

Loss and damage and climate litigation: The case for greater interlinkage

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With the negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) failing to provide adequate support to climate victims, vulnerable countries, nongovernmental organizations and affected communities are increasingly exploring legal avenues to obtain recourse for loss and damage. This article contributes to the emerging scholarship on climate litigation by exploring whether, how and with what effects such litigation interacts with the UNFCCC negotiations. For this purpose, the article contextualizes normative claims about the influence of climate court cases through practice-embedded views of stakeholders in the loss and damage context and provides a typology of loss and damage-related cases. Having due regard to the fact that litigation for liability and compensation of climate harms is still at an early stage, it argues that this legal avenue offers significant potential to advance the UNFCCC negotiations on loss and damage, and provides recommendations on how both spheres can be more strongly interlinked.

1 | INTRODUCTION

While some hailed the adoption of the Paris Agreement in 2015 as a victory for multilateralism in climate governance,¹ for others the treaty's goals provide yet another yardstick against which to measure our failure to deal with global climate change collectively. At the Climate Action Summit in September 2019, youth climate activist Greta Thunberg emphatically declared: 'We will not let you get away with this. Right here, right now is where we draw the line.'² Together with 15 other children, she filed a legal complaint against five polluting countries before the United Nations (UN) Committee of the

Rights of the Child.³ Against the slow pace and chronic lack of ambition of the climate negotiations, vulnerable countries, civil society organizations, lawyers and affected communities are increasingly exploring alternative means to hold States and corporations accountable for the climate crisis.

Perhaps nowhere in the climate regime run opinions more divided than on the question of how to address loss and damage. Although there is no agreed definition, it can be taken to refer to 'the actual and/or potential manifestation of climate impacts that negatively affect human and natural systems'.⁴ Some authors point out that these

¹Laurent Fabius' Reflections on the Paris Conference and Implications for 2016' (13 February 2016) <<https://unfccc.int/news/laurent-fabius-reflections-on-the-paris-conference-and-implications-for-2016>>.

²O Milman, 'Greta Thunberg Condemns World Leaders in Emotional Speech at UN' (The Guardian, 23 September 2019).

³UNICEF, '16 Children, Including Greta Thunberg, File Landmark Complaint to the United Nations Committee on the Rights of the Child' (23 September 2019) <<https://www.unicef.org/press-releases/16-children-including-greta-thunberg-file-landmark-complaint-united-nations>>; 'Communication to the Committee on the Rights of the Child' (23 September 2019) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Not-available_petition.pdf>.

⁴United Nations Framework Convention on Climate Change (UNFCCC) 'A Literature Review on the Topics in the Context of Thematic Area 2 of the Work Programme on Loss and Damage: A Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change' UN Doc FCCC/SBI/2012/INF.14 (15 November 2012) 2.

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impacts are not or cannot be avoided through mitigation and adaptation.⁵ This includes extreme weather events such as hurricanes and floods as well as slow-onset events including sea-level rise and desertification. Although loss and damage has been recognized by the Paris Agreement as a core element alongside mitigation and adaptation in the international response to climate change, the work undertaken by the Warsaw International Mechanism on Loss and Damage (WIM) so far provides little to nothing in terms of action and support to protect people in harm's way. The international climate finance infrastructure has not disbursed any funds to date to assist current and future climate change victims. With countries' collective nationally determined contributions' (NDCs) trajectories locking the world into 3°C of warming or higher,⁶ the prospects of more frequent and more severe climate losses and damages appear inevitable.

In a parallel development, there has been a steep surge in climate change litigation post-Paris. Broadly, this includes court cases at domestic, regional and international levels, complaints and inquiries before human rights commissions and other quasi-judicial bodies, where climate change is one of the principal concerns. One reason for this is that strategic climate litigation is 'increasingly viewed as a tool to influence policy outcomes and corporate behavior'.⁷ The Intergovernmental Panel on Climate Change's (IPCC) Special Report on 1.5°C relevantly points to 'a growing body of legal literature [that] considers the role of litigation in preventing and addressing loss and damage and finds that litigation risks for governments and business are bound to increase with improved understanding of impacts and risks as climate science evolves (high confidence)'.⁸ While it may be difficult to pass a final verdict on the extent to which litigation shapes international climate policy, as Hunter remarks, 'the turn to climate litigation ... is reshaping how we think and respond to the climate change challenge'.⁹ It is this very assumption which forms the starting point for the inquiry in this article.

While climate change litigation is spreading, there are many aspects of this phenomenon that have not yet been researched. One important aspect concerns the question whether, how and with what effects climate litigation interacts with the multilateral negotiations on climate change. This article critically analyses the relationship between litigation and the negotiations in the context of the international policy response to loss and damage under the United Nations Framework Convention on Climate Change (UNFCCC), using legal and interpretive analysis. The research presented here both builds

on and challenges the existing literature on the role of climate litigation, by contextualizing normative claims about the influence of court cases through the practice-embedded views of stakeholders in the loss and damage context. Based on this analysis, I argue that climate litigation offers significant potential to advance the negotiations on loss and damage under the UNFCCC and that the two spaces could be more closely linked than is currently the case.

The article begins by taking stock of the history and current state of the international response to loss and damage under the UNFCCC, identifying key issues of relevance to litigation. It then examines recent developments in the field of climate litigation and provides a typology of loss and damage cases to illustrate the different ways climate litigation has addressed the issue to date. In the second half, the article analyses to what extent the two spheres are already interlinked based on legal materials and literature on climate litigation and the UNFCCC negotiations. Finding a significant disconnect between the two spheres, the article explores both why and how the links between litigation and the negotiations should be further developed, providing recommendations on how this effort can be strengthened.

For the purposes of this inquiry, doctrinal research based on an analysis of primary documents (e.g. case law, treaties, decisions, submissions, official reports, press and newspaper articles) and a literature review were conducted to canvass the arguments presented in existing literature on how court cases could influence the multilateral negotiation process. Building on this, semi-structured interviews were conducted with key stakeholders in the main multilateral processes on loss and damage including at the 9th Meeting of the Executive Committee (Excom) of the WIM in April 2019 and the Bonn Climate Change Conference (SB50) in June 2019. Further interviews were conducted via Skype and in person in June 2019. Stakeholders were selected based on their direct involvement in the international loss and damage policy response and, where applicable, their professional engagement or academic expertise in climate change litigation. In total, 12 interviews were conducted with 13 stakeholders (one joint interview). Of these stakeholders, seven were from or advise vulnerable countries (small island developing States (SIDS) and least developed countries (LDCs)), five from developed countries and one from an economy in transition. Eight of the stakeholders are active in research and three working with nongovernmental organizations (NGOs). Seven stakeholders participated as negotiators (three diplomats, four consultants) and four as observers in the multilateral processes examined. Five stakeholders have a background in law and two are actively involved in climate litigation. Following transcription, the interviews were coded for analysis using MAXQDA. The method employed for this article relies on an interpretive rather than empirical approach with the aim of developing a 'descriptive narrative'¹⁰ of the relationship between litigation and UNFCCC policymaking in the loss and damage context.

⁵R Verheyen and P Roderick, 'Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage' (WWF-UK 2008).

⁶United Nations Environment Programme (UNEP), *The Emissions Gap Report 2019* (UNEP 2019) ix.

⁷J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2019 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science 2019) 1.

⁸J Roy et al, 'Sustainable Development, Poverty Eradication and Reducing Inequalities' in Intergovernmental Panel on Climate Change (IPCC), *Global Warming of 1.5°C* (Cambridge University Press 2018) 445, 456.

⁹DB Hunter, 'The Implications of Climate Change Litigation: Litigation for International Environmental Law-making' in HM Osofsky and WCG Burns (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press 2009) 373.

¹⁰S Mason-Case, 'On Being Companions and Strangers: Lawyers and the Production of International Climate Law' (2019) 32 *Leiden Journal of International Law* 625, 627.

2 | A TALE OF TWO SPHERES

2.1 | The international policy response

The issue of loss and damage emerged as a relative latecomer in the climate regime. From its inception in 1990, the UNFCCC focused predominantly on the mitigation of greenhouse gases and it was not until around 2007 that adaptation was included as a key pillar of its work. Concerns over the need to address climate impacts that are not avoided through mitigation and adaptation have been voiced since the early days of the regime, most notably by the Alliance of Small Island States (AOSIS).¹¹ However, the issue only gained traction under the UNFCCC in the late 2000s owing to the efforts of the largest negotiating block of developing countries (G77), groups of vulnerable countries including AOSIS, the African Group and LDCs, and NGO advocacy, on the back of a growing awareness that global mitigation and adaptation efforts are insufficient to prevent major loss and damage in many parts of the world.¹² Loss and damage was only recognized as an official negotiation term in 2007 in the UNFCCC's Bali Action Plan,¹³ and in 2010 parties to the Convention set up a dedicated work programme on the topic.¹⁴ Loss and damage was institutionalized in 2013 through the WIM, a technical sub-process under the UNFCCC mandated to address the issue through information gathering, coordination and communication as well as enhancing action and support.¹⁵ Furthermore, at the UNFCCC Conference of the Parties (COP) in Paris in 2015, parties agreed to include loss and damage in a standalone article in the Paris Agreement (Article 8) with the caveat that no liability or compensation would flow from it under the treaty.¹⁶

Throughout the history of the UNFCCC the discussions on loss and damage have been marked by competing perspectives, which have contributed to its present definitional ambiguity. Several studies have documented and analysed the different framings of loss and damage among stakeholders in the climate regime.¹⁷ Rather than reproducing

them here, I will highlight only the key contestations of relevance to climate litigation. The first concerns the distinction of loss and damage from adaptation. Many industrialized countries treat the issue as a subset of climate adaptation, a view which has significant practical and political implications for its governance under the UNFCCC. Historically, the first reference to loss and damage in a COP decision and the first work programme dedicated to the issue were both adopted under the rubric of 'enhanced action on adaptation'.¹⁸ While Article 8 of the Paris Agreement has brought the WIM under the treaty, provisions on loss and damage in the Paris rulebook agreed at COP24 in 2018 were again adopted under the adaptation rubric.¹⁹ Similarly, anyone trying to access information on the WIM's work through the UNFCCC website will have to look under the section on 'adaptation and resilience'.²⁰ This stands in stark contrast with the view of most developing countries and vulnerable countries in the regime, which frame loss and damage as concerning adverse climate impacts that are beyond the limits of adaptation.²¹ Since the 1990s, these countries have called for financial support from developed nations for dealing with adverse consequences of insufficiently mitigated climate change. From their perspective, addressing loss and damage as part of adaptation implies that international funding would come from existing rather than new and additional sources, cutting into already limited adaptation finance.

