, Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?" (2016) 5:2 Transnational Environmental L 353 (doi:10.1017/S2047102516000194).

UK, for instance, and notes that case law has raised the primacy of directors' discretion which ultimately upholds shareholder interests. Even where regulated, Benjamin notes that firms and other regulated entities may practice a sort of 'regulatory arbitrage' by exploiting the differences between national regulatory environments to their advantage. In addition to possible regulatory arbitrage, Benjamin also notes that the existing corporate laws in the UK did not point to a clear, mandatory requirement for sustainable climate behaviour. Meanwhile, the voluntary corporate response has proved inadequate, creating the need to sustain the conversation on how best to police corporate behaviour causing climate change, especially as it has transnational implications. National climate laws designed to meet the various Nationally Determined Contributions under the *Paris Agreement* present one such means. However, the primary climate law in the UK, *The Climate Change* Act still fails to provide a robust response to corporate carbon emissions owing to its endorsement of a self-reporting requirement. Additionally, it is constrained by the fact that its provisions largely do not carry a legal imperative and is more of best endeavour legislation. Mark Stallworthy makes this point and discusses the challenges in trying to legislate such a complicated area as climate change.[31] Peel and Osofsky note that this complication ties into the multi-level and multi-scalar nature of climate change and argue that the inadequacies of legislation and international treaties to regulate climate change have emphasized the role of climate litigation as an important complementary regulatory regime.[32]

Anita Foerster notes the potency of climate change litigation. She writes that "Strategic climate change litigation can help to establish, recognize or clarify legal responsibilities for certain

[31] Mark Stallworthy, "Legislating against Climate Change: A UK Perspective on a Sisyphean Challenge." (2009) 72:3 Mod L Rev 412

[32] Hari M Osofsky & Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?", (2013) 30 Envtl & Planning LJ 303

public and private actors to act in certain ways on such climate change issues. More indirectly, such litigation can also help to shift social norms and public discuss and thereby the decision-making of both public and private actors, including by pressuring governments to introduce new laws and policies to address climate justice and responsibility." [33] The role of climate change litigation and the interaction of various jurisdictions in regulating climate change through litigation is discussed extensively in the work edited by Ivano Alogna, Christine Bakker and Jean-Pierre Gauci[34] as well as in the various collaborations between Peel and Osofsky and Peel and Lin.[35] Also, a review of some decided cases including the cases of *Native Village of Kivalina v ExxonMobil*[36], *Milieudefensie et al. v Royal Dutch Shell Plc.*[37], *Luciano Lliuye v RWE AG*[38], *Amis de la Terre and Sherpa v Perenco*[39], *and Re Greenpeace Southeast Asia* case[40] help us contextualize the place of climate litigation as an avenue for norm-setting and shaping the emergent legal regime that is climate change.

The various authors writing on the regulatory potential of climate litigation, however, rarely examine the important place of context, legal realism and the subjectivity of rights claims that characterizes litigation generally. They rarely interrogate how the Global North is shaping the

[33] Anita Foerster, "Climate Justice and Corporations" (2019) 30:2 King's LJ 305 (doi: 10.1080/09615768.2019.1645447).
[34] Ivano Alogna et al, *Climate Change Litigation: Global Perspectives*, 1st ed. (Leiden, Netherlands: Koninklijke Brill NV, 2021)
[35] Jacqueline Peel & Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, (Cambridge University Press, 2015). Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South", (2019) 48 AJIL 679
[36] *Native Village of Kivalina v ExxonMobil Corp*, 663 F Supp (2d) 863, 868 (ND Cal 2009) [Kivalina District Court]
[37] *Milieudefensie etal. V Royal Dutch Shell Plc* (2021), Case No C/09/571932 / HA ZA 19-379 Hague District Court (The Netherlands), online: <climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>
[38] *Luciano Lliuya v. RWE AG*, Case No. 2 O 285/15 (2015), Case No 2 O 285/15 Essen Regional Court (Germany), online: <climatecasechart.com/non-us-case/lliuya-v-rwe-ag>.
[39] *Amis de la Terre and Sherpa v Perenco* (2022), Appeal No 20-22.444 Cour de Cassation (France), online: <climatecasechart.com/non-us-case/amis-de-la-terre-and-sherpa-v-perenco/>
[40] *In Re Greenpeace Southeast Asia & Ors*, (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>

emergent legal regime that is climate change by the central position that writings and case law from the Global North occupy in this regulatory assignment relative to the Global South. Setzer and Vanhala merely lay out this uneven position between the Global North and South without discussing the implications of the marginalization of Global South contributions as the emerging legal regime on climate change through litigation is couched.[41] James Gathii, utilizing a TWAIL approach writes that the marginalization of Global South voices is never by accident but is the norm when any international legal regime is being developed. He notes that international law marginalizes Global South voices in their natural order of evolution.[42] Stephen Krasner further develops the argument on the politics of international law and the dynamics of its creation[43] while Duncan Kennedy and Oliver Wendell Holmes help us understand the place of politics and context in court decisions which go on to shape case law on various subject matters.[44]

To a great extent, the reason for marginalization of Global South voices is tied to perceived issues of legitimacy of court decisions from the Global South which borders on issues of partiality, weak adjudicatory structures, incapacity of legal personnel, poor understanding and application of international law norms, a developing legal regime etc. The case of *Ecuador v Chevron*, previews these issues. It shows very intricate and intractable challenges that come with litigating transnational environmental claims against a carbon major company in the Global South. Manuel

[41] Joana Setzer & Lisa C. Vanhala, "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance", (2019) 10 Wires Climate Change 1
[42] James Thuo Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 Am U Intl L Rev 377.
[43] Stephen Krasner, "Realist Views of International Law." (2002) 96 American Society of International Law 265
[44] Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in *Left Legalism/Left Critique*, Wendy Brown and Janet Halley (New York, USA: Duke University Press, 2002) 178-228.

Gómez in his work, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador"[45] reviews the *Ecuador v Chevron* case and notes that:

> Because litigation does not occur in a vacuum but rather in a context affected by social, economic, and political realities, the effective compliance with a court judgment is also influenced by a number of external factors… Other non-party stakeholders including government officials, non-governmental organizations, and members of the private sector will also play a role in influencing the outcome of large-scale complex cases.

A collage of the issues in the *Ecuador v Chevron* case shows the challenges faced by domestic courts, particularly in the Global South. Gómez restricted himself to a review of the case and the challenges, however, and did not point to a way to remediate the situation. This research would seek to create an adjudicatory system that standardizes justice and largely addresses the challenges that attend the adjudication of transnational climate and environmental disputes in the Global South. This would also solve the ancillary problem of shipping adjudication of disputes involving corporations to the Global North, fueled by the concern that Global South courts are unable to ensure access to justice in tangible terms and in all its ramifications.[46] The proposition is to adapt a hybrid court system, one that is able to mainstream Global South voices while addressing the identified challenges.

A hybrid court system would ensure the rights of the aggrieved individuals to institute actions in courts within their reach, thereby expanding access to justice as well as the place of litigation as conversation. The extensive jurisdiction of the court framed both under national and international laws as well as access to experienced personnel will solve the question of conflict of laws, partiality

[45] Manuel A. Gomez, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429 (<law.stanford.edu/wp-content/uploads/2018/05/gomez.pdf>)

[46] Rufus A. Mmadu, "Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel" (2013) 2:1 J Sustainable Dev L & Pol'y 149 (<ajol.info/index.php/jsdlp/article/view/122606>)

of experts and adjudicators as well as ensure standardized notions of justice, and objective outcomes.[47] The question of enforcement of judgments can also be taken care of under the auspices of the United Nations, involved in the courts' creation - thereby strengthening the confidence of claimants in the climate litigation process. Jane Stromseth in her work, "The International Criminal Court and Justice on the Ground*,"*[48] chronicles the evolution of international criminal justice and notes that hybrid courts were a response to the criticisms against International Criminal Tribunal for Rwanda and Yugoslavia being too far away from the victims. Paul Seils[49] agrees with Stromseth on the benefit of justice closer to home. Being closer to home, a hybrid court is able to drive norm integration and take into consideration Global South contexts. In "Justice Should Be Done, But Where? The Relationship Between National And International Courts", Laura Dickinson references the creation of the crime of forced marriages by the Special Court in Sierra Leone to explain the capacity of hybrid courts to "create a space not only for top-down incorporation of international law but also for norms to percolate "upwards".[50] I consider this an example of the potential of hybrid courts to infuse voices of the Global South into the conversation on transnational climate change justice while also redressing the challenges and weaknesses that obtain in the local systems of the Global South.

To understand the architecture of hybrid courts, Suzannah Linton's "New Approaches to International Justice in Cambodia and East Timor"[51] proves very useful. Linton notes that hybrid

[47] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the legacy of hybrid courts,* (New York, NY: United Nations Publication, 2008).
[48] Jane Stromseth, "The International Criminal Court and justice on the ground" (2011) 43:2 Ariz St LJ 427
[49] Paul Seils in "Justice Should be done, But Where? The Relationship between National and International Courts." (2007) 101 Am Soc'y Intl L Proc 289 (http://www.jstor.org/stable/25660207)
[50] Laura Dickinson in "Justice Should be done, But Where? The Relationship between National and International Courts." (2007) 101 Am Soc'y Int'l L Proc 289 at 299 (http://www.jstor.org/stable/25660207)
[51] Suzannah Linton, "New approaches to international justice in Cambodia and East Timor" (2002) 84:845 Int'l Rev Red Cross 93.

courts or internationalized domestic tribunals "are not ad hoc international tribunals as those created by the Security Council under Chapter VII of the United Nations Charter nor are they regular domestic courts. They can be seen as the product of partnerships between the state concerned and the United Nations, which has a considerable input into the design and structure of the court".[52] It is noteworthy that international support in terms of personnel and materials are extended to these courts and the applicable laws are that of the state, international laws and UN-state Memorandum of Understanding. Laura Dickinson further writes on the important promise hybrid courts hold as the most recent creative and adaptive option in transitional justice in her work "The Promise of Hybrid Courts".[53] She notes that this emerging mechanism for justice delivery holds great promise for ensuring accountability. She describes the apparatus and applicable laws as being a blend of international and domestic laws with domestic laws reformed to accord to international standards and local judges sitting with their foreign counterparts to deliver justice.

This research will review various hybrid court systems with a view to harnessing the promise of hybrid courts, contemplate the weaknesses of such a court and modify the system to make it adapted for the settlement of transnational environmental and climate change claims. Thus, ensuring that the ubiquitous impact of climate change, particularly in poor countries with weak systems, is adequately addressed and compensation provided to the most vulnerable populations. This is in addition to influencing discussions that drive policy changes and shaping the emergent legal regime on climate change.

[52] *Ibid*
[53] Laura A Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am U J Int'l L 295 (doi:10.2307/3100105)

CHAPTER ONE

Evaluating Climate Change and the Politics of Climate Change Response

> *In the remote village of Fandiova, in Amboasary district (Madagascar, Africa), families recently showed a visiting WFP team the locusts that they were eating. "I clean the insects as best I can but there's almost no water," said Tamaria, a mother of four, who goes by one name. "My children and I have been eating this everyday now for eight months because we have nothing else to eat and no rain to allow us to harvest what we have sown," she added.*
>
> *"Today we have absolutely nothing to eat except cactus leaves," said Bole, a mother of three, sitting on the dry earth. She said her husband had recently died of hunger, as had a neighbor, leaving her with two more children to feed. "What can I say? Our life is all about looking for cactus leaves, again and again, to survive".*[54]

1.1 Contextualizing Climate Change

The above excerpt from reporting by the BBC on Madagascar's climate change-induced famine helps us contextualize the challenges of climate change and perhaps provides a response to the discounting that seems to dominate interaction with the concept.[55] As many as 63% of Americans think climate change is an issue for future generations, driving the (mis)conception that it is an abstract consideration rather than a present problem with real-life implications.[56] This view is not just an American view but is largely held by people of various backgrounds and circumstances and explains the lull in the sense of urgency that should attend the issue. Such that, although climate change has been described severally, as an "existential threat", the response has not measured up.

Perhaps the heft of this view is contributed to by the absence of a widespread, coordinated and immediate devastation on a global scale that may be attributed to climate change. Maybe if whole

[54] Andrew Harding, "Madagascar on the Brink of Climate Change-induced Famine", *BBC News* (2021) <bbc.com/news/world-africa-58303792>
[55] Naomi Klein, *This Changes Everything: Capitalism vs. The Climate*, (Toronto: Simon & Schuster, 2014)
[56] Michael P Vandenbergh & Kaitlin T. Raimi, "Climate Change: Leveraging Legacy" (2015) 42:1 Ecology LQ 139

sections of cities and towns are wiped away by climate change-induced phenomena in a coordinated fashion, the dangers would crystallize. However, that this has not happened, at least on a coordinated scale, does not detract from the fact that climate change is wreaking enormous havoc even now on our world. According to contributions by Working Group II to the Intergovernmental Panel on Climate Change Assessment Report released on February 27, 2022, "Climate change has already altered terrestrial, freshwater and ocean ecosystems at global scale, with multiple impacts evident at regional and local scales… Impacts are evident on ecosystem structure, species geographic ranges and timing of seasonal life cycles (phenology)."[57]

The Report assigns varying confidence levels in attributing adverse impacts in assessed locations to climate change. It assigned a 'very high confidence level' to climate change having adverse effects on the physical health of people globally as well as the mental health of people in Asia, Europe, North America, and the Arctic. It assigned 'high confidence' to climate change having an adverse effect on human health, livelihoods and key infrastructure in urban settings.[58] It also noted with 'high confidence' that climate change has led to an intensification of heatwaves in cities, aggravated by air pollution events and limited functioning of key infrastructure.[59] In the case of direct human impacts, the Report notes with 'high confidence' that "climate change is contributing to humanitarian crises where climate hazards interact with high vulnerability. It shows that:

> "Climate and weather extremes are increasingly driving displacement in all regions, with Small Island States disproportionately affected. Flood and drought-related acute food insecurity and malnutrition have increased in Africa and

[57] Intergovernmental Panel on Climate Change, "Climate Change 2022: Impacts, Adaptation Vulnerability" (2022), online: <www.ipcc.ch/report/ar6/wg2>
[58] See also: Angela Di Ruocco, Paolo Gasparini, and Guy Weets, "Urbanisation and Climate Change in Africa: Setting the Scene" in S. Pauleit et al, *Urban Vulnerability and Climate Change in Africa: A Multidisciplinary Approach* (Switzerland: Springer International Publishing, 2015)
[59] *Supra*, note 57

> Central and South America. While non-climatic factors are the dominant drivers of existing intrastate violent conflicts, in some assessed regions extreme weather and climate events have had a small, adverse impact on their length, severity or frequency, but the statistical association is weak (medium confidence). Through displacement and involuntary migration from extreme weather and climate events, climate change has generated and perpetuated vulnerability (medium confidence)."[60]

Translating these assessments to on-the-ground implications, Oxfam chronicles only five of the natural disasters that beg for climate action. The list includes Cyclones Idai and Kenneth in 2019, which cost more than a thousand lives across Zimbabwe, Malawi and Mozambique as well as wiped out the livelihood of millions. Cyclone Kenneth's reach touched some areas of northern Mozambique, not before hit by tropical cyclones since the start of satellite recordings.[61]

Also on the list is the Australian wildfires which blazed through more than 10 million hectares in early 2020 against the backdrop of the country's hottest year on record. The blaze killed more than 28 people, razed entire communities, destroyed the homes of thousands of families and caused the killing of more than a billion native animals as well as extinguished some species and ecosystems.[62]

The East African drought has been linked to climate change which has caused higher sea temperatures. Severe droughts in 2011, 2017 and 2019 have repeatedly wiped-out crops and livestock, leaving 15 million people in Ethiopia, Kenya and Somalia in need of aid. Millions of

[60] *Ibid*
[61] Oxfam International, "5 natural disasters that beg for climate action", (2021) online: https://www.oxfam.org/en/5-natural-disasters-beg-climate-action.
[62] *Ibid.* The Australian wildfires were inextricably linked to climate change by scientific study, see Andrew J. Dowdy, "Climatological Variability of Fire Weather in Australia", (2018) 57:2 J Appl Meteorol Climatol 221

people are facing acute food and water shortages as a result of extreme climate and weather conditions.[63]

The floods and landslides in South Asia have forced 12 million people from their homes in India, Nepal and Bangladesh. The intensity of these natural disasters has increased dramatically over the years with records showing the worst flooding in 30 years in certain areas, including a third of Bangladesh being buried underwater with monsoon rains. Scientists describe the unusual monsoon rains as being intensified by rising sea surface temperatures throughout South Asia.[64]

In Central America, drought has become prolonged, lasting for years on end. Guatemala, Honduras, El Salvador and Nicaragua are seeing prolonged dry seasons leading to crop failure and causing a humanitarian crisis. More than 3.5 million need humanitarian assistance while about 2.5 million people are food insecure.[65]

These are major disasters that call for concern and require the full might of governments across the board to articulate tangible policies towards addressing the issue. It is then pertinent to consider government policies toward addressing climate change and mitigating its impacts, bearing in mind its far-reaching implications for humanity. This chapter will review the national

[63] *Ibid.* Angela Di Ruocco et al, notes that 90% of African cities with at least one million inhabitants are exposed to natural disasters exacerbated by climate change. See Angela Di Ruocco, Paolo Gasparini, and Guy Weets, "Urbanisation and Climate Change in Africa: Setting the Scene" in S. Pauleit et al, *Urban Vulnerability and Climate Change in Africa: A Multidisciplinary Approach* (Switzerland: Springer International Publishing, 2015)
[64] *Ibid.* Rathan Lal et al, notes that Bangladesh and other coastal regions may be soon displaced by rise in sea level. The authors profer solutions including l and use and soil/water/crop/vegetation management practices which would enable land managers to adapt to climate disruption by enhancing soil/ecosystem/social resilience including the place of politics for effective action. See Rathan Lal et al, *Climate Change and Food Security in South Asia* (Netherlands: Springer International Publishing, 2011)
[65] *Ibid*

laws and policies of selected countries in a bid to gauge the effectiveness of government response and the constraints to a robust climate change action, including corporate interference in the regulatory process. I will demonstrate that the shortcomings of government regulation have implications for international climate change response and suggest that climate litigation proves an important complementary tool.

1.2 Interrogating National Policies on Climate Change

Governments acting in concert under the auspices of the United Nations have sought ways to dial back the levers to climate collapse.[66] These efforts are represented in various treaties and conventions as well as the various agreements and institutional frameworks set up to ensure a more sustainable climate. In the national sphere, efforts have also been made to cut down on carbon emissions and promote renewable energy as well as many such policies directed toward climate sustainability.

Notwithstanding these initiatives, the effectiveness and even sincerity of the efforts are issues for serious contemplation and debate; in any case, they have proven insufficient to meet the moment. Various writers have varying opinions on the reasons for the shortcomings of government intervention. Authors like Naomi Klein, Carmen Gonzalez, and Christopher Nyelberg have all pointed to capitalism as the culprit. Naomi Klein notes that "we have not done the things that are necessary to lower emissions because those things fundamentally conflict with deregulated capitalism, the reigning ideology for the entire period we have been

[66] An example of such efforts is the UN Framework Convention on Climate Change (UNFCCC) and the various conference of the parties under it, including COP21 yielding the Paris Climate Agreement. United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement*, 21st Conference of the Parties, 15 December 2015, 3156 UNTS 54113 (entered into force 4 November 2016) online: <unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>

struggling to find a way out of this crisis".[67] Estrin and Ferreira note that "the greatest barriers to global climate action can be attributed to the domestic politics of climate policy reform".[68] The argument is that the politics and ensuing policies have mostly been hijacked by corporations with interests to protect under a capitalist economic ideology.

Scholars sympathetic to the current governmental approach, on the other hand, argue that switching to climate-responsible behaviour at the scale and pace required could be costly and would "require changes in living standards which most people will not accept".[69] The argument has tilted towards incremental behaviour that could one day add up to manageable emission levels. But even the gradual phasing down or phasing out that is projected towards getting to a net emissions target is currently not on course and continues to be undermined by powerful lobby groups and corporations. [70] The corporate political activity that sees an interference with the process of legislation and policy formulation has undoubtedly influenced the direction and even effectiveness of climate change laws.

To demonstrate this, I briefly review some of the national laws and policies regulating corporate carbon emissions in four states in the Global North. Specifically, I have selected the United Kingdom, the United States, and Canada and compare these jurisdictions with what obtains in the Netherlands. The choice of the United States is obvious as it is a top emitter of

[67] Naomi Klein, *This Changes Everything: Capitalism vs. The Climate,* (Toronto: Simon & Schuster, 2014).
[68]David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change" (2020), online: <10.2139/ssrn.3559045.>
[69]Adair Turner, "Is capitalism incompatible with effective climate change action?", (03 September 2019) *World Economic Forum*, online: <weforum.org/agenda/2019/09/is-capitalism-incompatible-with-effective-climate-change-action/>
[70] *Ibid*

Carbon Dioxide (CO2).[71] The choice of the United Kingdom is in a bid to feel the policy and legislative pulse of a country with one of the earliest climate change laws that have formed a model for several other national laws on climate change.[72] How has this apparently progressive and early effort translated into the regulation of corporate carbon emissions? Reviewing Canada's climate policy is necessary to not only understand the climate response of the country where this research is written but also to gauge the climate response of a middle power, particularly one that has climate change as a central political issue, as well as a top emitter of GHG. I compare the approach of these countries with that of the Netherlands, a country which has proved a very progressive site for climate sustainability decisions.

By reviewing the laws of these countries as it pertains to the regulation of climate change, I will be demonstrating that the inadequacy of legislation in curtailing corporate carbon emissions highlights the supplementary role of the courts. The countries I have selected are industrialized nations with corporations that rely intensively on energy production and use and consequently carbon emissions to thrive. The energy requirements of these countries, together with other G20 countries contribute largely to propelling global carbon emissions to unacceptable levels. Indeed, the poorest 45% of humanity generated 7% of the CO2 emissions in the 21st century while the richest 7% generated 50%.[73] It is only prudent to focus on interrogating the extent to which industrialized nations of which the selected countries belong are able to regulate climate change through legislation. I argue that legislation alone will not be

[71] Sean Fleming, "Chart of the Day: These Countries create most of the World's CO2 Emissions*", World Economic Forum* (07 June 2019), online: <www.weforum.org>. Although China and India represent high carbon dioxide emitting nations as well, I focus, however, on the Global North as they are most responsible for climate change asides these outliers.
[72]Alina Averchenkova, Sam Fankhauser & Jared J. Finnegan, "The impact of strategic climate legislation: evidence from expert interviews on the UK Climate Change Act", (2020) 21:2 Clim 251
[73] Carmen Gonzalez, "Climate Change, Race and Migration", (2020) 1:1 J Polit Econ 109

able to drive climate change regulation as the laws enacted by governments post-*Paris Climate Agreement* show. This is further demonstrated by the fact that countries are billed to miss the Paris target to limit global carbon emissions to 1.5° Celsius or well below 2° Celsius over the pre-industrial level.[74] This chapter, by interrogating the laws of the selected jurisdictions, aims to highlight legislative failings and, ultimately, point to the complementary regulatory role of the courts. To aid a disciplined interrogation, an examination of the legal framework, the institutional framework and the general policy attitude of the government form the tracks upon which the succeeding enquiry will proceed.

The United Kingdom

The United Kingdom's *Climate Change Act* 2008 (amended in 2019) is considered a very progressive and ambitious piece of legislation. As the primary climate law in the United Kingdom, it aims to realign the economy and civil society towards a low carbon trajectory and has proposed net zero emissions by 2050. To achieve this, the legislation prescribes a duty-based framework that requires compliance with reduction targets set under the Act. There is a statutory duty to set periodic carbon budgets and ensure public reporting and scrutiny concerning levels of progress.[75] It also aims to drive accountability and institutional reforms. The Act in furtherance of these objectives created the Climate Change Committee (CCC) and tasked it with the responsibility to advise and report on compliance with the carbon budgeting process pursuant to Part 2 of the Act.

A review of the goal-setting provisions in sections 1 and 5 of the Act shows an obligatory commitment on the part of the government to ensure net zero emission by 2050. However, the

[74] Stephen Leahy, "Most countries aren't hitting 2030 climate goals, and everyone will pay the price", *National Geographic* (5 November 2019), online: <nationalgeographic.com/>
[75] *Climate Change Act 2008* (UK), c27

strategy for achieving the goals, as well as compliance measures, are left to government policies and does not constitute a statutory imperative. Section 4 of the Act confers on the secretary of state the powers to set a carbon budget for each period of five years and to ensure that the carbon account for each such period does not exceed the budget. The Act does not specify any consequences for exceeding the carbon budget, nor does it impose obligations to comply with the plans and processes necessary for meeting the net zero emissions target by 2050. Thus, while the Act's normative architecture prescribes emissions reductions, it fails to impose an obligatory pathway to meeting the target nor impose consequences for missing the reduction targets. The effect of the foregoing is to leave practical aspects of the Act's implementation to politicians, and in many ways take the matter back to where we all started from – the absence of a statutory duty to cut down on carbon emissions. To compensate for this, the Act's primary path to accountability lies in a mandatory requirement to report to Parliament and to the public.

The foregoing calls into question whether the Act, asides from the appearance of being legally binding legislation is really one, especially considering that its breach does not admit to a challenge in court for executory enforcement. Testimonies before the joint select committee of the House of Lords and Commons noticed this legislative lapse and chide government on the manoeuvre, with one witness admonishing that,

> "Governments should not pretend that they are establishing a legally enforceable regime of carbon emission reductions, thereby falsely laying claim to the credibility and legitimacy which the principle of legality, the cornerstone of the rule of law, confers. Indeed, a more apposite description of duty in such form is more suggestive of 'best endeavours".[76]

[76] Environment, Food and Rural Affairs Committee, Draft Climate Change Bill, Fifth Report, Session 2006-07, HC 534 [85 – 6] in Mark Stallworthy, "Legislating against Climate Change: A UK Perspective on a Sisyphean Challenge," (2009) 72:3 Mod L Rev 412.

