

## A4J CLIMATE LITIGATION GUIDE

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## SUB-PAGE 1: INTRODUCTION

Climate change is a huge threat to our environment, communities and the enjoyment of our human rights. **The climate is changing.** There is consensus among climate scientists that governments are not doing enough to combat it and that many corporations are continuing to contribute to climate change by emitting excessive amounts of greenhouse gases (“GHGs”).

But society is not powerless. There are options for us to fight for climate justice. One of these options is **climate litigation**. Climate litigation means **legal action that aims to combat climate change** and involves arguments which are related to climate change.

This is a **step-by-step guide** designed to introduce you to a range of legal responses to climate change and help you think about which response may be right for you, your organisation or community. In particular, it provides guidance on taking legal action to:

- Hold governments accountable for not doing enough to reduce their GHG emissions (“**mitigation claims**”);
- Hold governments accountable for not doing enough to protect you from the impacts of climate change (“**adaptation claims**”);
- **Challenge carbon-emitting projects** which will significantly contribute to climate change;
- **Hold corporations accountable** for significantly contributing to climate change; and
- **Challenge investment and financial support** of the fossil fuel industry.

### **The Scope and Purpose of the Action4Justice Climate Litigation Guide**

This Guide is designed to help you think about whether climate litigation is right for you. It provides an introduction to different types of claims you could bring, legal strategies that could help you bring such claims, and highlights organisations and other resources that could help.

### **The Guide is not a substitute for legal advice.**

- This Guide is general in scope. It looks at examples of laws and cases in different countries, outlines legal developments and provides general tips on legal strategy.
- To bring a case, you have to **know the law and legal system in your country**.

If, after reading the Guide, you want to explore the possibility of taking climate litigation further, **seek a lawyer** or an organisation that could help you develop your case.

### **1. What Is Climate Change?**

Climate change refers to the changes in climate because of the **increase in the average global temperature**. Temperatures have naturally risen and fallen throughout history. What is different about

climate change is that there is a trend of temperatures continuing to rise, and this trend is **not caused by natural causes**.

So far, the average global temperature has risen **1.1°C** in the last century. Climate scientists say this will continue to rise unless we take action. 1.1°C may not sound like much, but it has big environmental and human consequences.

#### *A. What Are the Causes of Climate Change?*

Certain gases in the atmosphere, such as carbon dioxide (CO<sub>2</sub>), methane, nitrous oxide and chlorofluorocarbons (CFCs), create what's called the "**greenhouse effect**".

- Heat from the sun is supposed to hit the Earth through radiation, warming it;
- Some of the heat is then released back into space; and
- Some of the heat stays in the atmosphere. This is because **greenhouse gases (GHGs)** act as a thermal blanket for the Earth, absorbing heat and warming the surface to a life-supporting temperature.

GHGs are natural and have an important function. The problem is that human industrial activity has resulted in an unnaturally high level of GHG emissions.

- The burning of fossil fuels (i.e. coal, oil and gas) as fuel for cars, factories, machines and planes creates excess levels of CO<sub>2</sub> in the atmosphere;
- Intensive meat and dairy farming create excess levels of methane in the atmosphere; and
- The cutting down of trees and destruction of ecosystems reduces the Earth's ability to capture GHGs.

This unnaturally high level of GHGs in the atmosphere creates a **more intense greenhouse gas effect**. Too much heat from the sun becomes trapped in the Earth's atmosphere instead of being released into space. This leads to global temperatures increasing over time.

#### *B. Is Climate Change Really Happening?*

**Yes.** It is now almost universally accepted that climate change is happening.

- At least **97% of scientists** globally agree that the Earth's temperature is rising, and human activity plays a central role.
- The IPCC's Fifth Assessment Report (AR5), concluded that there's a **more than 95% probability** that human-produced GHGs have caused much of the increase in Earth's temperature.

Courts are very likely to accept the main scientific findings of the IPCC as the generally accepted view on climate change. This is because in most cases you do not have to prove something is absolutely certain to

be true or for it to be accepted as a fact. It is often enough to give evidence that something is more likely than not for it to be accepted as true in court.

## ***2. What Are the Impacts of Climate Change?***

Global average temperatures are rising. But this does not mean that everywhere becomes a little hotter. Different places are affected differently. There can be dangerous spikes of temperature increase in different seasons, and even small temperature increases can have major impacts on our ecosystems and human life.

The IPCC [concludes](#) that damages resulting from climate change are likely to be significant and to increase over time. The impacts of climate change include:

- Temperature extremes, such as increasingly frequent and severe heatwaves;
- Changes in patterns of rainfall, leading to more floods, landslides and droughts;
- Rise in sea levels, leading to flooding of coastal areas;
- Melting of permafrost, snow, ice and glaciers, leading to flooding and release of GHGs; and
- Air pollution severely impacting the health of your family and community.

These effects have severe impacts on human life, including:

- Food and water shortages;
- Threats to physical health and survival;
- Loss of property and home; and
- Loss of way of life and cultural survival.

**Key Resource: WHO Report – [Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s](#)**

This is the latest of the World Health Organisation’s assessments of the health impacts that climate change is projected to have. The assessment concludes that climate change is expected to cause approximately 250,000 additional deaths per year between 2030 and 2050; 38,000 due to heat exposure in elderly people, 48,000 due to diarrhoea, 60,000 due to malaria, and 95,000 due to childhood undernutrition.

While climate change is a global problem, it’s important to note that its impacts are local and vary, affecting some regions and peoples much more than others:

- Children, indigenous peoples, women and the global poor are particularly affected; and
- Island nations, coastal countries and countries closer to the equator will be badly affected.

## ***3. Can We Do Anything to Stop Climate Change?***

**YES.** There are practical and affordable ways to do this.

### A. *What Needs to Be Done?*

The IPCC has concluded that we can substantially reduce the risk of dangerous climate change if we limit global warming to **1.5°C** above pre-industrial levels. If temperatures rise by over 1.5°C and especially by 2°C, there is a risk the impacts will be irreversible, uncontrollable and severe. BUT it should be underlined that **there is no safe level of global warming**. The Earth has already warmed by 1.1°C and this has led to record breaking heatwaves, forest fires and other disasters, costing human lives.

To keep temperatures to 1.5°C, countries need to **immediately and substantially reduce their GHG emissions**. This process of reducing our GHG emissions is called “**mitigation**”.

Every country has to take **mitigation measures**. But industrialised countries, who are responsible for most GHG emissions, have to take the most action. The IPCC has concluded that, **at a minimum**:

- Industrialised countries should have reduced their GHG emissions by **25-40% by 2020**;
- Industrialised countries must reduce their GHGs by at least **50% by 2030**; and
- Globally, we should aim for GHG emissions to reach **net zero by 2050** (this means that we only produce as much GHGs as can be captured by, for example, photosynthesis in trees).

GHG emissions can be reduced in a variety of different ways, and countries have some flexibility in what mitigation measures they take. But the following actions are fundamental:

- Immediately reducing (and eventually stopping) the amount of coal, oil and gas we take out of the ground;
- Transitioning to renewable energy (wind power, solar power, tidal power etc) for electricity and transport, instead of burning coal, oil and gas for fuel;
- Reducing levels of intensive meat and dairy farming; and
- Stopping deforestation and rehabilitating ecosystems (forests, marshes, wetlands etc) that can capture CO<sub>2</sub>.

As we cannot avoid all the impacts of climate change, governments also need to take “**adaptation measures**” to protect people from climate impacts. This includes building flood defences and developing drought resistance crops.

### B. *What Have Countries Done?*

Climate change is a global problem and can only be solved by global action. One of the main ways the world has reacted is by creating **international climate change agreements**.

#### [The United Nations Framework Convention on Climate Change \(UNFCCC\)](#)

This was the first international agreement on climate change. It sets the global framework for negotiations on climate change and 197 countries are parties. It contains general obligations for countries to:

- Take mitigation measures to avoid dangerous climate change; and
- Take adaptation measures to protect impacted communities.

But, as a framework convention, its commitments are general to permit adjustments over the years as scientific evidence, understanding and political will evolves.

The UNFCCC also paved the way for yearly negotiations, called the Conference of the Parties (COP), where more specific agreements can be reached.

### The Paris Agreement

This is the most recent climate change agreement under the UNFCCC. Its key features are:

- It sets an **objective of limiting global temperature rises to well below 2°C, while pursuing efforts to limit temperature rise to 1.5°C**;
- All countries have an obligation to reduce their GHG emissions; and
- Countries have to submit **nationally determined contributions**, which detail countries efforts to reduce GHG emissions.

### *C. Are We Doing Enough?*

**No.** While some countries are starting to take mitigation measures, we are not close to reducing our GHG emissions to the extent that science tells us we need to avoid dangerous climate change.

- Some countries haven't made strong enough commitments to take mitigation measures.
- Other countries have made commitments but don't take enough action to make these commitments a reality.

### **Key Resource:** [United Nations Environmental Program Emissions Gap Reports](#)

UNEP releases annual reports which compare the actual GHG emissions reductions with the GHG emissions reductions we have to make to avoid temperature rises of 1.5°C and 2°C.

- It considers different scenarios and makes projections on the basis of current policies.
- It also outlines the level of GHG emissions reductions that need to be made each year to avoid dangerous climate change.

UNEP's latest report has outlined that countries' current GHG reduction commitments will only deliver a third of the reductions needed to limit global warming to 1.5°C.

Governments and corporations need to act fast. Climate litigation is one way of trying to get governments and corporations to take the necessary steps to avoid dangerous climate change. This Guide will now take you through the options you have and the steps you need to take to use legal action to combat climate change.



## SUB-PAGE 2: CLIMATE LITIGATION BASICS

So far, we have introduced you to the causes and impacts of climate change, as well as what needs to be done to prevent dangerous climate change. The Guide will now take you through what legal options may be available to combat climate change and some of the basics to get you started if you are thinking of pursuing legal action.

### **1. *What Is Climate Litigation?***

Climate litigation means legal action that aims to combat climate change and involves arguments which are related to climate change. Climate litigation is one tool communities and individuals are using to force governments and corporations to do more to prevent dangerous climate change.

#### **A. *Are People Taking Climate Litigation?***

Climate litigation is growing fast across the world. A recent report from the Grantham Research Institute on Climate Change and the Environment and the Sabin Centre for Climate Change Law details that, as of July 2020, there were more than 1,213 cases filed in the United States and over 374 cases brought in other countries.

#### **Key Resources:**

To find out more about the latest developments, look at the sources below:

- **[The Sabin Center Climate Litigation Database](#)**: Columbia Law School’s database provides a comprehensive collection of different pieces of climate litigation brought across the world.
- **[Climate Liability News](#)**: A website that provides updates on new climate litigation cases.
- **[Climate Change Laws of the World Database](#)**: LSE, the Grantham Research Institute and the Sabin Center for Climate Change Law have a database on climate litigation and climate laws/policies around the world.
- **[New Model Statute For Citizens to Challenge Governments Failing To Act on Climate Change \(IBA 2020\)](#)**: The Model Statute provides a number of rationales, precedents/authoritative decisions and articles that would support climate litigation for the reduction of greenhouse gases.

#### **B. *What Different Types of Climate Litigation Are There?***

For an overview of the key elements of the most common types of climate litigation, see the “[Action4Justice Climate Litigation Matrix](#)”. Please note that different forms of litigation are not mutually exclusive. For example, you may be able to target inadequate action in both mitigation and adaptation.

##### **(i) Mitigation Claims**

These are legal cases brought against governments of countries who have significantly contributed to climate change and are accused of failing to take sufficient action to reduce their GHG emissions (i.e. to take mitigation measures).

**Example: [Urgenda Foundation v Kingdom of the Netherlands](#)**

A Dutch environmental group and 886 citizens sued the Netherlands for not taking enough action to reduce their GHG emissions.

In 2019, the Dutch Supreme Court found that the Dutch government must, by 2020, have reduced their GHG emissions by at least 25% from 1990 levels. The government's failure to do this was a violation of the rights to life and private life protected under the **European Convention on Human Rights**.

This Guide will go into detail about how you could bring this type of claim in “**Legal Action to Get My Government to Reduce its Emissions**”.

**(ii) Adaptation Claims**

These cases involve forcing governments to take adaptation measures to protect communities from the impacts of climate change that are already occurring or will occur, for example from life-threatening extreme weather events.

**Example: [Leghari v Republic of Pakistan](#)**

A case was brought against government authorities in Pakistan by a local farmer for their failure to put in place sufficient adaptation measures and the resulting damage to his livelihood.

The Court held that Pakistan had violated citizens' rights to life, dignity and property and ordered the government to take measures to minimise the impacts of changing weather patterns, including presenting a list of climate adaptation measures and to establish a Climate Change Commission.

A related type of climate litigation is against specific public authorities or private companies who have a duty to protect citizens against the effects of climate change. These could involve claims against engineers or government departments responsible for building adequate flood defences, architects responsible for buildings that consists withstand extreme weather events, and fire departments responsible for constructing fire breaks or fire defences. When these groups fail to carry out their legal duties, they may be liable to those damaged by that failure.

This Guide will go into detail about how you could bring this type of claim in “**Legal Action to Get My Government to Protect Me from Climate Impacts**”.

**(iii) Challenges to Carbon-Intensive Projects**

These are cases brought against public bodies who have licensed resource extraction or infrastructure development which will significantly contribute to climate change (e.g. coal mines, oil drilling, fracking dams, roads or airports etc).

**Example: [EarthLife Africa Johannesburg v Minister of Environmental Affairs](#)**

An environmental organisation in South Africa successfully challenged the opening of a new coal mine on the basis that the responsible public body failed to take into consideration its climate impacts when licensing the project.

This Guide will go into detail about how you could bring this type of claim in “**Legal Action to Challenge Carbon-Intensive Projects**”.

**(iv) Claims Against Carbon Majors**

These are cases brought against big corporations who have significantly contributed and continue to contribute to climate change. These cases can ask for corporations to contribute to the cost of responding to climate impacts, compensation for damage, or for orders to change restrict their actions.

**Example: [Lliuya v RWE AG](#)**

A case brought by a Peruvian farmer in German courts against RWE (a German energy company) for their contribution to climate change and its impact on glacial melts and flooding of his community. They demand that RWE contribute to adaptation costs required to protect against flooding.

This Guide will go into detail about how you could bring this type of claim in “**Legal Action to Hold Corporations Accountable for Contributing to Climate Change**”.

**(v) Investor and Financial Claims**

Investor and financial claims involve a range of different forms of climate litigation. This includes legal action against institutions that finance carbon majors or carbon-intensive projects, such as shareholders, banks, pension funds and others. It can also involve legal action brought by shareholders and investors against carbon majors because of their continued engagement in carbon-intensive activity or because of their lack of transparency on their climate policies or emissions.

**Example: [ClientEarth v ENEA](#)**

The Claimant, an environmental organisation, purchased some shares in the defendant company and sued it in its capacity as a shareholder in Poland.

The Claimant argued that a proposal by ENEA to construct a new coal plant risked breaching board members’ fiduciary duties of due diligence and to act in the best interests of the company and its shareholders because of the poor financial prospects of the proposed coal plant. These poor financial prospects were based on rising carbon prices, increased competition from renewable energies and increased regulation of the industry.

The Polish court agreed and found the plans for the new coal power plant to be invalid.

This Guide will go into detail about these types of claims in “**Investor and Financial Claims**”.

#### (vi) Alternatives to Court

This Guide will also address other climate-related complaints that do not strictly amount to climate litigation. These are often complaints to “**non-judicial bodies**” which can hear complaints against governments or corporations.