A second point of contention in the loss and damage negotiations concerns the provision of international finance to support those suffering climate harms at present and in the future. Vulnerable countries, in particular, have traditionally advocated for loss and damage finance to be provided by industrialized countries given their historical responsibility for climate change.²² This demand has continually met with strong resistance by developed countries.²³ Under the Convention, developed country parties are obliged to provide 'new and additional financial resources' to help developing countries meet the costs of climate action.²⁴ Similarly, the Paris Agreement's reporting guidelines require developed country parties to explain how the financial support they provide to developing countries constitutes new and additional resources.²⁵

¹¹AOSIS, 'Submission by Vanuatu on behalf of AOSIS, found in Intergovernmental Negotiating Committee, Negotiation of a Framework Convention on Climate Change, Elements relating to mechanisms, Vanuatu, Draft annex relating to Article 23 (Insurance) for inclusion in the revised single text on elements relating to mechanisms' UN Doc A/AC.237/WG.II/Misc.13 (1991).

¹²M Doelle, 'The Birth of the Warsaw Loss & Damage Mechanism: Planting a Seed to Grow Ambition?' (2014) 8 Carbon and Climate Law Review 35, 36; PJ Hoffmaister et al, 'Warsaw International Mechanism for Loss and Damage: Moving from Polarizing Discussions towards Addressing the Emerging Challenges Faced by Developing Countries' (Loss and Damage in Vulnerable Countries Initiative 2014).

¹³UNFCCC 'Decision 1/CP.13, Bali Action Plan' UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008) para 1(c)(iii).

¹⁴UNFCCC 'Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 26.

¹⁵UNFCCC 'Decision 2/CP.19, Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts' UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014) para 5(a)–(c).

¹⁶UNFCCC 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) para 51.

¹⁷E Boyd et al, 'A Typology of Loss and Damage Perspectives' (2017) 7 Nature Climate Change 723; L Vanhala and C Hestbaek, 'Framing Climate Change Loss and Damage in UNFCCC Negotiations' (2016) 16 Global Environmental Politics 111.

¹⁸Decision 1/CP.13 (n 13) para 1(c)(iii); and Decision 1/CP.16 (n 14) para 26, respectively.

¹⁹UNFCCC 'Decision 18/CMA.1, Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement' UN Doc FCCC/PA/CMA/2018/3/Add.2 (19 March 2019) Annex, para 115.

²⁰UNFCCC, 'Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM)' <<https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage-ld/warsaw-international-mechanism-for-loss-and-damage-associated-with-climate-change-impacts-wim>>.

²¹This was partly recognized by the COP in a preamble to its decision establishing the WIM in 2013, acknowledging 'that loss and damage associated with the adverse effects of climate change includes, and in some cases involves more than, that which can be reduced by adaptation'; Decision 2/CP.19 (n 15) preambular para 4.

²²AOSIS (n 11).

²³L Benjamin, A Thomas and R Haynes, 'An "Islands" COP'? Loss and Damage at COP23' (2018) 27 Review of European, Comparative and International Environmental Law 332.

²⁴United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 4(3).

²⁵UNFCCC 'Decision 2/CP.17, Annex I, UNFCCC Biennial Reporting Guidelines for Developed Country Parties' UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012); UNFCCC 'Decision 19/CP.18, Common Tabular Format for "UNFCCC Biennial Reporting Guidelines for Developed Country Parties"' UN Doc FCCC/CP/2012/8/Add.3 (28 February 2013).

Parties have also disagreed over the sources of climate finance. Where developing countries have pointed to the obligation of industrialized countries to provide finance through public funds, developed country parties have highlighted the importance of mobilizing funds through the private sector.²⁶ In this context, several NGOs have proposed the exploration of innovative sources of finance, based on the polluter pays principle, including a loss and damage tax on fossil fuel production or an airline passenger levy.²⁷ At COP25 in December 2019, parties agreed to establish an expert group on action and support (including finance) under the WIM by the end of 2020. The COP also agreed²⁸ to explore options for finance through the Green Climate Fund (GCF), an operating entity of the UNFCCC's financial mechanism established in 2010 with the goal of assisting developing countries' mitigation and adaptation efforts.²⁹ This outcome has been criticized by the G77 and China, which called for the establishment of a new finance facility for loss and damage at COP25.³⁰ Rather than being new and additional – a core demand by developing countries – this money would come from an existing pool of international funds allocated also for mitigation and adaptation projects. This has been criticized by vulnerable countries and NGO observers as insufficient, given that adaptation currently only accounts for a fourth of GCF projects³¹ (whereas the Paris Agreement suggests a balanced allocation of climate finance between mitigation and adaptation projects³²). Moreover, the same actors have criticized that the outcome does not reflect the obligation of developed countries to provide such new and additional finance, and instead broadly urges 'private and non-governmental organizations, funds and other stakeholders' to scale up action and support including finance.³³

A third contestation of relevance concerns differing views among stakeholders on the role of liability and compensation for loss and damage. Claims for liability and compensation were first expressed by AOSIS in 1991.³⁴ Relying on what some scholars have termed an 'existential perspective',³⁵ vulnerable countries and

NGOs have continued to advocate for liability and compensation throughout the lifetime of the UNFCCC and have consistently met with strong resistance from industrialized countries reluctant to engage on this issue.³⁶ Many industrialized countries have eschewed any discussion of responsibility and potential liability, and have instead advocated risk management and particularly insurance mechanisms as a principal and effective means to deal with loss and damage.³⁷ Discussions came to a head in 2015, when the COP expressly excluded liability and compensation under Article 8 of the treaty through paragraph 51 of its decision accompanying the adoption of the Paris Agreement.³⁸ This prompted several countries to submit declarations when ratifying the treaty, declaring that paragraph 51 does not exclude the applicability of general rules of international law, particularly the rules of State responsibility. As part of a COP decision, paragraph 51 is not legally binding and could be amended by a future COP decision.³⁹ However, there appears to be no consensus in sight with tensions over paragraph 51 flaring up again most recently at COP25 in December 2019.⁴⁰ In effect, by adopting paragraph 51, the UNFCCC COP has outsourced the question of liability and compensation to international, regional and domestic courts.

The contestations examined above have also contributed to confusion over the precise meaning and content of loss and damage. The absence of a universally agreed definition was recently noted in the IPCC's Special Report on 1.5°C.⁴¹ Some scholars have argued that the term 'loss and damage' emerged as an ambiguous 'overarching master frame' which allowed for different interpretations and ultimately 'led to the resolution of differences among the parties' on whether the issue is best addressed through liability and compensation or risk management and insurance approaches.⁴² This ambiguity, while constructive for diplomatic negotiations, could pose a significant obstacle to potential litigants seeking to rely on the international policy response in their arguments and judges looking for clear guidance on State obligations in relation to climate harm.⁴³

²⁶Y Yamineva, 'Climate Finance in the Paris Outcome: Why Do Today What You Can Put Off Till Tomorrow?' (2016) 25 *Review of European, Comparative and International Environmental Law* 174, 181.

²⁷J Gewirtzman et al, 'Financing Loss and Damage: Reviewing Options under the Warsaw International Mechanism' (2018) 18 *Climate Policy* 1076, 1082; JT Roberts et al, 'How Will We Pay for Loss and Damage?' (2017) 20 *Ethics, Policy and Environment* 208.

²⁸UNFCCC 'Decision 6/CMA.2, Guidance to the Green Climate Fund' UN Doc FCCC/PA/CP/2019/6/Add.1 (15 December 2019) para 8.

²⁹UNFCCC 'Decision 3/CP.17, Launching the Green Climate Fund' UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012) Annex.

³⁰DP Nathoniel et al, 'Loss and Damage at COP25 – A Hard Fought Step in the Right Direction' (2019) <<https://climateanalytics.org/blog/2019/loss-and-damage-at-cop25-a-hard-fought-step-in-the-right-direction/>>.

³¹Green Climate Fund, 'Project Portfolio' (2020) <<https://www.greenclimate.fund/projects/dashboard>>.

³²Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 art 9(4).

³³UNFCCC 'Decision 2/CMA.2, Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts and its 2019 Review' UN Doc FCCC/PA/CP/2019/6/Add.1 (15 December 2019) para 33.

³⁴AOSIS (n 11) para 1.4.

³⁵Boyd et al (n 17) 725.

³⁶F Simlinger and B Mayer, 'Legal Responses to Climate Change Induced Loss and Damage' in R Mechler et al (eds), *Loss and Damage from Climate Change* (Springer 2019) 194.

³⁷Vanhala and Hestbaek (n 17) 127.

³⁸Decision 1/CP.21 (n 16) para 51.

³⁹For relevant scholarly work on the legal character of COP decisions, see MJ Mace and R Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 *Review of European, Comparative and International Environmental Law* 197; J Brunnée, 'COPing with Consent: Law-making Under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1.

⁴⁰CarbonBrief, 'COP25: Key Outcomes Agreed at the UN Climate Talks in Madrid' (2019). At COP25 the United States sought to extend paragraph 51 to the UNFCCC as a whole beyond its express focus on Article 8 under the Paris Agreement.

⁴¹Roy et al (n 8) 454.

⁴²Vanhala and Hestbaek (n 17) 111.

⁴³On the importance of distinguishing loss and damage from adaptation, see also E Lees, 'Responsibility and Liability for Climate Loss and Damage after Paris' (2016) 17 *Climate Policy* 59, 62.

2.2 | The parallel evolution of climate litigation

Over the past decade there has been a steep rise in case law related to climate change across different jurisdictions both regional and domestic.⁴⁴ The majority of the approximately 1,500 cases identified as climate litigation by the Sabin Center for Climate Change Law have been brought in the United States (over 75 percent),⁴⁵ followed by Australia, the European Union and United Kingdom.⁴⁶ While a handful of communications and complaints have recently been filed before UN committees, no case has been brought to date before an international court or tribunal. The conceptual scope of climate litigation is very broad. According to van Asselt, Mehling and Kehler Siebert, '[i]t can encompass anything from a claimant appealing to a court to enforce existing climate laws to which the defendant is legally bound, to a claimant challenging the validity of a climate law'.⁴⁷ Accordingly, there is great variance of definitions in legal scholarship on the topic.⁴⁸ For the purposes of this research, climate change litigation or climate-related litigation can be understood as legal cases where climate change is invoked as a key component influencing a case's outcome, regardless of whether it is raised expressly by the claimant, the defendant or the court's decision. Aside from cases that challenge infrastructure or energy projects on climate grounds, many climate-related cases challenge governments for their lack of ambition in tackling climate change, primarily in terms of mitigation and adaptation.⁴⁹ A vast number of cases involve the fossil fuel industry litigating to prevent regulation affecting their vested interests, and in many instances, the courts find in their favour.⁵⁰ Moreover, and relevant for this research, several cases seek to establish liability for greenhouse gas emissions by governments and corporate entities, or seek to assign responsibility where failures to adapt to climate change result in harm.⁵¹ While only few climate cases have been brought to date specifically with the aim of achieving compensation (relative to cases aimed at increasing mitigation ambition or funding adaptation measures), many court cases do grapple with questions of responsibility, attribution and ultimately some form of remedy or relief.⁵²