This tendency of the Act to hold back from making obligatory and enforceable provisions and relying instead on external interventions also extends to its regulation of corporate carbon emissions. The Act failed to make any concrete regulatory provisions as it pertains to corporations, choosing instead to endorse reporting requirements which are arguably ineffective in curbing corporate carbon emissions. Section 85 of the Act mandates the Secretary of State to "(a) make regulations under section 416(4) of the *Companies Act* 2006 (c. 46) requiring the directors' report of a company to contain such information as may be specified in the regulations about emissions of greenhouse gases from activities for which the company is responsible, or (b) lay before Parliament a report explaining why no such regulations have been made."[77] Section 83 mandates the Secretary of State to publish guidance to aid reporting by relevant entities of their emissions. For carbon major companies which "are responsible for over 30% of global industrial greenhouse gas (GHG) emissions, and arguably control 'the future of the planetary climate system",[78] this sort of regulation by reporting is clearly insufficient to meet climate change mitigation at the scale required. In essence, "they are not compelling or incentivizing carbon majors to reduce their emissions." [79]

The foregoing issues with the Act and its implementation can arguably be described as consistent with the need to protect business interests as well as the social structure that they service.[80] I argue that the legal gaps are present by design and are symptomatic of corporate intervention in the political process that yields regulation. The history of regulation is replete with

[77] *Supra*, note 75
[78] Richard, Heede, "Tracing the Anthropogenic Carbon dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854 – 2010" (2014) 122:1 Climatic Change 229.
[79] Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?" (2016) 5:2 Transnational Environmental L 353 (doi:10.1017/S2047102516000194)
[80] *Supra*, note 73

examples of collusion between the political and business class and this frequently produces the kind of results seen with the *Climate Change Act*. Lisa Benjamin notes that "regulation is a political outcome, resulting from a negotiated process. Regulation can be exploited either at its formative stage through powerful lobbying groups which can act on behalf of companies, or at its post-enactment stage, through lack of monitoring and enforcement".[81] Thus, the regulatory and enforcement gaps which remain in UK climate laws, including the *Climate Change Act*, continue to undermine what would have been a truly progressive champion of climate sustainability. The effect of these shortcomings is that the UK is on track to miss its 4th and 5th carbon budgets (2023-2027 and 2028-2032), with many stakeholders responding in the empirical study conducted by Averchenkova et al doubting that the institutional machinery created by the Act will be enough to close the gap.[82]

For all its shortcomings, however, it is impressive that the UK is at least making as much effort as it is towards tackling its carbon emissions. Greater focus needs to be paid to the top global emitters, such as the United States and China to determine the extent of their contribution to dialling back on climate change. In this light, I now review the climate laws and policies of the United States to find out where the second largest emitter of carbon dioxide stands in its efforts to curb its carbon emissions.

The United States

The state of climate change legislation in the United States is best described by Rebecca Tuhus-Dubrow. She notes that "in a sense, efforts to regulate greenhouse gases are arguably still

[81] *Supra*, note 79
[82] Alina Averchenkova, Sam Fankhauser & Jared J. Finnegan, "The impact of strategic climate legislation: evidence from expert interviews on the UK Climate Change Act", (2020) 21:2 Clim 251

relying on Congress. But they're relying on the Congress of the 1970s, when environmentalism was an enormously popular bipartisan cause, and when the chambers were not as polarized".[83] Keel notes that "it would be an understatement to say the USA has struggled with national solutions to climate change."[84] The present fracture and inability to agree on climate change is a result of denial about its full import by certain aspects of the society, which in many ways is fueled by political ideology and sharp partisanship on one hand, and the effect of corporate political activity on the other. Through campaign financing and intense lobbying, as well as manipulation of public opinion utilizing several means, including intense marketing, newspaper op-eds, 'astroturfing' and funnelling funds through political action committees and Super PACs, and the so-called dark money in politics, corporate interest is perpetuated.[85] And the result is there for all to see, represented in political logjams in Congress as well as the sharp polarisation of the American people between red and blue states and with it, segments of the conversation. In 2015 with a Democrat president in the White House and a Republican-led Congress, there were four bills to put a price cap on carbon emissions and there were seven bills to undercut the Environmental Protection Agency's ability to regulate greenhouse gases. These efforts gained steam and got even more aggressive with the election of Donald Trump to the Presidency.[86] Even the judiciary is not spared the ideological divergence. Keele following an empirical analysis of climate cases filed

[83]Rebecca Tuhus-Dubrow, "Climate Change on Trial", (2015) 62:4 Dissent 152, online: <doi.org/10.1353/dss.2015.0087>. Dissent is a publication of the University of Pennsylvania Press.
[84] Denise M. Keele, "Climate Change Litigation and the National Environmental Policy Act", (2017) 30:2 J. Environ. Law 285
[85] Christopher Wright and Daniel Nyberg, *Climate Change, Capitalism, and Corporations* (Cambridge: Cambridge University Press, 2016)
[86] President Trump's 'Energy Independence' Executive Order, signed in March 2017 dismantled the Clean Power Plan of 2015. The Plan had set state-by-state targets for carbon emissions reductions as well as a roadmap to lower national electricity sector emissions overall by 32% below 2005 levels by 2050.

before District Courts concluded that judges appointed by Democratic presidents tended to rule in favour of climate change than those appointed by a Republican one.[87]

To compensate for the absence of comprehensive federal legislation specifically tailored to climate change, recourse is made to state laws, EPA regulations, executive orders, funding bills[88], and court actions by litigants seeking an expansive interpretation of existing environmental laws passed in the 70s.[89] The extant laws include the *National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Endangered Species Act (ESA)*. The broad language of these laws has proven vital to supporting present challenges mounted before the courts to ensure remediation. And the fact that it allows for "citizen suits" ensures that ordinary citizens may sue for its enforcement without the need to demonstrate personal injury as would ordinarily be required for 'standing'.[90] The broad language of the law and the inclusion of unfettered access to the court has seen some scholars argue that they can

[87] *Supra*, note 84

[88] In August, 2022, Democrats in Congress passed the Inflation Reduction Act aimed at amongst other things providing funding for climate change. The bill which has been sent to the House of Representatives aims at allocating "billions of dollars to expand wind and solar power production, bring electric vehicles closer to the financial reach of more Americans and make $1.5 billion available to oil companies cut down their greenhouse gas emissions and penalize them for failing to do so. And it would help develop technologies such as carbon capture and sequestration, hydrogen and small nuclear reactors that experts say will be needed to get the U.S. to net-zero emissions by 2050, a level scientists say is necessary to prevent catastrophic climate change. It would devote $4 billion to help address an imminent disaster for the southwest as climate change-fueled drought threatens power and water supplies for 40 million people along the Colorado River." See Ben Lefebvre, Kelsey Tamborrino and Josh Siegel, "Historic climate bill to supercharge clean energy industry", *Politico* (August 7, 2022) online: <politico.com/news/2022/08/07/inflation-reduction-act-climate-biden-00050230>

[89] *The National Climate Program Act*, 1978, *The Global Climate Protection Act* 1987 are not substantive legislations to the extent of requiring mitigation efforts or responding to climate change as contemporarily required. They merely established an information collection and coordination strategy as it pertains to climate change. See Jacqueline Peel & Hari M. Osofsky, "Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia" (2013) 35:3 Law & Pol'y 150.

[90]David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change" (2020), online: <10.2139/ssrn.3559045>.

comfortably ground climate change litigation as well. They argue that we already have potent laws on the books and that what "we need [is] the political will to actually implement it."[91]

However, as expansive and necessary tools as they might be, the existing environmental laws are what they are, environmental laws. The laws were not specifically designed to tackle climate change and as Michael Gerrard of the Sabin Center for Climate Change notes, the *Clean Air Act* is designed to better regulate proposed power plants rather than existing ones.[92] Additionally, regulations made further to the existing laws may be reversed by future presidents or successfully challenged before an overwhelmingly conservative majority on the Supreme Court as happened in the case of *West Virginia v EPA.*[93] In this case, the state of West Virginia together with several corporations challenged the powers of the EPA to make the Clean Power Plan (CPP) which sought to cap carbon dioxide emissions from electricity generation. The claimants contended that the agency exceeded its powers to make regulations under section 111 of the *Clean Air Act*. In a 6-3 decision, the majority conservative Supreme Court relied on the "major question" doctrine to reverse and remand the CPP on the basis that it was up to Congress to make any such far-reaching regulations, not the EPA. This finding supports the argument for specific climate change laws rather than reliance on agency intervention.

Furthermore, the transnational nature of climate change and the constraints to litigating climate change including issues of standing, displacement, *de minimis* argument, and the political doctrine question - issues which will be addressed in the next chapter - all point to the need for a

[91] *Ibid*
[92] Michael B. Gerrard and Jody Freeman eds, *Global Climate Change and U.S Law* (Chicago, IL: American Bar Association, Section of Environment, Energy, and Resources, 2014)
[93] *West Virginia v EPA et al*, 985 F (3d) 914 (US 2022), online: <supremecourt.gov/opinions/21pdf/20-1530_n758.pdf>

dedicated climate Act in the United States. The chances of this happening, however, at least soon, is difficult to imagine and the reason is very clear – vibrant corporate political activity.

The United States has enormous influence in the world and its leadership is central to making progress on this issue on the scale required. Its inability to address legislative gaps at home when it comes to climate change seems to be something that would continue for a long time, insofar as corporate money continues to find its way into its politics. For context, in the 2020 election cycle, Chevron shelled out about $4.9 million dollars in spending to "support the election of candidates who believe, like we do, in the value of responsible oil and natural gas development and organisations and measures that are aligned with our business interests".[94] With such involvement in the election process, the capitalist interest of the corporate actors will continue to influence the laws and policies of the government. Considering the antecedents of carbon majors, there are few reasons to believe that their interests will be compatible with any serious climate action enough to meet the demands required for progress on the issue. Yet, there is hardly any room for this kind of ambiguity as it relates to climate change response bearing in mind the steep challenges it poses. Government policies should be clear on the subject. Hence, it is particularly important that the US get on course and consequently lead the world on the issue of climate change.

Canada

Climate change and climate change response is a central issue in Canadian political culture, with almost every political party recognizing it as an election matter for Canadians. It is reflected in government actions, including enshrining its Nationally Determined Contribution (NDC) and

[94] Statement from Chevron's spokesman Sean Comey reported by Reuters. Liz Hampton, "U.S. Oil Majors pitch more Campaign Cash to Democrats as Frack Battle Looms", *Reuters* (16 October 2020), online: <reuters.com/article/us-usa-election-oil-donors-idUSKBN27116P>

other commitments to the *Paris Climate Agreement* into law – the *Canadian Net-Zero Emissions Accountability Act* (the Act). The Act legislates attaining net-zero emissions by 2050, targets the reduction of greenhouse gas emissions to 40-45% below 2005 levels by 2030 and requires the minister of environment to set subsequent targets for 2035, 2040 and 2045 in keeping on the path to net-zero.[95]

In addition to the Act, the government has also put in place numerous other laws and regulations aimed at policing carbon emissions from corporations, including the *Greenhouse Gas Pollution Pricing Act* (GHGPPA). The Act implements the federal government's pollution pricing system based on fuel charges and an output-based pricing system.[96] The output-based pricing system requires facilities to pay a carbon price if their emissions exceed 50,000 tonnes or more of CO2 while the fuel charge imposes a $50 cost per tonne from 2022. The Act allows provinces to set up their own carbon pricing system or be regulated under the GHGPPA.[97] The Act and the carbon pricing system that it implements are expected to deliver a reduction of about 80-90 MT of carbon emissions in 2022.[98]

Although there have been debates about the effectiveness of carbon pricing systems, Medhora and Panezi argue that they work, even if within smaller settings. The authors note that "after being tested for almost a decade, the ongoing efforts of American States and Canadian provinces to tax

[95] *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c22, Section 7
[96] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c12
[97] The provinces and territories have put in place regulations or laws to that effect including Ontario's Emissions Performance Standards (EPS), New Brunswick's Output-Based Performance System (OBPS), and Saskatchewan's Management and Reduction of Greenhouse Gases Act, amongst others. Manitoba's Greenhouse Gas Pollution Pricing Act was rejected for being insufficient.
[98] Environment and Climate Change Canada, "Estimated impacts of the Federal Carbon Pollution Pricing System" (2018) online: < canada.ca/en/services/environment/weather/climatechange/climate-action/pricing-carbon-pollution/estimated-impacts-federal-system.html>

carbon emissions have demonstrated that carbon taxes are not detrimental to the local economies where these taxes are imposed".[99]

Notwithstanding these excellent prospects, however, Canada's oil sands facilities alone continue to present an enormous source of greenhouse gas emissions and pollute the atmosphere more than crude oil production.[100] It will require significant changes to be made to the oil industry if the country is to meet its target, especially as the oil and gas industry contributes the highest GHG to Canada's carbon emissions records. In 2020 the oil industry accounted for 27% of Canada's carbon emissions, and between 1990 and 2020 emissions from the sector increased by 74%.[101] Also, during the same period, crude oil production more than doubled in Canada with GHG emissions from oil sands increasing by about 437% compared to the 4% increase from conventional oil production[102] All these raise the prospects of Canada missing its emissions reductions targets as agreed under the *Paris Climate Agreement,* now codified in the *Canadian Net-zero Emissions Accountability Act*. Bakx and Seskus note that the Canadian government has a track record of setting ambitious targets and falling short in its implementation.[103]

The foregoing state of affairs is obviously not aided by the decision of Ontario's provincial government to cancel the carbon cap and trade program and replace it with the less stringent provisions in the *Cap and Trade Cancellation Act,* 2018.[104] This Act was the subject of litigation

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[99] Rohinton Medhora & Maria Panezi, "Will the Price Ever Be Right: Carbon Pricing and the WTO" (2018) 10:1 Trade L & Dev 19

[100] Stephen Leahy, "Most countries aren't hitting 2030 climate goals, and everyone will pay the price", *National Geographic* (5 November 2019), online: <nationalgeographic.com/>

[101] Environment and Climate Canada, "Greenhouse Gas Emissions" (2022) online: <canada.ca/en/environment-climate-change/services/environmental-indicators/greenhouse-gas-emissions.html#oil-gas>

[102] *Ibid*

[103] Kyle Bakx, Tony Seskus, "For Canada, meeting its current climate targets will be complicated and expensive", *CBC News* (27 October 2021) online: <cbc.ca/news/business/bakx-climate-goals-cop26-canada-1.6221958>

[104] *Cap and Trade Cancellation Act*, SO 2018, c13

in the case of *Mathur et al. v. Her Majesty in Right of Ontario*.[105] The Applicants, in this case, sought declaratory and mandatory orders relating to Ontario's target and plan for the reduction of greenhouse gas ("GHG") emissions in the province by the year 2030. The Applicants argued that Ontario's target is insufficiently ambitious and that Ontario's failure to set a more stringent target and a more exacting plan for combating climate change over the coming decade infringes the constitutional rights of youth and future generations.[106] In response, the government raised several legal arguments, including the justiciability question in asking the court to strike the suit.

The argument of the provincial government is apt in demonstrating the point I am making in this chapter pertaining to the insincerity of governments when it comes to effective climate change regulation as well as the deliberate designs of laws to limit obligation; highlighting the important complementary role of climate litigation. The provincial government argued that the emissions target published in the plan is aspirational and not meant to have the force of law. Particularly, it contended that the targets are

> "an expression of the provincial government's intentions and aspirations" and therefore "not a legal instrument like a statute or regulation". Ontario disagrees with the Applicants' assertion that the Target "governs" the amount of GHG emissions in the province… Ontario further submits that the Target has no legal effect on anyone, as the Target itself does not change the law that governs the burning of natural gases, since there are other statutes, regulations, and policies. Evaluating the Target's merits, therefore, is not a question with legal content, and, on that basis, the Application should be struck. Ontario also contends that the Plan is unlike a statute because it does not have a "fixed and definite meaning" and is unlike a regulation, which is similar to a statute that is enacted by the Lieutenant Governor in Council. The Plan is therefore more like a press release, a speech in the assembly, or a budget presentation. Ontario describes the Plan as essentially a tool "that lays out for the public in detail what the government intends to do."[107]

[105] *Mathur v. Ontario* [2020] ONSC 6918
[106] *Ibid*
[107] *Ibid*

The Applicants on their part argued that the Plan is "law" in that it is "promulgated pursuant to a statutory mandate [the Cancellation Act]". They contend that the Act established targets for the reduction of GHGs and the plan was made pursuant to this requirement. Interestingly, while the court considered the target and plan to carry the force of law for the purpose of judicial review, it however fell short of making a definitive declaration on whether they were "law". The court found that the setting of targets and the making of plans towards achieving the same were justiciable matters as contended by the Applicants, especially if they are argued in connection to Charter rights. Although the substance of the target and plan will now be adjudicated by the courts, this decision on justiciability, and the refusal to accede to the argument about the plan being merely aspirational, demonstrates the gap-filling role of courts as well as their ability to direct regulation of climate change. By overriding what would have been a political manoeuvre aimed at perpetuating a weak legislative approach to climate change regulation, the court centred itself as an important regulatory stakeholder.

The Netherlands

European countries have generally been sensitive to the issues of climate change and have adopted numerous policies, en bloc, to stem climate change. The Netherlands has proved to be an even more progressive champion for climate sustainability as "the Dutch government has a tradition of being a frontrunner in respect of environmental protection within the European Union. In implementing EU laws, the Dutch legislator often used to go beyond the level of protection agreed on a communal level".[108] Living up to this reputation, the Netherlands have enacted several laws geared to environmental protection and climate sustainability. It is working on an impressive legislative project which aims to integrate various aspects of Dutch environmental law, from

[108] Jochem Spaans etal., "The Environment and Climate Change Law Review: Netherlands", *The Law Reviews* (02 February 2022) online: <thelawreviews.co.uk/title/the-environment-and-climate-change-law-review/Netherlands>

zoning and planning to nature protection etc., into a single comprehensive legislation - *The Environment and Planning Act* (*Omgevingswet*).

Specifically, on climate change, the Netherlands in addition to its obligation under the various EU Directives, including the *EU Energy Efficiency Directive 2012/27/EU*, has enacted the *Climate Change Act* which entered into force on September 1, 2019. The Act, a framework legislation, mirrors the law in the UK and Canada as it pertains to making plans and setting emissions reduction targets. It appears that countries are adhering to the same template in enacting climate change laws further to their nationally determined contributions under the *Paris Agreement*. Averchenkova et al note that the UK *Climate Change Act*, as one of the earliest framework legislation influenced the subsequent laws of various other countries.[109] Consequently, the *Climate Change Act* of the Netherlands admit to the same arguments regarding enforceability as I have earlier made concerning framework legislation as the UK CCA. Section 2(1) of the Act sets out its main objective which is to reduce greenhouse gas emission levels by 95 per cent by 2050 (compared with 1990). Subsection 2 enjoins the relevant ministers to aim to reduce greenhouse gas emissions by 49 per cent by 2030 and to make energy production carbon-neutral and fully reliant on renewables by 2050.

In addition to the climate Act, the Dutch government has entered 'the Climate Agreement' with various interest groups towards achieving the goals of the climate Act. "The negotiations

[109] These countries include Finland (*Climate Change Act* 2015), France (*Energy and Climate Law* 2019), Germany (*Climate Protection Law* 2019), Ireland (*Climate Action and Low Carbon Development Act* 2015), Mexico (*General Law on Climate Change* 2012), New Zealand (*Climate Change Response (Zero Carbon) Amendment Bill* 2019), Sweden (*Climate Act* 2017), Canada (*The Canadian Net-Zero Accountability Act* 2021). See Alina Averchenkova, Sam Fankhauser & Jared J. Finnegan, "The impact of strategic climate legislation: evidence from expert interviews on the UK Climate Change Act", (2020) 21:2 Clim 251

were conducted at five so-called 'sector tables', representing the following five sectors: Industry, Electricity, Mobility, Built Environment and Agriculture. Each sector discussed possible measures and delivered a statement on how their sector would achieve the number of megatonnes of greenhouse gases emissions reduction necessary for that sector by 2030 in order to reach the joint 49 per cent reduction target."[110]

While the Dutch legislature in enacting the *Climate Change Act* is not very different in its approach to climate change as the other countries reviewed in this chapter, and while it expected that enforcement of the Act would not be a matter for the courts, the decisions of the Dutch courts in the two landmark cases of *Urgenda Foundation v. State of the Netherlands*[111] and *Milieudefensie et al. V Royal Dutch Shell Plc.*[112] points otherwise. In the two very progressive decisions, the Dutch courts found that the Dutch state and corporations, particularly Royal Dutch Shell Plc. have an obligation to reduce greenhouse gas emissions respectively.[113] The fact that the Dutch courts, especially the Supreme Court, are holding governments and corporations accountable for commitments under the *Paris Climate Agreement*, presents a good example of a country that is getting things right as it pertains to climate change regulation. This is in addition to the various other policies of government such as the climate agreement as well as the country's long-term strategy for climate mitigation.[114] More importantly, there are measurable results of progress as

[110] Veen, Gerrit van der & Kars de Graaf. "Climate Litigation, Climate Act and Climate Agreement in the Netherlands" in Martha M Roggenkamp & Catherine Banet, eds, European Energy Law Report XIII, ed (Intersentia, 2020) 457.
[111] *The State of the Netherlands v Urgenda Foundation* (2019), Case No 19/00135 (Supreme Court of The Netherlands)
[112] *Milieudefensie et al V Royal Dutch Shell Plc* (2021), Case No C/09/571932 / HA ZA 19-379 Hague District Court (The Netherlands), online: <climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>
[113] I discuss these cases in the next chapter.
[114] Ministry of Economic Affairs and Climate Policy, "Long Term Strategy on Climate Mitigation: The Netherlands", (December 2019) online: <ec.europa.eu/clima/sites/lts/lts_nl_en.pdf>

the World Bank survey of CO2 emissions (metric tonnes per capita) shows a reduction in levels from 9.9 in 1990 to 8.4 in 2019.

1.3 Evaluating the International Law Response to Climate Change

The ambivalence in the national politics on climate change discussed in the foregoing pages provides insight into the challenges facing a robust international climate response. It is a case of failure of national governance on the issue affecting global response to climate sustainability. Estrin and Galvao-Ferreira note that "addressing climate change is highly dependent upon global cooperation, and yet global cooperation is highly dependent upon the degree of implementation of international commitments at the national level. The greatest barriers to global climate action can be attributed to the domestic politics of climate policy reform."[115] It is thus a catch-22 situation, a cyclical dilemma. Various treaties including the *Paris Climate Accord* are designed to moderate national behaviour, yet the whole point of the effectiveness of the international legal regime rests on the behaviour which it seeks to moderate. This resumes the agelong question of the (im)potency of international law and whether the system can maintain world order outside the whims and caprices of major powers. Realists argue that international law is designed to privilege the powerful, deployed when it would suit their purpose and jettisoned when it inhibits their progress. Stephen Krasner notes that "the self-enforcing equilibria made possible by international law privilege the powerful. They are the ones that set the rules."[116] I argue that insofar as the commitment-based regime remains a definitive feature of international law, no effective climate progress can be made. A view endorsed by Krasner, noting that "it is naïve to expect that a stable international order can be erected on normative principles embodied in international law".[117]

[115] David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change" (2020), online: <10.2139/ssrn.3559045>.
[116] Stephen Krasner, "Realist Views of International Law" (2002) 96 American Society of International Law 265
[117] *Ibid*

It is not a surprise then, that notwithstanding several attempts to tackle the climate change question, including various treaties and Conferences of the Parties, actions necessary to tilt the pendulum in the right direction continue to flounder. From the *UN Framework Convention on Climate Change (UNFCCC)* in 1994 to the *Kyoto protocols*, to the *Paris Climate Agreement* in 2015, to the various Conferences of the Parties (COPs), the committee of nations have been in search of an elusive response to climate change. At the end of the COP26 held in Glasgow Scotland from October 31- November 12, 2021, parties once again made commitments to provide tighter deadlines for updating their plans to reduce emissions. They failed, however, to reach concrete determinations on such substantive issues as the 100 billion dollars a year of support for developing countries to give effect to the *Paris Climate Agreement*. As a matter of fact, the outcome document, the Glasgow Climate Pact, had its language on "phasing out" the unabated use of coal power watered down to read "phase down" instead by China and India.[118]

The prominence given to national interest above the need to protect our climate raises serious climate sustainability questions. An analysis of the 184 pledges made to significantly cut greenhouse gas emissions by 2030 shows that countries are on course to renege on their commitments.[119] China and India, the world's first and fourth biggest emitters are projected to have higher emissions by 2030, and Russia has not bothered to even make a pledge, although it is the fifth highest emitter. The United States as the second largest emitter did not make a sufficient pledge and has in fact sabotaged international efforts on climate change from time to time.[120] It is

[118] United Nations, "COP26: A snapshot of the agreement", (15 November 2021) online: <unric.org/en/cop26-a-snapshot-of-the-agreement/>
[119] Stephen Leahy, "Most countries aren't hitting 2030 climate goals, and everyone will pay the price", *National Geographic* (5 November 2019), online: <nationalgeographic.com/>
[120] Asides the Trump administration almost pulling the US out of the Paris Climate Agreement, the US was also central to the ineffectiveness that dogged the Kyoto Protocol. Michael Zammit Cutajar, UNFCCC Executive Secretary, 1995 – 2002 notes that "Kyoto was a very important political signal … Unfortunately it didn't have its full force because

only in Europe that there seems to be progress in keeping with a sustainable climate commitment.[121] Sir Robert Watson, former chair of the Intergovernmental Panel on Climate Change ruing the impending failure of the *Paris Climate Agreement* to deliver, notes that whilst "we have the technology and knowledge to make those emissions cuts, what's missing are strong enough policies and regulations to make that happen … Right now, the world is on a pathway to between 3 and 4 degrees C (5.5 and 7F) by the end of the century."[122] To compound the situation, it is worth noting that there is currently no international legal regime on corporate carbon emissions, notwithstanding that investor-owned companies rival nation-states in their carbon emissions record.[123]

Consequently, there is a need to develop creative ways to ensure not just climate sustainability but also the protection of the lives and livelihoods of people who are most impacted by climate change. In this case, it is always citizens of the Global South – with the exception of China and India – who have contributed the least to climate change that bears the most brunt of it, owing to limited wherewithal to mitigate and adapt to climate change. To further compound their woes, the need for much-needed capital and the necessity to prop up their weak economies often means that they do not have strong regulations regarding corporate practices within their borders. In many cases, multinational corporations are almost equal to the government and have the capacity to hijack political governance either through unrest or corruption.