Examples include:

- Complaints to **OECD National Contact Points** against corporations;
- Complaints to **National Human Rights Institutions** against governments or corporations; and
- Submitting reports to **International Human Rights Bodies** to evaluate government climate action.

This Guide will give more information about these types of complaints in “**Alternatives to Going to Court**”.

#### (vii) Other Types of Litigation

This Guide does not intend to go into detail on every type of litigation that could be taken to address climate change. As the effects of climate change are increasingly felt and calls for climate justice grow louder, it is likely that more and more types of claim will be developed and be successful. Below are some examples of areas of law to watch in case of potential developments:

- **Competition and anti-trust law:** Although the cost of renewable energy is falling, carbon intensive companies and economies may have at least a short-term economic advantage over low Carbon equivalents. It may be possible to argue that this infringes national or regional competition or anti-trust laws.
- **Criminal law:** Where corporations or public officials provide untrue information on climate change they may attract criminal or regulatory liability. Also, such proceedings are usually brought by public authorities, this may be as a result of a complaint from an ordinary citizen.
- **Insurers’ liability:** Insurers have a huge influence on how industry and commerce operate. If insurers continue to cover carbon-intensive industries, it could be possible for persons affected by the operation of a company’s activities to bring an action direct against its insurers.

It should also be remembered that there **are other types of litigation which can help combat climate change** but are not considered climate litigation.

- For example, there may be plans for a large coal mine to be built on a site which is the habitat of an endangered species of frog. The members of the local Climate Justice Campaign may be more concerned about climate impacts of the mine than the impact on the frogs, but taking legal action

based on a law protecting the frog's habitat may be the most effective legal strategy to stop the mine and its climate impacts.

These types of litigation will not be covered in this Guide.

### *C. [What Impact Can Climate Litigation Have?](#)*

Climate litigation is **only one tool** that we can use to secure climate justice. Political action, campaigning and economic initiatives will also be key. Nonetheless, climate litigation can have a big impact.

Depending on what type of case you bring, a **successful climate litigation** case could result in:

- Governments having to take action to reduce national GHG emissions;
- Governments having to take action to protect vulnerable communities from climate impacts;
- Big carbon projects being cancelled, leading to reduced GHG emissions;
- Corporations being held accountable for their contributions to climate change, being made to either pay or change their business operations; and
- Financial divestment from the fossil fuel industry.

An important point to understand about some forms of climate litigation and some of the above outcomes is that their purpose is to effect change **for the benefit of society as a whole** and future generations and not just for the direct benefit of those bringing the claim.

- In other types of environmental cases, claims can be brought by people close to a mine or factory to stop pollution from it. The pollution affects the local people, and if they win, they benefit because it stops.
- Some types of climate litigation are different. Winning or losing a claim to reduce your government's GHG emissions or hold a corporation accountable for its contribution to climate change will generally have no immediate benefit for the people bringing the case, but it will contribute to the broader goal of preventing dangerous climate change.

Climate litigation is new, complicated and difficult. Many of those who bring a case to court don't win. But even **unsuccessful climate litigation** (i.e. that lose in court) can have an impact:

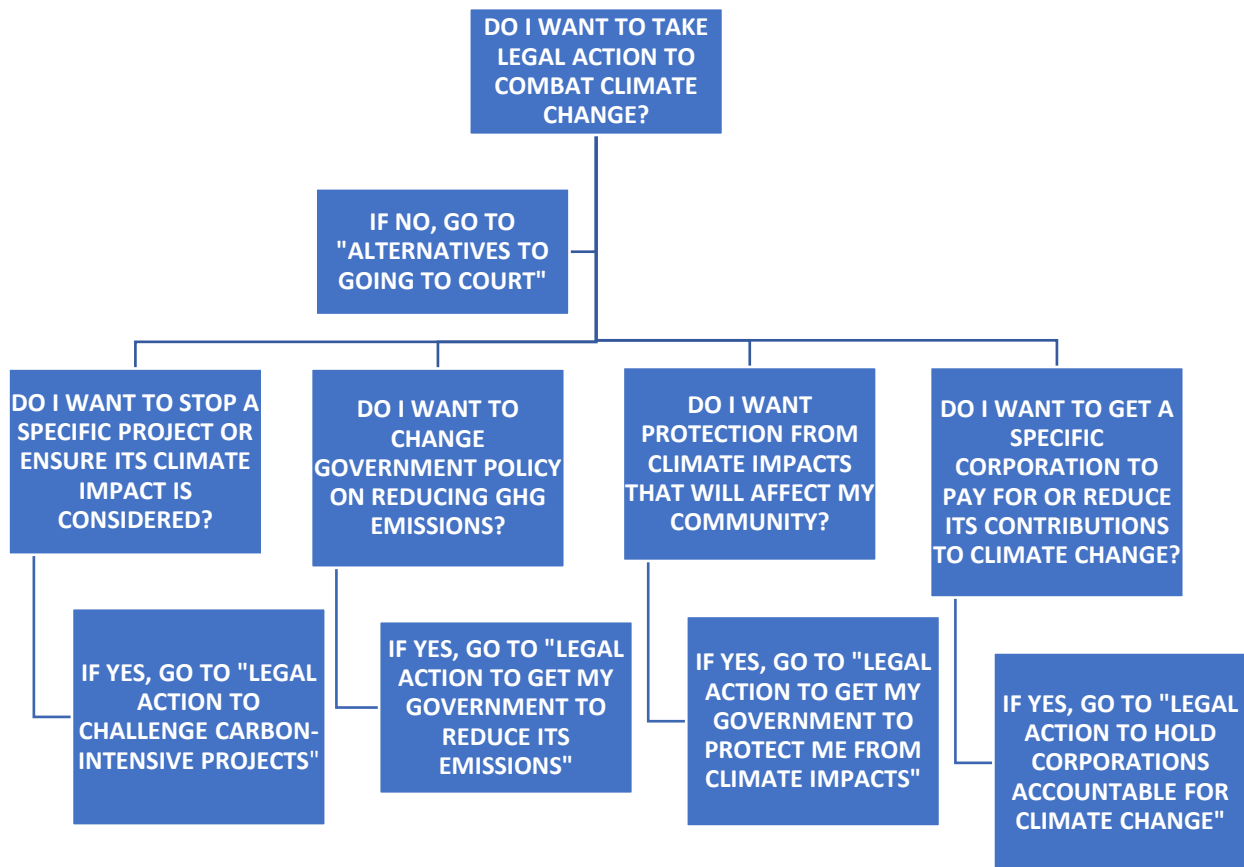
- Although an overall case might lose, a court can make a helpful finding (e.g. accepting the climate science in your case) that **future cases** can build on; and
- They **raise awareness** about climate change and increase pressure for governments/corporations to change their actions.

However, sometimes the opposite can occur. A poorly thought out action can set a helpful precedent for those opposed to adequate emission reduction or have an adverse effect on a campaign. Before taking

any action, it is necessary to think through the possible benefits and possible risks. This guide is designed to help do this.

## 2. What Type of Claim Is Right for Me?

A good first step in deciding what type of claim might be right for you is thinking about what outcome you would like to achieve from your case as shown in the table below.



After you think about outcomes, you can then focus on practicalities or legal issues which may change the type of claim that’s right for you. The remaining sections of the Guide will help put you into a position to decide what type of legal action is right for you.

## 3. The Building Blocks of Successful Climate Litigation

Before the Guide goes into details on tips and strategies for specific types of climate litigation, below you can find some general tips that can apply to most climate litigation cases.

### A. [Base Your Claim on the Best Climate Science](#)

Climate science provides the foundation of evidence on which you can build your case. In any climate litigation case, you must establish before a court that:

- Climate change is occurring;
- Climate change is caused by man-made GHG emissions; and
- Climate change has serious impacts on ecosystems and/or human lives.

An important source that represents that **scientific consensus** on climate change is the **Intergovernmental Panel on Climate Change (IPCC)**. Courts have relied on IPCC reports in several cases.

#### **Key Resource:** [The IPCC Reports](#)

The IPCC is an international body for assessing climate science. Hundreds of leading climate scientists take part in it, and 195 representatives of countries are members of the IPCC, giving its findings exceptional weight.

The IPCC conducts scientific assessments of existing climate science. Its findings provide the basis for all the major international agreements on climate change. The IPCC's "**assessment reports**" outline the occurrence, causes and impacts of climate change. **The reports also outline the amount countries need to reduce their GHG emissions by to prevent dangerous climate change.**

Countries are adopting the recommendations of the IPCCs reports, meaning that these assessments also represent the political consensus on climate change science. For these reasons, they offer a great starting point in gathering evidence on which to base your litigation.

In addition to the IPCC reports, the following sources also provide strong evidence:

- Studies by respected scientific institutions such as **NASA, the WMO, the Union of Concerned Scientists;**
- Reports by respected **international organisations** such as the World Bank, the IMF and United Nations bodies;
- Peer-reviewed scientific journals such as **LANCET, the European Academics' Advisory Council, Nature, Science, and AmetSoc.**

If you are taking climate litigation, you will usually also need to gather evidence about the specific impacts that climate change is having on your country, region or community. Useful sources of evidence to demonstrate local climate impacts often include:

- Local attribution studies which connect the intensity and frequency of extreme weather events with the occurrence of climate change ("**attribution science**");

- Reports by **governmental bodies and regional organisations** on the national/regional impacts of climate change;
- **Peer-reviewed scientific studies** focusing on the impact climate change is having in your area.

Science is determinative in shaping climate litigation strategy on two important climate liability issues. These issues are important elements of **attribution science**. It is helpful to provide scientific evidence on both elements :

1. **Source Attribution:** To what extent are the GHG emissions that are causing anthropogenic climate change the defendant’s responsibility (whether that is a corporation or a government); and
2. **Impact/Event Attribution:** To what extent the specific injuries or harms suffered by the claimant are attributable to the defendant’s contribution to climate change.

#### **Key Source of Evidence: Event Attribution Science**

This refers to scientific studies that seek to determine the extent to which climate change has influenced the probability or severity of a weather event or type of weather event (e.g. forest fires, heatwaves or floods).

Event attribution science may be useful in proving that you are specially affected or threatened by a certain extreme weather event and that this event is connected to climate change.

In the remaining sections of the Guide, we will outline additional evidence that can be helpful for different claims.

#### ***B. Establishing Jurisdiction***

For a court to be able to hear the case you are bringing, it must have “jurisdiction” over the party who you want to sue. This essentially means that the court has the power to hear the claim against the defendant.

Depending on your case, a couple of different types of jurisdiction could be relevant:

##### **(i) Geographical Jurisdiction**

Usually, courts only have jurisdiction over defendants (persons or businesses) that are based in the country of the court or where the case concerns actions that took place in that country. This will not be a problem where you want to take legal action against your government, or a corporation based in your country.

However, issues can arise if you want to take legal action against a corporation that is based in another country. For more information on what countries’ courts may have jurisdiction over a corporation, see the “[A4J Business and Human Rights Guide](#)”.



## (ii) Subject Matter Jurisdiction

The claim must also be of a type the court is willing to hear. In some countries, courts can refuse to hear cases then they think they are not “[justiciable](#)” or raise a “**political question**”.

- In climate litigation, justiciability could prevent your claim from being heard if the judge thinks climate policy is an issue that should be left with the executive/legislative aims of government.
- This is based on the principle of the **separation of powers**, which outlines what responsibilities courts, legislatures and executive bodies should have in governing a country.

Some cases have successfully overcome this requirement. A key argument in these cases has been that although a judgment might have political consequences, it only involves a “**legal question**”.

### Example: [Urgenda Foundation v The Kingdom of the Netherlands](#)

The Dutch Supreme Court rejected the government’s arguments that the separation of powers prevents the court from interfering with its climate policy. It held that:

- The question of whether the government’s policy violated human rights was a legal question which the court had authority to decide; and
- While the court outlined the minimum the government had to do to respect human rights (i.e. reduce its GHG emissions by 25% by 2020), it left the government discretion as to **how** it would reduce its emissions.

To overcome the justiciability requirement, it can be helpful to:

- Emphasise that your case concerns legal rights and duties, and that it’s the court’s role to review the lawfulness of government action (i.e. **the rule of law argument**);
- Argue that you have a right to access remedies or reparation where a legal wrong has been committed (i.e. **the access to remedies argument**); and/or
- Limit the requests for relief so the government or corporations still has some room to decide how it will reduce GHG emissions.

Courts may also decline to hear cases on the basis of the doctrine of “**displacement**” or “**pre-emption**”. In some countries, these doctrines mean that if a central government or legislature makes a law or regulation covering an issue, it is not possible to challenge activities relating to that issue on the basis of lower laws in the hierarchy (e.g. local or state law), older laws or more general laws (e.g. laws of civil responsibility).

For example, if government has given a national body the power and duty to regulate greenhouse gases, or has enacted statutes or regulations on climate change, the courts may decline to hear climate litigation that is based on laws of civil responsibility (e.g. tort) or state laws. However, as explained below, if the

statutory or regulatory regime itself is inadequate, it may be possible to challenge this on constitutional grounds as this is the highest form of law.

### *C. [Establishing Standing](#)*

The person or group bringing a legal claim (“the Claimant”) has to show that they are entitled to bring the claim. In many countries, this entitlement is called “**standing**”. This can be a difficult issue and climate litigation claims have been declined because the claimant cannot show a sufficient interest or stake in the issue because they have not suffered any specific or special harm from climate change or from the specific action complained about.

What types of people may have standing in different types of cases will be discussed throughout the Guide. If you would like to find out more about standing in general, see “[Who Can Take Legal Action?](#)” on the **A4J Going to Court: Q&A**.

#### **Key Example:** [People’s Climate Case](#)

This case demonstrates the difficulties claimants may encounter in showing they have suffered special harm from climate change. The EU General Court rejected the claimant’s arguments that their countries’ GHG reduction targets were too low on the basis that the claim was inadmissible because the claimants were not individually concerned by EU law on climate change (i.e. they lacked sufficient interest).

This case demonstrates the difficulties claimants can have in establishing standing in climate litigation cases, showing that in some courts, the broader the impacts of climate change, the less power courts have to adjudicate.

#### **Key Case to Watch:** [Reserva Los Cedros v. Ecuador](#)

In June 2020, the Constitutional Court of Ecuador agreed to hear an infrastructural challenge brought by Los Cedros Reserve against the government on the grounds that its concessions for mining exploration and exploitation projects violate the Rights of Nature enshrined in the Ecuadorian constitution. The claimants are also arguing that the projects violate the legal status of the Los Cedros Protected Area, collective rights of indigenous peoples and the procedural rights of communities to prior consultation before potential environmental damage.

### *D. [Identifying the Legal Basis for Your Claim](#)*

It is not enough to succeed in a legal claim to show that you have suffered or may suffer harm from climate change. You have to invoke either a specific legal right that you have, which has been breached, or demonstrate there is a law or legal duty on the defendant that has been broken. This legal right or law could be based on your country’s constitution, international agreements, environmental or other legislation, or general civil responsibility laws (e.g. tort laws). The most relevant laws for each type of climate litigation will be outlined through the Guide.

**Key Term: Cause of Action**

A cause of action is a set of facts that ground a claimant's legal claim in court. You must have a cause of action and fulfil each legal element of your cause of action to succeed in court.

Remember that the law can change. What may not have been possible yesterday, may be possible today. Pay attention to legal changes in your country and new opportunities that could exist to bring climate cases.