Most public climate litigation (i.e. against national governments and subnational public authorities) to date has focused on mitigation and to a lesser extent adaptation,⁵³ while addressing loss and damage is increasingly coming into the purview of private litigation (i.e. cases primarily brought against corporations).⁵⁴

There are few climate cases seeking liability or compensation, and to date many of them have been unsuccessful. Some of the key obstacles claimants face include lack of standing,⁵⁵ the difficulty of proving causality,⁵⁶ specifically by attributing harms to polluters,⁵⁷ as well as territorial limits of jurisdiction.⁵⁸ Potential claimants may struggle with the challenge of finding a court to hear their case in the first place due to the reluctance of some national courts to deal with something they perceive as a political issue. Recent studies have reaffirmed these challenges in the specific context of loss and damage-related climate litigation.⁵⁹

There are, however, signs that the climate litigation landscape is shifting rapidly, raising prospects for claimants pursuing liability and compensation for loss and damage. For example, the landmark judgment by a Dutch court in 2015 in *Urgenda v The Netherlands*⁶⁰ inferred a causal link between the country's greenhouse gas emissions and present and future climate impacts,⁶¹ and was recently upheld by the Dutch Supreme Court.⁶² In the case, the claimants successfully relied on the tort concept of liability for hazardous negligence under Dutch civil law to hold the government liable for insufficient climate mitigation efforts. Some scholars have suggested that cases like *Urgenda* could inspire similar litigation particularly in jurisdictions with similarly framed laws and access to courts.⁶³ This effort is complemented in practice through the work of litigation networks (discussed in more detail later in this article). Furthermore, progress in attribution science could over time provide a sufficiently robust basis for successful climate litigation.⁶⁴ A recent Advisory Opinion

⁴⁴For an overview, see Setzer and Byrnes (n 7).

⁴⁵Sabin Center for Climate Change Law, 'Climate Case Chart' (2020) <<http://climatecases.echart.com/>>.

⁴⁶See LSE Grantham Research Institute on Climate Change and the Environment, 'Climate Change Laws of the World' (2020) <<https://climate-laws.org/>>.

⁴⁷H van Asselt, M Mehling and C Kehler Siebert, 'The Changing Architecture of International Climate Change Law' in G Van Calster et al (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar 2015) 1, 23. For a more complete summary of typologies of climate change litigation, see L Vanhala and C Hilson, 'Climate Change Litigation: Symposium Introduction' (2013) 35 *Law & Policy* 141, 144.

⁴⁸In their review of 130 academic publications on the topic, Setzer and Vanhala remark that '[t]here are as many understandings of what counts as "climate change litigation" as there are authors writing about the phenomenon'; J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 *Wiley Interdisciplinary Reviews: Climate Change* e580, 3.

⁴⁹Setzer and Byrnes (n 7) 6.

⁵⁰This is particularly the case in the United States; see S McCormick et al, 'Strategies in and Outcomes of Climate Change Litigation in the United States' (2018) 8 *Nature Climate Change* 829.

⁵¹UNEP, *The Status of Climate Change Litigation – A Global Review* (UNEP 2017) 5.

⁵²*Ibid* 22; S Marjanac, L Patton and J Thornton, 'Acts of God, Human Influence and Litigation' (2017) 10 *Nature Geoscience* 616, 616.

⁵³Setzer and Byrnes (n 7) 6. The authors note that 80 percent of both public and private climate litigation focuses on mitigation.

⁵⁴See Simlinger and Mayer (n 36) 181.

⁵⁵M Doelle and S Seck, 'Loss & Damage from Climate Change: From Concept to Remedy?' (2020) *Climate Policy* 1, 6. <https://doi.org/10.1080/14693062.2019.1630353>

⁵⁶S Beck and E Bureson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3 *Transnational Environmental Law* 17, 24.

⁵⁷RA James et al, 'Attribution: How is it Relevant for Loss and Damage Policy and Practice?' in Mechler et al (n 36) 113, 140.

⁵⁸International Bar Association (IBA), *Achieving Justice and Human Rights in an Era of Climate Disruption* (IBA 2014) 68.

⁵⁹See, e.g., Simlinger and Mayer (n 36); Doelle and Seck (n 55).

⁶⁰*Stichting Urgenda v Government of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7145, *Rechtbank Den Haag*, C/09/456689/HA ZA 13-1396.

⁶¹R Cox, 'A Climate Change Litigation Precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34 *Journal of Energy and Natural Resources Law* 143, 160.

⁶²*Urgenda Foundation v State of the Netherlands*, ECLI:NL:HR:2019:2007, Hoge Raad, 19/00135 <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007>>.

⁶³J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37, 49.

⁶⁴S Marjanac and L Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 *Journal of Energy and Natural Resources Law* 265, 266.

by the Inter-American Court of Human Rights⁶⁵ provides for the extraterritorial application of the human right to environment and sets an important precedent for climate change litigation concerned with prospective harm under human rights law.⁶⁶ Furthermore, given projected increases in the frequency and intensity of adverse climate events, it is likely that liability and compensation will feature more prominently in future climate cases.⁶⁷

Rather than recount the history of climate litigation or deep dive into specific cases, this article highlights several high-profile cases and examines their relevance to loss and damage. Bouwer refers to these as the 'holy grail' cases – 'grand, "aspirational" or newsworthy climate change cases, including but not strictly limited to large scale primary liability cases against big corporations or governments'.⁶⁸ For this analysis, I have selected 27 such high-profile cases (Appendix) through a systematic search for key terms from the Climate Case Chart database provided by the Sabin Center for Climate Change Law⁶⁹ that have been filed, heard and/or decided during the past 15 years (some are still pending appeal or final verdict). This is by no means an attempt to provide an exhaustive list of all cases potentially linked to loss and damage, but rather serves to illustrate the different ways climate litigation has addressed the issue to date. Moreover, this illustration provides a basis for further discussion of the potential influence of climate litigation on the multilateral negotiations. While Bouwer's call for more scholarly attention to the smaller or would-be cases that are under- or unreported, and those that may not at first glance appear to be about climate change, is warranted, this would substantively exceed the scope of this research. The focus on high-profile cases here is also deliberate because of their potential to engage a variety of actors in the loss and damage debate and to spur momentum inside and outside the UNFCCC.⁷⁰

2.3 | A typology of loss and damage cases

Any attempt to take stock of climate litigation relevant for loss and damage is plagued by the same definitional ambiguity surrounding the very concept. Is there such a thing as a 'loss and damage court

case' and if so, how does one delineate it from an adaptation or mitigation case? Is not all litigation pursuing increased mitigation of greenhouse gases ultimately concerned with the prevention of loss and damage? The following presents a first attempt to provide a typology of loss and damage litigation in accordance with two defining elements: the framing of 'harm' and the claimant's objective.

2.3.1 | The framing of harm

Using the broadest possible conception of loss and damage litigation as a court case dealing either *de facto* or *de jure* with climate harm, it appears that many of the recent high-profile climate court cases fall under this definition (Appendix).⁷¹ Narrowing this down, we can distinguish cases dealing with harms that have already occurred (*ex post*) as 'loss and damage-related' cases and those dealing with prospective harms (*ex ante*) as mitigation or adaptation cases. A further distinction can be made according to the associated climate impact which triggers the harm. Does the litigation refer to specific extreme weather events or slow-onset events, or does it perhaps treat climate impacts in the abstract? Should we include cases that concern loss and damage arising from impacts of measures to respond to climate change (i.e. deforestation for biomass)? Equally important is the type of harm at issue as well as its degree of localization by reference to who is impacted: Is the harm specified and/or localized? Has the harm affected or would it affect specific communities and individuals or the entire population covered by the jurisdiction of the court?

Though most high-profile cases to date concern prospective harm that is not location-specific (e.g. *Urgenda*), several climate cases seek to remedy or prevent a repeat of specific, identifiable past harms. For example, in *Juliana*, one of the claimants based in Louisiana suffered harm from eight 500-year floods and one 1,000-year flood in the space of two years.⁷² By contrast, in the case of *KlimaSeniorinnen*⁷³ the claimants, all Swiss elderly ladies, sued for the prevention of a very specific type of harm (e.g. increased mortality from heat strokes) due to heatwaves in Europe that stand to increase in intensity and frequency as a result of climate change. Meanwhile, in *Carvalho*⁷⁴ the case was dismissed at first instance on the grounds that none of the claimants were uniquely impacted by climate-induced harms.

⁶⁵Environment and Human Rights (State Obligations Regarding the Environment Within the Framework of the Protection and Guarantee of Rights to Life and Personal Integrity – Interpretation and Scope of Articles 4.1 and 5.1, in Relation to Articles 1.1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

⁶⁶C Campbell-Durufé and SA Atapattu, 'The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law' (2018) 8 *Climate Law* 321, 335.

⁶⁷M Burkett, 'Climate Reparations' (2009) 10 *Melbourne Journal of International Law* 509, 520; V Pekkarinen, P Toussaint and H van Asselt, 'Loss and Damage after Paris: Moving Beyond Rhetoric' (2019) 13 *Carbon and Climate Law Review* 31, 39; van Asselt et al (n 47) 26.

⁶⁸K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 *Journal of Environmental Law* 483, 484; K Bouwer, 'The Holy Grail of Climate Litigation: Misses and Lessons in Private Law' (2019).

⁶⁹Sabin Center for Climate Change Law (n 45).

⁷⁰C Schwarte and R Byrne, 'International Climate Change Litigation and the Negotiation Process' (Foundation for International Environmental Law and Development 2010) 21.

⁷¹For the purposes of this inquiry I will not be discussing the merits of each case.

⁷²*Juliana et al v United States of America et al*, No 6:15-cv-01517-TC, 10 Nov. 2016, 217 F.Supp.3d 1224 (D. Or. 2016); and most recently No 18-36082, D.C. No 6:15-cv-01517-AA, 17 Jan. 2020.

⁷³*Verein KlimaSeniorinnen Schweiz et al v Bundesrat*, Judgment A-2992/2017 (27 November 2018).

⁷⁴Case T-330/18, *Armando Ferrão Carvalho and Others v The European Parliament and the Council*, ECLI:EU:T:2019:324; see G Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 *Transnational Environmental Law* 137.