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the United States didn't join in… that rejection coloured everything that followed. See Luomi Mari, "Global Climate Change Governance: The Search for Effectiveness and Universality" (2020) online: International Institute for Sustainable Development <jstor.org/stable/resrep29269>.

[121] Stephen Leahy, "Most countries aren't hitting 2030 climate goals, and everyone will pay the price", *National Geographic* (5 November 2019), online: <nationalgeographic.com/>

[122] *Ibid*

[123] Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?" (2016) 5.2 Transnational Environmental L at 353 (doi:10.1017/S2047102516000194)

1.4 Summarizing the position

The inadequacies of national laws and consequently international legal regime on climate change have created a regulatory void, which, especially as it pertains to corporations, has become mostly filled by voluntary self-regulation. The limited effectiveness of government regulation is to a great extent deliberately caused by corporations interfering with the regulatory process as transnational corporations have long favoured self-regulation which is flexible for business rather than mandatory government regulation. Stephan Schmidheiny, founder of the World Business Council, a group formed to increase the influence of corporations in the face of increasing calls for regulation, reportedly pleaded with businesses ahead of the 1992 Rio Summit on Environment and Development, that unless "we promote self-regulation … we face government regulation under pressure from the public".[124]

Asides from self-regulation, consumers have contributed to corporate accountability through the choices they make in terms of products purchased and the companies they invest in; otherwise identified as the sustainable investment movement.[125] This has ignited such conversations as free-market environmentalism as well as mainstreaming carbon emissions reporting and emissions reduction target-setting in line with the *Paris Climate Agreement*. For instance, most companies in Canada are reporting their emissions reduction targets in line with public pressure as well as the demands of the 'social license' to operate. Kagan, Thornton and Gunningham define the social

[124] William Park, "How companies blame you for climate change", *BBC Future* (5 May 2022) online: <bbc.com/future/article/20220504-why-the-wrong-people-are-blamed-for-climate-change>

[125] Purchasing choices and consumer democracy are adding to corporate responsible behaviour. A Unilever market research survey of 20,000 people in five countries found that a third of consumers are concerned with a brand's social and environmental footprint while 21% of people stated that they consider brands that highlight their sustainability credentials on their packaging and marketing. See Unilever Press Release, "Report shows a third of consumers prefer sustainable brands" (4 January 2017) online: unilever.com/news/press-and-media/press-releases/2017/report-shows-a-third-of-consumers-prefer-sustainable-brands/

license to operate as "consisting of various stakeholder pressures on the company" which often will demand emissions reduction from companies.[126] For instance, sustainable investment combines investors' financial objectives with their concerns about environmental, social and governance (ESG) issues.[127] The review of a company's profile to establish its records on climate responsibility is a form of activism which has encouraged the so-called "green stocks". Additionally, climate-conscious investors are realizing the importance of forming Cooperatives that allow their shared interest in a sustainable environment. Co-ops are considered much more democratic in their operations than traditional corporations and the principles guiding co-operatives including concern for sustainable development in the communities where they operate allow for a lot more social than financial considerations.[128] Personal efforts are also being made by an increasingly informed populace, aware of the dangers of continued neglect of a changing climate. Whether it is the work of activists like Radha d'Souza in establishing the Court for Intergenerational Climate Crimes or efforts by volunteers such as Volunteer Ocean Caretakers (VCC) in Kenya, working on clearing plastics from our ocean, such personal efforts are adding to the pool of climate sustenance.

The foregoing are all the little efforts aimed at contributing towards solving a collective challenge. However, these efforts, though commendable, are clearly far from making significant changes on the scale required to alter the climate change trajectory. On the individual efforts to

[126] Kagan, Thornton and Gunningham, "Explaining Corporate Environmental Performance: How Does Regulation Matter?" (2003) 37:1 Law Soc Rev 51 at 76

[127] Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?" (2016) 5.2 Transnational Environmental L at 353 (doi:10.1017/S2047102516000194)

[128] Kenzie Love, "How Co-ops are Responding to Climate Change", *Canadian Worker Co-op Federation* (20 August 2019), online: <canadianworker.coop/how-co-ops-are-responding-to-climate-change/>. The seven principles of cooperatives are as set by the international Cooperative Alliance, the principles may be accessed on <Ontario.coop/co-operative-principles>.

stem climate change, for instance, while this is commendable and has the potential to cause incremental changes which could one day add up, scholars working on the subject warn of the unplanned consequences as well. This includes the potential to create a "disconnect between the severity of the climate crisis versus so much focus on these little actions (like recycling or picking up litter), that not only distract from corporate responsibility, but also don't seem to (make) a difference – it's trying to encourage a feeling of empowerment, but I think it sometimes can actually be disempowering."[129]

Countries and corporations must adopt responsible behaviour at a sufficient scale to effect needed changes. Companies particularly need to be sincere in their efforts towards making their operations eco-friendly. There have been doubts, for instance, concerning the credibility of the various sustainability measures undertaken by companies under stakeholder pressure. Free market environmentalism has been associated with 'greenwashing'; a term used to describe companies misleading the public about their engagement in climate sustainable behaviour. A study by the European Union found that environmental claims on many companies' websites are exaggerated, false and potentially illegal.[130] The incentive to skirt actual climate sustainability actions in favour of messaging and public relations comes down to the point about climate responsible behaviour being incompatible with the profit maximization that underpins the interest of most corporations.[131]

[129] William Park, "How companies blame you for climate change", *BBC Future* (5 May 2022) online: https://www.bbc.com/future/article/20220504-why-the-wrong-people-are-blamed-for-climate-change.
[130] *Ibid*. In the United States, the Massachusetts Supreme Judicial Court on May 24, 2022 ruled that the case against ExxonMobil Corp. for a series of claims including duping "consumers with marketing that suggested some of its gasoline and motor oil products were good for the environment" can go forward. See *Commonwealth v ExxonMobil Corp*, 462 F Supp (3d) 31, 34 (D Mass 2020).
[131] *Ibid.* According to a report from researchers at the London School of Economics, companies which produce "green" goods tend to be less profitable

1.5 Conclusion

The result of the gaps in national laws is that various governments continue to miss out on their climate change targets. Averchenko et al conducting an empirical analysis on the effectiveness of the UK CCA cited concerns about the ability of framework laws to ensure concrete progress on climate policy. The authors noted that "it is an important reason why the UK lacks policy continuity and why the Act is not seen as providing sufficient grounds for investment by the business community."[132] This is problematic as the promise for climate sustainability largely rests with effective government policy which the current reporting requirements and voluntary mechanisms are not able to deliver.

It is gainsaying the point that governments and corporations have the most power and agency to bring about changes on the scale necessary to bring sizable emissions cuts quickly. Corporations having aborted effective government regulation nationally and by implication internationally have resorted to self-regulation, which has been considered ineffective for providing leeway for continued irresponsible climate behaviour. Lisa Benjamin, reviewing the voluntary measures of top carbon major companies as it pertains to sustainability, notes that "there seems to be no concrete connection between CSR initiatives and activities which might direct, or cause, GHG reductions."[133] Clearly, other more effective regulatory tools need to be considered in tackling climate change.

[132] Alina, Averchenkova, and Sini Matikainen, "Climate legislation and international commitments" in Alina Averchenkova et al, *Trends in Climate Change Legislation* (Cheltenham, UK: Edward Elgar Publishing 2017) 193
[133] Lisa Benjamin, "The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?" (2016) 5.2 Transnational Environmental L at 353 (doi:10.1017/S2047102516000194)

I argue that climate change litigation can complement and cover for the shortcomings and inadequacies in legislation, government policies, international commitments and voluntary efforts by corporations. The beauty of utilizing the courts lies in their ability to make decisions based on the particular facts in issue, thus allowing for norm creation that considers the prevailing social contexts. On the other hand, a significant challenge to utilizing a court system in driving regulation lies in procedural rules of activating court jurisdiction in the first place, including questions of forum, standing, and territoriality, as well as the textualism that often defines court decisions. In the next chapter, I focus on the promise of effecting climate sustainability norms through climate change litigation. Thereafter, I discuss ideas to surmount some of the identified procedural challenges while also approaching climate justice from a realist lens. I argue for justice liberalization by allowing for infusion of Global South context in the emergent court-driven regulatory regime now primarily being designed in Global North courts.

CHAPTER TWO

Climate Change Litigation: A Useful Third Wheel for Climate Justice and Accountability

> *"Strategic climate change litigation can help to establish, recognize or clarify legal responsibilities for certain public and private actors to act in certain ways on such climate change issues. More indirectly, such litigation can also help to shift social norms and public discuss and thereby the decision-making of both public and private actors, including by pressuring governments to introduce new laws and policies to address climate justice and responsibility".*[134]

2.1 The Role of the Courts as a Centre for Climate Change Regulation

The courts play an important role in clarifying legal rights and responsibilities, and setting norms.[135] In common law systems, judge-made law has served to fill in the vacuum, extend the reach and even infuse new meaning into existing legislation. Mark Hall notes that "the content of case law merits careful study not simply because judicial opinions reflect or respond to the law,

[134]Anita Foerster, "Climate Justice and Corporations" (2019) 30:2 King's LJ 305 (doi: 10.1080/09615768.2019.1645447).

[135] The role of the courts in norm-setting and as agents of social engineering has been extensively reviewed by scholars studying the judiciary's role in society. Under the subject of legal functionalism, a rich scholarship on the role of the courts as agents of social change has developed. While some observers highlight the limits of courts as actors in social change, others note that the courts can effect broad policy changes that transcend merely the interpretation of laws. For instance, Joe McIntyre writes that "Courts are public actors engaging in social governance." McIntyre further argues that "mechanisms of dispute resolution can be used to engage in social governance by affecting (1) the sources of public power/force; and (2) the social norms/rules of society." Consequently, the courts present as a source of law-making, impacting or altering the law by "reinforcing legal rules through application; increasing the predictability of legal rules; maintaining coherence between legal rules; and altering the substantive legal rule." See Joe McIntyre, "The Judicial Form of Social Governance" in *The Judicial Function: Fundamental Principles of Contemporary Judging* (Singapore: Springer, 2019) 49.

Similarly, David Schultz and Stephen Gotlieb note that "throughout the history of American law, jurists and statesmen have viewed the law functionally as a means for promoting social goals and purposes." They note that citizens have relied on the law to effect social change through a series of legal actions brought before courts and that the court carries out this function directly and indirectly. Schultz and Gotlieb writing on the impact of such landmark decisions as *Brown v Board of Education* on prevailing social order such as segregation laws note that "…since law imposes social costs and affects incentives, the decision itself, without extra-judicial assistance, raised new obstacles to segregation. What once was a nearly costless behavior suddenly entailed increased litigation costs, fines, and injunctions; the threat of executive action against segregation now was increasingly real, and it now was likely that other related behaviors also would be similarly burdened." Thus law "does constrain, influence, and otherwise alter our behavior by influencing how we think and the choices we have to select … The Court serves as an agenda setter and excuse for policy makers to act (page 89)." See, David Schultz & Stephen E. Gottlieb, "Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change" (1996) 12:1 JL & Pol 63.

but because they *are* the law".[136] Consequently case laws are studied as indicative of the direction of the courts as well as the law; this is the realist praxis. Indeed, there is a whole research methodology that dedicates itself to the empirical study of case outcomes and consequently the direction of the law by mapping/coding the content of court decisions; including a more sophisticated method, otherwise known as 'jurimetrics' that looks to predict how courts would rule on a particular point.[137]

This is possible because, in common law systems, courts honour past precedents as laws which bind present disputes, and where new principles of law are developed, they become precedents for the future. This is the doctrine of "*stare decisis et non quieta movere"* (let the decision stand and do not disturb settled things). Allan Hutchinson notes that "the common law method insists that past decisions are not only to be considered by future decision makers but also to be followed as being binding. Judges accept the responsibility to curb their own normative instincts and to respect the limits of extant decisions. The principle of stare decisis does not apply only to good decisions, if it did, it would have neither value nor meaning."[138] Yet as Hutchinson argues, the common law plays host to a dynamic relationship between change and stability. He notes that "in an important sense, the common law is to be found in the unfolding struggle between the openings of decisional freedom and the closings of precedential constraint. Consequently, in order to ensure that the common law does not grind to a halt and begin to slide into irrelevance and injustice under the

[136] Mark Hall, "Coding Case Law for Public Health Law Evaluation: A Methods Monograph for the Public Health Law Research Program (PHLR) Temple University Beasley School of Law", (2011) online: <researchgate.net/publication/228295382_Coding_Case_Law_for_Public_Health_Law_Evaluation_A_Methods_Monograph_for_the_Public_Health_Law_Research_Program_PHLR_Temple_University_Beasley_School_of_Law>
[137] *Ibid*
[138] Allan C. Hutchinson, *Evolution and the Common Law, 1st ed.* (Cambridge: Cambridge University Press, 2005)

weight of its own backward-looking mind-set, the courts have developed a whole series of techniques that allow them to avoid or loosen the binding force of precedent".[139]

It is at this interstice between change and stability that the "sweet spot" of litigation as a regulatory mechanism lies and that grounds its place as an important complementary tool to legislation. By providing the stability and certainty that legislation promises while also allowing the facts of the case and the extant decisions of the court to form new laws that meet the challenges of the moment, litigation is able to rouse itself more quickly and functionally to meet the moment and effect policy change. It is ultimately this ability of the court to respond and at the same time lock in changes, that informs this chapter's consideration of climate litigation as an important third wheel for climate regulation and forms the reason why I consider it an important complement to legislation. After all, as Hall notes, "the facts and reasons the judge selects are the substance of the opinion that creates law and binding precedent, so they merit careful study for this very reason."[140]

In the emergent and flux legal regime that characterizes climate change, this role of the courts becomes even more fundamental in holding governments to account as well as developing the contours of rights and responsibilities of various stakeholders. As noted, litigation is best primed to respond adequately and quickly to change while also providing precedent, as opposed to legislation with all the politics and debate that delay action.[141] Additionally, and as discussed in the previous chapter, the inadequacy of existing laws, corporate voluntary mechanisms, and activist efforts to confront the scale of the challenges posed by climate change, has left an

[139] *Ibid*
[140] *Supra*, note 136
[141] Ben Depoorter and Paul H. Rubin, "Judge-Made Law and the Common Law Process", in Francesco Parisi, *Public Law and Legal Institutions*, ed. (Online edn: The Oxford Handbook of Law and Economics, 2017) online: <doi.org/10.1093/oxfordhb/9780199684250.013.001>

important complementary role for the courts. Peel and Lin noted that the inadequacy of international law in addressing climate change and "the large degree of discretion afforded state parties in their implementation of international climate treaty obligations" means that within the "regulatory regime, litigation—including the emerging cases in the global south—plays an important supplementary, gap-filling role."[142]

The slew of judicial decisions on climate change, whether favourable to climate activists or not, serves to define and determine the legal regime on climate change. Osofsky and Peel note that this is particularly the case as international treaties have faced two foundational issues of failing to meet their goal of mitigating emissions adequately, as well as the multi-scalar implications of climate change.[143] The authors note that the regulatory impact of climate litigation in this regard lies in its ability to create a forum for multiscale engagement and dialogue between competing interests. Osofsky notes that the rulings issued by courts in climate change cases across various jurisdictions and at different levels of governance (subnational, national, and international) can thus be seen to play an important role in articulating forms of "transnational climate change regulation".[144] Higham and Setzer in mapping the 2,002 climate cases filed between 1986 and June 2022 show clearly that courts are playing an important climate regulatory role and are being used as an avenue to drive climate regulation of corporations and governments.[145]

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[142] Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South", (2019) 48 AJIL 679

[143] Hari M. Osofsky & Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?", (2013) 30 Envtl & Planning LJ. 303

[144] Hari Osofsky, "The Continuing Importance of Climate Change Litigation", (2010) 1 Climate L. 3

[145] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022) online: <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/06/Global-trends-in-climate-change-litigation-2022-snapshot.pdf.>. I am relying on this extensive empirical work done by Higham and Setzer as sufficient sample size to argue that climate litigation has important regulatory implication for climate change.

In this context, it is important to consider how courts are shaping the emergent legal regime on climate change and more importantly, how the Global South features in this exercise. As I argue in this chapter, rights argument is subjective and court decisions are not objective exercises but are largely guided by the context and lived experiences of judges, conforming to the theory of legal realism. Thus, the prominent voices shaping the legal outcomes through litigation write the rules of national and transnational climate change regulation. I argue that these rules and the emergent legal regime on climate change are now being written in the Global North with Global South voices occupying marginal positions. The reason for this ranges from the way international law develops, to the perceived challenges with the adjudicatory processes in Global South countries, including issues of impartiality, weak structures, and incapacity of personnel. There is then, a need to address the constraints to mainstreaming Global South voices in this regard and, as I will argue in the next chapter, a hybrid court will be able to achieve this.

To better trace how litigation is shaping the legal regime on climate change, I adopt the conceptual concentric circles sketched by Peel and Osofsky. I find it useful, as the authors' concern, as is mine, lies with reviewing the regulatory impact of case laws in the legal and policy development on climate change. Peel and Osofsky's concentric circles have at their core, cases where climate change "is a central issue in the litigation".[146] The next layer incorporates "cases where: (1) climate change is raised but as a peripheral issue in the litigation, and (2) lawsuits motivated at least in part by concerns over climate change but brought and decided on other grounds." Finally, "[a]t the outer limits of the boundaries of climate change litigation lie cases that

[146] Jacqueline Peel & Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, (Cambridge University Press, 2015)

are not explicitly tied to specific climate change arguments, but which have clear implications for climate change mitigation or adaptation."[147]

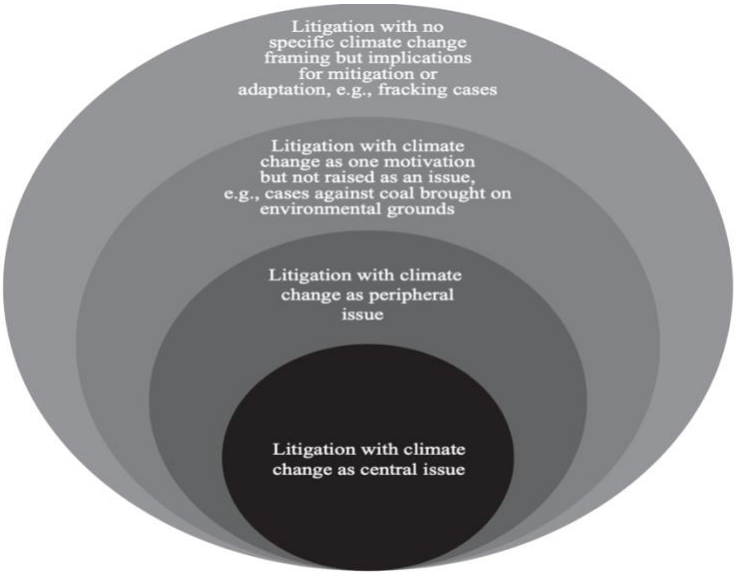

Figure 1.1 Conceptualizing climate change litigation.

[148]

Considering the foregoing sketch together with the functional definition of climate change litigation offered by Columbia University's Sabin Centre for Climate Change Law, I situate my discussion in this chapter broadly, enabling robust conversation about litigation's regulatory implications. The Sabin Centre for Climate Change Law describes "climate litigation" as "any piece of federal, state, tribal, or local administrative or judicial litigation in which the . . . tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts."[149]

Taken together, the concentric circles by Peel and Osofsky and the Sabin Centre definition provide, broadly, information regarding the content of a claim as well as the adjudicating authority

[147] *Ibid*
[148] *Ibid*, Fig 1.1 is Peel and Osofsky's concentric circle categorizing climate change litigation.
[149] David Markell & J.B. Ruhl, "An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual", (2012) 64 FLA L REV 15

that would ground "climate change litigation". It admits cases that have a direct and indirect connection to the concept of "climate change" including environmental law cases that have implications for the climate. The adjudicatory authority includes traditional courts as well as quasi-judicial bodies, such as tribal and other local administrative bodies which are not law courts. This definition would admit decisions from the Commission on the Human Rights of the Philippines which determined the *Re Greenpeace Southeast Asia* case[150], for instance. It will also include decisions touching on environmental degradation but which authors like Markell and Ruhl would exclude for being "litigation motivated by a concern about climate change or climate change policy" but which do not involve "issues of fact or law that bear directly on relevant questions of climate change law and policy."[151]

Following this operationalization of concept, I will now look at some climate change cases in a bid to gauge how much regulatory impact they are exerting. Regulation, as used in this context, refers to the impact that court decisions have in enforcing sustainable climate behaviour and dissuading irresponsible behaviour, whether by prohibitive or mandatory orders of court clarifying rights and responsibilities or by indirectly guiding decision-making owing to a perceived attitude of the courts to certain behaviours. Piecing together a collage of various decisions by courts and non-courts, and claims which have climate change at its core as well as periphery, I intend to show that climate change adjudication provides an avenue for norm-setting and supplementation of legislation. I will thereafter examine the voices that are prominent in shaping the emergent body of norms that would constitute the transnational and international legal regime on climate change.

[150] *In Re Greenpeace Southeast Asia & Ors* (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>
[151] *Supra*, note 146

As rights claims and judicial decisions are not objective exercises but are largely infused with the context and lived experiences of judges/adjudicators, I will also discuss the implication of having prominent and subordinate voices in the norm-setting exercise. Finally, I will look at the constraints militating against robust and impactful climate change litigation.

2.2 Tracing the Regulatory Complementarity Role of Climate Litigation

Legislation and government policies present the initial wheels of climate change regulation. The inadequacy of these two measures to effectively address the challenges of climate change has highlighted the place of strategic climate change litigation. Whether in holding governments accountable to their commitment under the *Paris Climate Agreement* as well as other international instruments or in enforcing rights by litigants, climate litigation has served to clarify rights and influence policies. Consequently, the courts have become an important avenue for shaping multi-level climate governance.[152] Additionally, climate litigation has worked towards "advancing the goals of international law instruments, such as the *Paris Agreement*, through holding state parties accountable for their "self-differentiated" nationally determined contributions (NDCs) to the global climate change response".[153]

In some other instances, however, litigation has also served to constrain the fullest expression of plaintiffs' claims by circumscribing the reach of existing arguments as well as constraining the introduction of novel points of law.[154] Whatever the case may be, whether expanding the scope or

[152] Hari M Osofsky & Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?", 30 (2013) Envtl & Planning LJ 303

[153] Lavanya Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics," (2016) 65 Int'l & Comp L Q 493

[154] In the case of *Swiss Senior Women for Climate Protection v Swiss Federal Council et al* (2017), No A-2992/2017 (Swiss Supreme Court), the administrative Court in Switzerland refused to take on a climate change case filed by the Swiss Association of Senior Women for Climate Protection on the ground that the women have not been able to show that they were more impacted by climate change compared to the larger population. The Court constrained the law on instituting a climate challenge in this case. Also, in the case of *Friends of the Earth v. Canada (Governor in Council)*

restricting the same, climate change litigation serves to define the contours of climate change regulation. I agree with the view that climate change litigation is "not just a series of interesting cases in disparate courts but rather a phenomenon with a distinct "regulatory role" that cuts across multiple levels of governance".[155] Higham and Setzer reviewing 2,002 cases filed between 1986 and 2022 also conclusively determined the strong regulatory role of litigation noting that climate litigation has been used to enforce or enhance climate commitments.[156] This role is particularly important as it pertains to transnational litigation, especially against corporations. The reason is twofold, firstly, various national laws on climate change regulate activities within the state, and secondly, the international legal regime on climate change does not cover corporations. There is then a gap as it pertains to transnational corporations. Climate change litigation not only addresses national and international claims alone but transnational claims as well. I argue that it provides the most important regulatory tool for transnational climate change, especially as it concerns non-state actors owing to its multi-level and multi-scalar reach.

In sketching this complementary regulatory role of climate litigation, I will review four instructive cases against corporations in various jurisdictions to demonstrate how climate litigation is advancing or circumscribing the landscape on climate sustainability. These cases also speak to the debate regarding protection of rights extraterritorially, and reviews how national courts and tribunals are approaching damage caused by climate change in transnational or extra-jurisdictional

2008 FC 1183, aff'd 2009 FCA 297, the Federal Court in Canada held that a plan for climate change reduction made further to the *Kyoto Protocol Implementation Act*, 2007 was not justiciable and so its content regarding keeping with Canada's commitment was not litigable.

[155] Hari M Osofsky, "Is Climate Change "International"?: Litigation's Diagonal Regulatory Role", (2009) 49 Va J Int'l L. 585.

[156] Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022) online: <lse.ac.uk/granthaminstitute/wp-content/uploads/2022/06/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>

contexts. The climate promotive cases include the German case of *Luciano Lliuya v RWE AG* where the court decided, amongst other things, on the justiciability of extraterritorial claims before national courts.[157] Also, I review the *Re Greenpeace Southeast Asia* case, where the Commission on the Human Rights of the Philippines concluded on the liability of carbon majors for causing transboundary climate change and infringing the rights of Filipinos.[158] In the case of *Millieudefensie v Royal Dutch Shell* the courts literally 'legislated' climate regulations as it pertains to corporations while also commenting on the territorial limits of its remedies.[159] On the other hand, the case of *Kivalina v ExxonMobil* presents an example of a climate restrictive case in its refusal to recognize the causal connection between the people of Kivalina and the extraterritorial carbon-emitting activities of carbon majors.[160] The choice of all four cases is due to the landmark legal principles developed by the courts therein as well as the identified legal gap which this research will summarize in the succeeding analysis.