In certain cases, particularly those brought against corporations based in other countries, there may be a question over which country's law should apply to your case. For more information on this issue, see the "[A4J Business and Human Rights Guide](#)".

*E. Supplementary Legal Principles*

If you are pursuing climate litigation, there are some general legal principles that can support your arguments, even if they are not actually part of the law of the country in which you are bringing the claim. Courts in some countries are often willing to pay attention to arguments based on international human rights law, as well as some principles of public international law detailed below.

You are not arguing that government policy or a corporation's actions are unlawful because they violate these principles. Rather, you are arguing these principles should influence how the court interprets and applies national law.

**(i) The Precautionary Principle**

This principle requires that where there is a threat of serious or irreversible environmental harm, scientific uncertainty cannot be used as a reason to delay action to prevent the harm. This principle is included in the **UNFCCC** and **many national laws**.

In some legal systems, where you can prove there is a credible risk of serious or irreversible environmental harm, the precautionary principle can **reduce the "standard of proof"**. This can mean that you may not have to provide as much evidence to prove that the harm will occur or was caused by a specific thing, as long as there's evidence of a serious risk.

Although it is sufficiently certain that climate change is happening, it's caused by GHG emissions and it will have impacts, the precautionary principle can be useful in the following circumstances:

- Where it's not clear what the precise impact of a carbon-emitting project will be, the precautionary principle can help overcome this uncertainty;

- Where the government has different options available in dealing with climate change, the precautionary principle could help persuade the court to side with the most safe and effective option; or
- Where the level of influence climate change has had on causing a specific weather event is uncertain, the precautionary principle could be used to persuade the court that evidence generally connecting climate change to that type of weather event is sufficient.

**(ii) The no-harm principle**

This principle **requires states to prevent transboundary environmental harm** in other countries where the source of the harm comes from their territory.

- This principle can be particularly useful if you are bringing a climate case against a government in another country; or
- You want to persuade a court that it should take into account the climate impacts that your government's actions will have in other countries when making its decision in your case.

**(iii) The polluter pays principle**

This principle **requires those who are responsible for pollution to make good and/or bear the costs of the damage it causes**. This principle is contained in many **national laws** and environmental regulations.

- The polluter pays principle also applies to GHG emissions.
- The principle can be useful if you are bringing a climate case against a Carbon Major.

**(iv) International climate change agreements**

Although international climate change agreements cannot be directly enforced in courts, key provisions from the UNFCCC and the Paris Agreement can influence how national laws are applied in climate cases.

- E.g. the aims of limiting global temperatures to 1.5°C to 2°C in the Paris Agreement can be used to assess whether the government is doing enough to reduce its GHG emissions.

**Example: [Plan B Earth v Secretary of State for Transport](#)**

In the UK, an environmental organisation challenged the expansion of Heathrow Airport on the basis that the government failed to consider how the expansion was consistent with their commitments under the Paris Agreement.

**(v) The rights of future generations and the principle of sustainable development**

These principles require that actions of the present generations must be balanced against the protection of the environment in a way that does not compromise the needs of future generations. These principles of rights of future generations can strengthen an argument that human rights and environmental protections should be applied with a long-term view.

- For example, it could be argued consideration of the rights of future generations and environmental sustainability mean that governments should consider the long-term climate impact of projects before making licensing decisions, even if it's economically beneficial in the short-term.

#### *F. [Identifying an Appropriate Remedy](#)*

A remedy is a legal order that is made by a court. This may be to stop, undo or compensate for the consequences of an unlawful action or may be simply to declare that an act or decision or policy is unlawful or of no effect. Courts do not have unlimited powers to make any order they want. Normally you have to seek an order which the court has power to grant. In climate litigation, these are usually things such as striking down or declaring a law or policy invalid, granting an order to a party to do something or stop doing something, or order payment of compensation.

It is important to remember **that affected individuals and communities should be leading the development of the climate litigation strategy and deciding which remedies are appropriate**, as opposed to NGOs or lawyers. In addition to community involvement, remember to consider the community impacts of the strategy and each possible remedy.

Before you start your claim, it's important to think about what remedy you want and whether this could be ordered by a court that can hear your claim. More information will be provided on this issue in later sections. For general information on remedies, see "[What Remedies Are Available?](#)" in the **A4J Going to Court: Q&A**.

#### *G. [Contact a Lawyer](#)*

Climate litigation can be complicated and difficult. It is a new area of law that is constantly changing. For this reason, you will need support from a lawyer or an organisation with expertise in the relevant area of law to take a case. They will be able to help you decide whether you have a case, the strengths of your case and also on the best course of action to take. For more information, see "**Where Can I Find More Information and Support?**" in this Guide or "[How Can I Get Legal Support?](#)" in the **A4J Going to Court: Q&A**.

#### *H. [Paying for Your Case](#)*

All claims cost money. Bringing a claim can be an expensive and time-consuming process. This can be especially true in climate litigation, where the complexity of the cases is high. In some countries, the loser of the claim must pay the winner's fees. In these countries, someone who brings a lawsuit and loses may find themselves facing very high expenses for the other side's lawyers. BUT, there are ways to help finance your claim, including legal aid, pooling together resources in a group claim, obtaining volunteer support from pro-bono lawyers or experts, or getting support from an organisation. In some countries, it's also

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possible to have court fees waived in public interest cases. We recommend that you read our webpage [“How Can I Finance My Action?”](#) in the **A4J Going to Court: Q&A**.

*1. [Dealing with Threats and Security Issues](#)*

Taking legal cases in politically sensitive areas can be dangerous. You can be faced with threats when challenging governments and corporations to take climate action. This is because climate justice can conflict with powerful political and economic interests that want things to stay the same.

Before taking a case, we recommend you read [“How Can I Deal with Security?”](#) and [“How Can I Protect My Information?”](#).

**SUB-PAGE 3: LEGAL ACTION TO GET MY GOVERNMENT TO REDUCE ITS GREENHOUSE GAS EMISSIONS**

This section concerns what can be called “**Mitigation Claims**”. They are called mitigation claims because they involve **bringing governments to court to demand that they take better mitigation measures**. They seek to force governments to take bolder action to reduce emissions or to support non-GHG emitting alternatives, such as renewable energy.

Mitigation claims are typically brought against governments of countries who have significantly contributed to climate change and are accused of failing to take sufficient action to reduce their GHG emissions (i.e. to take mitigation measures).

**Consider the following checklist if you are thinking about taking a mitigation claim:**

CHECKLIST	YES/NO
1) Is a mitigation claim right for me?	
2) Is there an appropriate law for me to base a mitigation claim on?	
3) Do I have the right to bring a claim?	
4) Have I identified the right defendant to take a mitigation claim against?	
5) Have I gathered enough evidence to take a mitigation claim?	
6) Have I identified and followed the procedural steps I need to take in my claim?	
7) If I win, what remedies could I get?	
8) If I lose, is there an appeals process or a regional/international court that I can bring a mitigation claim to?	

This section seeks to help you answer these questions. In addition, if you want to take a mitigation claim further, the “[A4J Mitigation Claims Template](#)” may help you form your legal arguments.

***1. Is a Mitigation Claim Right for Me?***

A question to ask yourself when considering bringing a case to court is whether bringing the case is the right decision for you. You should continue to ask yourself at each stage of your case’s preparation.

The following table of advantages and disadvantages is designed to help you consider whether a mitigation claim is right for you.

### Advantages of mitigation claims

- Mitigation claims can change overall government policy on climate change. This can have a ripple effect, leading to specific actions (e.g. cancelling high-emission projects and regulating corporations).
- Successful mitigation claims have now been brought that provide useful examples for other cases.
- They can raise awareness about climate change in your country.
- Mitigation claims don't have to ask for specific outcomes (i.e. they can be limited to asking for a minimum level of GHG emission reductions). This can help overcome justiciability arguments.
- You may have the option of going to a regional/international body if you don't succeed at the national level.

### Disadvantages of mitigation claims

- Mitigation claims may be more difficult in developing countries as the IPCC mitigation targets relate to "industrialised countries".
- If your government is one of the few doing the minimum (or close to the minimum) required by the IPCC targets, it will be harder to take a successful case.
- Justiciability is often a barrier for courts hearing mitigation claims.
- Some countries have strict "standing" requirements which mean you have to show you are especially affected by climate change to bring a mitigation claim.
- The general nature of the remedies can lead to problems with enforcement.
- If all appeal processes are used, claims can take years.

## 2. What Laws Could I Base My Claim on?

If you are bringing a mitigation claim, you will usually bring a claim under national human rights, constitutional or administrative law. These types of laws fall within an area of law called “**public law**”. This is the body of law that regulates the relationship between the State and individuals. There are many different areas of public law. Each area prevents public bodies from doing certain things or requires them to do certain things, and provides consequences when laws are broken.

Once you have outlined the facts of your case, look at the areas of law below and see which most closely relates to your situation. Then check your national law to see what the law is in your country.



**Remember:**

Your **legal analysis has to be supported by the evidence you have gathered**. You should consider seeking legal advice. A lawyer with expertise in the relevant area should be able to provide advice on the options available to you and advise on your chances of success.

The types of evidence you may need to support your argument will be outlined later in this section.

The specific content of these laws will change in different countries. However, below are the main types of law on which you could have a “**cause of action**” for a mitigation claim on.

**A. *Human and Constitutional Rights***

Human rights are the **rights and freedoms held by every human being** without discrimination. Human rights protect our basic needs and freedoms. Human rights are contained in international human rights instruments, such as:

- International Covenant on Civil and Political Rights
- International Covenant on Economic Social and Cultural Rights
- If a state signs and ratifies these treaties, they become “**binding**” on your state at international law. You can check whether your country has signed and ratified a UN Human Rights Treaty [here](#).

These rights also often included in national constitutions and human rights laws. It is these laws that you will generally enforce in national courts.

- There may be rights protected in your national constitution that aren’t expressly protected in an international human rights treaty, such as the right to a healthy environment; and
- International human rights laws may not create legal rights or obligations which are enforceable in national courts, whereas rights under national constitutions are often enforceable in national courts.

**Key Resource: [A People’s Guide on Holding Your Government Accountable for Climate Change](#)**

Greenpeace International, a partner of A4J, has created an excellent guide on how to bring a human rights-based climate change case against the government. It goes into detail on:

- Climate science you could use as evidence;
- How to identify enforceable human rights;
- Issues of admissibility (i.e. standing and justiciability);
- How you can prove a violation of your human rights; and
- How to develop a rights-based campaign strategy to complement your case.

If you want to find out more about bringing a human rights-based mitigation claim after reading this section, we recommend reading the Greenpeace Guide.

## What Human Rights Are Impacted by Climate Change?

Climate change poses a serious threat to the enjoyment and exercise of our human rights.

**Key Resource:** [The OHCHR Study on the Relationship between Human Rights and Climate Change](#)

Although it is now quite dated, this is a useful UN paper that provides an overview of the impacts climate change has on different human rights. It provides useful information for human rights-based arguments and has reference to evidence that shows how human rights will be affected.

The following human rights are most clearly affected by climate change:

- **The right to life:** Climate change poses a threat to human life due to the higher incidence of mortality associated with extreme weather events, increased heat, drought, disease.
- **The right to health:** Climate change can impact health by increasing heat-related respiratory and cardiovascular diseases caused by extreme weather events and natural disasters and nutrition deficits linked to food shortages and loss of livelihoods. There is also evidence of an increase in vector-borne diseases linked to climate change.
- **The right to a healthy environment:** Climate change has huge impacts on ecosystems, threatening biodiversity, causing ocean acidification and desertification.
- **The right to food:** Changes in temperature and precipitation may affect crop production and warming oceans can affect fishing productivity.
- **The right to water:** Climate change will increase drought in currently dry areas.
- **The right to property and housing:** Rising sea levels, flooding, forest fires and other climate-related harms will deprive many people of their housing and property.
- **The right to private and family life:** In countries where the rights to health, housing or a healthy environment are not recognized, the right to private/family life provides some protection for the same issues.
- **The right to self-determination:** Climate change threatens the existence and traditional livelihoods of whole nations. For example, rising sea levels have resulted in a threat to the physical and cultural survival of various Pacific island nations.

## What Are My Government's Relevant Human Rights Obligations?

Governments have an **obligation to protect** human rights: This obligation requires governments to take action to prevent third parties (e.g. corporations, individuals) from interfering with human rights.

- For example, governments must adopt and enforce laws regulating corporations, ensure they are held accountable and that people receive a remedy when they interfere with your human rights.
- For further information on this general obligation, see the "[A4J Business and Human Rights Guide](#)".

**Key Case:** [The Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights](#)

The IACtHR held that the obligation for States to guarantee (i.e. protect) rights under the **American Convention on Human Rights** included an **obligation to prevent significant damage to the environment** which would interfere with other rights. This obligation includes:

- A **duty to regulate** activities that threaten to cause environmental damage which impact other rights;
- A **duty to supervise** and control such activities; and
- A **duty to mitigate** environmental damage that is occurring.

The IACtHR made it clear that these obligations **apply to climate change**.

**Key Case to Watch:** [Álvarez et al v. Peru](#)

In 2019 a group of youths filed a complaint against the Peruvian government for its alleged failure to halt deforestation in the Amazon. The youths have argued that this failure means the government has not taken sufficient action to address climate change. The claimants have also argued that their human and constitutional rights to a healthy environment, life, water and health have been violated.

The claimants are seeking an order that requires the Peruvian government to take mitigation and adaptation measures as well as establish concrete plan to reduce and prevent further deforestation in the Amazon.

The obligation to protect is most relevant because private persons, particularly corporations, are responsible for most GHG emissions.

- The key point to make in human rights-based mitigation claims is that the obligation to protect certain human rights requires that the government takes regulatory measures to reduce GHG emissions created by private actors in its territory.

**Focus Point: The Principle of “Shared Responsibility”**

A defence often raised by governments in mitigation claims is that climate change is a global issue and no single country is responsible for preventing it.

This is true. But, although the State cannot prevent climate change on its own, **preventing climate change is a shared responsibility in which all States must take appropriate mitigation measures** to prevent climate change. It should be argued that **each State can be held accountable for their share of the responsibility** to prevent climate change. In addition, the **UNFCCC** provides that each of the developed state parties commit to taking steps to limit its GHG emissions within its own jurisdiction, as well as the overarching agreement that this is a shared responsibility amongst all states.

This argument was accepted by the Dutch Supreme Court in [Urgenda v Kingdom of the Netherlands](#).

### What Right Should I Base My Claim on?

In deciding which rights to base a mitigation claim on, you need to consider:

#### 1. How does or will climate change affect my human rights?

After you have gathered evidence about the impacts of climate change on your country or region, think about the climate impacts outlined in the introduction to this Guide and the list of rights above. Then narrow down the most relevant rights to your factual situation.

- For example, if you live in a coastal area and your housing is threatened by rising sea levels, the right to property, housing or private/family life may be most relevant.

#### 2. What human rights are legally enforceable in my country?

After you have identified the most relevant human rights, you need to check which ones are legally enforceable in your country. Although human rights are universal in principle, they may not all be recognized in a law that you can enforce.

If you want to enforce a human right in national courts, it must generally be contained in:

- Your **national constitution** or national human rights laws; and/or
- An **international or regional human rights treaty** which is directly enforceable in your country.

#### Example: [Swiss Senior Women for Climate Protection v Swiss Federal Government](#)

A group of senior Swiss women used human rights and constitutional law to challenge their government's inadequate climate policies. Climate change is affecting their human rights through severe heat waves which have profound impacts on their life, health and wellbeing.