2.3.2 | Claimant's objective

Furthermore, the defining element of a loss and damage-related case could lie in its *raison d'être*. This requires a narrower definition of loss and damage-related litigation according to the claimant's objective, as being primarily concerned with remedying harm rather than preventing it through increased mitigation or funding adaptation efforts. Here we find relatively few cases, primarily in US courts. These include most prominently *Kivalina*,⁷⁵ where residents sued large energy corporations for loss of land from flooding, seeking compensation for their relocation. In *Comer v Murphy Oil*⁷⁶ and several other similar cases, claimants sought financial compensation for damages from Hurricane Katrina which struck the United States in 2005, claimed over 1,200 lives and caused catastrophic damage particularly in New Orleans. Many of the claims by US cities and counties against big oil companies involve liability for nuisance, compensation for infrastructure damage and adaptation costs, as well as punitive damages for fraud. Outside the United States, the case of *Lluyva v RWE*⁷⁷ has gained recognition as the first case in which a court found that a private company could potentially be held liable for climate damages from its emissions, allowing the case to progress to the evidentiary stage. The Canadian *Burgess*⁷⁸ case involved a class action suit seeking C\$900 million in compensation from the Ministry of Natural Resources and Forestry for damages from lake flooding as a result of increased snow melt and precipitation. In Australia, the *Ralph Lauren 57*⁷⁹ case concerned an action seeking compensation for diminished property value and protective measures incurred due to an encroaching shoreline.

2.3.3 | Reflections

The typology presented here highlights the factual links to loss and damage in recent high-profile climate cases. In particular, it illustrates how prevalent the issue of loss and damage is in recent climate litigation when one moves beyond the narrow UNFCCC terminology to encompass a wider conception of loss and damage as climate harm. However, it would be wrong to assume all cases that deal with climate harm are automatically loss and damage cases. As the typology shows, recent high-profile climate litigation has framed harms in myriad ways (in terms of timing, type and scope, as well as the associated climate impact triggering the harm). Rather, it is imperative to also consider the claimant's objective. Here, the element that truly sets a loss and damage case apart from mitigation or adaptation cases that involve loss and damage *de facto* (e.g. property damage, personal injury or death) appears to be that claimants pursue liability or compensation through the litigation.

⁷⁵*Native Village of Kivalina v ExxonMobil Corp* 696 F.3d 849, 858 (9th Cir 2012), cert denied, 133 S Ct 2390 (2013).

⁷⁶*Comer v Murphy Oil USA, Inc.* 585 F.3d 855 (5th Cir 2009).

⁷⁷*Saul Luciano Lluyva v RWE* (2017) 20171130 Case No I-5 U 15/17 (Oberlandesgericht Hamm).

⁷⁸*Burgess v Ontario Minister of Natural Resources and Forestry*, Court File No 16-1325CP.

⁷⁹*Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169.

Before moving deeper into a discussion of the relationship between the multilateral negotiations and court cases, the typology presented above also warrants several critical reflections. Crucially, there is a need to consider the claimants and defendants in loss and damage-related litigation. It should come as no surprise that the dominant number of loss and damage-related cases have been brought by claimants based in the global North. The claimants are predominantly US cities and counties, or NGOs and private individuals in European countries. The exception appears to be *Lluyva v RWE*,⁸⁰ where the plaintiff is a farmer from Peru, supported by a German NGO. This evidently raises questions of jurisdiction and access to justice. One must ask, as indeed Bouwer has, whether from the perspective of distributive climate justice it is desirable that potential compensation awarded through these cases should go to claimants based in the global North (US cities) which are arguably in a better position to provide remedies for their citizens to cope with loss and damage.⁸¹ As Doelle and Seck note, '[u]ltimately, the question is whether everyone should be entitled to [loss and damage] remedies, or whether access to climate justice should only be available to vulnerable groups within developing countries, or perhaps to the south within the north (e.g. indigenous peoples)'.⁸² There has been a rise of lawsuits in the global South by and on behalf of vulnerable communities affected by climate change.⁸³ Many of these cases target governments rather than corporations, compelling States to enforce existing climate laws and policies that suffer from poor implementation.⁸⁴ However, litigants in the global South are often faced with structural hurdles, such as a lack of financial resources and specialist expertise to make their claims heard.⁸⁵

This raises a final issue, namely that the scarcity of loss and damage-related litigation – relative to 'pure' mitigation and adaptation cases – may partly stem from the (perceived) inadequacy of remedies. Here we ought to consider the different objectives of loss and damage cases. In cases where the harm is repairable, are claimants seeking restitution or compensation (financial or otherwise)? Moreover, monetary compensation could be insufficient where irreversible losses have been incurred, for example in scenarios involving non-economic losses such as culture, traditional knowledge, as in the case of displacement from for instance sea-level rise. Could cases be brought not for remedying harm *ex post*, but providing injunctive relief? Suffice to say, these questions need to be considered on a case-by-case basis but add to the uncertainty potential claimants particularly from the global South are faced with.

⁸⁰*Saul Luciano Lluyva v RWE* (n 77).

⁸¹Bouwer (2019) (n 68) 37–38.

⁸²Doelle and Seck (n 55) 5. Legal scholars have increasingly turned their attention to climate change litigation from the global South; see, e.g., J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 *American Journal of International Law* 679; and Joana Setzer and Lisa Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations' (2020) 9 *Transnational Environmental Law* 77.

⁸³Setzer and Benjamin (n 82).

⁸⁴*Ibid* 79.

⁸⁵*Ibid* 96.

2.4 | A FUNDAMENTAL DISCONNECT

Given the topical proximity of the UNFCCC negotiations on loss and damage, particularly the work of the WIM, one could reasonably expect to find some references to negotiation outcomes, bodies and processes in relevant climate litigation. To what extent do relevant elements of the negotiations feature in the claimants' or defendants' arguments or the reasoning of the judges? Arguably, through the adoption of Article 8 and through the work of the WIM, the UNFCCC has essentially established itself as the principal authority on the issue occupying the central international policy space on climate loss and damage. As one stakeholder interviewee noted:

[Claimants] will look for the expert body on it. And there is no other body in international law and politics that deals with loss and damage, other than that [the WIM]. So they will turn to the Excom; and when they read the stuff on the Excom they are going to be completely confused, because there is just absolute uncertainty.⁸⁶

Indeed, none of the cases examined in the Appendix refer to the work of the UNFCCC on this issue, specifically Article 8 of the Paris Agreement, the WIM or any of its sub-bodies.⁸⁷

However, a reference to Article 8 does not necessarily make sense from a legal perspective, since paragraph 51 of the Paris COP decision makes explicit that none of the provisions of the Paris Agreement are intended to give rise to liability and compensation.⁸⁸ As Siegele observes, the emphasis on cooperative and facilitative approaches in Article 8(3) of the treaty suggests that 'adversarial adjudicatory avenues for addressing loss and damage under the Paris Agreement are closed for the time being'.⁸⁹ For the same reasons, one stakeholder active in litigation suggested potential claimants should avoid referring to Article 8 in loss and damage cases.⁹⁰ Whilst paragraph 51 does not exclude liability under general international law including the rules of State responsibility,⁹¹ and cannot be seen as barring claims under human rights treaties signed by the parties,⁹² it is evident that the Paris Agreement itself currently does

not provide a sufficiently solid basis for claimants to bring a case on loss and damage. The same can be said for the work of the WIM and the decisions of the COP in relation to loss and damage.

In the absence of an agreed definition of what constitutes loss and damage, and given the explicit exclusion of liability and compensation through paragraph 51, the only benefit for claimants to refer to the UNFCCC's work on the topic would be to support the argument that the international policy response as it currently stands is woefully inadequate to protect those in harm's way. According to Doelle and Seck, the role of a State actor undermining global ambition through action or inaction in the climate negotiations might constitute an actionable wrong for which they could potentially be held responsible.⁹³ Several stakeholders interviewed noted that the lack of progress under the UNFCCC on loss and damage will likely lead to further court cases.⁹⁴ Two respondents remarked that the provision of finance for loss and damage under the UNFCCC could render litigation efforts obsolete and determine a claimant's decision to file a case in the first place.⁹⁵ However, this argument fails to account for the diversity of loss and damage-related litigation as reflected in the typology presented above and thus only applies to State-based international litigation. In this context, even where a new finance facility for loss and damage were to be agreed at the multilateral level, question marks remain as to how the funds would be distributed and accessed by affected communities locally. In future, domestic and regional litigation could thus play a key role in cases where internationally agreed funds are not adequately disbursed, ensuring those suffering loss and damage on the ground have access. This is especially relevant considering that only 18 percent of adaptation finance reaches LDCs and only 10 percent is committed to reach the local level to address local drivers of poverty, natural degradation and vulnerability to adverse climate change impacts.⁹⁶ Moreover, a multilateral fund may not be a suitable solution for cases of non-economic loss (e.g. loss of cultures, traditions, indigenous lands but also human lives and health), where monetary compensation does not provide a suitable remedy.⁹⁷ Litigation would thus still play a role in such cases to enforce claims over land rights, immigration or relocation policies, but equally fails to address the non-substitutability of fundamental assets.

3 | BRIDGING THE GAP

In the following, I will explore some of the normative arguments that have been made about the role of climate litigation and its influence

⁸⁶Interview 8 with negotiator at SB50 (18 June 2019).

⁸⁷*Ralph Lauren 57* (n 79) is the only case to explicitly refer to the concept of 'loss and damage', albeit not to the UNFCCC policy response on the topic. In fact, the 2016 order by the Supreme Court of New South Wales does not refer to climate change at any point.

⁸⁸See Pekkarinen et al (n 67) 6.

⁸⁹L Siegele, 'Loss and Damage (Article 8)' in D Klein et al (eds), *The Paris Agreement on Climate Change* (Oxford University Press 2017) 230.

⁹⁰Skype interview 11 with delegation consultant (21 June 2019).

⁹¹Mace and Verheyen (n 39) 206; M Wewerinke-Singh and D Hinge Salili, 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change' (2020) *Climate Policy* 1, 5. <https://doi.org/10.1080/14693062.2019.1623166>

⁹²Human rights and other rights recognized in key international treaties are referenced in the Paris Agreement's preamble which though not legally binding provides important context for the interpretation of its provisions, thus including Article 8. See P Toussaint and A Martínez Blanco, 'A Human Rights-based Approach to Loss and Damage under the Climate Change Regime' (2020) *Climate Policy* 1, 5. <https://doi.org/10.1080/14693062.2019.1630354>. For a counterargument on the importance of the preamble, see A Zahar, 'Methodological Issues in Climate Law' (2015) 5 *Climate Law* 25, 29.

⁹³Doelle and Seck (n 55) 8.

⁹⁴Interview 2 with observer at Excom9 (10 April 2019); Phone interview 4 with lawyer active in climate litigation (11 June 2019); Interview 10 with NGO representative at SB50 (18 June 2019).

⁹⁵Interview 2 (n 94); Interview 5 with delegation consultant at SB50 (17 June 2019).

⁹⁶M Soanes et al, 'Money Where it Matters: Designing Funds for the Frontier' (International Institute for Environment and Development 2019).

⁹⁷See O Serdeczny, 'Non-economic Loss and Damage and the Warsaw International Mechanism' in Mechler et al (n 36) 205.

on the multilateral political process and structural barriers litigation advocates face in trying to raise awareness of and raising litigation as an argument in the negotiations. To complement this analysis, I then turn to the concrete pathways by which litigation advocates bring this topic into the UNFCCC and explore how this effort can be further strengthened.