Considered closely, it begins to crystalize that climate arguments vary from one jurisdiction to another, depending on the lived experiences of litigants. Thus, while Global South cases will

[157] *Luciano Lliuya v. RWE AG*, (2015), Case No 2 O 285/15 Essen Regional Court (Germany), online: <climatecasechart.com/non-us-case/lliuya-v-rwe-ag>. See also the cases of *Order of the First Senate of 24 March 2021*, (2021) 1 BvR 2656/18 Federal Constitutional Court (Germany) <bverfg.de/e/rs20210324_1bvr265618en.html>; *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* [2019] UKSC 20; *In Re Greenpeace Southeast Asia & Ors* (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>; *Amis de la Terre and Sherpa v Perenco* (2022), Appeal No 20-22.444 Cour de Cassation (France), online: <climatecasechart.com/non-us-case/amis-de-la-terre-and-sherpa-v-perenco/>.

[158] *In Re Greenpeace Southeast Asia & Ors* (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>

[159] *Milieudefensie etal. V Royal Dutch Shell Plc* (2021), Case No C/09/571932 / HA ZA 19-379 Hague District Court (The Netherlands), online: <climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/>

[160] *Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (2012). See also the cases of *Swiss Senior Women for Climate Protection v Swiss Federal Council et al* (2017), No A-2992/2017 (Swiss Supreme Court), online: <climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>.; *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* (2016), HR-2020-846-J (Norwegian Supreme Court), online: <climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/>.

likely take the outer layer in Peel and Osofsky's concentric circle, with climate change issues typically at the periphery, the Global North is more likely to raise it as a core issue for litigation. This is because Global South litigants typically frame climate arguments as rights claims or focus on adaptation while Global North claimants would generally make arguments for climate change mitigation. I will evaluate the selected cases henceforth.

2.2.1 *Luciano Lliuya v RWE AG*[161]

Facts of the Case

In a claim filed in November 2015 before the District Court of Essen, the claimant, Saúl Luciano Lliuya, a Peruvian farmer living in Huaraz, Peru sued RWE AG, Germany's largest electricity producer, contending that the company had knowingly contributed to climate change by emitting greenhouse gases and consequently bore some measure of liability for melting mountain glaciers near his hometown in Peru. According to the claimant, the melting glaciers have caused Palcacocha, a glacial lake located above Huaraz, to experience a substantial volumetric increase since 1975, which has dramatically accelerated from 2003 onwards. He argued several legal theories including nuisance for which he had incurred substantial costs to mitigate. He then urged the court to "order RWE to reimburse him for a portion of the costs that he and the Huaraz authorities are expected to incur from setting up flood protections for his property. The share calculated amounted to 0.47% of the total cost - the same percentage as RWE's estimated contribution to global industrial greenhouse gas emissions since the beginning of industrialization (from 1751 onwards)."[162]

[161] *Luciano Lliuya v. RWE AG*, (2015), Case No 2 O 285/15 Essen Regional Court (Germany), online: <climatecasechart.com/non-us-case/lliuya-v-rwe-ag>
[162] *Ibid*, pgs. 16-19

Decision

The District Court refused the claimant's claims for declaratory and injunctive relief as well as for damages, on the grounds that the claimant was unable to show linear causation and redressability of the claims. Consequently, the claimant appealed to the Higher Regional Court of Hamm which considered that the claims were well-pled and ruled that it should proceed to the evidentiary phase. The court found that there was sufficient connection between the parties under German law as "the existing legal relationship relevant to the plaintiff's claim is the possible relationship between himself and the defendant, arising in connection with section 1004 of the *German Civil Code [Bürgerliches Gesetzbuch (BGB)]*."[163] At the evidentiary phase, the court would consider the evidence obtained through expert opinions to determine whether

> "As a result of the significant increase of the expansion and volume of water of the Palcacocha lagoon, there is a serious threat to the defendant's property, which lies beneath the glacier lagoon in the city of Huaraz in the region of Ancash in Peru, due to a flood and/or a mudslide;
> 2. (a) The CO2 emissions released by the defendant's power plants ascent into the atmosphere and due to physical laws result in a higher density of greenhouse gases throughout the entire earth atmosphere. (b) The compression of the greenhouse gas molecules results in a reduction of the global heat radiation and an increase in global temperature. (c) As a consequence of the caused, also local, increase in average temperatures, the melting of the Palcaraju glacier accelerates; the glacier loses size and retreats, the water volume of the Palcacocha lagoon increases to a level that cannot be constrained by the natural moraines; (d) The defendant's co-causation share to the causal chain shown under a) to c) can be measured and calculated. It currently amounts to 0.47%. A possible deviating determination of the causation share shall be quantified accordingly by the expert."[164]

[163] Section 1004 of the Code provides that "If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction."
[164] *Supra*, note 161

Analysis

This case is a landmark decision in recognizing the transboundary nature of climate change, particularly the point that the carbon emissions of a company could cause damage to claimants outside the territory where the company carries on its activities. This was exactly the same issue that the Commission on the Human Rights of the Philippines considered in the *Re Greenpeace Southeast Asia* case, although significantly constrained by the fact that it is not a court and so its processes were largely ignored by the carbon majors. As climate change is a transboundary and global issue, this case even if only by recognizing the justiciability of extraterritorial effects of climate change represents a fundamental contribution. It signals that Global South victims, as the claimant, who bear the brunt of climate change although least responsible for it, can now approach the court to enforce their right to a remedy not minding that there is no direct connection in terms of being within the same physical jurisdiction as the infringing company.

While the decision represents a win and the case must now go to the evidentiary phase, there is a need for cautious optimism. This is because, although this same principle of justiciability of extraterritorial rights was recognised in the case of the *Order of the First Senate of 24 March 2021*,[165] wherein complainants from Nepal and Bangladesh argued that the failure of the German government to reduce carbon emissions impacted them adversely, the issue of territoriality constrained any possibility of remediation. The German Federal Constitutional Court in that case created limited extraterritorial jurisdiction. Limited because the court, although recognizing that "it is true that by reducing the greenhouse gas emissions produced in Germany, the German state could protect people living abroad against the consequences of climate change just as it could

[165] *Order of the First Senate of 24 March 2021* (2021), 1 BvR 2656/18 Federal Constitutional Court (Germany) <bverfg.de/e/rs20210324_1bvr265618en.html>.

protect those living in Germany", it nevertheless, refused to order remedies in favour of the foreign claimants.[166] In principle, the court would not recognize any obligations of the German government to protect extraterritorial rights, due to the sovereignty of states. There is then a need to consider mechanisms for transcending the Westphalian sovereignty barriers, especially as the extraterritorial nature of climate change has become judicially noticed by the courts, in addition to already being scientifically proven.

2.2.2 *Native Village of Kivalina v ExxonMobil*[167]

Facts of the Case

Unlike the decision of the German Court, which is arguably progressive in its doctrinal interpretations, the decision of the United States courts in *Kivalina v ExxonMobil* circumscribed, instead of expand the role of the courts in climate change litigation. I contend that the context and lived experiences of the courts may be instrumental in the liberal and conservative approaches taken by the various courts. The issue of legal realism is one that I will discuss subsequently in another section of this chapter.

In this case, the Inupiat Native Alaskans sued ExxonMobil and other oil companies, alleging that activities of the carbon majors were responsible for the transboundary release of greenhouse gases which has adversely impacted their community, including coastal erosion and melting of the Arctic Sea and permafrost[168]. This they claimed, threatened the existence of their village and way of life and is resulting in their displacement and relocation. They claimed damages under the federal common law of public nuisance.

[166] *Ibid*
[167] *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (2012)
[168] *Native Village of Kivalina v ExxonMobil Corp*, 663 F Supp (2d) 863, 868 (ND Cal 2009) [Kivalina District Court]

Decision

Two important points played a role in the dismissal of the suit by the District Court; the first was the question of "standing" and the other was the "political question" doctrine. For standing, the court restated the principles necessary for its jurisdiction to be properly invoked. It held that the following conditions must be shown to exist (a) that the plaintiff has suffered an injury in fact (b) the injury must be fairly traceable to the misconduct of the defendant (i.e the causation requirement) and (c) the injury is capable of being redressed in court. The court found that the plaintiffs could not establish causation because there was "no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time".[169]

The causation question has always served as a stumbling block to transboundary climate claims. However, the work done by Richard Heede[170] and other scientists working to provide the evidentiary basis for surmounting this challenge is proving useful. The Commission on Human Rights of the Philippines in the *Re Greenpeace Southeast Asia* case drew from Heede's work to attribute causative liability to carbon majors for transboundary emissions which impacted Filipino farmers.[171]

Dissatisfied with the District Court's decision, the claimants in *Kivalina* appealed to the US Court of Appeals for the Ninth Circuit (Appeals Court). The court upheld the dismissal by the District Court but on a different basis. It relied on the 2011 United States Supreme Court decision

[169] *Ibid*
[170] Richard Heede, "Tracing the Anthropogenic Carbon dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854 – 2010" (2014) 122:1 Climatic Change 229.
[171] *In Re Greenpeace Southeast Asia & Ors* (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>

in *American Electric Power Co. Inc. v. Connecticut (AEP* case)[172] to invoke the doctrine of displacement, finding that reliance on the federal common law claim of public nuisance was displaced by the enactment of the *Clean Air Act* as well as regulations set by the EPA. The Supreme Court in the *AEP* case had determined that "whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue."[173] The Appeals Court found that the *Clean Air Act* spoke to and displaced the public nuisance claims of the claimants. It further found that "when a cause of action is displaced, displacement is extended to all remedies ... Thus, *AEP* extinguished Kivalina's federal common law public nuisance damage action, along with the federal common law public nuisance abatement actions."[174] The court recognized that "our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."[175] The petition to the United States Supreme Court for writ of certiorari was refused without reason, leaving the decision of the Circuit Court as the current position on the matter.

Analysis

A comparison between the attitude of the German court in *The Order of the First Senate* case and that of the American court in the *Kivalina* case shows a difference in the way the two courts approached the issues before it and supports the argument that the views of judges determine the outcome of decisions. The position of the German court on the issues of standing, causation, and liability as well as its willingness to stretch the reach of existing legislation to ground new rights is much more progressive and contrasts with the rigid application of precedents by the American

[172] *American Electric Power Co Inc v Connecticut*, (2011) 131 S Ct 2527 (USC) [AEP].
[173] *Ibid*
[174] *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (2012), para 11655.
[175] *Ibid*, para. 1167

courts. Additionally, while the German court recognized that the powers to make climate laws and regulations were ordinarily a prerogative of the legislature and executive, it nevertheless signalled its willingness to enquire into the content and sufficiency of the laws and regulations made. In the *Kivalina* case, on the other hand, once the court determined the applicability of the 'displacement doctrine' it shut off the need to engage in further enquiry about the nature of the remedy being sought, finding that "when a cause of action is displaced, displacement is extended to all remedies".[176] I agree with the argument made by Peloffy that the court ought to have distinguished the *Kivalina* case from *AEP*, particularly as the remedies framed in the former were made with the challenges faced in *AEP* in mind.[177] Like the *Order of the First Senate* case, this case also highlights the challenges of enforcing rights in transnational contexts. It demonstrates the barriers to holding transnational corporations accountable for damage caused by their extraterritorial activities. For citizens of the Global South who bear the brunt of climate change it seems as though there are no remedies. I propose hybrid courts as a means to access justice and remediate transnational damage.

2.2.3 *In Re Greenpeace Southeast Asia*[178]

Facts of the Case

Greenpeace Southeast Asia and numerous other organizations (the claimants) filed a complaint before the Commission on the Human Rights of the Philippines (CHRP) contending that research had identified particular carbon majors' quantum of responsibility for anthropogenic greenhouse gas emissions since 1751 which infringes the rights of Filipinos. They called upon the

[176] *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (2012), para 11655.
[177] Péloffy, Karine, "Kivalina v. Exxonmobil: A Comparative Case Comment." (2013) 9:1 McGill Int'l J Sust Dev L & Pol'y 119 (<jstor.org/stable/24352636. 9:1 121>)
[178] *In Re Greenpeace Southeast Asia & Ors* (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines), online: <climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/>

Commission to investigate "the human rights implications of climate change and ocean acidification and the resulting rights violations in the Philippines"—and specifically—"whether the investor-owned Carbon Majors have breached their responsibilities to respect the rights of the Filipino people."[179] The petitioners contended that the carbon majors had contributed to climate change which is negatively affecting the human rights of the Filipino people and should be held responsible for this breach as prescribed under the United Nations Guiding Principle for Business and Human Rights (UNGP).

Decision

Questions of jurisdiction were raised by the carbon majors, as well as the issue of territoriality, with the carbon majors contesting the powers of the Commission to inquire into their activities, especially where the alleged activities occurred outside the boundaries of the Philippines. The carbon majors challenged the authority of the Commission to hear the petition, arguing that it did not have operations within the Philippines and refused to participate meaningfully in the proceedings conducted at various venues including Manila, New York and London.[180] The Commission summarizing its findings on this issue held that,

> "Stripped of legal niceties, the contention was that our Commission, or, indeed the Philippine State, in general, may only inquire into the conduct of corporate entities operating within the Philippine territory, even if the corporations' operations outside our territory were negatively impacting the rights and lives of our people. We cannot accept such a proposition… Our commission decides on how it must perform its constitutional duty. And the performance of this duty is neither constrained by nor anchored on the principle of territoriality alone.
> The challenge to NHRIs is to test boundaries and create new paths; to be bold and creative, instead of timid and docile; to be more idealistic or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards.[181]

[179] *Ibid*
[180] *Ibid*, pg. 4-6 of the CHRP Report
[181] *Ibid*, pg. 4 of the CHRP Report

Commenting on the scope of its authority, the Commission noted that it did not have the powers to compel attendance nor pass punitive judgments against the carbon majors but was merely conducting an inquiry on the basis of "persuasion not compulsion".[182] On the substantive claims, the Commission found that carbon majors contributed 21.4% of global carbon emissions[183] and were aware that their products caused adverse effects to the environment and climatic system, at least as far back as 1965.[184]

The Commission also found that the carbon majors obfuscated and delayed efforts to transition to cleaner energy noting that "all acts to obfuscate climate science and delay, derail, or obstruct this transition may be a basis for liability. At the very least, they are immoral"[185] It further found that "climate change denial and efforts to delay the global transition from fossil fuel dependence still persists." And that "obstructionist efforts are driven, not by ignorance, but by greed. Fossil fuel enterprises continue to fund the electoral campaigns of politicians, with the intention of slowing down the global movement towards clean, renewable energy."[186] The Commission concluded that, "the carbon majors have the corporate responsibility to undertake human rights due diligence and provide remediation".[187] "Business enterprises, including their value chains, doing business in, or by some other reason within the jurisdiction of, the Philippines, may be compelled to undertake human rights due diligence and held accountable for failure to remediate human rights abuses arising from their business operations".[188]

[182] *Ibid*, pg. 5 of the CHRP Report
[183] *Ibid*, pg. 99 of the CHRP Report
[184] *Ibid*, pgs. 101-104 of the CHRP Report
[185] *Ibid*, pgs. 115 of the CHRP Report
[186] *Ibid*, pgs. 110 of the CHRP Report
[187] *Ibid*, pgs. 110 of the CHRP Report
[188] *Ibid*, pgs. 113-114 of the CHRP Report

Analysis

Although the Commission is not a court of law and its findings were not binding, its approach to the issue of extraterritorial rights infringement, especially as it pertains to carbon majors, represents a very innovative step. By highlighting the special legal status that human rights ought to occupy and clarifying the approach that tribunals ought to take in the adjudication of human rights infringement emanating from climate-changing activities of corporations, the Commission elevated the conversation on remediation of damage to Global South victims, who usually pursue a rights-based claim.

Additionally, the Commission's approach to the extraterritoriality question represents the attitude that courts and tribunals adjudicating climate change ought to take considering its transboundary nature, instead of being bogged down in conservative arguments about the sovereignty of states and limitations of territory. This was the constraint the court faced in the *Order of First Senate* case and in the case of *Milieudefensie et al. V Royal Dutch Shell Plc. (discussed below)*[189] where the Dutch court limited its decision to Dutch residents and the inhabitants of the Wadden region.[190] I argue in the next chapter that hybrid courts such as applied in Sierra Leone and Senegal would be able to reach extraterritorially to find liability where they exist.

[189] *Milieudefensie etal. V Royal Dutch Shell Plc* (2021), Case No C/09/571932 / HA ZA 19-379 Hague District Court (The Netherlands)

[190] Indeed, even the Commission notwithstanding its statements about its authority to conduct extraterritorial inquiries ended up containing its obligatory findings to businesses within the Philippines. The language of the Report suggests a distinction between the weight attached to the 'responsibility' and 'compulsion' duties of carbon majors, depending on whether they were within or outside the Philippines. According to the Commission, "the Carbon Majors have the corporate ***responsibilit***y to undertake human rights due diligence and provide remediation (p. 110). Business enterprises, including their value chains, doing business in, or by some other reason within the jurisdiction of, the Philippines, may be ***compelled*** to undertake human rights due diligence and held accountable for failure to remediate human rights abuses arising from their business operations (pp. 113-114)."

The Commission in conducting some of its proceedings outside the Philippines sought to respond to some of the issues that I argue hybrid courts would be able to address, the most important of all being the perception of impartiality and consequently legitimacy. It noted that sitting outside the Philippines was "not only a matter of underscoring the global nature of climate change and the global character of the dialogue we sought to pursue. It was a matter of "due process", as well – that is, if the carbon majors domiciled in other parts of the globe were not willing to come to our country, then we were willing to come to their regions to encourage them to participate in our process." [191] I contend that hybrid courts with local and foreign judges will encourage not just participation but also enforcement of decisions emanating from the adjudicatory process.

Finally, it is important to highlight the point made by the Commission regarding corporate interference in the political and consequently regulatory process. This ties into the earlier conversations in this paper and supports the call for an institution with strong designs to withstand corporate interference. I argue, in the next chapter, that hybrid courts should be able to achieve this, especially in countries with weak structures.

2.2.4 *Milieudefensie etal. V Royal Dutch Shell Plc.*[192]

Facts of the Case

By a court summons dated April 5, 2019, Milieudefensie and several other claimants (collectively Milieudefensie), alleged that Royal Dutch Shell (RDS) had breached the duty of care owed the claimants as enshrined in Article 6:162 of the *Dutch Civil Code* as well as violated their

[191] *Ibid*, pg. 7 of the CHRP Report
[192] *Milieudefensie et al. V Royal Dutch Shell Plc* (2021), Case No C/09/571932 / HA ZA 19-379 Hague District Court (The Netherlands)

right to life, right to private life, family life, home, and correspondence as enshrined in Articles 2 and 8, respectively, of the European Convention on Human Rights (ECHR).[193] The claimants leveraging the decision of the Hague Court in *Urgenda Foundation v. State of the Netherlands*[194], where the court found that the failure of the Dutch government to reduce its greenhouse gas emissions amounted to a violation of the duty of care and rights of citizens, asked the court to make a similar determination against corporations, in this case, RDS. The claimants argued that RDS and the legal entities it commonly includes in its consolidated annual accounts, and with which it jointly forms the Shell group, acts unlawfully towards them if they fail to reduce their aggregate annual volume of all CO2 emissions by at least 45% or net 45% relative to 2019 levels no later than the end of 2030.[195]

Defending the suit, Shell asked the court to find it inadmissible, arguing that there is no legal basis for hearing the case. Shell further contends that "the solution should not be provided by a court, but by the legislator and politics,"[196] the so-called political doctrine question.

Decision

On the question of admissibility, the court found that the class action was admissible insofar as it relates to Dutch residents and the inhabitants of the Wadden region but not allowable insofar as they serve the interest of the world's population.[197] The court also interpreted the provisions of Book 3 section 305a of the *Dutch Civil Code* as it relates to the question of standing. It found that

[193] *Ibid*, para 3.2
[194] *The State of the Netherlands v Urgenda Foundation*, (2019), Case No 19/00135 (Supreme Court of The Netherlands)
[195] *Supra*, note 192, para 3.1. The claimants also made their claims in the alternative, asking the Court to find that Shell and its affiliated entities breached their rights if it fails to in the alternative reduce its emissions by at least 35% or net 35% relative to 2019 levels; further, in the alternative reduce its emissions by at least 25% or net 25% relative to 2019 levels.
[196] *Ibid*, para 4.1.2
[197] *Ibid*, para 4.2.4-5

although the "claimant must have an independent, direct interest in the instituted legal proceedings", where a public interest action is instituted, it serves to ground standing and excludes the right to a separate individual claim.

The court interpreted the UN Guiding Principles on Business and Human Rights (UNGP) in determining the unwritten standard of care that companies owe to protect the fundamental rights of citizens. It found that "due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS has committed itself to the UNGP, although RDS states on its website to support the UNGP".[198] Following this finding, the court determined that "it can be deduced from the UNGP and other soft law instruments that it is universally endorsed that companies must respect human rights. This includes the human rights enshrined in the ICCPR as well as other 'internationally recognized human rights', including the ECHR".[199]

Furthermore, and on the substantive claims,

> "The court concludes that RDS is obliged to reduce the CO2 emissions of the Shell group's activities by net 45% at end 2030, relative to 2019, through the Shell group's corporate policy. This reduction obligation relates to the Shell group's entire energy portfolio and to the aggregate volume of all emissions (Scope 1 through to 3). It is up to RDS to design the reduction obligation, taking account of its current obligations. The reduction obligation is an obligation of result for the activities of the Shell group. This is a significant best-efforts obligation with respect to the business relations of the Shell group, including the end-users, in which context RDS may be expected to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible.[200]

[198] *Ibid*, para 4.4.11
[199] *Ibid*, para. 4.4.14
[200] *Ibid*, para 4.4.55

The court hinted that RDS could meet its obligation in this regard by limiting investment in fossil fuels or reducing the production of fossil fuels. The decision of the court was made provisionally enforceable, meaning RDS and its subsidiaries were obliged to comply with the decision even while they appealed it. The court adopted this measure, weighing the interest of the parties and the climate change impact on Milieudefensie et al. It found that "the circumstances of the case works out to the advantage of Milieudefensie et al."[201]

Analysis

The Urgenda decision is a landmark decision in compelling a country to reduce its GHG emissions toward protecting the rights of its citizens. The Milieudefensie et al case builds on this landmark decision to extend responsibility to corporations as well. One of the challenges associated with the legal regime on climate change, especially under international law, is its focus on states, leaving corporations largely unpoliced. This is notwithstanding that investor-owned companies are responsible for 315 gigatonnes of equivalent CO2 (GTCO2e) of emissions compared to 312 GTCO2e emitted by nation-states.[202] The Dutch Courts by directing the state and now corporations to limit their GHG emissions are centring intervention in climate responsible behaviour and involving themselves in the activation of policies towards climate sustainability. The courts are rejecting the notion that the issue of policy towards climate sustainability is a prerogative of the legislative and executive branches of government and has taken its place as an important centre for policy development and effective enforcement of climate obligations.

2.3 Transnational Climate Litigation and Challenges to Climate Accountability

Climate change is a ubiquitous, widespread, and complex transnational problem. Its impact "crosses borders, requires collective solutions, and has the capacity to cause extraordinary

[201] *Ibid*, para 4.5.7
[202] Anita Foerster, "Climate Change and Corporations" (2019) 30 King's L J 305

losses."[203] Climate change regulation has typically occurred in the national, regional, and international spheres with transnational climate response falling through the cracks.[204] However, climate litigation with its ability to effect multi-level governance promises the potential to address claims that occurs at the transnational level. Peel and Osofsky note that "climate litigation becomes "part of the transnational regulatory dialogue over climate change" that helps shape multilevel climate governance through the case law's broader effects on governmental regulatory decision making, corporate behaviour, and public understanding of the problem of climate change."[205]

Scholars note that "climate change has been a "prime arena" for the development of transnational environmental law because it involves "global systems with complex local linkages."[206] In the *Order of the First Senate* case,[207] for instance, claimants from Bangladesh and Nepal approached the German Constitutional Court to claim their rights under the German *Basic Law*. They argued that the failure of the German government to take adequate climate action infringed their rights to property and occupation under sections 12 and 14 of the *Basic Law* and adversely impacted them in their countries. The court found the claim admissible, just as it did in the case of *Luciano Lliuye v RWE AG*[208] discussed earlier in this chapter.

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[203] Saul Holt & Chris McGrath, "Climate Change: Is the Common Law up to the Task" (2018) 24 Auckland U L Rev 10.

[204] Transnational climate regulation in this context differs from international regulation in the sense that while international regulation refers to the broad agreements and governance of climate change involving the comity of nations, transnational climate regulations involve activities that straddle two nations or jurisdictions and the regulation of those kinds of activities. In the sphere of climate change, those activities could take place exclusively in one jurisdiction, but its impact felt in another jurisdiction, yielding an extraterritorial impact. This sort of multi-scalar impact creates sub-relations within the global structure for which national laws and international laws do not cover. This is made thornier by the fact that transnational climate activities are mostly caused by corporations which are not covered under international climate arrangements.

[205] Hari M Osofsky & Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?", (2013) 30 Envtl & Planning LJ 303

[206] Thijs Etty et al, "Transnational Climate Law" (2018) 7 Transnat'l Envtl L 191.

[207] *Order of the First Senate of 24 March 2021* (2021), 1 BvR 2656/18 Federal Constitutional Court (Germany) <bverfg.de/e/rs20210324_1bvr265618en.html>.

[208] *Luciano Lliuya v RWE AG* (2015), Case No 2 O 285/15 Essen Regional Court (Germany), online: <climatecasechart.com/non-us-case/lliuya-v-rwe-ag>.

In *Amis de la Terre and Sherpa v Perenco*[209], Sherpa and Friends of the Earth considered bringing an action before the French Courts regarding potential environmental and health violations in the Democratic Republic of Congo. Perenco is a French company specializing in the optimization of previously exploited oil wells, with a presence in many parts of Africa, including the DRC. To be able to pursue their claims, the claimants approached the Tribunal de Grande as the court of first instance under Article 145 of the *Code of Civil Procedure*, to obtain more evidence, including internal documents, linking Perenco France and the companies operating locally in the DRC. Both the Tribunal de Grande and the Paris Court of Appeal refused the claimants' request, consequent upon which it appealed to the Court of Cassation.