Although the claim did not succeed before the Swiss Courts, they argued that their government's failure to reduce Switzerland's GHG emissions violates:

1. Their rights to life and to private/family life under the **Swiss Constitution**; and
2. Their rights to life and private/family life under the **European Convention of Human Rights**, which can be enforced directly in Switzerland.

There is also a possibility of taking a claim to enforce rights contained in an international or regional human rights treaty in an international or regional human rights body. This is discussed in "**Alternatives to Court**".

Also, even where you are enforcing rights protected in a national constitution in national courts, the interpretation and application of that right to your case could be influenced by how similar rights are

understood and enforced at the international level. For more information on how international law can be used in national courts, see [“What Laws Could I Enforce?”](#) in the **A4J Going to Court: Q&A**

### **How Can I Argue that the Government Has Violated My Human Rights?**

Once you have identified a relevant and legally enforceable right, you need to argue that the government has **violated that right**. This means that it has breached the human rights obligations it owes you.

In essence, what you will be arguing is that the government’s failure to take adequate mitigation measures (i.e. its failure to reduce its country’s GHG emissions as required by the IPCC and the Paris Agreement) has contributed to climate impacts and, consequently, violated your human rights.

For this argument to be successful, you usually need to show:

- There has been an **interference** with your enjoyment of a human right. This means that climate change has affected your rights, and this is connected to your government’s failure to reduce its country’s GHG emissions. You will have to show the impact on your enjoyment of the human right has (i) reached a minimum threshold of seriousness, and (ii) is caused by climate change and (partly) by your country’s GHG emissions. To demonstrate this, it will be important to have evidence of the legal test and threshold of seriousness to meet in your country, past cases which have reached this threshold, climate change’s impact on you, the causes of climate change and your country’s GHG emissions; and
- The **interference cannot be justified**. Governments usually try to justify their GHG emissions on the basis of development goals or economic well-being. You have to show that the government’s failure to reduce its GHG emissions was an unreasonable or disproportionate way to achieve these objectives when compared to the impact their failure has had on your rights. This will be a highly contested and fact sensitive argument. It will depend on the level of harm you have or will suffer, the economic development of your country and their level of emissions relative to the goals in the Paris Agreement.

You can find more information on this issue in the [People’s Guide on Holding Your Government Accountable for Climate Change](#).

#### *B. Judicial Review and Constitutional Principles*

In many countries, there are constitutional or public law principles which make an action or omission of a public body unlawful. Below are some common examples of these principles.

##### **i. Acting without lawful authority**

Where there is a law in your country which sets limits or conditions on the government’s powers when it comes to climate policy but the government acts outside those limits, its act can be challenged. For example:

- If there is a law in your country which requires the government to seek parliamentary approval or hold an environmental impact assessment before setting a mitigation target, the proposed mitigation target can be challenged if the government does not abide by the above limits/conditions; and
- If there is a law which requires any mitigation targets to be above a minimum level and the proposed mitigation target falls below that limit, the target can be challenged.

**Example: Friends of the Irish Environment v. Ireland**

In 2017, an advocacy group brought a case against the Irish government, arguing that the government's National Mitigation Plan was unlawful and should be quashed, in part, because it violated Ireland's Climate Action and Low Carbon Development Act 2015.

In July 2020, the Supreme Court issued a ruling quashing the Plan. The Irish Climate Action and Low Carbon Development Act 2015 required the State to put forth at regular intervals a national low-carbon transition and mitigation plan in line with its national transition objective for 2050 (i.e. cutting GHG emissions by 80% of 1990 levels). The Court held that the National Mitigation Plan failed to make clear how Ireland would achieve its 2050 goals under the Act and was unlawful as a result. The Court noted that a lawful plan must be 'sufficiently specific as to policy for the whole period to 2050.'

**ii. Failing to take action required by law**

If there is climate change legislation which requires the government to take certain mitigation measures and the government fails (or is projected to fail) to do this, this can be challenged.

**Key Source: [The Law and Climate Change Toolkit](#)**

This is a database of legal provisions in different countries that relate to climate change. You can find information on:

- Climate change legislation that exists in different countries;
- An assessment of the quality of climate change legislation in these countries; and
- Recommendations on best practice.

You can use this database to find out whether there is legislation on which you could base a mitigation claim against your government. Alternatively, if you find out your government has no climate law legislation or there are gaps in the law, this could be used to strengthen a human rights-based argument that your government is not doing enough (see above).

See also on [Climate Change Laws of the World Database](#).

**iii. Misinterpretation of law**

Where the government has justified the mitigation measures it is taking under a certain law, but their decision was based on an interpretation of the law which you believe is wrong, the proposed mitigation target could be challenged.

**Example: [Plan B v Secretary of State for Business, Industrial and Energy Strategy](#)**

In the UK, an environmental organisation brought a case against the government for failing to revise their 2050 mitigation target after the Paris Agreement.

- The government's view was that the Paris Agreement's reference to "pursuing efforts to limit the temperature rise to 1.5 degrees" was only intended to strengthen efforts to limit temperature rises to 2 degrees.
- Plan B argued this interpretation of the Paris Agreement was incorrect and, because the government relied on this interpretation in making their decision not to change the 2050 target, this decision was based on an **error of law** and was illegal.

The case was recently dismissed by the court of appeal. A more obvious case of misinterpretation may be required for future cases to be successful.

**iv. Improper purpose**

If a climate change law in your country has a specific objective, government mitigation measures under this law could be challenged if they are contrary to this objective.

**Example: [Thompson v Minister for Climate Change Issues](#)**

A student from New Zealand challenged the government's decision not to change their 2050 GHG emissions reduction target after the release of the IPCC's AR5 report, which stated that tougher targets were needed to avoid dangerous climate change.

The court ruled that an objective of New Zealand's **Climate Change Response Act 2002** is for New Zealand to meet its international obligations under the UNFCCC and take mitigation measures to avoid dangerous climate change. It was contrary to this objective for the government not to review its 2050 target after the release of new IPCC science that required stronger action. However, because the new government had changed its policy shortly before the case was heard, no order from the court was needed and the lawsuit was ultimately dismissed.

**v. Relevant and irrelevant considerations:**

Where a law gives the government discretion on what mitigation measures it can take, its decision in how it exercises this discretion could be challenged if you can show that it took irrelevant considerations into account, or it failed to take relevant considerations into account when making its decision.

**Example: [Thompson v Minister for Climate Change Issues](#)**

It was also argued in *Thompson* that the government's decision not to revise its 2050 target was because unlawful because the government failed to consider the following factors when it made its decision:

- The costs of dealing with climate impacts;
- The inadequacy of its measures in light of new climate science; and
- The fact New Zealand, as a developed country, has a greater responsibility to take mitigation measures.

The court ruled that these were mandatory considerations but that the government had considered them. Therefore, although one can disagree with the government's decision, it was not unlawful on this basis.

**vi. The Doctrine of Irrationality or Unreasonableness**

Irrationality is a principle in which a decision of a public body can be challenged if it is so unreasonable that no reasonable decision-maker could have made the decision.

**Example: [Thompson v Minister for Climate Change Issues](#)**

It was also argued in *Thompson* that the government's failure to revise their 2050 target was irrational as, if every developed country adopted that target, the world could not avoid dangerous climate change.

The court rejected this argument as New Zealand's targets were similar to other countries and had some scientific support. This meant they couldn't be considered irrational.

This is a high threshold and would likely only be successful if a government was taking no mitigation measures or completely inadequate measures.

**C. [The Doctrine of Public Trust](#)**

In some countries there is a legal doctrine called public trust which **requires the government to take measures to protect the shared natural resources** of the State.

**Example: [Juliana v United States](#)**

A group of youth argued that the US government's failure to take appropriate mitigation measures violated the public trust because it demonstrates the government is not taking adequate steps to protect the natural resources of the State (which will be impacted by climate change).

In 2016, the Oregon Federal Court denied a motion to dismiss their claim, ruling that they had a reasonable claim based on the doctrine of public trust.



However, in 2020, the Ninth Circuit Court of Appeal dismissed the claim on the grounds the youths did not have **standing** and the claim concerned a **political question**. These issues are addressed in other parts of this Guide.

There are a limited number of cases in the United States where a public trust claim succeeded. However, the success of the case was dependent on the incorporation of the public trust doctrine into the State constitution. Check your country's constitution to see the doctrine has been incorporated into your constitution.

### 3. *Who Can Bring a Claim?*

To be able to bring a constitutional, public law or human rights claim, you must have “**standing**” (i.e. the legal right to bring a claim).

The following types of people can often have standing to bring public law claims. But you have to check this in your country's legal system.

#### A. *Affected Individuals and Groups*

Claims can generally only be brought by **the person who has been harmed** when a national law is broken.

Some jurisdictions permit multiple affected individuals to be represented collectively by a claimant.

- These actions may be called a “**group**”, “**collective**” or “**class**” action.

In mitigation claims, a person or group of people who have been or will be affected by climate impacts could potentially have standing. However, a difficulty in some countries is that you will have to show that **climate change will affect you in a way that is different or worse** than how it will affect other people. This special impact could be because of:

- Physical health conditions of yours which make you especially vulnerable to climate change;
- Your geographic location is particularly vulnerable to climate change impacts; or
- Your way of life and culture is particularly vulnerable to climate change impacts
- It could also be argued that young people (or future generations), who will have to live through the worst impacts of climate change if no action is taken, will be particularly affected because of future harms.

#### Example: [Swiss Senior Women for Climate Protection v Swiss Federal Government](#)

In 2018, the Swiss Federal Administrative Court dismissed a mitigation claim brought by a group of senior women on the basis that everyone in Switzerland would be affected by climate change and the women would not be particularly affected.

The decision was appealed to the Swiss Supreme Court. The group bringing the case argued that the women, due to their age and gender, are particularly affected by heatwaves which are connected to climate change. However, the appeal was rejected on the basis of the court's view that fundamental human rights will not be breached until the Paris long-term temperature goal has actually been exceeded. Other courts may not follow this reasoning.

Claimants do not always have to be individuals or groups of individuals. For example, a Wildlife Trust that owns a nature reserve affected by climate change might be permitted to bring a case.

#### *B. Public Interest Groups*

In some countries, groups that have an interest in a particular issue can bring a case that involves that issue even if they aren't personally affected.

#### **Example: [Urgenda Foundation v Kingdom of the Netherlands](#)**

In the Netherlands, claims can be brought by groups that involve public or collective interests, as long as the group represents these interests.

It was ruled that the Urgenda Foundation, a citizens' platform founded to prevent climate change, was able to bring a mitigation claim.

In other countries, such as the Philippines and Uganda, there are "open-standing provisions", where persons can seek to enforce environmental legislation and constitutional provisions without showing harm. Check if this possibility exists in your country.

For more information, see "[Who Can Take Legal Action?](#)"

#### **4. *Who Is the Claim Brought Against?***

For mitigation claims, the appropriate defendant could be:

- The **State** as a whole (i.e. your country); or
- The **government department, ministry or body** that is responsible for deciding climate policy in your country.

Mitigation claims are also typically brought against **industrialised countries** (e.g. USA, Germany, Argentina etc) who are responsible for a large proportion of global GHG emissions.

**Focus Point: Common but Differentiated Responsibility (CBDR)**

This principle is contained in the UNFCCC and the Paris Agreement. It means that developed countries should have the greatest responsibility to reduce GHG emissions as they are most responsible for climate change and have the greatest ability to prevent it.

The principle of CBDR could make it more difficult to bring a mitigation claim against a developing country:

- Although all countries have an obligation to reduce their GHG emissions, the strict targets outlined in the IPCC reports are directed at developed countries.
- This could make it more difficult to find a mitigation target to judge your country's mitigation measures against.
- Also, the principle of CBDR means that developed countries have stricter obligations to reduce GHG emissions while developing countries have more flexibility.

However, this doesn't mean it's impossible to bring a mitigation claim against a developing country.

- Rather, it means that your claim would probably have to ask for a lower level of GHG emissions reductions from the government.
- Such claims are more likely to be successful when your government is taking no mitigation measures or isn't reducing its GHG emissions at all.

**Example: [Maria Khan v Federal Republic of Pakistan](#)**

This is a mitigation claim that is being brought against the government by a woman in rural Pakistan. She is arguing the government's complete failure to reduce its GHG emissions and approve green energy initiatives violates her constitutional rights to life, dignity and a healthy environment.

It may also be possible to bring a mitigation claim against a foreign country.

**Area to Watch: Extraterritorial Human Rights Obligations**

There is growing acceptance that governments' human rights obligations extend to persons outside their borders. It may therefore be possible to bring a mitigation claim against a government of another country where their failure to reduce GHG emissions has impacted your human rights.

For example, a claim in a court in France in relation to emissions from France might include claimants from Fiji. This is potentially important because the people often most damaged from climate change are from states which group contribute least to global emissions.

## 5. *What Evidence do I Need to Bring a Claim?*

In public law actions, it's the claimant who has the “**burden of proof**”. This means the person bringing a civil claim needs to prove their case.

One of the first things you need to do then to bring a successful claim is gather evidence that will be accepted in court. You need to have a set of facts that describes what happened and evidence that supports your “**version of events**” (i.e. what you are saying happened).

When you are bringing a mitigation claim, you will need evidence to support 5 things:

### A. *The Occurrence, Causes and Impacts of Climate Change*

You will need to provide evidence that:

- Global temperatures are rising;
- This is caused by man-made GHG emissions; and
- The warming of the Earth will have serious local and/or national impacts (see the introduction for an overview).

Useful and publicly available sources of evidence were outlined in “**Climate Litigation**”.

When presenting evidence on climate impacts, you should focus on the particular climate impact that affects you and your community.

- For example, if the specific loss and damage in your case (see below) is caused by forest fires, emphasis should be placed on the relationship between climate change and forest fires in your region.

### B. *Mitigation Targets*

You need to outline the minimum rate at which your country should reduce its GHG emissions over a certain period of time (“**the minimum appropriate mitigation target**”).

To do this, first, **identify the maximum safe global temperature increase** your claim will be based on. Different limits are used in the IPCC studies and the Paris Agreement. The main ones are:

- **The 2°C Limit:** The IPCC 4<sup>th</sup> Assessment Report set 2°C as the maximum temperature increase to avoid dangerous climate change (the Paris Agreement sets the target of “*well below 2°*”); and
- **The 1.5°C Limit:** The more recent IPCC 1.5°C Special Report sets 1.5°C as the maximum temperature increase to avoid dangerous climate change. This has been accepted by many countries, and the Paris Agreement states countries should pursue efforts to limit temperature rise to 1.5°C.

Climate science and the current international consensus point in favour of the 1.5°C limit. However, a key factor in choosing a target can be what mitigation target is set in your country's national law.

Secondly, **identify the minimum targets of GHG emission reduction that your country must follow** to stay within the 2°C or 1.5°C limit. This will depend on: (1) the temperature limit you pick; (2) your country's level of development; and (3) any legal/political commitments your country has made. For example:

- Where a 2°C limit is picked, the IPCC 4<sup>th</sup> Assessment Report shows that industrialised countries must reduce their emissions **by at least 50% below 1990 levels by 2030**;
- Where a 1.5°C limit is picked, the IPCC 1.5°C Special Report still maintains a **minimum mitigation target of at least 50% by 2030** (depending on the pathway you choose);
- If you live in a developing country, the mitigation target is likely to be lower; but
- If your country has adopted a specific mitigation target in law or has committed to a mitigation target in policy (e.g. its INDCs under the Paris Agreement), these targets could be used against them in court.