3.1 | The role of climate litigation in the political process

The academic literature on climate litigation offers a wealth of insights into the potential role of court cases in climate change policymaking. Accordingly, both international and domestic courts are being invoked to fill a governance gap due to the slow progress under the UNFCCC and domestic climate policy.⁹⁸ Some of the works specifically point to the influence of cases on political processes, albeit primarily at national level, for instance through raising awareness and pressuring governments.⁹⁹ Others analyse the role of court cases from a legal perspective, arguing that cases help clarify the law,¹⁰⁰ and contribute towards policy harmonization.¹⁰¹ Successful cases may function as a deterrent,¹⁰² and even the very act of bringing a case contributes toward the democratization of environmental law and policymaking.¹⁰³ Thanks to its 'story-telling quality',¹⁰⁴ climate litigation puts the spotlight on the victims and empowers them to share their personal experience of loss and damage in an authoritative setting. This renders accounts of loss and damage both more tangible and immediate, setting the tone of the discussions. Hunter further argues that this 'increases the saliency of questions about compensation and adaptation to climate change, and the urgency of mitigating ... to avoid even worse impacts in the future'.¹⁰⁵ In the same vein, he notes that most litigation to date has aimed at forcing more ambitious political action,¹⁰⁶ suggesting that even 'the acts of preparing, announcing, filing, advocating, and forcing a response have significant impacts'.¹⁰⁷

Of the handful of studies purporting the influence of court cases on international political processes, all appear to be largely based on conjecture, offering little empirical evidence. For example, it has been suggested that:

*The [climate] negotiations respond to external pressure – including legal action. The fossil fuel industry lobbies the negotiations and has influence through industry reps, delegates and decision makers at all levels. Successful litigation against the industry or a credible threat thereof could lead governments and the industry to take and support ambitious climate action and a robust framework of implementation and compliance.*¹⁰⁸

Beyond ongoing court cases, Gupta suggests that the threat of future litigation might provide strong incentives to governments to address climate change.¹⁰⁹ Writing in the context of loss and damage, Simlinger and Mayer note, 'whether litigation leads to a favourable court decision or not, it contributes to raising awareness and creating political momentum for future developments'.¹¹⁰ Similarly, Hunter contends that:

*The focus on remedies that is inherent to climate litigation may influence future debates at the UNFCCC over adaptation. Certainly, the portrayal of specific harm to victims today, as opposed to general impacts tomorrow, is likely to force climate negotiators and the UNFCCC secretariat to focus on adaptation and compensation sooner than it otherwise would. This could increase funding available under the regime to respond to the needs of victims. In the most extreme scenarios, the threat of civil liability could conceivably lead industry and others to promote a liability regime under the UNFCCC that would both clarify the rules of liability and essentially cap private-sector liability – much as has been done with environmental damage from nuclear facilities and oil spills.*¹¹¹

I have argued elsewhere that 'public and corporate pressure surrounding climate litigation may spill over into the UNFCCC arena', suggesting that 'investors, companies, regulators and the insurance industry ... may equally seek to influence Parties' negotiating mandates and lobby decision-making outcomes'.¹¹² A recent policy paper by the NGO Germanwatch focusing on the role of climate litigation for the political debate on loss and damage stresses the litigation risk for corporations and the financial system,¹¹³ but here too, the authors are silent on how advocates can and do influence the negotiations in practical terms.

⁹⁸van Asselt et al (n 47) 24.

⁹⁹BJ Preston, 'The Contribution of the Courts in Tackling Climate Change' (2016) 28 *Journal of Environmental Law* 11; Simlinger and Mayer (n 36).

¹⁰⁰Zahar (n 92) 29.

¹⁰¹J Gupta, 'Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change' (2007) 16 *Review of European Community and International Environmental Law* 76, 85.

¹⁰²E Kosolapova, *Interstate Liability for Climate Change-related Damage* (Eleven International 2013) 187.

¹⁰³Hunter (n 9) 370.

¹⁰⁴ibid 360.

¹⁰⁵ibid.

¹⁰⁶ibid 372.

¹⁰⁷ibid 358.

¹⁰⁸Christoph Schwarte, Director of the Legal Response Initiative, interviewed in K Boom, JA Richards and S Leonard, 'Climate Justice: The International Momentum towards Climate Litigation' (2016) 59.

¹⁰⁹Gupta (n 101) 85.

¹¹⁰Simlinger and Mayer (n 36) 180.

¹¹¹Hunter (n 9) 366.

¹¹²Pekkarinen et al (n 67) 39.

¹¹³L Schäfer, V Künzel and C Bals, 'The Significance of Climate Litigation for the Political Debate on Loss & Damage' (Germanwatch 2018) 8.

3.2 | Structural barriers

Before considering the concrete ways the linkages between litigation and the multilateral negotiations could be strengthened, it is helpful to discuss some of the structural barriers those seeking to raise awareness of court cases in the UNFCCC face. Fundamentally, the negotiations are a party-driven process, where State parties set the agenda, enjoy preferential speaking rights and adopt decisions by consensus.¹¹⁴ With the exception of the Local Communities and Indigenous Peoples Platform (LCIPP), where indigenous peoples speak and decide on par with States, observers are accorded limited participation rights, have no voting power and may be excluded from meetings at the request of parties.¹¹⁵ Moreover, delegations of vulnerable countries, particularly SIDS and LDCs, tend to be much smaller than to those of major industrialized countries, thus significantly limiting their bargaining power and ability to participate in multiple and often simultaneous negotiation sessions. This is particularly relevant since outspoken loss and damage litigation advocates are likely to be found in higher concentration among NGO observers and on smaller delegations of vulnerable countries that are considering legal action outside the Convention.

Furthermore, litigation is perceived by some as a taboo topic in the climate negotiations.¹¹⁶ The UNFCCC has engendered a culture of non-adversarial, good-faith negotiations¹¹⁷ that since its inception in 1990 has eschewed any discussion of liability and compensation for climate harms. Litigation is often considered synonymous with claims for liability and compensation and thus deemed 'unagreeable language'.¹¹⁸ The adoption of paragraph 51, while not precluding parties and other claimants from seeking judicial recourse outside the UNFCCC, appears to have fuelled this taboo.¹¹⁹ Others have described litigation as too 'disruptive'¹²⁰ for the negotiations and some advocates have been accused of 'distracting from mitigation commitments'.¹²¹ Moreover, the WIM is still a relatively young process, and some fear that litigation – especially when successful – could 'jeopardize' hard-won negotiating gains.¹²² There is also the perception among some stakeholders that the multilateral political process is a more suitable forum to provide support for loss and damage (including finance) over domestic and regional litigation due to its

global governance implications.¹²³ For example, any remedies obtained through antagonistic legal cases will be limited to the parties of that dispute whereas a negotiated outcome under the UNFCCC promises to provide recourse to a broader spectrum of climate victims. Presently, such a multilateral solution is nowhere on the political horizon, forcing climate victims to rely on a 'patchwork of venues' to hear and enforce their claims.¹²⁴

3.3 | Strengthening the linkages

Notwithstanding these structural hurdles, litigation advocates have brought the topic into the UNFCCC in a variety of ways. In the following, I identify four principal pathways through which loss and damage-related litigation can influence the deliberations on loss and damage under the UNFCCC. These pathways include NGO advocacy in the climate regime; litigation as a negotiating strategy for vulnerable countries; the contribution of expert communities; and litigation networks. I assess the potential of each pathway in turn and provide recommendations on how ongoing efforts under each can be further strengthened.

3.3.1 | NGO advocacy

One stakeholder interviewee both active in litigation and participating as an observer at the Excom, Subsidiary Body (SB) and COP meetings described their own role in the multilateral process as raising awareness among negotiators of the link between negotiations and court cases.¹²⁵ Some NGOs have specialized expertise in climate litigation and regularly share their experiences in the climate negotiations, including the Center for International Environmental Law (CIEL) in the context of human rights and, previously, the Foundation for International Environmental Law and Development (FIELD). CIEL, for example, has convened several side events on climate litigation in the past, and FIELD released a working paper ahead of COP16 in 2010 outlining the opportunities and limitations of inter-State litigation for climate change.¹²⁶ Similarly, several other international NGOs active in the UNFCCC have promoted litigation, including Greenpeace, Earthjustice and the Climate Justice Programme. Perhaps the only NGO that has advocated for and raised awareness of litigation specifically in the discussions on loss and damage to date is Germanwatch. This is quite a unique example, since the NGO has been participating as an observer in the climate negotiations for many years and has also been at the forefront of litigation for loss and damage, having initiated and supported the ongoing court case of *Lliuya v RWE*.

¹¹⁴P Toussaint, 'Voices Unheard – Affected Communities and the Climate Negotiations on Loss and Damage' (2018) 3 Third World Thematics: A TWQ Journal 765.

¹¹⁵*ibid.*

¹¹⁶See, e.g., B Müller, 'Framing Future Commitments: A Pilot Study on the Evolution of the UNFCCC Greenhouse Gas Mitigation Regime' (Oxford Institute for Energy Studies 2003) 3-3 and 3-4.

¹¹⁷UNFCCC 'Decision 1/CP.1, The Berlin Mandate: Review of the Adequacy of Article 4, Paragraph 2(a) and (b), of the Convention, Including Proposals Related to a Protocol and Decisions on Follow-up' UN Doc FCCC/CP/1995/7/Add.1 (6 June 1995) para 1(g).

¹¹⁸Interview 1 with negotiator at Excom9 (10 April 2019).

¹¹⁹Interview 3 with observer at Excom9 (11 April 2019); Interview 7 with negotiator at SB50 (17 June 2019).

¹²⁰Interview 3 (n 119).

¹²¹Interview 2 (n 94).

¹²²Interview 12 with climate lawyer at academic workshop (28 June 2019).

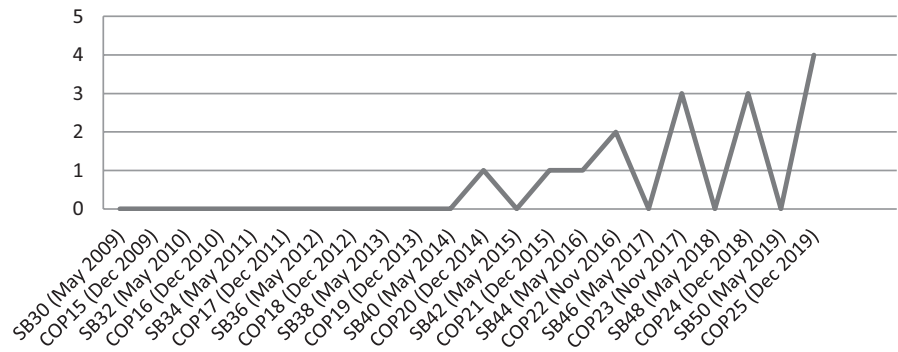
¹²³Wewerinke-Singh and Salili (n 91) 8.