The multinational company challenged the action on grounds of inadmissibility and conflict of laws, arguing that the appropriate forum for the matter was in Congo and under Congolese law. A move that would have prevented the claimants from accessing the required evidence. The Court of Cassation, amongst other things, found that

> (ii) With regard to the conflict of laws, a claimant for compensation for environmental damage or subsequent damage may choose to invoke either the law of the country in which the damage occurred or the law of the country in which the event giving rise to the damage occurred. Here, in the case of environmental damage suffered in the DRC due to the de facto control and dominant influence of the company whose head office is in France over the companies of the group operating in the DRC, the event giving rise to the damage is located in France.[210]

[209] *Amis de la Terre and Sherpa v Perenco* (2022), Appeal No 20-22.444 Cour de Cassation (France), online: <climatecasechart.com/non-us-case/amis-de-la-terre-and-sherpa-v-perenco/>

[210] *Ibid*. The court found in the circumstances that French law or *lex fori* will guide the proceedings. *Lex fori* (or law of the forum) is an international law principle, which provides that the law of the jurisdiction or venue in which a legal action is brought applies.

This decision of the court is similar to the "*effective doctrine*" principle advanced by the Inter-American Court in its *Advisory Opinion on the Environment and Human Rights*.[211] The tribunal opined that,

> In cases of transboundary damage, the exercise of jurisdiction by a State of origin is based on the understanding that it is the State in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory. The potential victims of the negative consequences of such activities are under the jurisdiction of the State of origin for the purposes of the possible responsibility of that State for failing to comply with its obligation to prevent transboundary damage.

The UK Supreme Court has also asserted its jurisdiction over transnational cases to ensure access to justice. In *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors*[212], 1,826 Zambian Villagers sued Vedanta Resources Plc., a UK company, and its subsidiary, Konkola Copper Mines (KCM) for violations of Zambian environmental laws, and negligence. The villagers claimed that the activities of the KCM had polluted their waterways, caused personal injury to them, damaged their property, and led to loss of income. The companies raised several jurisdictional questions in their defence, including issues of forum and cause of action. The companies argued that the right forum was in Zambia and further contended that there were no credible fears that the villagers would be unable to access justice in Zambia.

The Supreme Court, upholding the decisions of the Trial Court and the Court of Appeal, found that the case could proceed in the UK and that although Zambia would have presented the most convenient forum, there were credible questions about the potential of the villagers to access

[211] The opinion looked at the Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion 7-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (Advisory Opinion 23).
[212] *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* [2019] UKSC 20

justice. The foregoing cases demonstrate climate litigation's potential to redress extraterritorial wrongs, fill the gaps, and regulate transnational climate change.

Barriers to Climate Accountability

Effecting regulation through the courts comes with challenges. For one, courts, most times, view their duty as a call to simply interpret the law, and as requiring fidelity to the texts handed down by the legislature – the so-called textualism. This approach to legal interpretation is founded on the principle of separation of powers and a recognition that the courts are to give life to legislation not to make new laws. Writing about statutory interpretation in German and English courts, Martin Brenncke notes that the two courts deploy a mix of objectivism and subjectivism in interpretation, with the intention of the legislature serving as the focal point of commencement. Brenncke notes that "German judgments usually refer to an "objectivised intention" of the legislature as expressed in the provision and as determined by the provision's wording and its context…"[213] He further notes that "when English courts interpret statutes, they aim to discern and give effect to the intention of Parliament, that is to say, they aim to ascertain the true meaning of the statutory words used by Parliament."[214] Posner argues that the reference to 'objectivized intent' and 'ascertainment of meaning' is only "a tool for maximizing the judge's discretion in statutory interpretation" as it is the judge who decides what is reasonable."[215] Whatever the case may be, the constraints imposed by the duties of the court as an interpretive rather than a legislative body present the first limits of litigation.

[213] Martin Brenncke, *Judicial Law-Making in English and German Courts: Techniques and Limits of Statutory Interpretation*, ed (Intersentia, 2018).
[214] *Ibid*
[215] Richard A. Posner, *How judges think*, (Cambridge, Massachusetts: Harvard University Press, 2008) p. 337.

In climate litigation particularly, although the courts have in many instances been progressive in expanding the potential of climate change litigation to drive accountability of both state and non-state actors, significant constraints still exist. From the cases discussed, we can see the interaction of these constraints (represented in legal principles) with the facts of the case. They include questions of *forum conveniens*, issues of jurisdiction and territoriality, redressability, standing, causation, political question doctrine, conflict of laws, *de minimis* arguments and admissibility of claims.[216]

In the *Native Village of Kivalina v ExxonMobil* case, the restrictive interpretation deployed by the District Court as it relates to standing and causation, as well as the latter principle of displacement applied by the Appellate Court, gives us an insight into the barriers that climate litigation may sometimes face. It is very telling the helplessness penned down by the Ninth Circuit Court as it concerns remediating the claimant's claims. The court determined that "our conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law."[217] The defence of 'standing' was also deployed by the defendants and favourably ruled upon by the court in the case of *Swiss Senior Women for Climate Protection v Swiss Federal Council et al*.[218] The court, in this case, found that the Association suing on behalf of senior women was unable to prove that the women were disproportionately affected by climate change compared to the general population. In rejecting

[216] David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change." (2020), online: <10.2139/ssrn.3559045>
[217] *Native Village of Kivalina v ExxonMobil Corp*, 696 F 3d 849 at 11657 (9th Cir 2012) [Kivalina Appeal].
[218] *Swiss Senior Women for Climate Protection v Swiss Federal Council et al*, (2017), No A-2992/2017 (Swiss Supreme Court), online: <climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>.

their appeal, the Federal Supreme Court held that the plaintiffs' asserted rights had not been affected with sufficient intensity and that the remedy they seek must be achieved through political rather than legal means[219]

It is instructive, however, that the Philippine Commission was able to find creative ways to go around the same causation question that the *Kivalina* case struggled with at the District Court.[220] The Commission, utilizing the work done by Richard Heede traced causation to the carbon majors. Also, in the German case of *Order of the First Senate*[221] mentioned earlier in this chapter, the court was able to find that the claimants from Nepal and Bangladesh could validly come before it as their claims were justiciable. This is notwithstanding that it ultimately found that limitations of sovereignty and jurisdiction under international law constrained it from making any orders in favour of the claimants as this would create an obligation for third states to adapt and mitigate the impact on the claimant's rights. The court also refused to allow the claimants the same benefit of inter-temporality of rights under the German *Basic Law*. Aust notes that "…critical voices reproached the judges for unduly limiting extraterritorial rights protections, thereby implicitly differentiating between the worthiness of protecting individuals against climate change depending upon whether they reside in Germany or abroad."[222] The decision of the court in recognizing the admissibility of the claims but refusing remedies to the claimants from Nepal and Bangladesh raises access to justice questions and serves to hollow out the hallowed legal principle of *"ubi jus*

[219] *Swiss Senior Women for Climate Protection v Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others* (5 May 2020), Supreme Court Judgment No. 1C_37/2019, online: <climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200505_No.-A-29922017_judgment.pdf>

[220] *In Re Greenpeace Southeast Asia & Ors*, 2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines)

[221] *Order of the First Senate of 24 March 2021* (2021), 1 BvR 2656/18 Federal Constitutional Court (Germany)

[222]Jasper Mührel, "All that Glitters Is Not Gold", *Völkerrechtsblog* (May 3, 2021), online: <voelkerrechtsblog.org/de/all-that-glitters-is-not-gold>

ibi remedium". Thus, international law sovereignty and territoriality principles present the other barriers to climate litigation which we argue a hybrid court may be able to address.

The other defences that defendants submit before courts to limit the reach of climate litigation are the *de minimis* and redressability arguments, typically deployed at the evidentiary or substantive phase. Here the arguments are that emissions by the defendant are minute compared to the global emissions and, in any case, the court order would not be sufficient to make any significant climate protective impact. Estrin and Galvao-Ferreira note that "in other words, the government argument is that the only effective remedy in these cases would be a multiscale political response at the national and international level, something that is reserved to parliaments and the executive."[223] The authors cited the *Greenpeace Norway and Nature and Youth* lawsuit filed at the Oslo District Court, contending the decision by the Norway Ministry of Petroleum and Energy to issue licenses for deep-sea extraction of oil and gas in the Barents Sea.[224] According to Estrin and Galvao-Ferreira, the court in agreeing with the *de minimis* argument raised by the state noted that "Norway's carbon emissions constituted only 0.15 per cent of global emissions, with 28 percent of this contribution originating from the oil sector. The court added that even assuming the higher possible scenarios, the permits would lead "only [to] an extremely marginal increase of total Norwegian emissions..."[225]

Conversely, in the *Urgenda Foundation v State of the Netherlands*, the state sought to argue the *de minimis* defence, amongst other things. The Supreme Court rejected the argument that "a

[223] David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change." (2020) online: 10.2139/ssrn.3559045.
[224] *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy* (2016), HR-2020-846-J (Norwegian Supreme Court)
[225] *Ibid*, page 23 of judgment

state does not have to take responsibility because other countries do not comply with their partial responsibility".[226] It also refused to accept the argument that the Netherlands' "own share in global greenhouse gas emissions is very small and ... reducing emissions from [its] territory makes little difference on a global scale." The Supreme Court determined that "acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries['] or its own small share" of GHG emissions contribution to climate change.[227] It concluded that "rul[ing] out" these defences increases the prospect for other countries to take meaningful action on climate change because it allows each country to "be effectively called to account for its share of emissions" and maximizes the potential for "all countries actually making their contribution."[228]

Other barriers include the political doctrine question as well as the principle of separation of powers. The District Court in the *Kivalina* case applied these principles as did the Oslo District Court in *Greenpeace Norway and Nature and Youth* case. The Oslo District Court in upholding the argument on separation of powers found that "whether enough is being done in climate policy generally lies outside what the court must review."[229] The list of potential defences that limit climate accountability through the courts goes on and on, including arguments about forum; used by defendants, especially corporations, when asking courts in the Global North to transfer cases before it to the Global South. This chapter reviewed the case of *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors*[230] where the UK courts refused to

[226] *The State of the Netherlands v Urgenda Foundation* (2019), Case No 19/00135 (Supreme Court of The Netherlands), para 5.7.7
[227] *Ibid*
[228] *Ibid*
[229] *Supra*, note 224, Pg. 23
[230] *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* [2019] UKSC 20

transfer a case back to Zambia fearing that the claimants would be unable to access justice. Corporations wield enormous powers and can influence weak institutions in the Global South to escape liability. Contending forum in this light demonstrates how far corporate defendants can go in seeking to constrain the adjudicatory process and escape liability for their climate-changing activities or omissions.

While in some instances, judges have taken a stand in driving accountability, in some others the courts have not been forthcoming in their duties. [231] A collage of the cases reviewed in this chapter presents this contrast clearly. The different positions taken by various courts to adjudication as well as the packaging of the arguments that litigants make before courts bring me to the important discussion on the subjectivity of rights claim, the place of legal realism and the context of Judges in the determination of cases.

2.4 Legal Realism in the Emergent Climate Regime: Implications for the Global South

The cases I have reviewed in this chapter, as would every legal argument before a court, entail a rights argument on both sides, and calls on the judge to deploy legal reasoning in deciding one way or the other. When corporations or governments argue the separation of powers defence and the political doctrine question as we saw in *Kivalina, Urgenda*, and some other cases, they are asserting a right that they call upon a court to interpret in their favour. On the other hand, claimants asserting constitutional rights to health, life, and dignity of human person or property also claim a right which they call upon the court to determine in their favour. Duncan Kennedy in his seminal work demonstrates that legal rights are subjective and so is the judge's role in determining them. He notes that the rights argument and the legal reasoning that decides it are not objective, factoid,

[231] David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change" (2020), (online: <10.2139/ssrn.3559045>).

or generalizable but require balancing by the judge and are subject to manipulation by competing interests. Kennedy demonstrates what typically happens in court when parties render their argument thus,

> The upshot, when both sides are well represented, is that the advocates confront the judge with two plausible but contradictory chains of rights reasoning, one proceeding from the plaintiff's right and the other from the defendant's… And each chain is open to an internal critique.
>
> Sometimes the judge more or less arbitrarily endorses one side over the other; sometimes the judge throws in the towel and balances. The lesson of practice for the doubter is that the question involved cannot be resolved without resort to policy, which in turn makes the resolution open to ideological influence. The critique of legal rights reasoning becomes just a special case of the general critique of policy argument: once it is shown that the case requires a balancing of conflicting rights claims, it is implausible that it is the rights themselves, rather than the ''subjective'' or ''political'' commitments of the judges, that are deciding the outcome.[232]

The foregoing demonstrates legal realism and leads me to consider its implication for the emergent legal regime on climate change, from a Global South perspective. In determining cases, judges are making laws or influencing policies that become law. Whether creating binding precedents, mainstreaming soft laws or swaying governmental policy towards a certain direction, the role of the court as a norm-setting centre is incontestable. This applies notwithstanding the jurisdiction – common law or civil or whether the court is expanding legal principles or restricting them.[233]

For this reason, it is important to pay attention to the subjectivity of rights arguments as well as the influence of context on the outcome of decisions. The critique of legal realism and the

[232] Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in *Left Legalism/Left Critique*, Wendy Brown and Janet Halley (New York, USA: Duke University Press, 2002) 178-228
[233] Hari M Osofsky & Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?", (2013) 30 Envtl. & Planning LJ 303

subjectivity of rights argument is especially important for the Global South which is marginally represented in terms of the prominence of case reportage and consideration in scholarly reflection. Joana Setzer and Lisa Vanhala note that "academic examination of climate litigation has been produced mostly by scholars from the Global North and has focused primarily on a small number of high-profile cases concentrated in North America, Europe, and Australia."[234] The authors did a breakdown of the cases filed as of May 2019 and noted that they are concentrated in the Global North.[235] Out of the about 1300 cases filed in 28 jurisdictions, 1000 were filed in the United States, 97 were filed in Australia, 46 in the United Kingdom, 16 in New Zealand, 14 in Canada, and 13 in Spain. They further reviewed cases filed in the Global South and logged only 32 of which 18 were in Asia, 5 in Africa, and 9 in Latin America.[236] No doubt the number of cases filed continues to increase but the trend remains the same as seen in the global report published in June 2022.[237]

In being marginally represented, the Global South is missing the opportunity to infuse its contexts and join in the exercise of writing the emergent legal regime that is climate change law. This is because, as noted, the lived experiences of judges play a vital role in court decisions and by extension case laws and regulations. Oliver Wendell Holmes writes that "the life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices

[234] Joana Setzer & Lisa C Vanhala, "Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance", (2019) 10 Wires Climate Change 1
[235] *Ibid*
[236] *Ibid*
[237] According to a report by Joana Seltzer and Catherine Higham published in June 2022, out of the 2,002 cases filed between 1986 to 2022, only 88 are from the global South: 47 in Latin America and the Caribbean, 28 in Asia Pacific, and 13 cases in Africa. See: Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2022) online: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/06/Global-trends-in-climate-change-litigation-2022-snapshot.pdf

which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[238] The Global North is currently writing the laws on climate change by the prominence given to cases from the north and the marginal position occupied by cases from the Global South. In doing this, they are infusing their lived experiences and contexts in shaping what climate change laws would look like, even if within the context of climate litigation as a norm-setting centre.

2.5 Conclusion

Climate change litigation holds the potential to regulate the activities of various stakeholders, remedy wrongs, protect rights and drive policy changes. The court as a norm-setting centre holds an important position in determining what the laws, rights, and obligations for climate change are and ought to be. As I have tried to demonstrate in this chapter, the courts are playing this role whether expansively or restrictively within the constraints posed by the legal system.[239] I argue that in this role, rights arguments and adjudicatory outcomes are not objective exercises but are influenced by the contexts and lived experiences of litigants and judges. The outcomes go on to define the legal regime, including on climate change, especially transnationally. If progressive judges in multiple jurisdictions are deciding in a particular way, it has the potential to determine how corporate actors behave, define acceptable policies, and even drive claimants to these jurisdictions as we saw in *the Luciano* case, *the Vedanta* case as well as the German case of *Order of the First Senate*. In these cases, litigants from the Global South with support from Global North organizations approached Global North courts to ventilate their rights.[240]

[238] Oliver Wendell Holmes, "The Path of the Law" (1965) 45:1 BU L Rev 24.
[239] *Supra*, note 99
[240] While there is nothing wrong with approaching the global North Courts by global South claimants, the issue of perpetuating global North voices through the judge determining these cases is strengthened. I agree with Peel and Lin that Activists from the global South could make more impact on their government's response and influence climate regulation more by bringing their claim before global South Courts rather than in the global North. They further note that, "if the effects of individual Global South cases are amplified by South-South transnational advocacy networks,

I contend that with the marginal position being held by the Global South, made possible by the sometimes, restrictive definition of climate litigation adopted by stakeholders, the minimal reportage of cases from the Global South as well as minimal scholarly citation referencing Global South experiences, the emergent climate change regime is being written, heavily skewed in favour of the Global North. James Gathii suggests that this is typical when international legal regimes are being constructed. Gathii notes that "there are now ample empirical evidence that our textbooks are more likely to be filled with cases and examples from the international law produced in places like Geneva, New York, and Washington, D.C. Our scholarship and practice privileges certain locations while excluding and rendering other locations and their international legal activities invisible."[241] I join Gathii to

> "… challenge the limited geography of places and ideas that dominate the beltway of our discipline ... [Global North represents] places that our discipline celebrates as producers of the type of international law that in turn becomes the benchmark for the efficacy of the international law produced elsewhere. These are also the locations where the bulk of international legal practice is produced and that influences and reinforces our understandings not only of international practice but also of international law more generally."[242]

It is fundamental that voices from the Global South contribute to shaping the emergent legal regime on climate change and I agree with Peel and Lin that, "a "transnational" understanding of the nature, significance, and effects of climate litigation is incomplete if it fails to encompass the Global South experience."[243] I also agree that "… the broader justice aims of climate litigation—

Global South courts could begin to see a larger volume of climate cases; a phenomenon some clearly anticipate and are seeking to prepare for. And as existing innovative judgments demonstrate—like the *Leghari*, *Colombia Youths*, *and Earthlife Africa* cases—the ripples from these decisions extend well beyond their local context, highlighting ways that domestic courts can engage with, and shape, global climate governance." See Jacqueline Peel & Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South" (2019) 48 AJIL 679.

[241] James Thuo Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 Am U Int'l L Rev 377.

[242] *Ibid*

[243] Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South", (2019) 48 AJIL 679

to provide redress to victims for climate harms—can only be realized as part of a truly global effort."[244] As the authors rightly noted, the "courts' role in climate legal and policy development is not limited to the Global North. Indeed, in some cases, Global South judges have been highly creative in crafting legal remedies for climate inaction. This may provide a model for judiciaries both in the South and the North as domestic constituencies seek to play a role in holding governments and other actors to account for the implementation of international climate commitments."[245]

I am, of course, not oblivious of the problems militating against transnational adjudication of disputes in the Global South, including issues of partiality of adjudicators, the inadequacy of trained personnel, weak adjudicatory structures and institutions, as well as the complexity of the subject matter of climate change. Considering all these issues and the need for voice inclusion, I advocate for a hybrid court system. I argue that this will not only "standardize" notions of justice and assuage the reservations of Global North litigants and observers but will also ensure the inclusion of Global South voices. This is in addition to responding to the issues levelled against courts in the Global South, mainstreaming its contributions to the emergent legal regime that is climate change law.

[244] *Ibid*
[245] *Ibid*

CHAPTER THREE

Adapting Hybrid Courts to Drive Transnational Climate Accountability

> *"In the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilised nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside."*[246]

3.1 Evaluating the Architecture of Hybrid Courts

International law has been able to construct systems to address activities with global implications - from trade to diplomacy to accountability for mass atrocities etc. Whether by designing the International Criminal Tribunals, the International Criminal Court (ICC) or by crafting treaties, including the *Paris Climate Agreement*, the international community has demonstrated that the flexibility that attends international law may be deployed to meet a present need. By making compromises and reaching agreements, it has continuously developed the boundaries of existing international law instruments to meet the contemporary challenges of our world. An example of this is the creation of the transitional justice tool of hybrid courts to enforce international humanitarian law and ensure accountability for perpetrators of war crimes and crimes against humanity.[247]

[246] Sir Samuel Evans P. in *The Odessa* [1915] P. 52, 61-62 cited in *Trendtex Trading Corporation v Central Bank of Nigeria*, [1980] QB 629, [1977] 2 WLR 356 (UK CA)

[247] Hybrids courts have essentially been deployed in post-conflict situations where there has been a destruction of democratic and governmental structures. Christopher Waters notes that "legal systems are often in a chaotic state following armed conflict." See; Christopher P.M Waters, "Post-Conflict Legal Education", (2005) 10:1 J Confl Secur Law 101

Hybrid courts as a transitional justice[248] instrument were developed to address some of the criticisms levelled against the international criminal tribunals established for Rwanda and the former Yugoslavia. These include being too far away from the victims as well as issues of costs, legitimacy and legacy that characterized those tribunals.[249] It is also a compromise response to the challenges that have been identified with adjudication in purely domestic courts on one hand and international courts on the other.

The Office of the United Nations High Commissioner on Human Rights, the UN's lead entity on transitional justice, describes hybrid courts as "courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred."[250] They are "the result of a new approach to international justice by the United Nations. They are not ad hoc international tribunals created by the Security Council under Chapter VII of the United Nations Charter, nor are they regular domestic courts. They can be seen as the product of partnerships between the State concerned and the United Nations, which has considerable input into the design and structure of the court."[251] Thus, hybrid courts can transcend sovereignty questions that have so often trailed the operation of most international tribunals, owing to the participation of states in their design and implementation. Its

[248] According to the UN, "Transitional justice is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses. Transitional justice is not a special form of justice. It is, rather, justice adapted to the often-unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs. In some cases, these transformations will happen suddenly and have obvious and profound consequences. In others, they may take place over many decades." See United Nations, "What is Transitional Justice: A Backgrounder" UN Publications (20 February 2008) online: <un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf>
[249] Jane Stromseth, "The International Criminal Court and justice on the ground" (2011) 43:2 Ariz. St. L.J 427
[250] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the legacy of hybrid courts*, (New York, NY: United Nations Publication, 2008).
[251] Suzannah Linton, "New approaches to international justice in Cambodia and East Timor" (2002) 84:845 Int'l Rev Red Cross 93.

internationalized domestic approach to justice delivery and accountability typically becomes useful in instances where the domestic courts are unable or lack the capacity to deliver justice and where the costs of an international tribunal would be too much with limited impact. Laura Dickinson notes that the choice of a purely international tribunal may sometimes be unfavourable due to the huge cost relative to impact, challenges with norm-penetration, legitimacy and capacity. She notes that hybrid courts hold the promise to address to an appreciable degree these challenges from an international law perspective while strengthening the domestic institution of the state in question.[252] This is possible because "both the institutional apparatus and the applicable law consist of a blend of the international and domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards."[253] I argue that these benefits of a hybrid court would prove useful in the adjudication of transnational climate claims, especially as similar challenges that define transitional justice scenarios also obtain in litigation involving corporations in the Global South. Such challenges include weak institutions, the incapacity of personnel, questions regarding impartiality, extraterritoriality of defendants in some cases, and the complexity of proceedings.

Hybrid courts have been established in countries where the institutional framework for justice delivery is too weak to ensure accountability. It is thus, an access to justice tool that takes into consideration the local circumstances of the case, the need to standardize justice by ensuring impartiality, and the provision of personnel that are able to grapple with the complexities that

[252] Laura Dickinson in "Justice Should be done, But Where? The Relationship between National and International Courts" (2007) 101 Am Soc'y Int'l L Proc 289 at 299
[253] *Ibid*

attend the gravity of the cases. They have been applied in various countries to ameliorate the weaknesses of a post-conflict state where the "domestic courts often suffer from systemic problems that include inadequate laws, endemic corruption, incompetence, poor conditions of service and pay, lack of access to justice, including inadequate legal representation, and little if any, case-law reporting."[254] These courts include the Special Panels of the District Court in Dili and the Court of Appeal in East Timor, the so-called "Regulation 64 Panels" in the Courts of Kosovo, the Extraordinary Chambers in the Courts of Cambodia, the Extraordinary African Chambers within the Senegalese Courts, the Special Criminal Court for the Central African Republic, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the War Crimes Chamber of Bosnia and Herzegovina, and the Supreme Iraqi Criminal Tribunal.[255]

The mechanisms for the establishment of hybrid courts have principally developed in two ways. The hybrid courts in Kosovo and in East Timor were both unilaterally incorporated by the United Nations administrations that took over the two entities following post-conflict devastation.[256] In the case of the hybrid courts in Senegal, the Central African Republic, Sierra Leone and Cambodia, their establishment followed invitation by the national authorities in these countries and was the consequence of a negotiated process that yielded the courts' designs. In its nature as a hybrid court, the Special Court for Sierra Leone (SCSL) had both domestic and

[254] Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Maximizing the legacy of hybrid courts, (New York, NY: United Nations Publication, 2008).
[255] Christopher Waters notes that many years before these set of hybrid courts, a hybrid court had been applied in the Gambia following the 1981 failed coup against former president Kairaba Jawara. See Christopher Waters, "From Coup Reaction to Coup Prevention" in Charles Chernor, Jalloh, and Alhagi B.M. Marong, eds., *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (Leiden, The Netherlands: Brill | Nijhoff, 2015)
[256] The United Nations Interim Administration Mission in Kosovo (UNMIK) established the hybrid tribunal for Kosovo in 2000 under the international judges and prosecutor's programme. The United Nations Transitional Administration in East Timor (UNTAET) established the Serious Crimes Unit and Special Panels for Serious Crimes in 2000.

international personnel administering the courts with the two trial chambers composed of three judges, two international judges appointed by the UN Secretary-General and one Sierra Leonean judge.[257] The Appellate Chamber was composed of five judges, three international judges and two domestic judges. As part of the court's administration, the Secretary-General appointed the Prosecutor while the government of Sierra Leone appointed the deputy prosecutor. The judges of the court included two Sierra Leoneans, and a judge from Australia, Austria, Canada, Cameroon, The Gambia, and Nigeria.[258]

The laws governing trial were a blend of International Humanitarian Law and the domestic laws of Sierra Leone together with case law precedents from the decisions of the International Criminal Tribunals for Rwanda and former Yugoslavia as well as the decisions of the Sierra Leonean Supreme Court.[259] The jurisdiction of the court is contained in the *Special Court Statute* which empowers "the Prosecutor to bring charges for war crimes (violations of Article 3 common to the *Geneva Conventions and of Additional Protocol II*), crimes against humanity, other serious violations of international humanitarian law, and certain serious violations of Sierra Leonean law."[260] Funding for its operations was sourced from voluntary contributions from "member states, which meant that those with the most geopolitical interests in the sub-region, the US and UK, would be the key funders."[261]

[257] Michael Scharf, "The Special Court for Sierra Leone", (2008) 5:14 ASIL
[258] Laura A Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Int'l L 295 (doi:10.2307/3100105)
[259] *Ibid*
[260] The Residual Special Court for Sierra Leone and the SCSL Public Archives, "Special Court for Sierra Leone Residual Special Court for Sierra Leone", online: http://www.rscsl.org/
[261] Lansana Gberie, "The Special Court for Sierra Leone rests – for good", *Africa Renewal* (April 2014) online: <un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-–-good>

The SCSL at the conclusion of its mandate convicted nine persons and sentenced them to terms of imprisonment ranging from 15 to 52 years (enforced at Rwanda's Mpanga Prison).[262] On September 26, 2013, the Appeals Chamber of the court upheld the 50-year sentence handed down in April 2012 by the trial chamber which had found former Liberian President, Charles Taylor, guilty of "five counts of crimes against humanity, five counts of war crimes and one count of other serious violations of international humanitarian law perpetrated by Sierra Leone's Revolutionary United Front (RUF) rebels, whom he supported."[263] The court also "conducted contempt trials in 2005 (relating to threats against a protected witness) and three trials in 2011-2013 (for tampering with Prosecution witnesses who testified in the AFRC and Taylor trials, respectively)."[264] The court, following the conclusion of its mandate to "try those "bearing the greatest responsibility" for crimes committed in Sierra Leone after 30 November 1996, the date of the failed Abidjan Peace Accord", transitioned to a residual court.[265] The Residual Special Court for Sierra Leone would continue to oversee the continuing legal obligations of the SCSL.