### C. [Your Country's Emissions and Mitigation Measures](#)

The extent to which your country has contributed (and will likely continue to contribute) to climate change has to be proven. This can be done by:

- Outlining the **amount of GHG emissions** that come from your country;
- Outlining the **level of GHG reduction** that your country has made; and
- On the basis of current policy, outline statistics that project the level of GHG emissions your country will make by 2030 and/or 2050 (**the actual mitigation target**).

**Key Source:** [Climate Action Tracker](#)

This is a very useful scientific analysis that tracks government climate action and measures it against the objectives of limiting global temperature rises to 1.5°C and 2°C. It provides information on a country-by-country basis on:

- The level of GHG emissions of different countries;
- The climate action governments have already taken (i.e. their current levels of GHG emissions reductions);
- The pledges and commitments governments have made to reduce GHG emissions; and
- An analysis of whether individual countries are doing their "**fair share**" on the basis of their level of development.

These statistics need to be **compared with the minimum appropriate mitigation target** which you identified. This provides the basis of your argument that your government is not doing enough to prevent climate change.

**Key Example:** [Bushfire Survivors for Climate Action Inc v Environment Protection Authority](#)

Bushfire Survivors for Climate Action Inc are a group of people who have experienced the harmful effects of the Australian bushfires. They brought a claim against the New South Wales (NSW) Environment Protection Authority (EPA) and are challenging the EPA's inadequate response to climate change and lack GHG emissions policy. They are seeking to compel the EPA.

The latest ruling on 4th November 2020 will allow the Bushfire Survivors to present expert scientific evidence on climate change, including whether emissions trajectories for NSW, and the world, are on track with the targets in the Paris Agreement. The claimants' representatives, [Environment Defenders Office](#), have noted 'it is the first time an Australian court has ruled on whether evidence on climate change can be allowed to be heard in a case involving an alleged failure by a Government agency to perform a statutory duty.'

#### *D. [Personal Loss, Injury and Damage](#)*

In certain cases, the specific loss or damage the you have suffered, are suffering or will likely suffer as a result of climate change needs to be detailed. This may include:

- **Property damage** (e.g. extreme weather events such as forest fires, storms and floods that have endangered or destroyed the claimant's property);
- **Economic loss** (e.g. sea level rises, drought, ocean acidification or loss of biodiversity which has affected the claimant's way of life/occupation); or
- **Personal injury:** Extreme weather events or temperature changes that have affected the claimant's health or well-being.

Evidence on specific loss and damage will be particularly important in the following cases:

- Where an individual or individuals are bringing a claim that their human rights have been violated, evidence will generally be required to prove an interference (see section 2(a));
- Where an individual must show they are individually or specially affected to have standing (see section 3(a)); and
- Where an individual or individuals are seeking damages/compensation (see section 7).

In contrast, evidence of specific loss and damage is not generally required where:

- Human rights and constitutional cases are brought in the general public interest (see section 3(b)). In such cases, it is often enough to provide evidence of the general harms caused by climate change; and
- In judicial review type cases arguing that government act is unlawful or irrational. In such cases, it is generally sufficient to prove government act is contrary to law, without showing individual harm, unless this is required for standing (see section 2(b)).

The specific loss and damage your claim is based on needs to be consistent with and supported by the climate science on the impacts of climate change on your country or region.

#### **Practical Tip: Sources of Evidence**

Useful evidence to demonstrate personal loss, injury and damage include:

- **Witness statements** from yourself and people in your community/group who have been affected by climate change impacts;
- **Photographs, videos and satellite images;**
- **Environmental samples** from the local area demonstrating environmental harm (e.g. ocean acidification);
- **Local scientific, university, NGO/CSO and government reports**, and an expert witness which corroborates the harm claimed by witnesses; and
- **News reports** of extreme weather events in the area.

#### *E. [The Evidence Must Be Linked to the Legal Basis of Your Claim](#)*

This evidence also needs to relate to the **legal basis of your claim**. It is not enough to show that climate change affects you and that emissions in a country are inconsistent with the Paris Agreement. The evidence has to support your legal argument that your government's failure to reduce its GHG emissions corresponds with the breach of a legal obligation. See the sub-section above for examples of what the legal basis of your claim could be.

### **6. *What Procedural Steps do I Need to Take?***

Mitigation claims are usually taken in **national administrative or constitutional courts**.

- In some countries, this process is called “**judicial review**” or a “**constitutional petition**”.
- In many Latin American countries, this process is called “**amparo proceedings**”.

The procedure that you have to follow will depend on whether you live in a “**common law country**” or “**civil law country**”. The law in your country will outline a judicial review, constitutional petition or amparo process, so that you can bring a claim to the courts and the court may review the situation and provide a remedy.

**Focus Point: Limitation Periods**

A limitation period imposes a time limit within which a claimant may bring a case. The limitation period depends on the precise cause of action and will dictate the amount of time you have to file your case in court. If you do not file your case within the relevant limitation period, you may be prevented from bringing the claim.

Research the law in your country to determine the relevant limitation period for your claim. You will also need to identify when the time starts running for the limitation period. Time may start running from one of the following:

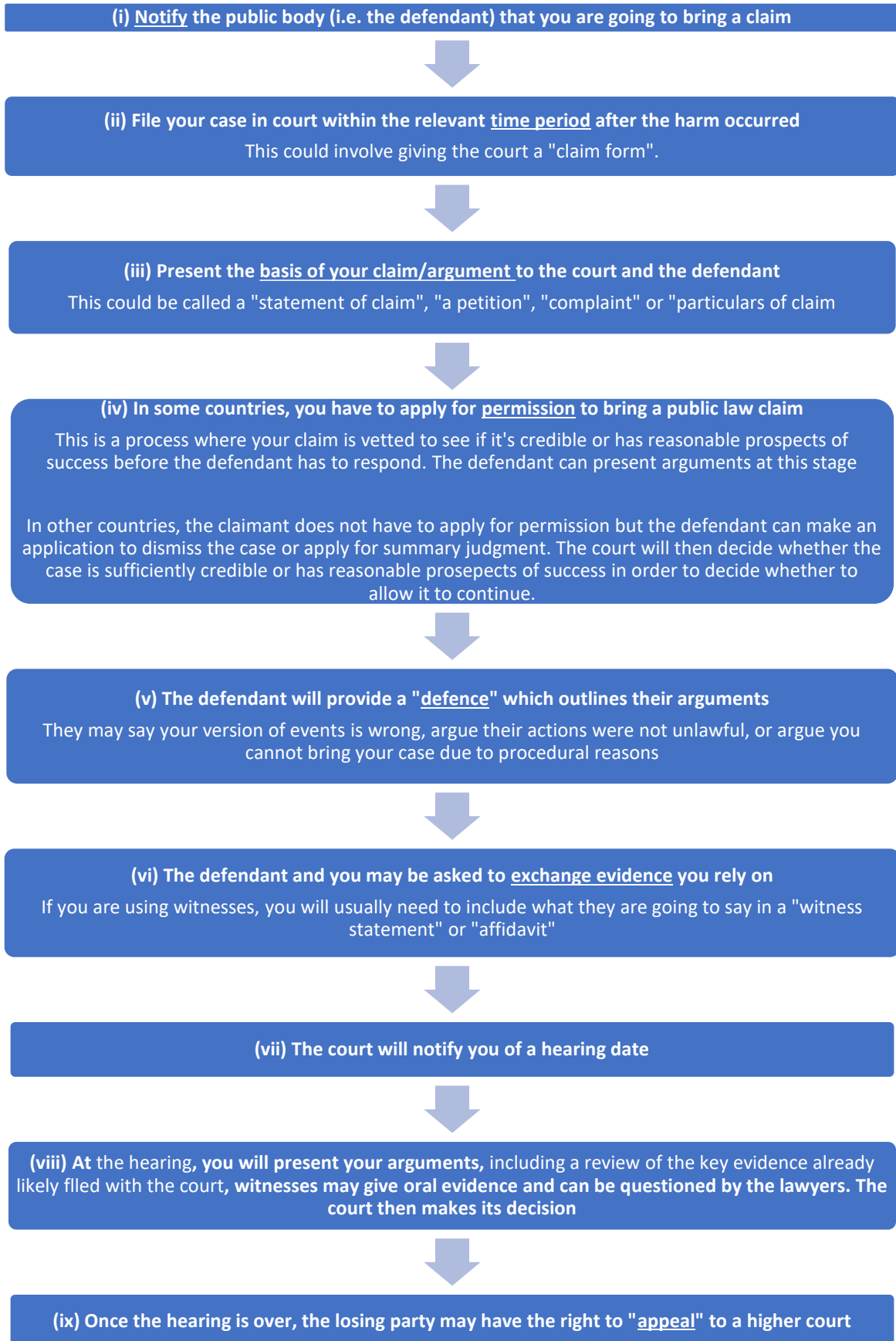
- The date the harm occurred (e.g. when a forest fire occurred);
- The date you learned about the harm; or
- The date the government made the specific policy decision or took an action that you are challenging.

In climate cases, it can be argued that there is “**continuing harm**” because the threat of climate change and the government’s failure to take sufficient action are ongoing. In some systems, the time limit will not begin to run where the harm is continuing.

It may also be possible to apply for the limitation period to be extended.

Generally, you will have to meet the following requirements to bring a constitutional or administrative claim:





**Focus Area: Complaints to Regional and International Human Rights Bodies**

If your claim is based on human rights, in some countries there is also the option to bring your case to a **regional or international human rights body** if you have been unsuccessful in national courts.

For more information, see “**Individual Complaints to Regional and International Human Rights Bodies**”.

## 7. *What Happens if I Win?*

If you bring a successful mitigation claim against the government in human rights, constitutional or public law, you could get one or more of the following “**remedies**”:

### A. Declaratory Judgment

Declaratory judgements are decisions where a court simply finds that the government has acted unlawfully but doesn’t tell them what to do.

Asking for a declaratory judgment that your government’s climate policy is unlawful can be a useful way of anticipating **justiciability arguments** that the court is being asked to make decisions which should be left to political bodies. By not asking the court to tell the government exactly what to do, you can argue that the **separation of powers** is being respected (for more information, [click here](#)).

**Practical Tip: Using Declaratory Judgments to Your Advantage**

Base your argument that the government has acted unlawfully on the fact that it has failed to reduce its GHG emissions in line with specific mitigation targets outlined in the **IPCC Reports**.

If the court rules that a government has acted unlawfully because it hasn’t reduced its GHG emissions by a specific minimum amount (e.g. 50% on 1990 levels by 2030), it implies a specific obligation for the government to reduce its GHG emissions by that amount.

If you believe your government has not properly enforced a declaratory judgement, you can go back to the court and ask them to define and enforce their judgement.

### B. Court Orders

If a court finds that the government has violated its obligation to protect, it may order the government to do the things it should have done. A court order in a mitigation claim could:

- Demand that the government reduces its GHG emissions to meet a certain mitigation target;
- Demand that the government sets a proper mitigation target;
- Demand specific mitigation measures, such as the phasing out of coal power stations; or
- Require the government to follow proper procedures when setting a new mitigation target.

If you can get a court order, this can make the process of enforcing your judgement easier.

**Example: Urgenda Foundation v Kingdom of the Netherlands**

The Dutch Supreme Court ordered the government to reduce its emissions by 25% (compared to 1990 levels) by 2020. The government has the discretion on how it implements this order (i.e. what policies it will take).

**Example: [De Justicia](#)**

In this case, the claimants were group of young people in Colombia who claimed that their rights were infringed by the Colombian government's failure to do more about reducing climate change by reducing deforestation.

The Colombian Supreme Court ordered government departments and ministries to prepare a plan within a specific timeframe to counteract the rate of deforestation.

**Example: [Friends of the Irish Environment v Ireland](#)**

The Irish Supreme Court reversed the lower High Court decision and issued a ruling quashing the government's National Mitigation Plan.

It is important to remember **that affected individuals and communities should lead on deciding which remedies are appropriate**, as opposed to NGOs or lawyers. Consider the community impacts of each possible remedy.

If you want more information:

- On remedies, go to our general page on "[What Remedies Are Available?](#)"
- On how to enforce a remedy if the defendant is not cooperating, go to our general page on "[How Can I Enforce a Court Order?](#)"

### ***8. The Action4Justice Mitigation Claim Template***

If you are considering bringing a mitigation claim against your government after reading this section, we recommend that you download the "**Action4Justice Mitigation Claim Template**".

**Key Resource: [The Action4Justice Mitigation Claim Template](#)**

The Template provides a skeleton for people to follow if they want to bring mitigation claims. The Templates have been designed by legal professionals with expertise in climate litigation.

The Templates aim to encourage effective use of the law to bring climate related litigation in appropriate cases by providing:

- An appropriate **format** for drafting a document in which to make a claim ("**the legal complaint**" - paragraphs, font, page numbers, title, headings etc);

- An effective **structure** in which users can place their legal and factual arguments regarding climate change;
- An outline of the **arguments** that could be used when bringing climate litigation; and
- References to **climate science and cases** to help the user build a strong case.

While your complaint needs to be different depending on what country you are taking a legal case, the Template provides useful tips and guidance to get you started if you are thinking about using legal action for climate justice.

**SUB-PAGE 4: LEGAL ACTION TO GET MY GOVERNMENT TO TAKE ADAPTATION MEASURES TO PROTECT ME FROM THE IMPACTS OF CLIMATE CHANGE**

This section concerns what can be called “**Adaptation Claims**”. They are called adaptation claims because they involve bringing governments to court to **demand that they take adequate adaptation measures**.

- Adaptation concerns minimizing or avoiding the impacts of climate change (e.g. flooding due to sea level rises) by adapting to changing conditions.

These cases seek to force government to do things like building flood defences and raising the levels of dykes, choosing tree species and forestry practices less vulnerable to storms and fires, and developing drought-tolerant crops.

**Consider the following checklist if you are thinking about taking an adaptation claim:**

CHECKLIST	YES/NO
1) Is an adaptation claim right for me?	
2) Is there an appropriate law for me to base an adaptation claim on?	
3) Do I have a right to bring an adaptation claim?	
4) Have I identified the right defendant to take an adaptation claim against?	
5) Have I gathered enough evidence to take an adaptation claim?	
6) Have I identified and followed the procedural steps I need to take in my claim?	
7) If I win, what remedies could I get?	
8) If I lose, is there an appeals process or a regional/international court that I can bring an adaptation claim to?	

***1. Is an Adaptation Claim Right for Me?***

A question to ask yourself when considering bringing a case to court is whether bringing the case is the right decision for you.

- You should continue to ask yourself this at each stage of your case.

The following table of advantages and disadvantages is designed to help you consider whether an adaptation claim could be right for you.

### Advantages of adaptation claims

- Adaptation claims can have immediate benefits for your community, ensuring that you are better prepared to deal with climate change impacts (e.g. flood defenses).
- Successful adaptation claims have been brought in other countries that provide useful examples for other cases.
- They can raise awareness about climate change in your country.
- Adaptation claims aren't asking to change the government's general climate policy. This can help overcome justiciability arguments.
- You may have the option of going to a regional/international body if you don't succeed at the national level.
- You don't have to prove your country has contributed to climate change. This avoids issues of "causation" and can make adaptation claims more suitable for developing countries.