¹²⁴Doelle and Seck (n 55) 9.

¹²⁵Interview 2 (n 94).

¹²⁶Schwarte and Byrne (n 70).

FIGURE 1 Climate litigation-themed UNFCCC events and exhibits from 2009 to 2019



A key pathway for NGO advocacy for litigation is the use of side events, press conferences and exhibits at the COPs to present new, ongoing or decided cases. This strategy contributes toward what Maljean-Dubois terms the 'successful mediatization at the global level of these cases'.¹²⁷ Perhaps the earliest example of this is the Inuit Circumpolar Conference, who formally announced their petition at a side event at COP10 in Buenos Aires in 2004. Hunter argues that '[t]his brought attention to their claims and their concerns, both for the filing of the petition but also in the negotiations as well'.¹²⁸ Moreover, he credits US climate litigation at the time with reducing US opposition to a second commitment period of the Kyoto Protocol arguing it provided fodder for alternative US voices present during the negotiations, effectively isolating the Bush administration.¹²⁹ Similar arguments have been made about the timing of the successful *Urgenda* judgment ahead of COP21 in Paris, with some noting the Dutch delegation was more constructive in the negotiations than they would have in the absence of litigation.¹³⁰

An examination of official UNFCCC side events, press conferences and exhibits during COPs and SBs between 2009 and 2019 reveals that until December 2014, discussion of climate litigation has been virtually non-existent.¹³¹ From 2016 onwards, the number of litigation-themed events has increased significantly, reaching a high of four events during COP25 in Madrid (see Figure 1). Drawing on the stakeholder interviews, respondents identified the same handful of side events during COP21 and COP23 where case updates were presented, first and foremost *Lliuya v RWE*. The Philippines' Commission on Human Rights has followed this trend, presenting the findings of its three-year inquiry into the

responsibility of 'carbon majors' for climate change at a side event at COP25.¹³²

Furthermore, NGOs are raising awareness on the issue of litigation through written communications, particularly in submissions and NGO newsletters distributed in the conference venue. A search of submissions to the WIM and its sub-bodies found references to litigation in several documents submitted by legal experts and NGOs in the context of displacement and finance for loss and damage. In a newsletter circulated during COP25 in Madrid in December 2019, NGOs criticized developed countries for failing to take responsibility for loss and damage and argued that 'litigation is waiting around the corner. Litigation + people power = change'.¹³³

NGOs involved in litigation have been among the first stakeholders in the UNFCCC to embrace the wave of climate litigation. By relaying the stories of climate victims suffering loss and damage and in some cases facilitating the direct participation of those most affected in side events, press conferences or other gatherings in the COP venue,¹³⁴ their efforts to date have been indispensable for raising awareness of recent climate litigation and for empowering those most affected to have a voice to share their experiences. Building on their experience and expertise, there is further scope for NGOs to collaborate with law firms, climate litigation researchers and like-minded parties to bring further visibility to this global phenomenon. In addition to offering state-of-the-art insights into the latest litigation achievements and facilitating storytelling, they could also provide trainings for vulnerable country negotiators on how to employ litigation arguments in their negotiating strategy.

¹²⁷S Maljean-Dubois, 'Climate Change Litigation' in H Ruiz Fabri (ed), *Max Planck Encyclopedia of Procedural Law* (Oxford University Press 2019) para 45.

¹²⁸Hunter (n 9) 365.

¹²⁹*ibid.*

¹³⁰Interview 11 (n 90).

¹³¹Aside from several side events calling for the creation of a World Environment Court or an International Tribunal on Climate Justice and a side event at COP20 on accountability for climate damages discussing the legal implementation of the Carbon Majors research. Events pre-dating 2009 were not considered due to the limited availability of data on the UNFCCC website.

¹³²I Kaminski, 'Carbon Majors Can Be Held Liable for Human Rights Violations, Philippines Commission Rules' (The Guardian, 9 December 2019).

¹³³Climate Action Network, 'The Heed the People's Call Issue' (ECO Newsletter, 13 December 2019) <http://www.climateactionnetwork.org/sites/default/files/eco_13.12.2019.pdf>.

¹³⁴For a personal account of the impact of the presence of claimant Saúl Lliuya at COP21 in Paris in December 2015, see A Gage and A Appadurai, 'Talking Climate Justice in Paris' (West Coast Environmental Law 2015) <<https://www.wcel.org/blog/talking-climate-justice-paris>>.

3.3.2 | Litigation as a negotiation strategy

Indeed, some countries have started considering litigation as part of their negotiating strategy on loss and damage. At a mandated informal WIM review event the day before the official start of COP25, a delegate from Vanuatu, in what appears to be the first statement of its kind in this political process, emphatically declared:

*In essence, Vanuatu sees the ongoing failure of this multilateral climate regime as pushing us towards exploring legal avenues to shift the costs of this [sic] climate protection back on those who are responsible. And I fully believe that at some point in the near future, if we don't address this review properly, we are going to reach a tipping point where like with the tobacco industry, legal liability for the crisis will land squarely on those who are responsible. And so, Vanuatu is not afraid to use the word compensation when we talk about action and support. However, preferable to litigation, wouldn't it be better for us to establish now at this COP, to decide on a multilateral loss and damage finance facility under the Convention and the Paris Agreement, so that we don't have to go down that route?*¹³⁵

Moreover, at the closing plenary during COP25, Ian Fry, negotiator for Tuvalu called out the United States for obstructing agreement on the future governance of the WIM, despite withdrawing from the Paris Agreement at the end of 2020. Fry declared: 'There are millions of people all around the world who are already suffering from the impacts of climate change. Denying this fact could be interpreted by some to be a crime against humanity.'¹³⁶ Whether this alludes to future legal action is subject to speculation, but Tuvalu has in the past threatened international legal action against Australia and the United States over climate impacts.¹³⁷ In 2019, the government leaders of the Pacific Islands Forum explicitly noted Vanuatu's proposal for a UN General Assembly Resolution seeking an Advisory Opinion from the International Court of Justice (ICJ) 'on the obligations of States under international law in relation to protect the rights of present and future generations against the adverse effects of climate change'.¹³⁸ By contrast, some vulnerable States, especially donor-dependent countries, may be reluctant to rely on international litigation for fear of diplomatic repercussions.¹³⁹ This reluctance is likely to dwindle the more these countries suffer the

impacts of climate change while being denied much needed international support.¹⁴⁰ Domestic litigation for loss and damage, too, could be seen as problematic in vulnerable countries 'because we do not want to be seen as suing our own governments, when [we] may need to go after the developed countries'.¹⁴¹

Wewerinke-Singh and Salili have recently discussed the promises and limitations of litigation as a negotiation strategy, focusing on the specific case of Vanuatu. They remark that the question is no longer whether but how this strategy can be best utilized by vulnerable countries, and conclude that 'a combination of legal initiatives and diplomacy may offer the greatest chances of catalyzing transformative change at the global level and obtaining much-needed reparations for actual climate harm'.¹⁴² In particular, they emphasize that '[I]nking peoples' lived experiences of loss and damage with the question of responsibility through a legal case would almost certainly inspire a more meaningful international debate on loss and damage, and may even result in more ambitious action to prevent and address it'.¹⁴³ In this context, Wewerinke-Singh and Salili suggest that State-based international litigation offers the greatest potential for directly influencing the negotiations. They argue that a favourable judgment and even a non-binding advisory opinion by the ICJ could serve to clarify States' rights and obligations, potentially bolstering the negotiating position of vulnerable countries.¹⁴⁴ With Vanuatu perhaps both the frontrunner of this approach, it may be still too early to assess the merits for vulnerable countries of using litigation as a negotiation strategy. That said, several stakeholder interviewees active in the negotiations recalled a closed briefing session during one of the UNFCCC Subsidiary Bodies' sessions where climate litigation was discussed as a potential negotiation strategy for developing country negotiators.¹⁴⁵ It is therefore conceivable that more vulnerable countries will follow suit.

An open question that merits further research is to what extent domestic and regional litigation efforts can muster sufficient public pressure to sway parties' negotiating positions. To date, legal scholarship on climate litigation has not come up with a reliable way to measure or trace the influence of such court cases on political processes at national and regional level, let alone the multilateral level.¹⁴⁶ That said, there is scope to further strengthen their influence on national climate policy, which involves raising awareness of present experiences and future threat of climate harm among citizens exercising their power as voters and consumers. It is at least conceivable that once a critical mass is achieved, this could trigger greater ambition in mitigation or adaptation efforts. With regard to loss and damage, specifically, this alone is unlikely to compel a government to spend taxpayer's money compensating vulnerable countries, but it could free up more political will to explore innovative sources

¹³⁵Christopher Bartlett on behalf of Vanuatu at COP25 WIM Review Event, Madrid, 1 December 2019, relevant excerpt of transcript of Skype recording on file with author. While a first under the UNFCCC, this is not the first time Vanuatu has announced its intention to explore legal action. See Wewerinke-Singh and Salili (n 91) 6.

¹³⁶"Total Disconnect": Voices from Marathon Madrid Climate Summit' (Reuters, 15 December 2019).

¹³⁷K Boom, 'See You in Court: The Rising Tide of International Climate Litigation' (The Conversation, 28 September 2011).

¹³⁸Pacific Islands Forum Secretariat, 'Forum Communiqué', PIF(19)14 (16 August 2019) <<https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>> para 16.

¹³⁹Skype interview 11 (n 90).

¹⁴⁰Schwarte and Byrne (n 70) 23.

¹⁴¹Interview 5 (n 95).

¹⁴²Wewerinke-Singh and Salili (n 91) 9.

¹⁴³ibid 8.

¹⁴⁴ibid.

¹⁴⁵Interview 6 with delegation consultant at SB50 (17 June 2019); Interview 9 with delegation consultant at SB50 (17 June 2019).

¹⁴⁶A recent literature review suggests that academia is beginning to look at ways to define and measure the influence of litigation. See Setzer and Vanhala (n 48) 2.

of financing which might play better with domestic constituencies. Along similar lines, increasing and successful domestic litigation against carbon majors could over time turn up the heat for shareholders and investors, who may seek to lobby their governments to promote the negotiation of a liability regime for loss and damage under the UNFCCC.¹⁴⁷

3.3.3 | Expert community of climate lawyers

Another important pathway of influence lies in the gatherings of communities of legal experts that convene outside the formal negotiations under the auspices of, for instance, the Climate Law and Governance Initiative.¹⁴⁸ These meetings take place as external expert roundtables and conferences held in parallel to the SBs and COPs and are frequented by legal academics and practitioners, sharing insights from the latest court cases and academic research. They do not require UNFCCC accreditation and are open to anyone registering and paying a fee. Due to their proximity to the negotiation venue they are frequently visited by UNFCCC negotiators and observers. Climate litigation has been a topic at every Climate Law and Governance Day since its inception in 2012.