The hybrid court in Kosovo was created in 2000 under the international judges and prosecutors programme of the United Nations Interim Administration Mission in Kosovo (UNMIK). UNMIK took over the administration of Kosovo following the bitter civil war that rocked the territory,

[262] The Residual Special Court for Sierra Leone and the SCSL Public Archives, "Special Court for Sierra Leone: Residual Special Court for Sierra Leone", <rscsl.org/>
[263] *Ibid*
[264] The Residual Special Court for Sierra Leone and the SCSL Public Archives, "Special Court for Sierra Leone: Residual Special Court for Sierra Leone", <rscsl.org/>
[265] According to the court's website, <rscsl.org>, The Residual Special Court was established pursuant to an agreement signed between the United Nations and the Government of Sierra Leone on 11 August 2010. It was ratified by Parliament on 15 December 2011 and signed into law on 1 February 2012. The agreement stipulates that the RSCSL shall have its principal seat in Freetown but shall carry out its functions at an interim seat in The Netherlands with a sub-office in Freetown for witness and victim protection and support. The RSCSL, like the SCSL, is funded by voluntary contributions from the international community, but the agreement permits it to seek alternative means of funding. The RSCSL has an oversight committee to assist in obtaining adequate funds and to provide advice and policy direction on non-judicial aspects of the Court.

decimating governmental structures including the judiciary. Laura Dickinson describing the challenges on the ground noted that,

> "Much of the physical infrastructure of the judicial system – court buildings, law libraries and equipment – had been destroyed or severely damaged during years of civil conflict. Local lawyers and judges were scarce, and those available lacked experience because most ethnic Albanians had been barred from the judiciary for many years and Serbian Judges and lawyers had mostly fled or refused to serve… Devastated by the conflict and by years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity or the independence to conduct such trials."[266]

In a bid to address these challenges, the United Nations Mission in Kosovo added foreign judges to existing courts[267], creating a hybrid court that was not requested by the entity, obviously as there was no functional government at the time. Through a series of regulations, the UN authorities created a court that sat both foreign and domestic judges on existing local Kosovar courts and allowed foreign lawyers to be able to work with their Kosovar counterparts to prosecute and defend cases. Throughout their proceedings, the court applied substantive law that was a blend of international and domestic law with international human rights norms superseding local law in the event of a conflict.[268] The role of hybrid courts in ensuring impartiality was highlighted by this court in Kosovo as it found that most of the trials conducted by judges of Albanian origin, who were mostly the victims of the conflict had not followed due process of law in finding the mostly Serbian defendants guilty of the alleged crimes.

The Extraordinary Chambers in the Courts of Cambodia (ECCC or "the court"), like the other hybrid courts, was created following a time of national crisis which had weakened Cambodian

[266] Laura A. Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Int'l L 295 (doi:10.2307/3100105)
[267] Laura Dickinson in "Justice Should be done, But Where? The Relationship between National and International Courts" (2007) 101 Am Soc'y Int'l L Proc 289
[268] *Supra*, note 266

institutions, including its judicial system. The court was formed to address the atrocities of the Khmer Rouge regime and its brutal campaign against the people of Cambodia. As with the other hybrid courts, the Extraordinary Chambers had both international and domestic judges sitting over the cases that were brought under its mandate. The Cambodian government reached an agreement with the United Nations regarding the composition and applicable laws that would guide the proceedings of the chambers, including an agreement on the means to come to a decision. Suzannah Linton writing on the control of the chambers notes that

> "Cambodian judges will form the majority, but a significant compromise between the United Nations and Cambodia was brokered through the adoption of a voting formula known as the "Super Majority". As a result, decisions on innocence or guilt can be made only on the basis of unanimity or a qualified majority. For example, a Trial Chambers is to be composed of five judges, three Cambodians and two internationals. Where there is no unanimity, a conviction can be agreed upon only if approved by at least four judges, one of whom would have to be an international judge."[269]

Funding for the court was planned in the same character as utilized in SCSL and was by voluntary contribution from Cambodia and the United Nations (through a specially created trust fund composed of voluntary contributions). Other avenues included "states contributing staff and other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations and private donors."[270]

The hybrid court in East Timor was established following the United Nations' take-over of administration of the tiny country which had faced serious devastation further to its occupation by Indonesia as well as subsequent violence post-referendum on independence. The United Nations Transitional Administration in East Timor (UNTAET) established the Serious Crimes Unit and

[269] Suzannah Linton, "New approaches to international justice in Cambodia and East Timor" (2002) 84:845 Int'l Rev Red Cross 93.
[270] *Ibid*

Special Panels for Serious Crimes in the District Court in Dili as an internationalized domestic tribunal to prosecute the atrocities that had taken place. Although the Special Panels were dominated by international judges, they were "part of the District Court of Dili and each consists of one East Timorese judge and two judges of other nationalities. Their judgments can be appealed to the Court of Appeal (the majority of whose members are again "international"), which hears all appeals from the four district courts of East Timor."[271]

The hybrid court in Senegal, the Extraordinary African Chambers, is particularly interesting for being a hybrid court formed by an agreement between a regional organization, the African Union, and the government of Senegal to prosecute atrocities committed during the regime of Chadian dictator Hisne Habré.[272] This is in addition to being the first hybrid court "established within one State's judiciary for the purpose of prosecuting another country's former head of State, in exercise of its obligation to extradite or prosecute."[273] Furthermore, the provisions of the Act establishing the court set it apart as an important innovative advancement in the operation of hybrid courts and support the proposal for hybrid climate courts. For instance, the applicable laws and jurisdiction of the court extended to infringement of not just Senegalese laws but also international conventions and customary international law. Article 3 of the establishment law provides that the court "shall have the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international

[271] *Ibid*

[272] There is an ongoing consideration for a similar regional hybrid court arrangement involving the Economic Community of West African States (ECOWAS) or the African Union (AU) to try atrocities committed during the tenure of former Gambian dictator Yahya Jammeh. See; Reed Brody and Salieu Taal, "From Truth to Justice in The Gambia" *Just Security* (14 March 2022) online: <justsecurity.org/80659/from-truth-to-justice-in-the-gambia/>

[273] Human Rights Watch, "Senegal/Chad: Court Upholds Habré Conviction: Decision Brings to a Close 26-Year Struggle for Justice" (27 April 2017) online: <hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction>

conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990."[274]

Article 11 provides for the composition of the court to include personnel from Senegal and other African countries with appointments to be made by the Senegalese government, and the African Union. The court which operated within the domestic court system of Senegal applied the principle of universal jurisdiction and its indictment of Habré represented the "first case on the principle of universal jurisdiction to proceed to trial in Africa. The principle allows countries to try a small number of very grave crimes in their domestic courts – regardless of where the crimes were committed or the nationality of the victims."[275]

Finally, there was the hybrid court within the Gambian state created to prosecute the 1981 coup plotters that attempted to overthrow former Gambian president, Kairaba Jawara.[276] Owing to the constraints of space, I will be discussing hybrid courts, henceforth in this work, as a reference to internationalized domestic tribunals under the UN, referring to other arrangements for context, comparison or emphasis.[277] From the architecture of the various hybrid courts described, the definitive contours of the courts are immediately visible. The courts draw from the expertise of both the domestic and international personnel that manage proceedings as well as the necessary

[274] Human Rights Watch, *Translation of the Statute of the Extraordinary African Chambers*, online: <hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>

[275] Human Rights Watch, "Senegal/Chad: Court Upholds Habré Conviction: Decision Brings to a Close 26-Year Struggle for Justice" (27 April 2017) online: <hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction>

[276] Christopher Waters, "From Coup Reaction to Coup Prevention" in Charles Chernor, Jalloh, and Alhagi B.M. Marong, eds., *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (Leiden, The Netherlands: Brill | Nijhoff, 2015)

[277]For conceptual ideal purposes -and perhaps idealistically- I will focus on the hybrid court arrangements under the auspices of the United Nations in advocating for a hybrid climate court, without discounting the potential of regional or domestic hybrid arrangements to also drive transnational climate accountability. Indeed, practically speaking the hybridization of transnational climate litigation may be more likely to begin at a domestic or regional level.

resources needed to ensure its operations. There are obviously great advantages, and disadvantages to adopting this kind of approach to justice delivery and this chapter will explore these in the succeeding section. I argue that notwithstanding the disadvantages, a hybrid court that incorporates both national and international aspects in its operations will be able to address the challenges of transnational climate change claims, transnational law being, in many ways, an interaction of domestic legal systems mediated by the law of nations.

3.2 The Promise and Challenges of Hybrid Courts.

Anne Heindel and John Ciorciari evaluating the promise and challenges of hybrid courts note that as a tool to address past atrocities, "… tribunals are often part of the societal response, and when they function well, they can play crucial roles within broader transitional justice processes. When they fail, they can dash hopes and consume resources that would better have been expended on other measures."[278] As a transitional justice tool, hybrid courts were conceptualized to solve some of the challenges that attend the administration of justice by international tribunals on one hand and domestic tribunals on the other. At the international level, they were designed to respond to challenges around state sovereignty, proximity to victims, the huge cost of running international tribunals, and limitations to accountability represented in the small number of offenders they can prosecute. As a domestic matter, hybrid courts are able to build a legacy for a strong judiciary, shore up capacity, and deliver 'standardized' justice with the participation of the locals.

Heindel and Ciorciari, writing on the criticisms against international tribunals which hybrid courts were designed to remedy, notes that "to many critics—including the governments of powerful developing countries such as China and Brazil—the ICTY and ICTR were projections

[278] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, (Ann Abor, Michigan: The University of Michigan Press, 2014).

of Western power and set dangerous precedents for justice meted out by the strong against the weak."[279] The argument here is that states should be independent and sovereign and as well retain the authority to try criminal infractions conducted within their national space. By transferring this power to international bodies, removed from the state, the sovereign authorities of the state over its affairs are severely imperilled.

Dispensation of justice by external tribunals also creates another problem, namely, the legitimacy of outcomes. By having outside tribunals removed from the space where the crime being tried was committed, the tribunal runs the risk of being detached from the population which ought to be the primary beneficiary of the justice being delivered. In this sense, legitimacy is loosely used to represent the acceptance and confidence reposed in the process by the local population. It speaks to how much the population can 'buy into' the process, the ownership and acceptability of the process and is more about being on the ground. It is a measure of "what factors tend to make the decisions of a juridical body acceptable to various populations observing its procedures".[280] It is important that justice not only be done but must be seen to have been done by its beneficiaries. It is this conceptualization that most international tribunals miss in their design as they are created from an externalist perspective that seeks to deliver justice to a setting considered 'uncivilized' in some sense.[281] As David Crane, the first Prosecutor for the Special Court for Sierra Leone notes,

> We simply don't think about or factor in the justice the victims seek. ... We approach the insertion of international justice paternalistically. I would even say with a self-righteous attitude that borders on the ethnocentric. ... We consider our justice as the only justice. ... We don't contemplate why the tribunal is being

[279] *Ibid*
[280] Laura A Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Int'l L 295.
[281] David M Crane, "White Man's Justice: Applying International Justice after Regional Third World Conflicts" (2006) 27:4 Cardozo L Rev 1683.

> set up, and for whom it is being established. ... After set up, we don't create mechanisms by which we can consider the cultural and customary approaches to justice within the region.[282]

Hybrid courts have been conceptualized to address this twin problem of respect for sovereignty and the legitimacy question. By providing justice on the ground and by admitting the local structures for justice delivery as well as other cultural and contextual considerations of the *locus delicti*, hybrid courts deliver justice with the participation of the locals. Jane Stromseth notes that hybrid courts were a response to the criticisms of the International Criminal Tribunal for Rwanda and Yugoslavia being too far away from the victims.[283] Paul Seils writing on sovereignty vis-à-vis international criminal justice notes that "states did not want to create a super court with primary jurisdiction over national courts because of long-standing and deeply felt beliefs about sovereignty."[284] Heindel and Ciorciari note that the designs of hybrid courts were a result of compromise on these identified issues as the courts have been conceptualized to "deliver justice meeting international standards but at a lower cost, easing sovereignty concerns by operating with host government consent and enjoying the functional advantages of proximity to the *locus delicti* and aggrieved population."[285]

At the same time, states that have required a hybrid court intervention also recognize, despite the need to guard their sovereign rights, and proximity of trials, that the existing systems are compromised and thus weak. In Sierra Leone, while President Tejan Kabbah did not want an international tribunal outside of the country to try the culprits accused of grievous crimes, he

[282] *Ibid*
[283] Jane Stromseth, "The International Criminal Court and justice on the ground" (2011) 43:2 Ariz. St. L.J 427
[284] Paul Seils in "Justice Should be done, But Where? The Relationship between National and International Courts." (2007) 101 Am. Soc'y Int'l L. Proc. 289 (http://www.jstor.org/stable/25660207)
[285] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, (Ann Abor, Michigan: The University of Michigan Press, 2014).

recognized nonetheless that the existing structures were incapable of conducting a fair trial.[286] This was also the case in Cambodia where the leaders Hun Sen and Ranariddh requested UN assistance to set up a court citing the incapacity of the nation's judicial system to conduct fair trials.[287] Capacity challenges that hybrid courts address could either be personnel problems, funding, infrastructural challenges or even inadequacy of existing laws. The support from wealthy contributors enabled most hitherto infrastructurally deficient states where hybrid courts were established to acquire state-of-the-art capabilities for dispensation of justice. I consider that adequate funding is crucial for large-scale, complex evidence-gathering processes and in the case of climate change, where the requirement of causation may sometimes be required, the needed funding and, generally, the capacity to undertake such complicated processes cannot be underestimated.[288]

Asides from capacity in terms of funding and assistance with the evidentiary process, perhaps the most definitive improvement that hybrid courts bring to the accountability regime is the personnel contribution they make to otherwise weak state institutions. By creating a forum for interaction with foreign judges, lawyers and other personnel, the participants can build capacity in such complex practice areas that define transitional justice. In this light, hybrid courts have the potential to ensure the interaction of local legal practitioners with their foreign counterparts, leading to improved capacity while also ensuring education and access to justice for the survivor

[286] Laura Dickinson in "Justice Should be done, But Where? The Relationship between National and International Courts." (2007) 101 Am Soc'y Int'l L Proc 289 (<jstor.org/stable/25660207>)
[287] John Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, (Ann Abor, Michigan: The University of Michigan Press, 2014).
[288] Laura Dickinson notes that "with respect to capacity building, again the Sierra Leonean court fares best. Donors funded the construction of a $6 million state-of-the-art courthouse equipped with modern computers that Sierra Leone will still be able to use after the hybrid court concludes its work." Laura Dickinson, supra note 279

population. Additionally, international personnel are able to contextualize their approach by learning more about the local population, as well as its institutions and approach to justice.[289]

The process of integrating the various international and local personnel has the advantage of ensuring norm-penetration and the development of the legal system both ways. Dickinson writing on the prospects of norm-integration notes that

> "The Sierra Leonean court has issued decisions with significant jurisprudential impact on the development of international law. For example, NGOs, victims, and others encouraged the court to include forced marriage as a crime within the jurisdiction of the tribunal. The inclusion of this offence is an example of the way in which hybrid courts create a space not only for "top-down" incorporation of international law, but also for norms to percolate "upwards." As to top-down impact, the court has made clear that its decisions on international human rights law take primacy over Sierra Leonean law, which may be the first step to incorporating international norms into domestic law.[290]

This sort of interaction moderates applicable laws, leads to international best practices, fills existing legal lacunae, and addresses potential issues of conflict of laws, especially where the hierarchy of laws is spelt out as was the case with the SCSL. Operating a purely international adjudicatory structure may end up dispensing justice that neither addresses the contextual peculiarities of the victims nor responds to legitimacy questions. Additionally, a purely international tribunal limits the chances of local legal professionals to learn, critique, develop and apply the international norms in question. Consequently, the local population potentially miss out on the opportunity to interact with international law as well, limiting norm integration.[291] Conversely, a purely domestic tribunal may be mired by questions of impartiality, poor understanding and application of legal standards, and lacuna in extant laws.

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[289] *Ibid*
[290] Laura Dickinson in "Justice Should be done, But Where? The Relationship between National and International Courts." (2007) 101 Am Soc'y Int'l L Proc 289 (<jstor.org/stable/25660207>)
[291] Laura A Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Int'l L 295 (doi:10.2307/3100105)

Thus, the integration that hybrid courts can achieve, allows for incorporation into the mainstream, voices which would ordinarily be at the periphery while preserving standardized notions of justice. This it can do by addressing some of the perceptions that primarily define the paternalistic, 'savage-victim-saviour' dynamics that characterize the designs of global systems and their relationship with the Global South.[292] Sujith Xavier and John Reynolds writing on the interaction between African institutions and western notions of justice argue that the latter approach the former with a kind of disdain which in turn informs the need to salvage the system.[293] This paternalistic dynamic is captured in David Crane's acknowledgement that the Special Court of Sierra Leone, and reasonably by analogy other such courts, is interested in "imposing white man's justice upon third world conflicts".[294] Thus, justice, especially where transnational in nature or has global implications, is not standardized or worthy of recognition if generated exclusively from settings outside of the Global North. The attendant implication is either an outright refusal to countenance decisions coming out from Global South settings or deliberate obscuration of such decisions.[295] Makau Mutua was writing about this when he noted that international law notions of justice "privileges Europe, European knowledge and things European … International law [is] a regime of global governance that issued from European thought, history, culture, and experience."[296] Julius Nyerere further notes that "in international rule-making, we are recipients not participants[297]

[292] Sujith Xavier and John Reynolds, "The Dark Corners of the World: International Criminal Law & the Global South" (2016) 14:4 J. Int Crim Justice 959.
[293] *Ibid*
[294] David M Crane, "White Man's Justice: Applying International Justice after Regional Third World Conflicts" (2006) 27:4 Cardozo L Rev 1683.
[295] See the case of *Ecuador v Chevron* discussed in Manuel A. Gomez, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429 (<law.stanford.edu/wp-content/uploads/2018/05/gomez.pdf>)
[296] Makau Mutua, "What is TWAIL" (2000) 94 Am Soc'y Int'l L Proc 31.
[297] Julius K. Nyerere, "South-South Option", in Altaf Gauhar ed., *The Third World Strategy: Economic and Political Cohesion in the South* (Praeger Publishers, 1983).

It is in a bid to pragmatically engage with this dominant and paternalistic positioning of international law contemplation of justice, and consequently, encourage possibilities of enforcement of decisions coming from the Global South that I urge the adaptation of a Global North (albeit international law) tool in incorporating Global South voices as it pertains to climate change. This way, there is a possibility for integration of norms and the percolation of Global South values upwards while receiving the stamp of acceptance that comes with the 'tempering influence' of Global North notions of justice.

While confrontation with the paternalistic attitude of the Global North may be edifying for a Global South writer, the powerlessness that soon attends such confrontation becomes stark when it is noted, the obstacles that rear up with enforcement of judgments in foreign jurisdictions where the defendant typically has its assets.[298] This was the case with the enforcement of the decision of the Ecuadorian court in the case of *Ecuador v Chevron*.[299] In this case, involving oil spill polluting the environment, the court in Ecuador awarded damages first in the sum of USD18.2billion, which was subsequently reduced to USD9.5billion. However, attempts at enforcement spanned several countries (Canada, United States, Argentina and Brazil) without success. After the U.S. District Court for the Southern District of New York ruled the judgment as unenforceable for being a product of fraud and racketeering, the plaintiffs approached the Canadian courts to enforce the judgment against Chevron's seventh-level indirect subsidiary. In refusing the enforcement attempts in the case of *Yaiguaje et al. v. Chevron Corporation et al.*[300], the Ontario Court of Appeal granted Chevron's summary judgment application to dismiss the enforcement proceeding on the

[298] *Yaiguaje et al. v. Chevron Corporation et al* (2018), 141 O.R. (3d) 1; (2018) ONCA 472 (CA)
[299] *Ecuador v Chevron* (2011), Ecuador 002-2003 (Super. Ct. of Nueva Loja).
[300] *Supra*, note 297

basis of corporate separateness. The court refused the plaintiff's application to pierce the corporate veil on "just and equitable grounds" and the plaintiff's application for leave to appeal to the Supreme Court of Canada was refused. Writing on the challenge of foreign enforcement of judgments, Manuel Gomez notes that,

> Because litigation does not occur in a vacuum but rather in a context affected by social, economic, and political realities, the effective compliance with a court judgment is also influenced by a number of external factors. As a result, the parties on each side of a dispute will typically embark on a quest of global proportions and deploy different strategies geared to find the most favorable jurisdiction to attain their goals. Other non-party stakeholders including government officials, non-governmental organizations, and members of the private sector will also play a role in influencing the outcome of large-scale complex cases. If one looks at today's transnational litigation landscape, there is hardly a better example than the case between a group of indigenous peoples from Ecuador and the Chevron Corporation to showcase the intricacies that surround the recognition and enforcement of foreign judgments.[301]

I argue that hybridization will encourage a perception of standardization of justice and consequently improve the chances of enforcement of decisions from Global South courts. This is in addition to voice inclusion.

Challenges with Adopting a Hybrid Court System.

An issue that has been raised about hybrid courts is that they are not so much a separate category of justice tool but are as a matter of foundational design bound to tilt either towards an international or a domestic influence.[302] The argument is that as the court is usually a product of agreement, the founding document which spells out the share of influence, including how many international and local judges would sit on the court and the hierarchy of laws is subject to manipulation and in the long run may affect fundamental claims of the court as being impartial or

[301] Manuel A. Gomez, "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429 (<law.stanford.edu/wp-content/uploads/2018/05/gomez.pdf>)

[302] Robert Muharremi, "The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers" (2018) 18 Intl Crim L Rev 623

allowing ownership by the local population. Thus, beyond the promise evident from its general features, the actual operation of the court is still largely subject to influence either from the international or domestic parties that meet to reach an agreement. This was pronounced with the Extraordinary Chambers in the Courts of Cambodia where overwhelming domestic influence almost derailed the participation of the United Nations, which saw the process as being largely hijacked by the national government.[303]

For instance, the court required an affirmative supermajority vote to make a determination; because it is constituted of four Cambodian judges and three international judges, every decision while requiring the buy-in of an international judge, conversely means that decisions on international best practices require convincing more than just one single Cambodian 'swing judge'.[304] Considering the close connection between the top personnel of the court and the government, the influence of the national government is almost guaranteed. This is especially as almost all the top positions in the court are appointed by the government. Ciorciari and Heindel note that "the resulting ECCC is undeniably a cumbersome and fragile institution, depending heavily on a government with a weak record of judicial integrity and independence and requiring the cooperation of two sides with a long record of mutual distrust. Political compromises also left the ECCC with a complex structure—including a bifurcated administration, pairs of Co-Prosecutors and Co-Investigating Judges, and a Pre-Trial Chamber—that raises serious efficiency challenges."[305]

[303] Suzannah Linton, "New approaches to international justice in Cambodia and East Timor" (2002) 84:845 Int'l Rev Red Cross 93.
[304] John Ciorciari and Anne Heindel, Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia, (Ann Abor, Michigan: The University of Michigan Press, 2014).
[305] *Ibid*

In the case of the hybrid court in Kosovo and East Timor, on the other hand, where the UN administrative bodies unilaterally set up the court without domestic agreement, the overwhelming international influence also severely undermined norm penetration and integration. To a great extent, these courts looked more like an international tribunal rather than a hybrid as the influence of the international partners undercut the contributions of the domestic court. Thus, while the local judges learnt about international law, the international judges missed the opportunity to be trained in the application of both local and international law. The limited interaction extended not just to the applicable laws but also to communication between the international judges and the domestic judges, with virtually no interaction beyond the formal proceedings and very little even then.[306] This situation is bound to undercut the advantage of norm penetration which hybrid courts have been hailed as being able to engender. It is important, however, to point out that the foregoing disadvantages being discussed are more of a specific feature of the particular hybrid courts to which they attach and as such, may be addressed by looking to other hybrid court arrangements.[307] The Special Court for Sierra Leone supports this argument as it has been able to address and limit these issues that have been raised regarding other hybrid courts.