### Disadvantages of adaptation claims

- Adaptation claims are limited to adapting to the worst climate change impacts. They don't challenge overall climate policy or push for reductions of GHG emissions. They don't do anything directly to prevent climate change.
- Justiciability can still be a barrier for courts hearing adaptation claims.
- Some countries have strict "standing" requirements which mean you have to show you are especially affected by climate change to bring an adaptation claim.
- If all appeal processes are used, claims can take years.

## 2. What Laws Could I Base My Claim on?

If you are bringing an adaptation claim, you will usually bring a claim under human rights, constitutional or administrative law.

- These types of laws fall within the area of "**public law**". This is the body of law that regulates the relationship between the State and individuals.

There are many different areas of public law. Each area prevents public bodies from doing certain things or requires them to do certain things, and provides consequences when laws are broken.

Once you have outlined the facts of your case, look at the areas of law below and see which most closely relates to your situation. Then check your national law to see what the law is in your country.

**Remember:**

Your **legal analysis has to be supported by the evidence you have gathered**. You should consider seeking legal advice. A lawyer should be able to provide advice on the options available to you and advise on your chances of success.

The types of evidence you may need to support your argument will be outlined later in this section.

The specific content of these laws will change in different countries. However, below are the main types of law on which you could have a “**cause of action**” for an adaptation claim to be based on.

*A. [Human and Constitutional Rights](#)*

Human rights are the **rights and freedoms held by every human being** without discrimination. Human rights protect our basic needs and freedoms.

Human rights are contained in international human rights instruments, such as:

- International Covenant on Civil and Political Rights
- International Covenant on Economic Social and Cultural Rights
- If a state signs and ratifies these treaties, they become “binding” on your state at international law. You can check whether your country has signed and ratified a UN Human Rights Treaty [here](#).

These rights are also often included in national constitutions and human rights laws. It is these laws that you will generally enforce in national courts.

- There may be rights protected in your national constitution that aren’t expressly protected in an international human rights treaty, such as the right to a healthy environment; and
- International human rights laws may not create legal rights or obligations which are enforceable in national courts, whereas rights under national constitutions are often enforceable in national courts.

**What Human Rights Are Impacted by Climate Change?**

Climate change poses a serious threat to the enjoyment and exercise of our human rights.

**Key Resource:** [The OHCHR Study on the Relationship between Human Rights and Climate Change](#)

This is a useful UN paper that provides an overview of the impacts climate change has on different human rights. It provides useful information for human rights-based arguments and has reference to evidence that shows how will human rights will be affected.

The following human rights are most clearly affected by climate change:

- **The right to life:** Climate change poses a threat to human life due to the higher incidence of mortality associated with extreme weather events, increased heat, drought, disease.
- **The right to health:** Climate change can impact health by increasing heat-related respiratory and cardiovascular diseases caused by extreme weather events and natural disasters and nutrition deficits linked to food shortages and loss of livelihoods. There is also evidence of an increase in vector-borne diseases linked to climate change.
- **The right to a healthy environment:** Climate change has huge impacts on ecosystems, threatening biodiversity, causing ocean acidification and desertification.
- **The right to food:** Changes in temperature and precipitation may affect crop production and warming oceans can affect fishing productivity.
- **The right to water:** Climate change will increase drought in currently dry areas.
- **The right to property and housing:** Rising sea levels, flooding, forest fires and other climate-related harms will deprive many people of their housing and property.
- **The right to private and family life:** In countries where the rights to health, housing or a healthy environment are not recognized, the right to private/family life provides some protection for the same issues.
- **The right to self-determination:** Climate change threatens the existence and traditional livelihoods of whole nations. For example, rising sea levels have resulted in a threat to the physical and cultural survival of various Pacific island nations.

**What Are My Government's Human Rights Obligations Relating to Climate Change?**

Governments have an **obligation to protect** human rights: This obligation requires governments to take action to prevent third parties and **natural disasters** from interfering with human rights.

**Key Case:** [The Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights](#)

The IACtHR held that the obligation for States to guarantee (i.e. protect) rights under the American Convention on Human Rights included an **obligation to prevent significant damage to the environment** which would interfere with other rights. This obligation includes:

- A **duty to establish a contingency plan** for natural disasters and emergencies; and
- A **duty to mitigate** environmental damage that is occurring.

The IACtHR made it clear that these obligations **apply to climate change**.



In adaptation claims, the obligation to protect is most relevant because we are asking the government to take action to protect people from weather events which interfere with their human rights (e.g. floods, forest fires etc) even if these have not been (mainly) caused by your government.

The key point to make in human rights-based adaptation claims is that the obligation to protect certain human rights requires that the government takes protective measures to reduce the harm caused to humans by climate impacts.

### **What Right or Legal Duty Should I Base My Claim on?**

In deciding which rights to base an adaptation claim on, you need to consider:

#### **1. How does or will climate change affect my human or constitutional rights?**

After you have gathered evidence about the impacts of climate change on your country or region, think about the climate impacts outlined in the introduction to this Guide and the list of rights above.

Then narrow down the most relevant rights to your factual situation. For example, if you live in a coastal area and your housing is threatened by rising sea levels, the right to property, housing or private/family life may be most relevant.

#### **2. What human rights are legally enforceable in my country?**

After you have identified the most relevant human rights, you need to check which ones are legally enforceable in your country. Although human rights are universal in principle, they may not all be recognized in a law that you can enforce.

If you want to enforce a human right in national courts, it must generally be contained in:

- Your **national constitution** or national human rights laws; or
- An **international or regional human rights treaty** which is directly enforceable in your country.

#### **Example: [Leghari v Republic of Pakistan \(2015\)](#)**

A successful case was brought against government authorities in Pakistan by a local farmer for their failure to put in place sufficient adaptation measures and the resulting damage to his livelihood.

The claim was based on the **rights to life, dignity and property found in the Pakistani Constitution**. The court ruled that the government had an obligation under these rights to take measures to minimise the impacts of changing weather patterns through adaptation measures.

There is also a possibility of taking a claim to enforce rights contained in an international or regional human rights treaty in an international or regional human rights body. This is discussed in “**Alternatives to Court**”.

Also, even where you are enforcing rights protected in a national constitution in national courts, the interpretation and application of that right to your case could be influenced by how similar rights are understood and enforced at the international level. For more information on how international law can be used in national courts, see “[What Laws Could I Enforce?](#)” in the **A4J Going to Court: Q&A**

### **How Can I Argue that the Government Has Violated My Human Rights?**

Once you have identified a relevant and legally enforceable right, you need to argue that the government has **violated that right**. This means that it has breached the human rights obligations it owes you.

In essence, what you will be arguing is that the government’s failure to take adequate adaptation measures has violated your human rights. You do not need to argue that the government has caused the climate impacts. Rather, you are arguing that the government has not done enough to protect you from these impacts.

#### **Example: [Petition of the Torres Strait Islanders to the UN Human Rights Committee](#)**

A group of indigenous people from the low-lying islands off the coast of Australia are bringing a complaint against the Australian government. Their islands are under threat by rising sea levels caused by climate change.

Part of their argument is that the Australian government’s failure to take adaptation measures, such as building flood defences and sea walls, violates their rights to minority protection, life and private/family life under the **International Covenant on Civil and Political Rights**.

For this argument to be successful, you usually need to show:

- There has been an **interference** with your enjoyment of a human right. This means a climate change-related impact (e.g. a flood) has affected your rights; and
- The government’s failure to take adequate adaptation measures is unreasonable or disproportionate to the impact their failure has had on your rights. This will be a highly contested and fact sensitive argument. It will depend on the level of harm you have or will suffer, the foreseeability of that harm, the economic development of your country and their level of available resources.

#### ***B. [Judicial Review and Constitutional Law Principles](#)***

In many countries, there are constitutional or public law principles which make an action or omission of a public body unlawful. Below are a few important examples:

##### **(i) Failing to take action required by law**

If there is a law which requires the government to take adaptation measures and the government is failing to do this, this failure to act can be challenged as unlawful.

This law may not be framed as a “climate change law”. For example, a duty on a government to create flood defences or manage forest fires could be found in a law on natural disaster prevention. These plans and laws are highly specific to each country and even different states.

**Key Source:** [Law and Climate Change Toolkit](#)

This is a database of legal provisions in different countries that relate to climate change. You can use this database to find out whether there is legislation requiring your government to take adaptation measures.

Alternatively, if you find out there are no laws on adaptation or gaps in the law, this could be used to strengthen a human rights-based argument that your government is not doing enough (see above).

See also on [Climate Change Laws of the World Database](#).

**(ii) Improper purpose (Ultra Vires)**

If a climate change law in your country has a specific objective, government adaptation measures under this law could be challenged if they do not further this objective.

- For example, if a law has an objective to protect people from climate change, government measures which fail to do this could be challenged.

**(iii) Relevant and irrelevant considerations**

Where a law gives the government discretion on what adaptation measures it can take, its decision in how it exercises this discretion could be challenged if you can show that it took irrelevant considerations into account or it failed to take relevant considerations into account when making its decision.

- For example, if this government has failed to take into account how climate change could affect your community in its adaptation policy, the policy could be challenged.

**(iv) Irrationality/Unreasonableness**

Irrationality is a principle in which a decision of a public body can be challenged if it is so unreasonable that no reasonable decision-maker could have made the decision.

This is a high threshold and would likely only be successful if a government was taking no adaptation measures or completely inadequate measures.

- For example, if your community is under imminent threat of severe flooding, it could be argued a government policy to do nothing is irrational.

**C. [Negligence and Duties to Prevent Harm](#)**

It may also be possible to bring a **civil or private law action**. A key example is **negligence**.

A public authority will commit negligence where its actions fall below the standard of care they owe you, and this causes harm. To bring a claim in negligence, you DO NOT need to show the public authority intended or wanted to cause the injury. It is usually enough that they acted carelessly or unreasonably.

To hold a public authority liable in negligence for a failure to take adaptation measures, you usually have to show that:

- (i) The public authority owes you a **duty of care**.

This means that the public authority must meet a standard of expected care. When arguing that a public authority owes you a duty of care relating to climate adaptation, you may need to show that:

- The public authority is responsible for preventing the harm you are complaining about. For example, it's the local or national authority responsible for flood defence management in your area; and
- The harm is foreseeable. For example, the flooding of your land was predictable as it had happened before and there is evidence that climate change is making it more likely.

- (ii) The **duty of care has been breached**.

This means the public authority did not meet the expected standard of care.

- For example, the public authority breached its duty of care by failing to take adaptation measures to prevent severe flooding.

- (iii) The action that breached the duty of care **caused the harm** that your claim is based on.

It does not generally matter that the public authority did not cause the flood as long as you can show that **but for** the public authority's failure to act, the harm occurred.

- For example, you could argue that if the public authority had built flood defences, your land would not have been flooded.
- In some countries, it can be sufficient in certain circumstances to show that the government's breach of duty contributed to the harm to the claimant.

**Example: [Burgess v Ontario Minister of Natural Resources and Forestry](#)**

A group of property owners around the Muskoka Lakes in Canada brought a claim against the government ministry that was responsible for managing the water levels of the lakes.

Since 2010, due to climate change, the property owners' lands began to be severely affected by flooding of the lakes. They argued that the Ministry had a duty to prevent foreseeable flooding, the Ministry knew that the lakes had reached dangerously high levels, yet negligently allowed the lakes to flood, which in turn damaged their lands.

The claim was discontinued in 2018.

These claims can be difficult because:

- It's difficult to prove the government or public authority owes a specific duty of care to prevent harm to you;
- Courts can think cases involving issues of public policy are not “**justiciable**”; and
- Courts may say that these types of claims should be dealt with through **public law** (e.g. human rights or judicial review cases) rather than through private law (e.g. negligence). This is particularly when there is already legislation which outlines the government's responsibilities in the area you are complaining about (e.g. flood management).

Check the law in your country and whether similar sorts of cases have been brought in order to see whether this type of claim could be successful.

### **3. Who Can Bring a Claim?**

To be able to bring a constitutional, public law or human rights claim, you must have “**standing**” (i.e. the legal right to bring a claim).

The following types of people can often have standing to bring public claims. But you have to check this in your country's legal system.

#### ***A. Affected Individuals and Groups***

Claims can often only be brought by the person who has been harmed when a national law is broken (this is particularly the case for human and constitutional rights cases).

- In adaptation claims, this would be a person who has been or will be affected by the specific climate impact which the government hasn't taken adaptation measures to protect the people from.

In some countries, you have to show that you will be affected in a way that is different or worse than how it will affect other people. In adaptation claims, this special impact could be because of:

- You live in a specific area that is affected by a weather event or sea level rises; or
- Your way of life (e.g. farming) is particularly affected by a climate-related impact.

Some jurisdictions permit multiple affected individuals to be represented collectively by a claimant.

- These actions may be called a “group”, “collective” or “class” action.

**Example: [Burgess v Ontario Ministry of Natural Resources and Forestry](#)**

The group bringing the claim argued they had standing because they were all individuals who lived beside the lake that was flooding and whose property had been damaged. This was a specific group who were harmed in a way that was different to the rest of the Canadian population.

### *B. [Public Interest Groups](#)*

In some countries, groups or individuals that have an interest in a particular issue can bring a case that involves that issue even if they are not personally affected.

For more information, see “[Who Can Take Legal Action?](#)”

## **4. *Who Is the Claim Brought Against?***

For adaptation claims, the appropriate defendant could be:

- The **State** as a whole for failing to adopt a climate adaptation policy;
- The **government department, ministry or body** that is responsible for deciding climate policy in your country; or
- **Local government bodies** which are responsible for regulating the specific harm that you are complaining about in your area (e.g. natural disaster departments or departments managing forests).

**Example: [Leghari v Federal Republic of Pakistan](#)**

The case was brought against a number of defendants, including:

- The central government of Pakistan;
- Central government ministries, such as the ministry of climate change, the ministry of water and power, and the natural disaster management authority; and
- Provincial government departments in the state of Punjab, such as the department of irrigation, the department of agriculture, and the disaster management department.

It may also be possible to take similar claims against private actors who are responsible for not ensuring your community was prepared to withstand climate impacts. These are not claims against the government, but may increase the efficiency of measures to protect citizens from the effects of climate change.

**Focus Point: Secondary Liability Claims**

This term is sometimes used in relation to liability of those who do not themselves contribute to climate change but fail to fulfil responsibility to reduce its effects, such as engineers who build inadequate flood defences or fire breaks or housebuilders whose houses will not withstand storms.

These claims are similar to adaptation claims as they relate to the failure to protect people from climate impacts. However, as they are not brought against public bodies, they have to rely on areas of law such as negligence (see above). As the consequences of climate change become more evident (and more foreseeable) this type of litigation may increase.

**Example: [St. Bernard Parish v US Army Corps of Engineers](#)**

The case was brought after Hurricane Katrina caused serious flooding in New Orleans in 2005. The claim was brought on the basis that the Defendant failed in its duty to protect residents against flooding, because it had not ensured that the flood defences were high enough and strong enough. The claim initially succeeded. Although the decision was reversed on appeal on the facts, it remains an illustration of the type of claim that could be pursued.

For more information, see [“Who Can I Sue?”](#).

**5. *What Evidence do I Need to Bring a Claim?***

Like all claims, you need to gather evidence. You need to have a set of facts that describes what happened and supports what you are arguing.

When you’re bringing an adaptation claim, you will generally need evidence to support 4 different things:

**A. [The Causes and Impacts of Climate Change](#)**

You will need to provide evidence that:

- Global temperatures are rising;
- This is caused by man-made GHG emissions; and
- The warming of the Earth will have serious impacts (see the introduction for an overview).