While it is difficult to measure the impact of exchanges in forums such as this, it should be highlighted that many of the lawyers participating also serve as legal advisors to State delegations and legal counsel of NGOs and intergovernmental organizations. In a recent ethnographic study, Mason-Case relevantly points out that international climate lawyers engage in 'role splitting', that is to say, they 'assume multiple roles in the field, jumping inward and outward from sites of governance, especially the UN climate regime'.¹⁴⁹ These lawyers provide legal advice, negotiate regime-specific procedures and define textual outcomes that constrain future decision making.¹⁵⁰ Among litigation advocates, climate lawyers enjoy unique influence and access as emissaries of legal knowledge and expertise across the different spheres, from the UNFCCC negotiations to other multilateral regimes and international organizations, national legal systems, NGOs, research institutions and the courts. As such, they are ideally placed to raise awareness of litigation efforts taking place outside the Convention and advise how litigation can be employed as argumentation strategy in the negotiations on loss and damage. Granted, this is not the sole prerogative of lawyers – observers and delegation consultants come from all sorts of backgrounds.

3.3.4 | Litigation networks

Litigation advocates can further strengthen efforts to bring the influence of domestic, regional and international climate cases to bear on the negotiations through the strategic use of litigation networks. Many litigation networks are led by legal NGOs, and

have significant overlap with the NGO community yet their approaches tend to differ from regular NGO advocacy under the UNFCCC. Broadly speaking, these networks initiate lawsuits and often provide training and support to litigation advocates across different jurisdictions to inspire further cases. This has been the founding mission of initiatives such as the Climate Litigation Network, founded in 2016 by lawyers for Urgenda (the NGO), the Foundation of International Law for the Environment (FILE) and the Environmental Law Alliance (ELAW).¹⁵¹ In addition to building capacity, some of these networks strategically disseminate information on litigation at all levels (local, national, regional and international) to influence political outcomes.

There are litigation networks that maintain a close connection with the UNFCCC process to raise awareness of lawsuits and build capacity among vulnerable country negotiators. The Climate Justice Fund (CJF), for example, was established in 2017 through a committee of legal experts convened by the Climate Justice Programme (CJP), a transnational NGO created in 2003 that brings together lawyers, activists and academics to promote the development of innovative legal solutions to the climate crisis. The CJP provides training and resources to empower lawyers to implement legal actions and to promote access to justice, and seeks to raise awareness in the international community of the impacts of climate change and the courageous legal actions that individuals and communities are bringing for climate justice.¹⁵² The CJF on the other hand is not geared at influencing the multilateral process, but aims to raise and administer resources for new and ongoing lawsuits.¹⁵³ Much like the work of the NGO Germanwatch examined above, the CJP/CJF's efforts to tie together litigation efforts outside the regime with NGO advocacy in the UNFCCC proves to be an inspiring model.

Furthermore, by linking up with existing transnational advocacy networks active in the climate negotiations, climate litigation networks, most of which operate outside the UNFCCC, could gain more clout and rally litigation advocates behind a unified voice in the multilateral process. Alternatively, we could see the emergence of a new transnational advocacy network of litigation advocates that could share their expertise and help build capacity among vulnerable countries considering using litigation as a negotiating strategy to advance the multilateral deliberations on loss and damage. Though it is too early to fully assess the merits of such initiatives, the spread of climate litigation networks and their contribution to the multilateral effort on loss and damage warrants future research.

4 | CONCLUSION

As the first loss and damage cases move ahead, the growing gap between the slow pace of the multilateral negotiations and the reality of more

¹⁴⁷Wewerinke-Singh and Salili (n 91) 9.

¹⁴⁸<http://www.climatelawgovernance.org/>.

¹⁴⁹Mason-Case (n 10) 645.

¹⁵⁰ibid 633.

¹⁵¹Environmental Law Alliance Worldwide, 'Climate Litigation Strategies' <<https://www.elaw.org/climate>>.

¹⁵²Climate Justice Programme, 'How We Work' <<https://climatejustice.org.au/our-work>>.

¹⁵³Climate Justice Fund, 'Supporting Legal Initiatives for Climate Justice' <<http://climatejustice.fund/>>.

frequent and more intense climate loss and damage on the ground could over the long term throw the UNFCCC into a crisis. This has led some commentators to conclude that governments convening under the COP are out of touch with their own national constituencies, which tend to favour more ambitious climate action irrespective of the level of action taken by other countries.¹⁵⁴ While affected communities represented by vulnerable country delegations and NGOs have long voiced their dismay at the slow pace of the negotiations from within, transnational social movements shaping public opinion on the climate crisis outside the process have recently spilled over into the UNFCCC.¹⁵⁵ The recent statement by the delegate from Vanuatu during the WIM review event at COP25, openly declaring that vulnerable countries could litigate for loss and damage, could herald a significant shift in the politics on loss and damage under the UNFCCC. This shift suggests that some stakeholders are actively challenging the *de facto* taboo on liability and compensation, and confronting developed country negotiators with the real-world consequences of their inaction. As one stakeholder interviewee aptly remarked: 'We could potentially set a precedent [in the UNFCCC], but I feel like right now the opposite is happening. We are seeing more advances outside this process and so in a way we are having to play catch-up.'¹⁵⁶ By raising State-based litigation or calling for an advisory opinion from the ICJ, countries do not seek to stop negotiations under the UNFCCC, but rather aim at enforcing the Convention and existing rights and obligations under international law. Successful litigation for liability and compensation nonetheless threatens to undermine the authority and legitimacy of the UNFCCC and particularly the WIM as a political forum to address loss and damage (rather than primarily addressing mitigation and adaptation). This rings especially true from the perspective of climate victims.

Against the fundamental disconnect between the multilateral negotiations and the courts, the article has argued that loss and damage-related litigation can play an important role in the UNFCCC process, particularly by lending a voice to climate victims and – once the first cases succeed – by providing arguments in the negotiation strategy of vulnerable countries. However, litigation advocates face significant structural hurdles, in particular the *de facto* taboo on liability and compensation – and with it litigation – as well as unequal participation rights. While it is difficult to measure the influence of court cases on the negotiations, several important pathways of influence have been identified in this article, including targeted NGO advocacy; supporting vulnerable country delegations to employ litigation as a negotiating strategy; and enhancing the contribution of the expert community of climate lawyers through litigation networks. Future research could build on the discussion of pathways of influence in this article using a variety of actor- and discourse-focused methodologies, including critical discourse analysis and process tracing.¹⁵⁷

The typology of loss and damage-related cases presented in this article has served to highlight the different ways many high-profile climate court cases currently address the issue. If the experience of tobacco litigation is anything to go by, it is only a matter of time before the first litigation for climate loss and damage succeeds. However, it remains difficult to predict a precise tipping point and the constellation of claimants–defendants–court needed to effect change. Moreover, the scalability of successful domestic or regional cases remains questionable and requires further research, particularly considering the important differences between national legal systems.

While it is yet too soon to determine precisely how the piecemeal and highly fragmented efforts of litigants pursuing loss and damage in domestic, regional and perhaps soon international courts will transform the climate governance landscape of which the multilateral negotiations on loss and damage are but a subset, successful litigation for loss and damage could spur greater ambition on the issue under the UNFCCC by forcing the parties to engage with questions of liability and compensation. That said, it is conceivable that over the long run, the slow progress of the international response on loss and damage, set against recurring and widely reported record-breaking climate-induced disasters, an unprecedented level of global public awareness and youth mobilization for climate action, coupled with the prospect of both more and inevitably increasingly successful climate litigation for loss and damage, form a dangerous cocktail that will put the UNFCCC response under a stress test in the years to come.

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¹⁵⁴T Bernauer and R Gampfer, 'How Robust is Public Support for Unilateral Climate Policy?' (2015) 54 *Environmental Science and Policy* 316.

¹⁵⁵See S Duyck and E Lennon, 'A Process on the Brink of Collapse Confronts a World on the Move' (20 December 2019) <<https://us.boell.org/en/2019/12/20/process-brink-collapse-confronts-world-move>>; and C Streck, 'The Mirage of Madrid: Elusive Ambition on the Horizon' (2020) 20 *Climate Policy* 143.

¹⁵⁶Interview 6 (n 145).

¹⁵⁷See, e.g., L Vanhala, 'Process Tracing in the Study of Environmental Politics' (2017) 17 *Global Environmental Politics* 88.

APPENDIX I A Typology of Litigation for Loss and Damage

Case (country) (filing date)	Status Outcome	Objective	Harm (1) Timing of harm	(2) Associated climate impact	(3) Type of harm	(3) Localization of harm
AD (Tuvalu) (2014) ^a	Granted	Resident visa for climate migrant(s)	Prospective harm	Sea-level rise; flooding; coastal erosion	Ground-water salinization; destruction of primary sources of subsistence & personal and community property	National and community level
Burgess v Ontario Minister of Natural Resources and Forestry (Canada) (2016) ^b	Discontinued (by claimant)	Liability and compensation for damages from failure to adapt	Specific past harm and prospective harm (flood damage)	Extreme weather; heavy rainfalls; snow melt; lake flooding	Property damage; diminution of property value; costs of evacuation and relocation; loss of use of enjoyment of properties and businesses; loss of amenities of life and community; mental, emotional, psychological damage and loss of enjoyment of life	State level
Carbon Majors Inquiry (Philippines Human Rights Commission) (2015) ^c	Investigation concluded	Mitigation and human rights violations	Specific past and prospective harm	Storms; floods; heatwaves; rainfall; ocean acidification	Human health; self-determination; biodiversity loss; tourism; fisheries; agriculture	National and community level
Carvalho and Others v Parliament and Council (EU) (2018) ^d	Appealed	Mitigation (liability and injunction; no compensation sought)	Past and prospective	For example, forest fires; drought; heatwaves; extreme weather events; sea-level rise; storm surges; cyclones; inundation	Property damage/loss; loss of production yield; loss of revenue (agriculture, farming, tourism); loss of livelihoods	Transnational and community level
Comer v Murphy Oil (US) (2005, 2011) ^e	Dismissed	Compensation for damages; punitive damages for negligence	Past (Hurricane Katrina) and prospective	Increased tropical storm activity; increased water temperatures; rising sea levels	Property damage/loss; death and injury; increased insurance costs; clean-up expenses; loss of business/income; hedonic damages; mental anguish and emotional distress; disruption of normal course of lives	Community (class action)
Commune de Grande-Synthe v France (2019) ^f	Pending	Mitigation and adaptation	Prospective harm	Sea-level rise; flooding; heatwaves	Damage to water management and drainage systems; soil damage; air pollution	Municipality level
Dejusticia (Colombia) (2018) ^g	Decided (for claimants)	Mitigation of climate change and impacts of deforestation	Prospective harm	Alterations of ecosystems; water sources and supply	Biodiversity loss; deforestation; human health	National/regional
EarthLife (South Africa) (2016) ^h	Decided (for claimants)	Environmental review of planned coal-fired power station	Prospective	Court found defendants had not carried out adequate review of climate change impacts	Crop loss; human health; property damages from increased flood risk; loss of ecosystem services	National, local