The foregoing argument also applies to the second challenge identified with utilizing hybrid courts instead of international tribunals. The issue has always been raised regarding the extent to which hybrid courts are able to resolve the constraints posed by extraterritoriality and sovereignty, especially considering that they are not international tribunals under Chapter VII of the UN Charter

[306] Laura Dickinson in "Justice Should be done, But Where? The Relationship between National and International Courts." (2007) 101 Am Soc'y Int'l L Proc. 289 (<jstor.org/stable/25660207>)
[307] Also, Kirsten Ainley et al proposed the model guidelines for the structure of hybrid courts. See, Kirsten Ainley et al, *Dakar Guidelines on the Establishment Of Hybrid Courts* (2019), online: <eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf>

and so have not been created through the Security Council.[308] Thus, while they are able to address the challenges of sovereignty in the country where they sit, owing to the agreement signed by those countries, third-party states are not bound to comply with their directions.[309] For my proposed climate court that needs to have a transnational reach, this obviously presents fundamental challenges, including challenges with enforcement of decisions. Again, the foundational nature of the court becomes important in this regard.[310] In the application made by Charles Taylor contending his indictment by the SCSL, the former president argued sovereign immunity and extraterritoriality to say that the SCSL does not have jurisdiction outside of Sierra Leone and, by extension, over him. Basically, the same extraterritoriality arguments considered by courts determining transnational climate change claims discussed in the previous chapter. The SCSL, considering its foundational documents, however, determined that the establishment of the court was a result of a treaty between the UN and Sierra Leone and as such, it had the same powers as the ICTY, ICTR and ICC to set aside the issues of sovereign equality, and immunity of a head of state as to proceed against Taylor.[311] The hybrid court in Senegal determining a similar argument made by Hisne Habré, had no need to make a judicial finding as the SCSL did because its establishment statute already expressly empowered it to exercise universal jurisdiction.[312] The

[308] The special characteristics of hybrid courts have raised criticism from supporters of international justice who fear that hybrid courts may supplant and undermine the use of full-fledged international criminal courts. On the other hand, those who oppose international justice mechanisms, such as under the Bush Administration, view such courts as resembling international courts which they resist. See Laura A Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Int'l L 295 (doi:10.2307/3100105). For the nature of the Court, see Suzannah Linton, "New approaches to international justice in Cambodia and East Timor" (2002) 84:845 Int'l Rev Red Cross 93

[309] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Maximizing the legacy of hybrid courts*, (New York, NY: United Nations Publication, 2008).

[310] Kirsten Ainley et al, *Dakar Guidelines on the Establishment Of Hybrid Courts* (2019), online: <eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf>

[311] Decision on Immunity from Jurisdiction in "*Prosecutor v Charles Ghankay Taylor* (2014), Case No. scsl-2003-01-i Special Court for Sierra Leone (Sierra Leone).

[312] Human Rights Watch, "Senegal/Chad: Court Upholds Habré Conviction: Decision Brings to a Close 26-Year Struggle for Justice" (27 April 2017) online: <hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction>

foregoing presents an important feature of hybrid courts which makes them suitable to address the extraterritorial issues that constrain access to justice, especially for citizens of the Global South.

The other disadvantage argued as inherent in the special character of hybrid courts as not being commissioned by the Security Council under Chapter VII relates to funding for the court. Funds for the hybrid courts in Sierra Leone and Cambodia were to be sourced through voluntary contributions.[313] This arrangement leaves the operation of the courts to the goodwill of external actors and raises serious sustainability and even impartiality questions.

As already noted, hybrid courts – aside from the definitive characteristics of incorporating both international and local personnel and laws – admit variations in the way they operate and the challenges that attend their operations.[314] Picking from the strengths and correcting for the weaknesses identified in their various structure, I will suggest the contours of a hybrid court that might address the challenges in transnational climate change litigation involving corporations. I note that the very issues that motivate the international community to embark on a project like hybrid courts similarly obtain in the transnational litigation of corporate activities in the Global South. Such issues as the potential influence of powerful defendants over a weak system on one hand, and the partiality of a court constituted by judges who may be aggrieved by the activities of corporations which have affected their communities on the other.[315] Also, there is the point about the need to build capacity in such complex areas as climate change litigation as well as ensuring

[313] Suzannah Linton, "New approaches to international justice in Cambodia and East Timor" (2002) 84:845 Int'l Rev Red Cross 93

[314] John Ciorciari and Anne Heindel, Hybrid Justice: *The Extraordinary Chambers in the Courts of Cambodia*, (Ann Abor, Michigan: The University of Michigan Press, 2014).

[315] See the facts of the case in *Wiwa v. Royal Dutch Petroleum Co*, [2000] 226 F 3d 88 (2d Cir), *Ecuador v Chevron* (2011), Ecuador 002-2003 (Super. Ct. of Nueva Loja).

norm integration. Hybrid courts in the context of transitional justice have been primed to achieve all these, and they could work in the context of transnational climate change litigation involving corporations in the Global South where similar challenges are present. I will try to adapt the designs of the court, adjusting for the identified challenges. In doing this, I do not intend to provide a detailed account, as that is beyond the scope of this work, but will rather sketch some of the key attributes of the proposed court which make it useful for transnational climate litigation involving corporations, especially in the Global south.

3.3 Adapting the designs of Hybrid Courts in Driving Accountability of Corporations

In adapting hybrid courts to transnational climate change claims involving corporations, I will proceed along the stages or issues that generally define the adjudicatory process. These include jurisdiction (including composition and constitution of the court as well as cause of action), the evidentiary processes, guiding laws, and enforcement of decisions. I will also discuss the important question of funding for the operations of the court.

Perhaps the important place to start from would be the foundational conceptualization of the court. I consider that the model adopted by the Special Court for Sierra Leonean (SCSL) would be a more effective consideration than the other models of hybrid courts in existence. The SCSL although not a Chapter VII court was formed by a treaty pursuant to the *Security Council's Resolution 1315* (2000), between the national government and the UN at the request of President Tejan Kabbah. The agreement was ratified by the national law, the *Ratification Act*.[316] The importance of having this foundational model is that unlike a mere memorandum of understanding

[316] Beth Dougherty, "Right-sizing international criminal justice: the hybrid experiment at the Special Court for Sierra Leone", (2004) 80:2 International Affairs 311. The text of the SCSL Statute is available on <rscsl.org/Documents/scsl-statute.pdf >

or agreement creating the other hybrid courts, the SCSL has an extraterritorial reach and is able to address the challenges imposed by the doctrine of sovereign equality. In the application brought by Charles Taylor to the appeal chamber of the SCSL challenging his indictment by the trial chamber, the former president of Liberia argued that the SCSL was a national court and its jurisdiction does not extend to Liberia nor to persons outside Sierra Leone. He also argued the principle of sovereign immunity. The Appeal Chamber, rejecting the argument found that "the absence of the so-called Chapter VII powers does not by itself define the legal status of the Special Court."[317] It went further to find that

> "it is to be observed that in carrying out its duties [...] under its responsibility for the maintenance of international peace and security, the Security Council acts on behalf of the members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between all members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.[318]

The Appeal Chamber concluded that the nature of the SCSL imbues it with the powers of an international court and as such, its reach extended extraterritorially to ground legal action against Charles Taylor. I contend that this interpretation of the treaty agreement is necessary for addressing the extraterritorial characteristics of climate change.[319] Also, a court that adopts the SCSL model of extensive jurisdiction can easily address issues of enforcement of its decisions anywhere corporations might have assets outside the site of adjudication.

[317] *Prosecutor v Charles Ghankay Taylor* (2014), Case No. scsl-2003-01-i Special Court for Sierra Leone (Sierra Leone).
[318] *Ibid.* In this regard, there might be need for a UNSC resolution that countries that want a hybrid climate court can set it up. This does not detract from national courts simply adding foreign personnel to their sittings, but issues of extraterritoriality may not be resolved as a matter of obligation but persuasively as happened in this case.
[319] Hybrid climate courts could also toe the line of the Extraordinary Chambers in the Courts of Senegal by clearly codifying the universality of its jurisdiction in its founding Agreement and Statute.

I propose that where the UN has no interest in setting up hybrid climate courts, considering the politics of international law or even due to challenges of funding such a court, countries, especially in the Global South who bear the brunt of climate change, can set up hybrid courts either individually or as a regional group to adjudicate transnational climate claims; similar to the hybrid court arrangement in Senegal, and in the Gambia. National courts or regional courts such as the Economic Community of West African States (ECOWAS) court or the East African Court of Justice may add foreign judges to their ranks to preside over such transnational climate claims pending before them.

3.3.1 Jurisdiction (constitution, composition and cause of action)

In terms of composition and constitution, I propose that the hybrid court would be established by treaty or domestic law, and connected to the regular court originally imbued with jurisdiction over corporations and/or climate change matters in a "multi-door courthouse" arrangement.[320] Under the multi-door courthouse arrangement in Nigeria, the courts run a court-connected ADR track with judges in the regular courts referring cases considered ripe for ADR to the multi-door courthouse by order of the court. The whole proceedings of the ADR tribunal are sanctioned and carried out under the auspices of the referring court and if parties are able to settle at the ADR, the regular courts adopt the outcome as its consent judgment.[321] In our case, when a climate matter comes before the court, the presiding judge may consider the cause of action to determine if it constitutes a purely domestic matter for which the court already naturally has jurisdiction or contains a transnational and international component for which challenges of conflict of laws,

[320] In the case of Nigeria for instance, the court would be the Federal High Court and in the case of Canada, the Superior Courts of the various provinces. See Chapter 7, Section 251(1) of the *Constitution of the Federal Republic of Nigeria*, 1999 (as amended)

[321] See *Lagos Multi-door Court House Law*, Supplement to Lagos State of Nigeria Official Gazette Extraordinary, 3rd August 2007, No 56, Vol 40 online (pdf): <international-arbitration-attorney.com/wp-content/uploads/2007_nigeria_lmdc_law.pdf>

extraterritoriality and sovereignty questions might arise. The cause of action that purely conveys a domestic claim would be handled by the court as a national matter without more. However, where the case evinces a transnational or international component, the court may refer the matter to the hybrid court and the judge may request the United Nations or regional organization to provide judges from its list of approved judicial officers, as you would have a list of arbitrators, to come and sit with the national judge to determine the case. Where the court has been set up under a national or regional multi-door courthouse arrangement without UN involvement, the local judges may invite eminent foreign judges to join in presiding over the case.

From the foregoing, another important part of the foundational conceptualization of a hybrid court for transnational climate change as I propose is evident. The reference to a list envisages that the hybrid court would involve an ad-hoc arrangement that sees the jurisdiction of the court only activated on a need basis, with the court keeping a list of eminent jurists as you would have a list of arbitrators. Hence, while we would have the site of the hybrid court with domestic judges assigned to it, the foreign personnel required to constitute its hybrid jurisdiction will be activated when a relevant case is referred to the court. In these circumstances, the hybrid court may then request international judges either from the UN or by inviting eminently qualified judges from its list. Thus, instead of having a permanent domestic court with international judges always present, which in any case is infeasible, I propose that the UN through the Secretary-General's office, or the domestic high court making the referral, or the domestic or regional secretariate of the hybrid court, maintain a list of qualified foreign judges which it can assign to join a domestic court following a 'request ruling'. In such an instance, an international component is then grafted upon the national court for the purposes of determining the transnational or international climate change claim.

The foregoing model of grafting onto or embedding an international component into the national legal order of the state involved is similar to the designs of the courts in Kosovo, East Timor, the Bosnian War Crimes Chamber, and the Extraordinary Chambers in the Court of Cambodia. For Bosnia, the ICTY which served as an appellate court for the War Crimes Chamber noted in the case of *Prosecutor v. Radovan Stankovich* that,

> 'The State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a "national court." Bosnia and Herzegovina has chosen to include in the composition of the State Court judges who are not nationals of Bosnia and Herzegovina. That is a matter determined by the legislative authorities of Bosnia and Herzegovina. The inclusion of some non-nationals among the judges of the State Court does that [sic! meant: 'not'] make that court any less a "national court" of Bosnia and Herzegovina.'[322]

Thus, there is a model for such hybridization within the confines of existing national legal structures.[323] With regards composition of the court, there is a need to ensure a balance of influence in the court's decisions in order to secure the impartiality of the tribunal and respect for the adjudicatory outcomes. As this is a fundamental area of concern and one of the often cited challenges to the authority of courts in the Global South, balancing voice inclusion from the Global South while ensuring the 'standardization' of justice through the participation of the international community is necessary. In the case of *Ecuador v Chevron*, the judgment of the court was not only challenged on the basis of partiality of the court but the enforcement of the decision has also been derailed by the legal challenges mounted by Chevron in courts of various countries where enforcement has been sought. Thus, constituting a court that is credible and impartial in its influence is fundamental to ensuring the enforcement of ensuing decisions. Also, as was evident

[322] *Prosecutor v. Radovan Stankovich*, UN Doc IT-96-23/2-PT, 17 at 26 (2005) para 26.
[323] Even where the court is set up as a treaty court as in the SCSL, the site of the court may still be grafted upon existing national courts to save costs, in a multi-door courthouse arrangement.

in the initial threat of the UN to pull out of the ECCC in Cambodia, a court that is largely influenced by domestic considerations and personnel as to bring to question the reputation of the UN will hardly enjoy its participation in such a project. To address this point, I argue that the composition model adopted in the SCSL will be able to address this issue. Article 12 of the *Statute of the Special Court for Sierra Leone* establishing the SCSL provides that "three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General")."[324] I suggest this composition of the SCSL for the hybrid courts considering that most of the national courts - which I argue should be the site of the hybrid court – are usually composed of one judge.[325] Thus the two foreign judges would join the local judge in presiding over cases.

The provisions of Article 13(1) and (2) of the *Statute of the Special Court for Sierra Leone* are also germane to determining the qualifications of the potential judges. According to the provision, judges of the court "shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."[326] Subsection 2 provides that "in the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice."[327] I consider that the appropriate modifications to substitute criminal law and juvenile justice with climate change law will be apt in the circumstances. The

[324] Article 12(1)(a) *Statute of the Special Court for Sierra Leone*, <rscsl.org/Documents/scsl-statute.pdf>
[325] The national hybrid court can invite two foreign judges from its list of eminent jurists.
[326] *Statute of the Special Court for Sierra Leone*, online: <rscsl.org/Documents/scsl-statute.pdf>
[327] *Ibid*

court's decisions will be determined by the majority votes of the judges delivered in public "accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended."[328] I argue that even a dissenting opinion would contribute to shaping the legal norms on climate change.

3.3.2 Evidentiary Processes

Causation has presented one of the most significant barriers to effective transnational climate change litigation. However, various scientific breakthroughs have eased the process of proving liability against carbon majors, and tribunals and courts are beginning to refer to these findings to make determinations. The work of Richard Heede is one of such scientific articulations regarding causation and liability of carbon majors for extraterritorial activities causing climate change.[329] In the *Re Greenpeace Southeast Asia* case[330], the Commission on Human Rights of the Philippines relied on the work of Heede to determine causation and to link the activities of carbon majors outside the Philippines to the damage suffered by Filipino farmers. In the German case of *Order of the First Senate*[331], it was argued before the court that the legislature had failed in its duty by not taking into consideration the findings of the IPCC on the impacts of climate change.

I argue that the evidential support for claims before the hybrid courts on climate change would be the prerogative of the parties before the court. The parties just as in the *Re Greenpeace Southeast Asia* case can rely on existing texts, commissioned experts or the findings of the IPCC to prove

[328] *Ibid*, Article 18
[329] Richard Heede, "Tracing the Anthropogenic Carbon dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854 – 2010" (2014) 122:1 Climatic Change 229.
[330] *In Re Greenpeace Southeast Asia & Ors* (2015), Case No CHR-NI-2016-0001 Commission on the Human Rights of the Philippines (Philippines)
[331] *Order of the First Senate of 24 March 2021* (2021), 1 BvR 2656/18 Federal Constitutional Court (Germany) <bverfg.de/e/rs20210324_1bvr265618en.html>.

claims or challenge cases against them.[332] The IPCC is the United Nations body responsible for evaluating the science as it relates to climate change.[333] The proposition for bearing evidentiary burden by parties is similar to the position at the SCSL where parties are responsible for proving their case, although with the help of agencies of government where specialized assistance is required.[334] In the instance of climate change, agencies focused on climate and environmental science may be requested to also provide advisory opinions.

3.3.3 Applicable Laws

From a review of various cases in the preceding chapter and as noted by scholars, climate litigation typically proceeds along two tracks, a challenge against government's inaction or inadequate response to climate change and a rights-based claim by plaintiffs.[335] Reviewing the cases brought against corporations, most claimants usually make a rights claim and argue that the activities of corporations are infringing on their fundamental rights to life, property or other connected rights such as the right to a healthy environment amongst others. As the focus of my proposition is on corporations, I contend that the applicable laws to guide proceedings should be the *lex fori* with a ready application of international law norms, practices and precedents where the circumstances require. As human rights generally apply universally, I envisage that most claims

[332] According to the final report of the Commission on the Human Rights of the Philippines released in May 2022, the commission "in addition to the Amici Briefs and expert testimonies proffered during the inquiry", also took "administrative notice of the reports of the Intergovernmental Panel on Climate Change (IPCC), the United Nations Framework Convention on Climate Change (UNFCCC), and the United Nations Environment Programme (UNEP)

[333] Amongst several task forces commissioned by the IPCC is the "Task Force on National Greenhouse Gas Inventories, whose main objective is to develop and refine a methodology for the calculation and reporting of national greenhouse gas emissions and removals." The Intergovernmental Panel on Climate Change (IPCC), https://www.ipcc.ch

[334] Article 15(2) of the *Statute of the Special Court* provides that "The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned." For instance, in cases involving aspects of banking regulation in Nigeria, parties may require the Central Bank of Nigeria to issue an opinion on the specific issue which may be tendered in court as evidence in support of a party's claims.

[335] Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South", (2019) 48 AJIL 679

and guiding laws would be similar with only minor variations between countries. Thus, the *UN Charter on Human Rights* as well as other regional and national rights laws can apply to guide the claims before the hybrid courts. The Nigerian Federal High Court in the case of *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Ltd. and Others*[336] applied both national and regional human rights laws in determining that the actions of Shell in gas flaring violated the rights to life and dignity of the person which include rights to a clean, poison and pollution-free environment.[337]

In circumstances where claims are brought under a tort or common law basis, I also consider that the way laws have developed under a shared colonial past has served to make for similar applicable legal principles in this regard. Consequently, I foresee that the applicable common law developments of torts and contracts should be applicable but with variations as the *lex fori* admits, tempered by international best practices. Hence, where the duty of care in developed countries is higher than what obtains in developing countries as the forum of the hybrid court, this higher duty should be applied in proceeding against the transnational corporation, notwithstanding compliance with the standards in the developing country. Plaintiffs should be able to rely on best practices embodied in the laws of developed countries in their claims against transnational corporations. This is important for countries in the Global South that have a reduced standard of operation and behaviour when it comes to business, which lower standards are aimed at attracting foreign investments.

[336] *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Ltd* (2005), FHC/B/CS/53/05 Federal High Court (Nigeria).
[337] *Ibid*

Ultimately, the decision on how to couch claims is the prerogative of the claimant within the ambits of applicable laws. I propose that the focus of the courts should be to do substantive justice instead of a rigid application of legal principles; in all instances, international best practices and the need to protect human rights should be the focus of the court.[338] Decisions of the courts in admitting claims as well as determining the substance of same should be guided by the creed of the Commission on the Human Rights of the Philippines which is to "test boundaries and create new paths; to be bold and creative, instead of timid and docile; to be more idealistic or less pragmatic; to promote soft laws into becoming hard laws; to see beyond technicalities and establish guiding principles that can later become binding treaties; in sum, to set the bar of human rights protection to higher standards."[339]

In addressing the identified barriers to effective climate litigation which may also come up before the hybrid courts, I consider that the model statute designed by the International Bar Association (IBA) would be instrumental.[340] Although the model statute is expressly geared towards the accountability of governments for climate change, I contend that the provisions of the model laws on standing, costs, judicial notice and presumptions, access to information etc. may be applicable with substantial modifications as to ground actions in transnational corporate climate litigation.[341] Article 3 of the model law requires courts to interpret rules of procedure and "give

[338] *The Constitution of the Federal Republic of Nigeria* 1999 (as amended) in Section 254C(1)(f), provides for such application of international best practices in labour-related matters, considering the gap in standards between human resources practices in Nigeria and what obtains outside Nigeria.
[339] The Commission outlined how NHRIs should proceed as it pertains to climate change litigations. See the decision of *Re Greenpeace Southeast Asia* case, pg. 4 of the CHRP Report
[340] The Model Statute for Proceedings Challenging Government Failure to Act on Climate Change is drafted by the expert working group made up of foremost climate litigation experts including David Estrin, Brian Preston, Roger Martella, Nicola Swan, Antonio A Oposa Jr, Hari M Osofsky, Jacqueline Peel, Lavanya Rajamani, Anne Ramberg, Peter J Rees QC, Nicole Smith and Jaap Spier. The working group collates contributions from various stakeholders towards updating the model statute.
[341] Article 2.2 of The Model Statute for Proceedings Challenging Government Failure to Act on Climate Change

such directions as it thinks fit to achieve the interests of justice."[342] Article 4 seeks to overcome the barrier placed by the defence of 'standing', providing for the right to an action "whether or not any right of that person has been or may be infringed by or as a consequence of that breach."[343] Article 4.2 proposes that such enforcement action may be brought "by a person on their own behalf or on behalf of another person (with their consent)."[344] Article 4.4 and 4.5 provides for qualifications to locus standi including requiring that a claimant show "(a) a serious issue is raised in the proceedings; and (b) a genuine interest in the issue and, in the case of an organization, an objective or mandate to protect the public interest."[345] Where these are satisfied, the model law proposes that the claimant can bring an action, even on behalf of "minors or future generations."[346] Article 4.6 provides that "The State (through the Attorney-General or other representative of the State) may bring climate change proceedings on behalf of its people."[347]

Article 6.1 provides for the powers of a court to take judicial notice of the findings of the IPCC as contained in its Assessment Reports or Special Reports except where the same has been successfully challenged by the opposing party. Where a challenge is sought, the model statute requires that the challenger seek leave of court, subject to the following conditions: "(a)leave shall not be granted unless the challenging party can demonstrate a reasonable prospect of success; (b) that challenge shall not unduly delay the disposition of the substantive claim or otherwise cause injustice to the plaintiff; (c) the challenging party bears the evidential burden of proof; (d) and

[342] *Ibid*
[343] *Ibid*
[344] *Ibid*
[345] *Ibid*
[346] *Ibid*
[347] *Ibid*

before leave is granted the court may require the challenging party to provide in advance sufficient funds for the responding parties to retain experts to respond to such challenges and conclusions."[348]

Article 7 of the model law provides that admissible evidence includes,

> (a) records and other material prepared for and by Government bodies that report on:
> (i) operations or activities that may result in GHG emissions, whether or not made in response to Government reporting requirements;
> (ii) the measurement, modelling or estimation of GHG emissions; or
> (iii) any other information involving GHG emissions and the potential risks such emissions may pose to the environment, health or human rights;
> (iv) peer-reviewed scientific studies;
> (v) statistical information or information derived from sampling;
> (vi) information derived from the use of climate models (including global, coupled or regional models); and
> (vii) epidemiological, sociological and economic studies.[349]

Article 7.2 provides that the foregoing may "be regarded as sufficient to satisfy relevant evidentiary standards for the court to adjudicate relief sought, including the quantification of any mitigation or adaptation required."[350] These provisions may be modified to ground corporate actions. Article 9 provides for the burden of proof and the application of the 'precautionary principle'. The precautionary principle requires that "where there are threats of serious or irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent, mitigate or adapt to climate change or the likely adverse effects of climate change or to remedy any likely or resulting damage."[351] The burden of proof is on the party challenging application of the precautionary principle.[352] Article 10 requires

[348] *Ibid* Art. 6.3
[349] *Ibid*
[350] *Ibid*
[351] *Ibid*
[352] *Ibid*, Article 9.3

Environmental Impact Assessment Reviews while Article 11 provides for access to environmental information.[353]

Article 13 provides for the disclosure of documents within the possession of the defendant. Again, although the article -as does the entire model statute- specifically refers to government, I consider that the provisions may also be relevant in holding transnational corporations accountable. In this light and upon application for a document which is relevant or likely to be relevant to the proceedings, the defendant should disclose whether such documents are in its possession, custody or power and produce such documents to the applicant on "such terms and conditions as the court considers appropriate in respect of any asserted privilege or other protections recognized by law."[354] Article 13.3 provides that in determining whether to make an order for production of documents, the court shall consider "(a) the benefits of making the order; (b) the cost consequences of the order; and (c) whether it is in the interests of justice for the orders to be made."[355]

Article 15 provides for the powers of the court to appoint experts and for remuneration of the expert by contributions of both the claimant and defendant. Article 16 rules out the *de minimis* defence as well as government defences of political policy, non-justiciability and legislative or executive function. Article 18 provides for possible remedies that the court may grant including abatement and mitigation of the action causing climate change, enforcement of rights conferred by any legal instrument, declaratory orders to give effect to any rights as well as any other order

[353] *Ibid*
[354] *Ibid*
[355] *Ibid*

as the court thinks fit to restrain or remedy the conduct of the defendant.[356] Article 18.2 provides for the powers of the court to monitor compliance with the orders so made and to make further orders where there is a breach or threatened breach of the initial orders made by the court.[357] Article 19 waives court fees for the claimant, I consider that this is very important to drive access to justice for any indigent claimants who may want to sue corporations.[358] Article 23 provides for cost-shifting in final cost orders and suggests that an unsuccessful defendant pays the cost of the plaintiff's court action but relieves the plaintiffs of that duty were unsuccessful in their claims.[359] This will protect claimants who are invariably in a weaker financial position than the powerful corporate defendants they are suing. It will encourage access to justice for victims of climate change.