Useful and publicly available sources of evidence were outlined in **“Climate Litigation”**.

When presenting evidence on climate impacts, you should focus on the particular climate impact that affects you and your community.

- For example, if your adaptation claim concerns the government’s failures to create flood defences, put particular emphasis on the climate science surrounding floods.

### *B. [The Government or Public Authority's Failure to Take Adequate Adaptation Measures](#)*

To show this, you will often need **evidence that shows what action should have been taken** to protect against a specific climate-related harm. For example:

- An **expert report** on what measures the government should have taken to prevent flood damage or forest fires in your area;
- **Government commissioned reports** that recommend that the government takes certain actions to prevent flood damage or forest fires;
- **Reports from NGOs**, universities or international organisations that are critical of the government's adaptation policies or make recommendations of what adaptation measures it should take.

You have to find out **what the government's adaptation policy is** and to what extent it has been implemented.

- This information should be publicly available on the websites of relevant government departments, policy papers and in parliamentary debates.

#### **Practical Tip: Freedom of Information Requests**

If information in the government's possession isn't publicly available, you could make a freedom of information request to find out about a government's policy or position in an area.

For more information, see "[Access to Information](#)".

Finally, to have a case, government policies and actions will have to fall short of what they should have done. This can be shown by **comparing the adaptation measures that government has actually taken with the reports/recommendations** above. For example:

- Despite recommendations from experts, the government has not adopted a climate change adaptation policy;
- The government's climate adaptation policy is completely inadequate compared to the recommendations of experts (i.e. not covering certain climate impacts or not providing enough resources for sufficient adaptation measures to be taken); or
- Although the government adopted a good climate adaptation policy, it has not implemented or has delayed implementing the policy (e.g. by building flood defences).

For more information, see "[How Can I Prove My Case?](#)".

### *C. [Personal Loss, Injury and Damage](#)*

The specific loss or damage that you have suffered, are suffering or will likely suffer as a result of climate change needs to be detailed. This may include:



- **Property damage** (e.g. extreme weather events such as forest fires, storms and floods that have endangered or destroyed the claimant’s property);
- **Economic loss** (e.g. sea level rises, drought, ocean acidification or loss of biodiversity which has affected the claimant’s way of life/occupation); or
- **Personal injury:** Extreme weather events or temperature changes that have affected the claimant’s health or well-being.

The specific loss and damage your claim is based on needs to be consistent with and supported by the climate science on the impacts of climate change on your country or region. It will also be helpful to demonstrate how that harm could have been avoided or mitigated by adaptation measures.

#### **Practical Tip: Sources of Evidence**

Useful evidence to demonstrate personal loss, injury and damage include:

- **Witness statements** from yourself and people in your community/group who have been affected by climate change impacts;
- **Photographs, videos and satellite images;**
- **Environmental samples** from the local area demonstrating environmental harm;
- **Local scientific, university, NGO/CSO and government reports**, and an expert witness which corroborates the harm claimed by witnesses; and
- **News reports** of extreme weather events in the area.

If an adaptation is brought in the general public interest or individual harm is not required for standing, loss and damage to a specific individual does not have to be shown. However, general evidence of actual or potential harm related to climate change and an absence of adaptation measures will be important to show the inadequacy of government policy.

#### ***D. [The Evidence Must Be Linked to the Legal Basis of Your Claim](#)***

This evidence also needs to relate to the **legal basis of your claim**. It is not enough to show that climate change affects you and that your government hasn’t taken adaptation measures. The evidence has to support your legal argument that your government’s failure to take adaptation measures corresponds with the breach of a legal obligation. See the sub-section above for examples of what the legal basis of your claim could be.

### **6. *What Procedural Steps do I Need to Take?***

Adaptation claims are usually taken in **national administrative or constitutional courts**.

- In some countries, this process is called “**judicial review**” or a “**constitutional petition**”.
- In many Latin American countries, this process is called “**amparo proceedings**”.

The procedure that you have to follow will depend on whether you live in a “**common law country**” or “**civil law country**”. The law in your country will outline a judicial review, constitutional petition or amparo process, so that you can bring a claim to the courts and the court may review the situation and provide a remedy.

#### **Focus Point: Limitation Periods**

A limitation period imposes a time limit within which a claimant may bring a case. The limitation period depends on the precise cause of action and will dictate the amount of time you have to file your case in court. If you do not file your case within the relevant limitation period, you may be prevented from bringing the claim.

Research the law in your country to determine the relevant limitation period for your claim. You will also need to identify when the time starts running for the limitation period. Time may start running from one of the following:

- The date the harm occurred (e.g. when a forest fire occurred);
- The date you learned about the harm; or
- The date the government made the specific policy decision or took an action that you are challenging.

In climate cases, it can be argued that there is “**continuing harm**” because the threat of climate change and the government’s failure to take sufficient action are ongoing. In some systems, the time limit will not begin to run where the harm is continuing.

It may also be possible to apply for the limitation period to be extended.

Generally, you will have to meet the following requirements to bring a constitutional or administrative claim:

(i) **Notify** the public body (i.e. the defendant) that you are going to bring a claim

(ii) **File your case in court within the relevant time period after the harm occurred**  
This could involve giving the court a "claim form"

(iii) **Present the basis of your claim/argument to the court and the defendant**  
This could be called a "statement of claim", "a petition", "complaint" or "particulars of claim"

(iv) **In some countries, you have to apply for permission to bring a public law claim**  
This is a process where your claim is vetted to see if it's credible or has reasonable prospects of success before the defendant has to respond. The defendant can present arguments at this stage

In other countries, the claimant does not have to apply for permission but the defendant can make an application to dismiss the case or apply for summary judgment. The court will then decide whether the case is sufficiently credible or has reasonable prospects of success in order to decide whether to allow it to continue.

(v) **The defendant will provide a "defence" which outlines their arguments**  
They may say your version of events is wrong, argue their actions were not unlawful, or argue you cannot bring your case due to procedural reasons

(vi) **The defendant and you may be asked to exchange evidence you rely on**  
If you are using witnesses, you will usually need to include what they are going to say in a "witness statement" or "affidavit"

(vii) **The court will notify you of a hearing date**

(viii) **At the hearing, you will present your arguments**, including a review of the key evidence already likely filed with the court, **witnesses may give oral evidence and can be questioned by the lawyers.**  
**The court then makes its decision**

(ix) **Once the hearing is over, the losing party may have the right to "appeal" to a higher court**

**Focus Area: Complaints to Regional and International Human Rights Bodies**

If your claim is based on human rights, in some countries there is also the option to bring your case to a **regional or international human rights body** if you have been unsuccessful in national courts.

For more information, see “**Individual Complaints to Regional and International Human Rights Bodies**”.

### **7. What Happens if I Win?**

If you bring a successful adaptation claim against the government in human rights, constitutional or public law, you could get the following “**remedies**”:

#### **A. Declaratory Judgment**

Declaratory judgements are decisions where a court simply finds that the government has acted unlawfully but doesn’t tell them what to do.

If you believe your government has not properly enforced a declaratory judgement, you can go back to the court and ask them to define and enforce their judgement.

#### **B. Court Orders**

If a court finds that the government has violated its obligation to protect, it may order the government to do the things it should have done. If you can get a court order, this can make the process of enforcing your judgement easier.

In adaptation claims, a court order could require the government to create an adaptation policy, implement an existing adaptation policy or take specific adaptation measures. In some countries, courts could remain involved in ensuring that adaptation measures are taken.

**Example: [Leghari v Federal Republic of Pakistan](#)**

After finding that the government’s failure to take adaptation measures to protect the Claimant from floods violated his constitutional rights, the court ordered government ministries to:

- Nominate "a climate change focal person" to help ensure the implementation of the national policy on climate adaptation; and
- Present a list of action points to the court for when they would take specific adaptation measures.

The court also created a Climate Change Commission composed of representatives of key ministries, NGOs, and technical experts to monitor the government's progress.

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In 2018, a report from the Climate Change Commission noting that 66% of the priority adaptation measures had been implemented (including flood defences).

It is important to remember **that affected individuals and communities should lead on deciding which remedies are appropriate**, as opposed to NGOs or lawyers. Consider the community impacts of each possible remedy.

If you want more information:

- On remedies, go to our general page on [“What Remedies Are Available?”](#)
- On how to enforce a remedy if the defendant is not cooperating, go to our general page on [“How Can I Enforce a Court Order?”](#)

## SUB-PAGE 5: LEGAL ACTION TO CHALLENGE CARBON-INTENSIVE PROJECTS

The biggest cause of climate change is excessive GHG emissions created by the combustion of fossil fuels (oil, coal and gas). As a result, the following types of carbon-emitting projects are big contributors to climate change:

- **Oil exploration and drilling:** The process of drilling is carbon intensive. More importantly, the oil and natural gas that's discovered is exported and burned;
- **Coal mines:** The process of mining coal is carbon intensive and leads to coal being exported and burned;
- **Fracking:** This is a carbon intensive process used to extract shale gas. Shale gas is then exported and burned;
- **Oil and gas pipelines:** Pipelines allow the mass transportation of oil and gas from the place of extraction to the place of exportation and combustion;
- **Fossil fuel power stations:** Fossil fuel power stations burn fossil fuels (often coal) to produce electricity;
- **Deforestation and Land Use:** Logging projects which don't replant trees at a sustainable rate reduce the earth's ability to capture carbon dioxide and contribute to climate change. Conversion of forest to other land use, policies or law which promote carbon intensive use of land generally. Industrial scale agriculture including livestock production;
- **Transport related projects, such building or expansions of airports, roads, ports:** Air travel accounts for a big proportion of GHG emissions.
- **Other infrastructure projects or policies:** This could involve carbon-intensive dam construction projects and commercial developments.

Each of these projects could be challenged through climate litigation. These cases can be split into 2 types of claims:

1. **Procedural challenges:** Projects can be challenged on the basis that the decision-making process which led to the licensing of the project failed to consider or gave insufficient weight to their climate impacts
2. **Substantive challenges:** Projects can be challenged on the basis that the extent to which the project will contribute to climate change mean they will violate your human/constitutional rights and/or be inconsistent with the government's legal commitments to reduce its GHG emissions.

Often claims will contain both procedural and substantive challenges. Note that a well-grounded threat of legal action before the project is licensed or permitted may be easier and more effective than challenging the licence or permit after it is granted. So, the points made in this section can apply to a stage when a project is still being planned or proposed, or an application made for a permit but not yet granted.

Consider the following checklist if you are thinking about challenging a carbon-emitting project on climate-based grounds


CHECKLIST	YES/NO
1) Is a challenge to a carbon-emitting project right for me?	
2) Is there an appropriate law for me to base my challenge on?	
3) Do I have a right to challenge the carbon-emitting project?	
4) Have I identified the right defendant to make my challenge?	
5) Have I gathered enough evidence to make my challenge?	
6) Have I identified and followed the procedural steps I need to take to make my challenge?	
7) If I win, what remedies could I get?	
8) If I lose, is there an appeals process or a regional/international court that I can bring an adaptation claim to?	

### ***1. Is a Project Challenge Right for Me?***

A question to ask yourself when considering bringing a case to court is whether bringing the case is the right decision for you.

- You should continue to ask yourself at each stage of your case’s preparation.

The following table of advantages and disadvantages is designed to help you consider whether a project challenge is right for you.



### Advantages of challenging carbon-emitting projects

- Successful cases can have the immediate result of cancelling a carbon-emitting project.
- Substantive challenges can change energy policy, creating a "precedent" that certain carbon-emitting projects are unlawful. This could lead to other high-emission projects being cancelled.
- Procedural challenges can force government to consider the climate impact of projects before licensing them, leading to different decisions.
- They can raise awareness about climate change in your country.
- Procedural challenges avoid questions of causation and justiciability.
- You may have the option of going to a regional/international body if you don't succeed at the national level.

### Disadvantages of challenging carbon-emitting projects

- Substantive challenges may be more difficult in developing countries as they have more flexibility on climate policy.
- If your government is doing more than the minimum required by the IPCC targets, it can be difficult to substantively challenge individual projects.
- Justiciability can be a barrier for substantive challenges.
- Some countries have strict "standing" requirements which mean you have to show you are especially affected by climate change to bring climate cases.
- Successful procedural challenges can result in the project being licensed again, but with a different procedure.
- If all appeal processes are used, claims can take years.

## 2. *What Laws Could I Base a Procedural Challenge on?*

If you are challenging the licensing/approval of a carbon-emitting project, you will usually bring a claim under national human rights, constitutional or administrative law.

There are many different areas of public law. Each area prevents public bodies from doing certain things or requires them to do certain things, and provides consequences when laws are broken.

It is also possible to challenge carbon emitting projects for relevant non-carbon impacts. For example, conventional challenges to projects that increase air pollution. These claims may be more successful than carbon-based claims because they cause distinctive impacts that are both local and immediate. However,



if you are challenging carbon emitting projects for non-carbon impacts, it can still be useful to highlight the climate impacts as an additional or alternative argument in your claim.

Once you have outlined the facts of your case, look at the areas of law below and see which most closely relates to your situation. Then check your national law to see what the law is in your country.

**Remember:**

Your **legal analysis has to be supported by the evidence you have gathered**. You should consider seeking legal advice. A lawyer should be able to provide advice on the options available to you and advise on your chances of success.

The types of evidence you may need to support your argument will be outlined later in this section.

The specific content of these laws will change in different countries. However, below are the main types of law on which you could have a “**cause of action**” for a procedural challenge.

*A. [Judicial Review and Constitutional Law Principles](#)*

Where there is a law in your country which sets limits or conditions on the government’s powers when it comes to licensing/approving industrial or energy projects, the licensing/approval of a project could be challenged where it acts outside those limits. These laws are often found in planning laws and regulations, regulations pertaining to specific industries, or environmental legislation.

The following are key examples of where procedural challenges could be made on this basis:

**(i) Environmental Impact Assessments**

Where planning, industry or environmental legislation requires the government to conduct an environmental impact assessment (EIA) before licensing infrastructure/energy projects, a licence could be challenged if:

- An EIA was not carried out at all; or
- The EIA that was carried out was inadequate as it did not assess the climate impact of the project (the legislation itself may require this or you could argue that any EIA must take into account climate change due to the immense environmental impacts it will have).

**Example: [EarthLife Africa Johannesburg v Minister of Environmental Affairs](#)**

An environmental organisation successfully challenged the opening of a new coal mine in South Africa.

In South African law, public bodies are required to undertake an EIA before approving energy project. While an EIA was undertaken before the coal mine was licensed, it did not consider the climate impact of the coal mine.

Although the law did not explicitly say EIAs had to include the climate impacts of projects, EarthLife argued that the environmental damage that would be caused by climate change and South Africa's international obligations required the climate impact of the project to be considered.

The court agreed with EarthLife and the licence was cancelled pending the undertaking of another EIA.

### (ii) Statutory Requirements to Take Climate Change into Account

Where legislation specifically requires (i) the government to take into account climate change when licensing infrastructural projects and/or (ii) give reasons as to how its decisions relate to their climate change commitments, a licence could be challenged if the government has failed to do this.

#### **Example:** [Plan B Earth v Secretary of State for Transport](#)

In the UK, the Planning Act requires the government, when setting national infrastructural policy, to take into account and give reasons as to how policies are consistent with the UK's commitments regarding climate change mitigation and adaptation.

Part of Plan B's challenge to the expansion of Heathrow Airport was based on an argument that the **government failed to consider how the expansion was consistent with their commitments under the Paris Agreement.**

### (iii) Public Participation in Decision-Making Processes

Where legislation requires the government to give the public an opportunity to participate in the decision-making process, a licence could be challenged if it fails to do this.