(Continues)

APPENDIX I (Continued)

Case (country) (filing date)	Status Outcome	Objective	Harm (1) Timing of harm	(2) Associated climate impact	(3) Type of harm	(3) Localization of harm
<i>ENVironnement JEUnesse v Canada</i> (2018) ^j	Dismissed	Mitigation and fundamental rights violations and punitive damage (not compensation)	Prospective harm	Coastal erosion, permafrost thawing; heat waves; floods; droughts	Damage to critical infrastructure; food security; particularly indigenous peoples	National level
<i>Family Farmers and Greenpeace v Germany</i> (2018) ^k	Dismissed, continued in part as constitutional complaint	Mitigation and human rights violations	Specific past and prospective harm	Heavy rainfall; heat stress; increased pests; sea-level rise	Crop losses; flood damage; economic loss; increased cattle mortality	National, community level
<i>Friends of the Irish Environment (Ireland)</i> (2017) ^k	Appealed (Supreme Court)	Mitigation	Past and prospective harm	Sea-level rise; storms and rainfall; river and coastal flooding; water shortages; increased risk of new pests and diseases	Human health; mortality; decreased water quality; plant and animal biodiversity loss	National and global
<i>Ioane Teitiota v MBIE (New Zealand)</i> (2015) ^l	Denied	Refugee status for climate migrant	Past and prospective harm	Sea-level rise; salinization; land degradation; storms and flooding	Contamination of water supply; scarcity of habitable space causing life endangering violent land disputes; crop loss; human health	National and community level
<i>Juliana (US)</i> (2015) ^m	Continued	Mitigation and adaptation (no damages sought)	Specific past and prospective harm	Sea-level rise; storm floods; droughts	Freshwater shortage; mass migrations; soil depletion; public health system collapse; species extinction; property damage	National and community level
<i>Kivalina v Exxon (US)</i> (2008) ⁿ	Denied	Compensation for loss of property, revenue and for relocation costs	Past and prospective	Coastal storm waves and surges due to loss of sea ice	Lost property value and revenue; relocation costs	Community level
<i>KlimaSeniorinnen (Switzerland)</i> (2016) ^o	Appealed (Supreme Court)	Mitigation and human rights violations	Past and prospective harm	Rising temperatures; heat waves; extreme weather	Heat strokes; increased mortality and injury	National
<i>Leghari v Pakistan</i> (2015) ^p	Granted	Mitigation and adaptation (implement national climate law)	Prospective harm	Glacier melt; floods; drought; cyclones; land degradation	Water stress; crop loss; livestock stress; decreased river flows; food and energy security	National level
<i>Liuyi v RWE (Germany)</i> (2015) ^q	Evidentiary stage	Liability; injunction; compensating cost of protective measures	Prospective	Flooding from glacial lake	Property damage/loss	Community level

(Continues)

APPENDIX I (Continued)

Case (country) (filing date)	Status Outcome	Objective	Harm (1) Timing of harm	(2) Associated climate impact	(3) Type of harm	(3) Localization of harm
<i>Maria Khan v Pakistan (2018)^r</i>	Filed	Mitigation (lack of government support for renewable energy) and violation of constitutional rights	Prospective harm	Disproportionate impacts on women; spread of diseases	Human health; mortality; crop losses; biodiversity loss	National level
<i>Milieudefensie v Shell (Netherlands) (2019)^s</i>	Pending	Mitigation; unlawful endangerment; human rights violations (no compensation sought)	Prospective	Sea-level rise; storms; forest fires; heat stress; flooding; ocean acidification; ice sheet melting	Water and food shortages; biodiversity loss	National, regional
<i>Notre Affaire à Tous and Others v France (2018)^t</i>	Pending	Mitigation and adaptation; human rights violations; compensation for 'moral', 'non-material' and 'ecological' damages (symbolic sum)	Prospective harm	Glacial melt; sea-level rise; degradation of air quality; extreme weather events; heatwaves; droughts; forest fires; extreme rainfalls; hurricanes [overseas territories]	Loss of biodiversity; human health and safety; increased mortality; crop loss	National level
<i>Pandey v India (2017)^u</i>	Filed	Strengthening national mitigation and adaptation measures	Prospective	Sea-level rise; storm surges, coastal flooding; extreme weather events	Loss of freshwater supply, ecosystems, biodiversity, crops, GDP; increased mortality; climate displacement	National level
<i>Plan B Earth v Sec. of State for Business, Energy and Industrial Strategy (UK) (2018)^v</i>	Dismissed; appeal denied	Mitigation; human rights violation; declaratory judgment; order to revise climate target	Specific past harm (2003 heatwave in UK) and prospective harm	Heatwaves; flooding; droughts	Loss of life; human health; property damage	Global, national and city level
<i>Ralph Lauren 57 v Byron Shire Council (Australia) (2016)^w</i>	Settled out of court	Compensating cost of protective measures and diminution of property value	Specific past and prospective harm (shoreline encroachment)	Sea-level rise; flooding; coastal erosion	Diminution of property value	Local level
<i>Sacchi et al. (UN Committee on Rights of Child) (2019)^x</i>	Pending	Mitigation and adaptation (no compensation sought; instead precautionary, declaratory and remedial relief)	Specific past and prospective harm	Wildfires; storms; sea-level rise; heatwaves; diseases; extreme weather patterns	Human health; life; children's mental health; subsistence way of life of indigenous communities	Global; national and community level
<i>Thomson v Minister for Climate Change Issues (New Zealand) (2015)^y</i>	Decided	Mitigation	Prospective harm	Glacier melt; sea-level rise; heat stress; disease spread	Crop loss (esp. in Africa); mortality from temperature extremes; biodiversity loss; malnutrition	Global level

(Continues)

APPENDIX I (Continued)

Case (country) (filing date)	Status Outcome	Objective	Harm (1) Timing of harm	(2) Associated climate impact	(3) Type of harm	(3) Localization of harm
Torres Strait Islanders' Petition (UN Human Rights Committee) (2019) ^z	Pending	Adaptation costs; mitigation; human rights violations; coal phase-out	Past and prospective harm	Sea-level rise; coral bleaching; ocean acidification	Loss of culture and way of life; loss of life; damage to burial grounds and cultural sites; loss of territory; loss of marine life	Subnational/community level
Urgenda (Netherlands) (2013) ^{aa}	Decided (for claimants)	Mitigation; recognition of human rights obligations	Prospective	Sea-level rise; extreme weather events; flash floods; heat waves	Property damage; business interruption; reduced quality of life; diminished health; increased mortality	National level
US cities and counties v 'Big Oil' (e.g. NYC v BP, Exxon & Co (2018); Oakland v BP (2017); Rhode Island v Chevron (2018), etc. ^{bb}	Undecided	Punitive damages for fraud; repayment of funds illegally obtained; liability for nuisance; compensation for adaptation costs	Prospective	Flooding, erosion, heat, precipitation, extreme weather events, sea-level rise	Damage to infrastructure and property; health and safety impacts	Cities, counties

^a AD (Tuvalu) Immigration and Protection Tribunal of New Zealand (2014) NZIPT 501370-371 and AC (Tuvalu) Immigration and Protection Tribunal New Zealand (2014) NZIPT 800517-520; see also AF (Kiribati) [2013] NZIPT 800413. ^b n 78. ^c *Philippines Reconstruction Movement and Greenpeace v Carbon Majors*, Case No CHR-NI-2016-0001 (2015). ^d n 74. ^e n 76. ^f Lepage, 'Climate Litigation: Commune de Grande-Synthe v. France' (23 January 2019) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190123_Not-Yet-Available_press-release-1.pdf>. ^g *Future Generations v Ministry of the Environment and Others* ('*Demanda Generaciones Futuras v. Minambiente*') (2018). Original complaint in Spanish: <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180129_11001-22-03-000-2018-00319-00_complaint-1.pdf>. ^h *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others* (2017) Case No 65662/16. ⁱ *ENvironnement JEUnesse v Procureur General du Canada*, Cour Supérieure, Province de Québec, District de Montréal (Canada), 26 Nov. 2018, [500-06]. ^j *Family Farmers and Greenpeace Germany v Germany*, 00271/17/R/SP (Berlin Administrative Court). ^k *Friends of the Irish Environment v Ireland* [2017] IEHC 747. ^l *Ioane Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107. ^m n 72. ⁿ n 75. ^o n 73. ^p *Ashgar Leghari v Federation of Pakistan* (WP No 25501/2015), Lahore High Court Green Bench. ^q n 77. ^r *Maria Khan et al v Federation of Pakistan et al* Writ Petition No 8960 of 2019 (Lahore High Court). ^s *Milieudefensie v Shell* (Netherlands), Hague Court of Appeals, filed 5 April 2019, 'Unofficial translation of the summons' <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_summons.pdf>. ^t *Notre Affaire à Tous*, 'Inaction over Climate Change: Let's Fight for Justice' (18 December 2018) <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181218_NA_press-release.pdf>. ^u *Ridhima Pandey v Union of India*, National Green Tribunal, filed March 2017 <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No._---of-2017_petition-1.pdf>. ^v *Plan B Earth & Ors*, R (on the application of) v Secretary of State for Business, Energy and Industrial Strategy [2018] EWHC 1892 (Admin) (20 July 2018). ^w n 79. ^x n 3. ^y *Thomson v Minister for Climate Change Issues* [2017] NZHC 733. ^z *ClientEarth*, 'Climate Threatened Torres Strait Islanders Bring Human Rights Claim against Australia' (12 May 2019) <<https://www.clientearth.org/press/climate-threatened-torres-strait-islanders-bring-human-rights-claim-against-australia/>>. ^{aa} See n 60 and 62. Note in the Summons, the plaintiffs state: 'claiming compensatory relief after the damage from climate change has materialised will necessarily have negative consequences for society that would come on top of the damage that is caused by climate change itself'. Urgenda, 'Translation Summons Urgenda Foundation v. Kingdom of the Netherlands' (25 June 2014) <<https://www.urgenda.nl/wp-content/uploads/Translations-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf>>, at para 35. ^{bb} *City of New York v BP plc* No 18-2188 (2nd Cir. filed 26 July 2018); *City of Oakland v BP plc* No 3:17-cv-06011-WHA (N.D. Cal. filed 14 December 2017) and No 18-16663 (9th Cir.); *Rhode Island v Chevron* No 1:18-cv-00395 (D.R.I., filed 2018) and No 19-1818 (1st Cir.). Due to the large amount of cases, data was collected from the complaint of *New York v BP plc* as a representative example.