While the foregoing provisions of the model statute are expressly indicated to cover only litigation against governments, I contend that with appropriate modifications, they may provide a starting point for successfully regulating litigation against transnational corporations. This is particularly as the same power imbalance that the model statute seeks to address also obtains with powerful transnational corporations, particularly in the Global South. Applying this model statute crafted by a team of experts and lawyers, with contributions from stakeholders who have grappled with the challenges of litigating climate change, will go a long way in driving effective climate action against transnational corporations.

[356] *Ibid*
[357] *Ibid*
[358] *Ibid*
[359] *Ibid*

3.4 Feasibility of Hybrid Courts as a Transnational Climate Change Accountability Tool

There are precedents for hybrid courts being established outside of transitional justice settings, a testament to the potential of the courts to solve a set of specific challenges already discussed in this chapter. Thus, the issue of feasibility of the courts is not necessarily a question of the potential of hybrid courts to solve the identified challenges, it is rather a question of the political will and interest of governments, especially in developed countries, to float and support such a court. Indeed, the challenges of climate change provide enough incentive to take serious action to remedy the situation and governments have shown that they could make commitments towards addressing the same if there is political will.[360] However, ample evidence exists of national interests sometimes trumping collective efforts for climate sustainability. Michael Cutajar, the executive secretary of the UNFCCC between 1995 and 2002 notes that the limitation to the successful operation of the *Kyoto protocol* was largely a result of the absence of political commitment by the United States. According to him, "Kyoto was a very important political signal … unfortunately, it didn't have its full force because the US didn't join in… that rejection coloured everything that followed".[361]

Barry Carin a top Canadian diplomat and negotiator for the G20 notes that, "it is difficult to mobilize political support for a problem that is seen as a future problem many years away… it is inherently difficult to orchestrate international coordination when the most vulnerable, poorest and least responsible countries have the least power. The countries with the most power – China, the United States and Russia – have their own priorities: China is preoccupied with economic growth,

[360] *The Paris Climate Agreement* represents one such moment of cohesion in response by governments.
[361] Mari, Luomi "Global Climate Change Governance: The Search for Effectiveness and Universality (2020) International Institute for Sustainable Development (IISD) online: http://www.jstor.org/stable/resrep29269

the United States is stuck in congressional gridlock; and Russia will actually benefit from climate change with longer growing seasons, richer cut of timber and lower heating bills."[362]

Beyond the absence of a political will, instances also exist of countries undermining the capacity of international instruments and resolutions aimed at climate sustainability. This happened with the Outcome Document of the COP26 meeting, the Glasgow Climate Pact, wherein India and China watered down language of the resolution aimed at phasing out unabated coal power from "phase out" to "phase down", thereby preserving the continued use of coal for the foreseeable future. It is this manipulability of potentially effective international law instruments by powerful nations when their interests are challenged that is fueling the argument that international law is weak and is an organizing force to the extent that it does not disturb the interests of powerful nations. Thus, if the superpowers perceive their interest to be threatened by the emergence of an institution capable of holding their governments or in this case, corporate nationals, liable for violations of rights and breach of climate sustainability requirements, there is reason to believe that such an institution would be undermined or at least receive no support.[363]

The potential beauty of hybrid courts as I have proposed in this chapter, however, is that developing countries which bear the most brunt of climate change do not necessarily need the support of any other country to set up the court. This is because even where an agreement with the UN is not feasible, the individual country or a group of countries within the same region may decide to set up and fund the court's operations. The only challenge here lies in the interstice of

[362] Barry Carin, "Climate Change, a Dead Horse and Realpolitik", (Hurst and Company: 2013), online: <jstor.com/stable/resrep16125>

[363] Undermining hybrid courts could also play out in the form of external influence or compromise of the judges constituting the court.

law and politics, as the developed countries may adopt a number of sanctions measures against the developing country hosting a hybrid court. Alternatively, the transnational corporations may move their investment out of the country to another more 'business friendly' jurisdiction in a divide and rule manoeuvre. With poverty and the need for economic development forming a fundamental issue for Global South countries, even a steadfast government may be undermined from within by agitation from citizens stoked from seeing potential investments go overseas.

The issue of funding for the courts is one that might also pose a serious challenge to its operation. Hybrid courts with their requirement of foreign personnel and experts can be quite expensive even if not as expensive as international tribunals. Lasana Gberie writing about the SCSL notes that although it was "meant to last for only three years with an initial budget of $75 million, the court formally closed in December 2013 after spending about $300 million."[364] The additional costs to support the operations of the court might mean that the country needs to allocate more resources to the judiciary or rely on foreign contributions like most of the established hybrid courts did. Except where there is clear political will on the part of the national government, reliance may have to be placed on foreign support which is not guaranteed, especially considering that developed countries might view such a court as undermining its economic interests. The other option that is available is for the UN to carve out resources from its available funds to support such a court. Alternatively, regional governmental institutions and an alliance of Global South countries that bear the brunt of climate change can institute a fund and make contributions towards hybrid courts, when needed by any of the allied countries. This is in addition to the far-reaching potential

[364] Lansana Gberie, "The Special Court for Sierra Leone rests – for good", *Africa Renewal* (April 2014) <un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-–-good>

of climate-sensitive activist organizations and individuals to make financial contributions towards supporting the courts' work.

3.5 Conclusion

Climate change is a global issue requiring a multi-level response from various stakeholders. This response requires that alliances and synergies be formed in order to leverage the experiences and diversity of approaches deployed in various jurisdictions. Peel and Lin note that climate activists in the Global North and South are already building the required synergy and deploying a hybrid approach to ensuring that they get the most out of the legal systems where they function, as well as extraterritorially. The authors note that "in *the Protection of the Paramos* case, for example, the Interamerican Association for Environmental Defense (based in San Francisco, California) and the Bogota-based NGO, Asociación Ambiente y Sociedad, submitted an amicus brief. Dejusticia, the NGO behind the Colombian Youths case, also submitted an amicus brief in this case."[365] Here, activists are driving norm percolation by submitting amicus briefs in support of cases filed by external climate advocacy organizations as well as supporting the work they do with the necessary funding. Although the authors did not conclusively determine that the collaboration between Global North and South advocacy groups was a conscious effort at shaping transnational law, they however agree that the synergy may "be driven by pragmatic needs to leverage expertise and capacity … Likewise, the growing trend of South-South cooperation in this area might be explained by norm diffusion processes, including imitation and learning."[366]

[365] Jacqueline Peel and Jolene Lin, "Transnational Climate Litigation: The Contribution of the Global South", (2019) 48 AJIL 679
[366] *Ibid*

Peel and Lin, however, note that there are indications that some stakeholders in the justice system of the Global South are synergizing towards driving transnational climate regulation through litigation. They note that their "conversations with Global South advocates and judges, as well as the networking activities in which they are engaged, indicate an openness to shaping the emerging climate case law as part of a transnational dialogue."[367] Thus, synergies and a collaborative approach to climate change have been explored by stakeholders in their work toward climate sustainability. I am proposing hybridity as an adjudicatory tool in this chapter as a means for dispersing 'credible' adjudicatory structures and 'standardizing' notions of justice in the Global South, ensuring voice inclusion in the process.

I consider that although hybrid courts are readily associated with transitional justice, they are not exclusively transitional justice tools.[368] Their use outside transitional criminal law contexts bears this out. Hybrid tribunals have been used in Lebanon and a hybrid arrangement has also been deployed in Guatemala in instances that are different from their use in Kosovo, Sierra Leone and other such transitional justice settings. The Special Tribunal for Lebanon, for instance, was established to ensure accountability following the assassination of former Lebanese Prime Minister, Rafik Hariri.[369] The tribunal which became operational in 2009 sat both international and national judges.[370] There was also the hybrid tribunal set up in the Gambia in the 1980s, preceding

[367] *Ibid*
[368] Other transitional justice tools include truth and reconciliation commissions, reparation programs, and international tribunals.
[369] Alamuddin Amal, Nidal Nabil Jurdi, and David Tolbert "*Special Tribunal for Lebanon: Law and practice*" (Oxford: Oxford University Press, 2014).
[370] *Ibid*

the hybrid courts of the 1990s and 2000s, to try coup plotters in the failed attempt to overthrow former Gambian president Dawda Kairaba Jawara.[371]

In Guatemala, the International Commission against Impunity in Guatemala (Spanish: *Comisión Internacional contra la Impunidad en Guatemala,* CICIG) was formed by an agreement between the government and the UN to investigate and prosecute serious crimes in Guatemala.[372] "It represent[ed] an innovative initiative by the United Nations, together with a Member State, to strengthen the rule of law in a post-conflict country."[373] Zamudio Gonzalez notes that the CICIG joined the "broad repertoire of postconflict institutions" such as hybrid courts "but with a different design and with its own challenges… International prosecutors work in the country with their own laws and in support of the Public Ministry, the National Civil Police and other institutions of the state."[374] Its peculiarity lies in the fact that it promotes the strengthening of the local justice system from within the country, working with national laws and "without intending to substitute or replace its government institutions."[375]

The CICIG was composed of a commissioner appointed by the Secretary-General of the United Nations and staff from Argentina, Canada, Chile, Colombia, Costa Rica, El Salvador, Spain, France, Honduras, Italy, Mexico, Peru, Portugal, Sweden, Uruguay, and Venezuela. Funding for its operations came from voluntary donations of UN member states and was

[371] Christopher, Waters, "From Coup Reaction to Coup Prevention" in Charles Chernor, Jalloh, and Alhagi B.M. Marong, eds., *Promoting Accountability under International Law for Gross Human Rights Violations in Africa* (Leiden, The Netherlands: Brill | Nijhoff, 2015)
[372] UN Department of Political and Peacebuilding Affairs, "International Commission against Impunity in Guatemala", online: <dppa.un.org/en/mission/cicig>. Although not a court the CICIG embodies hybridism to strengthen domestic institutions, build capacity, and ensure accountability by driving justice delivery.
[373] *Ibid*
[374] Laura Zamudio González, "The International Commission against Impunity in Guatemala (CICIG): A Self-Directed Organization", (2019) 25 Glob. Gov. 418
[375] *Ibid*

"administered through the UN Development Programme (UNDP). The donor group consisted of Norway, Germany, Canada, Spain, the United States, Italy, Japan, the Netherlands, and Sweden, as well as the Inter-American Development Bank, the World Bank, the International Monetary Fund, UNDP, the European Union (EU), and the Organization of American States".[376]

"Acting as an independent international body, CICIG [aimed] to investigate illegal security groups and clandestine security organizations in Guatemala – criminal groups believed to have infiltrated state institutions, fostering impunity and undermining democratic gains in Guatemala since the end of the country's armed conflict in the 1990s."[377] Its mandate also included investigation of "the existence of CIACS that commit crimes and undermine the fundamental human rights of the citizens of Guatemala and [to] identify their structures (including their links with state officials), activities, operating modalities, and sources of financing."[378] CIACS are "groups (1) that commit illegal actions to affect the full enjoyment and exercise of civil and political rights; and (2) are directly or indirectly linked with agents of the state or have the capacity to secure impunity for their illicit actions."[379] It was expected that through its operations, the CICIG would be able to prosecute sensitive cases that would have, otherwise, been too risky for national personnel alone. Through its involvement, it was hoped that the national institutions of Guatemala including its judicial institutions would be strengthened.[380]

[376] *Ibid*
[377] *Supra*, note 371
[378] *Supra*, note 373
[379] *Supra*, note 371
[380] As at the time of its closure, the CICIG had been able to realize its mandate to a great extent. See, Tiziano Breda, "Curtain Falls on Guatemala's International Commission against Impunity", *International Crisis Group* (3 September 2019) online: <crisisgroup.org/latin-america-caribbean/central-america/guatemala/curtain-falls-guatemalas-international-commission-against-impunity>

Gonzalez notes that the commission expanded its mandate to transcend violent crimes by CIACS to include "Illicit Political-Economic Networks (RPEIs)". By incorporating this new concept, the commission "sought to capture a much broader phenomenon, which mixes actors, contexts, and legal and illegal dynamics, public and private, formal and informal."[381] Thus "instead of investigating criminal groups and ringleaders, it also began investigating high-ranking officials involved in administrative corruption."[382] Under this expanded mandate, "the CICIG took up cases of endemic corruption, revealing structures of illicit financing in electoral campaigns, administrative corruption, smuggling and customs fraud, judicial corruption, drug trafficking and money laundering, everything that is focused on combating the economic bases of impunity."[383] It prosecuted "rackets involving prominent officials, business leaders, drug traffickers, extortionists and street gangs. Its work helped "oust a dozen corrupt judges, and led to the removal of 1,700 police officials accused of corruption and incompetence."[384] Amongst several cases that the commission prosecuted is the environmental case involving the clean-up of Lake Amatitlán. In this case, Roxana Baldetti, the former Guatemalan vice-president was charged with diverting millions of dollars earmarked for the decontamination of the lake, which had been polluted with untreated sewage.[385]

This case, like the others in which the CICIG was involved, demonstrates an instance where a hybrid arrangement was deployed outside the transitional justice setting. A similar arrangement

[381] *Supra*, note 373
[382] *Ibid*
[383] CICIG, "Informe de la Comisión Internacional contra la impunidad en ocasión de su octavo año de labores," s. f., (2015) online: <cicig.org/uploads/documents/2015/COM_085_20151113_VIII.pdf>
[384] Tiziano Breda, "Curtain Falls on Guatemala's International Commission against Impunity", *International Crisis Group* (3 September 2019) online: <crisisgroup.org/latin-america-caribbean/central-america/guatemala/curtain-falls-guatemalas-international-commission-against-impunity>
[385] BBC News, "Guatemala investigates Lake Amatitlan clean-up plan", *BBC* (13 March 2016) online: <bbc.com/news/world-latin-america-35796849>

as the CICIG has also been utilized in Honduras with the Organization of American States (OAS)-backed Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH, by its Spanish acronym).[386]

The foregoing discussion of hybrid courts and arrangements supports the view that international law can respond to various scenarios insofar as there is an appetite for such a response. There is hardly any other setting where there is an incentive to make bold decisions than on the issue of climate change which poses an existential threat to the entire world. There is nothing more global than climate change, and governments all over the world need to band together as they did with the *Paris Climate Agreement* to drive climate sustainability by strengthening institutions of climate accountability. I believe that hybrid climate courts could present one of such climate accountability tools. I also contend that the benefits of such hybrid courts in driving the needed changes in policy while ensuring access to justice far outweigh the disadvantages associated with it. Thus, establishing such a court or courts, while not discounting the feasibility questions considered in this paper, merits serious contemplation. Ultimately, the prescription for a hybrid court as made in this research is encouraged by the view that even though ideas may not be immediately practicable, they should be crafted for the future so that when the time is right, opportunity will meet preparation.[387]

[386] Julia Aikman Cifuentes and Adriana Beltrán, "A Year of Setbacks to Honduras' Anti-Corruption Efforts", *WOLA* (4 February, 2021) online: <wola.org/analysis/honduras-anti-corruption-efforts/>

[387] It is this same attitude that underlines the work of the International Bar Association pertaining to its project of creating various model climate laws that may be adopted by governments to stem climate change.

Conclusion and Recommendations

> *Tuvalu, which is about 2,500 miles southwest of Hawaii, is made up of nine small islands and has a population of around 12,000. Its tourism website, Timeless Tuvalu, warns that by the end of the century it could be under water. School pupils are learning about the effects of climate change and "could be the last generation of children to grow up in Tuvalu," the website states, adding that many people have already emigrated to New Zealand.*[388]

I Conclusion

International treaties on climate change have served as an important means of galvanizing international action on a scale that is required to effect climate sustainability. From the *UNFCCC* to the *Kyoto Protocols* to the *Paris Climate Agreement* to the various Conferences of the Parties, states have strived to calibrate climate action to an impactful setting. Yet international treaties alone are not enough to get us to where we need to be in urgently tackling climate change. Peel and Osofsky note that,

> The international treaty regime faces two foundational limitations as the primary regulatory approach to climate change, both of which help to create a regulatory role for litigation. First, the existing regime and negotiations are failing to achieve their goal of mitigating emissions adequately… secondly, and perhaps more fundamentally, climate change is a problem that interacts with many levels of government and types of law and involves a wide range of public and private actors. The complex regulatory dynamics at each level involve (1) scientific, technical and legal uncertainty; (2) simultaneously overlapping and fragmented legal regimes; (3) difficulties of balancing inclusion and efficiency; and (4) inequality and resulting injustice. Even a more effective treaty regime would struggle to capture the ways in which both mitigation and adaptation interact with the individual, local, state, national and international regional scales.[389]

[388] Lucy Handley, "The Road to COP26: Pacific Island Minister Films Climate Speech Knee-deep in the Ocean", *CNBC News* (November 8, 2021) online: <cnbc.com/2021/11/08/tuvalu-minister-gives-cop26-speech-knee-deep-in-the-ocean-to-highlight-rising-sea-levels.html>

[389] Hari M Osofsky & Jacqueline Peel, "The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?", (2013) 30 Envtl & Planning LJ 303

The practical representation of these limitations is that we are exceeding the mark scientists warn is necessary to avoid climate collapse, even as countries continually struggle to meet their commitments under the current international legal regime on climate change. Yet, "addressing climate change is highly dependent upon global cooperation" which at the same time, "is highly dependent upon the degree of implementation of international commitments at the national level."[390] It is in light of the shortcomings of both international and national laws and policies on climate change that it has become necessary to interrogate other avenues for ensuring climate justice and accountability of corporate actors.

Climate litigation has proved to be an important legal tool for ensuring such accountability and is particularly important in transnational settings as it is best suited to answer to the multi-level and multi-scalar nature of climate change. While progressive courts in the Global North and South are making important judicial pronouncements that complement international and domestic laws shaping climate regulation, substantial barriers still exist. Whether it be the issue of sovereignty of countries and limitation to extraterritorial reach by courts, or questions of standing, causation etc., the courts have been constrained from acting on the scale required to address what is clearly an existential threat.

Beyond this general problem, a peculiar challenge for the Global South lies in the familiar issues of marginality of voice when it comes to erecting the structures of international law.[391] The basis for marginalization is so often built around issues of weak legal systems and structures, partiality, incapacity of personnel, and general unappreciation of international law concepts by

[390] David Estrin and Patricia Ferreira, "Advancing Climate Justice: The New IBA Model Statute for Proceedings Challenging Government Failure to Act on Climate Change." (2020) online: <10.2139/ssrn.3559045>
[391] James Thuo Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 Am U Int'l L Rev 377.

adjudicators.[392] These issues raise substantial doubts about the standard of justice being delivered in the Global South and restrict access to justice for victims of climate change. In this work, I have deployed hybrid courts, a Global North (albeit international law) concept, to build trust as well as ensure that the voices of the Global South are infused into the emergent legal regime that is climate change law. Following review of hybrid courts' architecture, I consider that hybrid courts - although a transitional justice tool - when suitably adapted, could provide an answer to some of the identified challenges of transnational climate litigation generally, and especially in the Global South. Hybrid courts by addressing the challenges of transnational climate litigation are better suited to complement national laws and international treaties on climate change more effectively. What is more, the logic for establishing hybrid courts as a transitional justice tool squarely applies in the case of powerful corporations doing business in the Global South or outside the Global South but whose activities displace whole communities in the Global South. Like the defendants in transitional justice settings, corporations are powerful, possess influence and have the capacity to thwart justice in a weak system such as the Global South presents.

In a hybrid court, we have precedents, and we have practical examples of success in ensuring access to justice in very difficult and complicated circumstances; thus, the potential capacity of the court to deliver justice is not in doubt.[393] Also, hybrid courts have been deployed in non-transitional justice settings, a testament to the belief of the international community in the ability of the court to deliver justice wherever a set of challenges are in issue – weak structures, the need

[392] Manuel, Gomez, A., "The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment outside of Ecuador" (2013) 1:2 Stan J Complex Litig 429.

[393] It is for this reason that hybrid courts have experienced a resurgence, even after the formation of the ICC. For instance, hybrid courts have been considered for Syria, Sudan, and for the prosecution of Islamic State (ISIS) fighters. As recently as April 2022, the hybrid court in the Central African Republic began sitting over cases of violent crimes and impunity committed in the country.

to ensure standardized justice by having international personnel while also ensuring local participation, amongst other issues. This is the case with the hybrid arrangements in Guatemala, the Gambia and Lebanon and I believe that they could work in transnational climate change scenarios as well.

II Recommendations

This research following its review of various tools for climate change regulation makes a number of recommendations for ensuring a more robust climate change response. Firstly, it is important that we continue to deploy a mix of climate sustainability efforts as is being presently done. This includes international treaties backed by commitment and accountability in living up to such commitments, legislation and potent government policies, corporate efforts, advocacy groups challenging unfavourable policies, technological developments, and courts and tribunals interpreting the rights and responsibilities of litigants.

Beyond complementarity in tools, there is also the need to sustain the emerging complementarity between legal systems and advocacy groups in the Global North and South as well as internationally. Courts in the Global North are now more willing to proceed on a premise that is similar to universal jurisdiction or extend an extraterritorial reach in ensuring access to justice for victims of climate change. In *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors*[394], the UK Supreme Court ruled that although Zambia would have been the convenient forum, UK courts could assume jurisdiction over the case, owing to credible access to justice concerns regarding Zambia's judiciary. Also, the Federal Constitutional Court in the German case of *Order of the First Senate* noted that, although the court could not

[394] *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors* [2019] UKSC 20

order the German government to undertake adaptive actions for the benefit of the claimants from Bangladesh and Nepal due to sovereignty and extraterritoriality issues, "this does not exclude Germany from assuming responsibility, either politically or under international law, for ensuring that positive steps are taken to protect people in poorer and harder-hit countries."[395] Similar complementarity of legal systems is also seen in the case of *Luciano Lliuya v. RWE AG*[396] discussed in chapter two of this work.

Such interaction, driven by claimants from different jurisdictions bringing their cases before a foreign forum allows for the exchange of ideas and legal arguments as well as expertise amongst the various stakeholders. In this sense, complementarity by advocacy groups in filing amici briefs allows climate activists to bring their contexts to the climate argument and amplify climate challenges by presenting the stories of victims who may be outside the forum of adjudication. This is in addition to benefiting from funding and capacity which may be lacking, especially in the Global South.

I recommend that this kind of interaction and complementation between Global North and South systems and stakeholders, especially the courts, should be encouraged and sustained to ensure access to justice rather than embarking on restrictive interpretations along state sovereignty barriers. However, I make this recommendation very measuredly, recognizing the potential it has, to continue to mainstream Global North voices in terms of court decisions and advocacy groups shaping the climate change regime. I submit that while this is an important tool in the mix, it should

[395] *Order of the First Senate of 24 March 2021* (2021), 1 BvR 2656/18 Federal Constitutional Court (Germany) para 179

[396] *Luciano Lliuya v RWE AG* (2015), Case No 2 O 285/15 Essen Regional Court (Germany), online: <climatecasechart.com/non-us-case/lliuya-v-rwe-ag>.

be an unattractive sole recourse. To provide the same benefits it promises, especially legitimacy and capacity, while also ensuring the mainstreaming of Global South voices, I recommend the adaption of hybrid courts in driving access to justice while also ensuring 'standardized' notions of justice. With the right tweaking, the architecture of hybrid courts as discussed in this work may be deployed to transnational climate change claims, especially in the Global South. I recommend that the model of the SCSL should form the foundational architecture of the court, not only because it has been able to deliver on its mandate and transcended some of the challenges that face hybrid courts but also because it has stayed true to including voices of the Global South in norm creation and integration.[397]

With modifications that address the shortfalls of that tribunal, I believe it will be able to deliver on the objectives articulated in this work. With respect to funding, for instance, countries in proximity and with similar contexts, or even regional or subregional organizations or blocs, may band together to have a seat for the ad hoc court and fund it upon request by a participating country. Hence when a request is made to draw from the list of eminent foreign jurists kept by the national court or the UN to sit over a transnational climate case, the agreeing countries would fund the hybrid court's operations. Such collaboration would also ensure that transnational corporations would find it difficult to divide and conquer by taking businesses to places that have not set up hybrid courts. This is in addition to making it easier to withstand political pressure from Global North governments seeking to protect their corporate nationals from accountability. It is in this instance that there is indeed something to say about unity being powerful.

[397] The Residual Special Court for Sierra Leone and the SCSL Public Archives, "Special Court for Sierra Leone: Residual Special Court for Sierra Leone", online: <rscsl.org/>

As history has shown, many new structures in international law have been considered infeasible at conceptualization, with the negotiation and design stages looking very unpromising. This includes the ICC which faced serious opposition from powerful forces, making its proposition a bleak possibility at the time of conceptualization.[398] The lesson learnt is that the first step to creating important changes lies in thinking creatively about the solutions to a problem. As with the various climate model laws being drafted, the optimism that these laws could effect important changes in the future drives the efforts. The idea is to have important blueprints in the books to meet the moment when policymakers are ready to implement sustainable measures, as well as create an effective alternative to what presently obtains. Thus, questions of infeasibility should never halt important creative work being done regarding strengthening our systems, especially as it pertains to such fundamental areas as climate change. Every creative effort should be deployed in this regard, bearing in mind the admonishment by the court in *Trendtex Trading Corporation v Central Bank of Nigeria* that "in the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilized nations."[399]

[398] Bassiouni, Cherif, "Chronology of Efforts to Establish an International Criminal Court" (2015) 86 Rev IDP 1163, online: <doi.org/10.3917/ridp.863.1163>.
[399] Sir Samuel Evans P. in *The Odessa* [1915] P. 52, 61-62 cited in *Trendtex Trading Corporation v Central Bank of Nigeria,* [1980] QB 629, [1977] 2 WLR 356 (UK Court of Appeals)

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