#### **Example:** [Mexico Supreme Court Ruling on Modification to the Ethanol Fuel Rules](#)

The Mexican Supreme Court has invalidated a regulation in relation to the amount of ethanol allowed in gasoline because this of its potential environmental and climate change implications, and because of the failure to provide for the necessary public participation in the decision-making process.

### (iv) Relevant and Irrelevant Considerations

Where a law gives the government discretion regarding the licensing of industrial or energy projects, its licensing decision could be challenged if you can show that it took irrelevant considerations into account or it failed to take relevant considerations into account when making its decision.

- For example, an **irrelevant consideration** could be if the licensing decision was based on inaccurate climate science or an inaccurate assessment of the GHGs that would be emitted by the project.
- Examples of **relevant considerations** could be: the climate impact of the project; relevant climate science such as the recent IPCC 1.5 report; your government's commitments under the Paris

Agreement; findings of an EIA; or recommendations of an official advisory committee on climate change.

These claims can be successful even if there isn't a law which says the government has to take a certain issue into account (compare to statutory requirements to take climate change into account).

**Example: [Stephenson v Secretary of State for Housing and Communities and Local Government](#)**

An organisation against fracking challenged a UK government policy that promoted fracking on grounds that the policy was made **without consideration being given to the climate impact** of the policy. The court agreed and ruled that the policy was unlawful on this basis.

**(v) Procedural Unfairness**

Even if there is not a specific law which requires the government to adopt a specific procedure, decisions of governments in many countries can be challenged where the procedure leading to the decision is generally unfair.

This could be the case where the government:

- **Failed to give reasons** for licensing a project;
- **Failed to consult** with the public and provide opportunities for public participation in the process leading to the licensing of the project;
- Exercised **bias** in licensing a project where, for example, the relevant official/body has a conflict of interest (e.g. an official has a financial interest in the fossil fuel industry) or was improperly influenced by fossil fuel lobbying); or
- Has promised the public that they would not licence a project, giving rise to a **legitimate expectation**, but has broken that promise by licensing the project.

**B. [Human and Constitutional Rights](#)**

Human rights have a **procedural dimension**. This means where the government is taking actions which could interfere with your human rights, the government must abide by certain procedural safeguards.

**Example: [IACtHR Advisory Opinion on the Environment and Human Rights](#)**

The Inter-American Court of Human Rights outlined that States have the following procedural obligations before they undertake activities which could cause significant environmental damage that impacts human rights:

- **Duty to require and conduct environmental impact studies;** and
- **Provide opportunities for public participation** in the first stages of decisions.

The licensing of a big carbon-emitting project could be challenged on human rights or constitutional grounds where these requirements have not been complied with. This is true even if, for example, there is no specific law that requires the government to hold an EIA.

### 3. *What Laws Could I Base a Substantive Challenge on?*

Below are the main types of law on which you could have a “**cause of action**” for a substantive challenge.

#### A. *Human and Constitutional Rights*

Human rights are found national constitutions and human rights law, as well as in international human rights treaties.

#### **What Human Rights Are Impacted by Climate Change?**

Climate change poses a serious threat to the enjoyment and exercise of our human rights.

**Key Resource:** [The OHCHR Study on the Relationship between Human Rights and Climate Change](#)

This is a useful UN paper that provides an overview of the impacts climate change has on different human rights. It provides useful information for human rights-based arguments and has reference to evidence that shows how will human rights will be affected.

The following human rights are most clearly affected by climate change:

- **The right to life:** Climate change poses a threat to human life due to the higher incidence of mortality associated with extreme weather events, increased heat, drought, disease.
- **The right to health:** Climate change can impact health by increasing heat-related respiratory and cardiovascular diseases caused by extreme weather events and natural disasters and nutrition deficits linked to food shortages and loss of livelihoods. There is also evidence of an increase in vector-borne diseases linked to climate change.
- **The right to a healthy environment:** Climate change has huge impacts on ecosystems, threatening biodiversity, causing ocean acidification and desertification.
- **The right to food:** Changes in temperature and precipitation may affect crop production and warming oceans can affect fishing productivity.
- **The right to water:** Climate change will increase drought in currently dry areas.
- **The right to property and housing:** Rising sea levels, flooding, forest fires and other climate-related harms will deprive many people of their housing and property.
- **The right to private and family life:** In countries where the rights to health, housing or a healthy environment are not recognized, the right to private/family life provides some protection for the same issues.

- **The right to self-determination:** Climate change threatens the existence and traditional livelihoods of whole nations. For example, rising sea levels have resulted in a threat to the physical and cultural survival of various Pacific island nations.

### What Are My Government’s Human Rights Obligations Relating to Climate Change?

Governments have an **obligation to respect** human rights: This obligation requires governments not to act in a way that interferes your human rights (unless this can be justified).

**Key Case:** [The Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights](#)

The IACtHR held that the obligation to respect human rights includes a **duty not to interfere, through environmental contamination**, with the enjoyment of people’s human rights. The IACtHR made it clear that these obligations **apply to climate change**.

The obligation to respect is relevant here as it is the State, through its act of licensing or approving a carbon-emitting project, that is interfering with your human rights. The key point to make in human rights-based challenges to carbon-emitting projects is that the obligation to respect certain human rights prohibits the government from licensing projects which will interfere with your rights by significantly contributing to climate change.

### What Right Should I Base My Claim on?

In deciding which rights to base a project challenge claim on, you need to consider:

#### 1. How does or will climate change affect my human rights?

After you have gathered evidence about the impacts of climate change on your country or region, think about the climate impacts outlined in the introduction to this Guide and the list of rights above.

Then narrow down the most relevant rights to your factual situation. For example, if you live in a coastal area and your housing is threatened by rising sea levels, the right to property, housing or private/family life may be most relevant.

#### 2. What human rights are legally enforceable in my country?

After you have identified the most relevant human rights, you need to check which ones are legally enforceable in your country. Although human rights are universal in principle, they may not all be recognized in a law that you can enforce.

If you want to enforce a human right in national courts, it must generally be contained in:

- Your **national constitution** or national human rights laws; and/or

- An **international or regional human rights treaty** which is directly enforceable in your country (there is also a possibility of taking a claim to an international or regional human rights body [link]).

**Example: [Plan B Earth v Secretary of State for Transport](#)**

An environmental organisation in the UK challenged the expansion of Heathrow Airport. Part of the challenge was based on the UK's **Human Rights Act**, which incorporates the **European Convention on Human Rights** into national law.

There is also a possibility of taking a claim to enforce rights contained in an international or regional human rights treaty in an international or regional human rights body. This is discussed in “**Alternatives to Court**”.

Also, even where you are enforcing rights protected in a national constitution in national courts, the interpretation and application of that right to your case could be influenced by how similar rights are understood and enforced at the international level.

**Example: [De Justicia - Future Generations v Ministry of Environment and others, Colombia](#)**

The claimants in this case were a group of young people. The Colombian Supreme Court took into account a wide range of national and international human rights instruments and principles, in deciding that deforestation which contributed to climate change breached their constitutional rights to water, air, a dignified life, health and others.

For more information on how international law can be used in national courts, see “[What Laws Could I Enforce?](#)” in the **A4J Going to Court: Q&A**

### **How Can I Argue that the Government Has Violated My Human Rights?**

Once you have identified a relevant and legally enforceable right, you need to argue that the government has **violated that right**. This means that it's breached the human rights obligations it owes you.

In essence, what you will be arguing is that the government's licensing/approval of a big carbon-emitting project has contributed to climate impacts and, consequently, violated your human rights.

**Example: [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy](#)**

Environmental organisations in Norway are challenging a licensing decision to permit oil exploration in the Barents Sea. They are challenging the decision on the basis that it violates the **right to a healthy environment in Norway's Constitution**.

They argue that the licensing decision could lead to the discovery, export and combustion of a large amount of oil and gas which would excessively contribute to climate change and, as a result, environmental harms in Norway.

For this argument to be successful, you usually need to show:

- That an **action of the government interferes with your enjoyment of a human right**. This means that climate change has or will seriously affect your rights, and this is connected to a government licensing decision (i.e. there's a causal link between the project, climate change and the impact on your rights). You will have to show the action interfering with your enjoyment of the human right has (i) reached a minimum threshold of seriousness, and (ii) is caused by climate change and will be contributed to by the project in question. To demonstrate these criteria, it will be important to have evidence of the legal test and threshold of seriousness to meet in your country, past cases which have reached this threshold, climate change's impacts on you, the causes of climate change and the GHG emissions related to the project; and
- The interference with your rights is **not justified**. Usually, this requires you to show that the impact on your rights caused by a government action is disproportionate to the legitimate aim (e.g. economic development) that is pursued. This will be a highly contested and fact sensitive argument. It will depend on the level of harm you have or will suffer, the foreseeability of that harm, the economic development of your country and the necessity of the project for the economy.

You can find more information on this issue in the [People's Guide on Holding Your Government Accountable for Climate Change](#).

### *B. [Judicial Review and Constitutional Law Principles](#)*

The doctrine of **irrationality or unreasonableness** is a principle in which a decision of a public body can be challenged if it is so unreasonable that no reasonable decision-maker could have made the decision.

This is a very high threshold to reach but, in extreme cases, it could be argued that the licensing of a project was irrational because it was wholly and obviously incompatible with available climate science regarding climate change.

### *C. [The Doctrine of Public Trust](#)*

In some countries there is a legal doctrine called public trust which requires the government to take measures to protect the shared natural resources of the State.

It could be argued that a government's licensing of a carbon intensive project violates the public trust because it demonstrates the government is damaging the shared natural resources of the State (which will be impacted by climate change).

#### 4. Who Can Bring a Claim?

To be able to bring a constitutional, public law or human rights claim, you must have “**standing**” (i.e. the legal right to bring a claim).

The following types of people can often have standing to bring public claims. But you have to check this in your country’s legal system.

##### A. Affected Individuals and Groups

Claims can often only be brought by persons who have been harmed when a national law has been broken. In challenges against big carbon-emitting projects, this means you may have to **show that you will be particularly affected by climate change**. This could be because of

- Physical health conditions of yours which make you especially vulnerable to climate change;
- Your geographic location is particularly vulnerable to climate change impacts; or
- Your way of life and culture is particularly vulnerable to climate change impacts

However, when specific projects are being challenged, is sometimes sufficient to show that you have an **interest in the project**. This could be shown where:

- The project will take place near where you live; or
- The project will take place in an area which you regularly visit or use.

Some jurisdictions permit multiple affected individuals to be represented collectively by a claimant.

- These actions may be called a “**group**”, “**collective**” or “**class**” action.

##### **Example:** [Save Lamu v Nema & Amu Power Ltd](#)

A local community group successfully challenged the licensing of a coal-fired power plant on the basis it was granted without a proper environmental impact assessment was conducted. This was in part due to a failure to consider the climate impact of the project.

##### B. Public Interest Groups

In some countries, groups and individuals that have an interest in a particular area or issue can bring a case that involves their area of interest even if they aren’t personally affected.

##### **Example:** [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy](#)

Greenpeace Nordic and Nature & Youth were permitted to bring a constitutional challenge to an oil exploration licence on the basis that they were environmental organisations and the claim concerned environmental interests.



For more information, see “[Who Can Take Legal Action?](#)”

### 5. *Who Is the Claim Brought Against?*

Challenges against big carbon-emitting projects should generally be brought against the **public authority responsible for making the licensing decision**. This could be:

- The government department, ministry or body responsible for industry, transport or energy; or
- A local government body responsible for projects in your area.

#### **Example:** [EarthLife Africa Johannesburg v Minister of Environmental Affairs](#)

The claim in this case was brought against the Minister of Environmental Affairs, who was responsible for licensing the coal mine under review.

It may also be possible to bring a claim against a project in another country on human rights grounds.

#### **Area to Watch: Extraterritorial Human Rights Obligations**

There is growing acceptance that governments human rights obligations extend to persons outside their borders. It may therefore be possible to bring a challenge against a government of another country for licensing a big carbon-emitting project.

### 6. *What Evidence do I Need to Bring a Claim?*

In public law actions, it’s the claimant who has the “**burden of proof**”.

- This means the person bringing a civil claim needs to prove their case.

One of the first things you need to do to bring a successful claim is gather evidence that will be accepted in court. You need to have a set of facts that describes what happened and evidence that supports your “**version of events**” (i.e. what you are saying happened).

When you’re bringing a challenge to a carbon-emitting project, you will need evidence regarding:

#### *A. The Occurrence, Causes and Impacts of Climate Change*

You will need to provide evidence that global temperatures are rising, this is caused by man-made GHG emissions and the warming of the Earth will have serious impacts (see the introduction for an overview).

- Useful and publicly available sources of evidence were outlined in “Climate Litigation”.

#### **Focus Point: The Global Carbon Budget**

The global carbon budget is the amount of remaining GHGs that can be emitted if the world is to stay below 2° or 1.5°. This is especially important to include when you are making challenges to carbon-emitting projects as it provides a way that the climate impact of a project can be quantified.

When presenting evidence on climate impacts, you should focus on the particular climate impact that affects you and your community.

- For example, if your claim is based on sea level rises affecting your coastal town, place emphasis on the relationship between climate change and sea level rises in your area.

### *B. Your Country's Climate Change Commitments*

It can strengthen the argument that a public authority should not have licensed a project which will significantly contribute to climate change when the government has already made legal and/or political commitments to combat climate change.

#### **Key Sources**

You could demonstrate what commitments your government has made to combat climate change by highlighting that it has:

- Signed and ratified the Paris Agreement and UNFCCC;
- Made commitments to reduce its contribution to climate change in national law;
- Made political or policy commitments publicly regarding climate change.

These commitments can then be contrasted against the government's decision to license a project that will significantly contribute to climate change.

### *C. Details of the Project*

To successfully challenge a carbon-emitting project, you will need to know the details of the project.

#### **Key Questions**

- What is the project? (e.g. the construction and operation of a coal-fired power plant or the exploration, drilling and export of oil)
- Where will the project take place?
- How was the project licensed?
- When was the project licensed?
- Which public authority was responsible for licensing the project?
- When will the project begin?
- How long will the project last for? (i.e. the length of time the power plant will be operational); and

Some of this information may be publicly available. It could be found in:

- The body of the licensing decision itself (i.e. the law/regulation that approved the project); and
- Records of the political debate in parliament/congress that was conducted regarding the project.

If the information is not publicly available, you could possibly use a “**freedom of information request**” to gather more information about a project the government has licensed.

- For more information, see “[Access to Information](#)”.

#### *D. The Climate Impact of the Project*

The extent of the contribution the project makes to climate change should be outlined.

- This is particularly important for substantive challenges, but it’s also important for procedural challenges (i.e. by showing the project will have make a significant contribution to climate change, it strengthens the argument that its climate impact should have been considered before the project was licensed).

It will generally be important to demonstrate the following:

##### **(i) The projected/estimated output of the project**

For example:

- If you are challenging an airport expansion, how many extra flights will the project facilitate?
- If you are challenging an oil drilling project, how much oil is likely to be produced?
- If you are challenging a coal mine, how much coal is likely to be mined?

##### **(ii) The amount of GHGs that will be emitted in relation to the project**

This includes:

- GHGs emitted through the direct operation of the project (i.e. through the process of oil drilling or the operation of a coal-based power plant); and
- GHGs will be emitted down the value chain of the project (i.e. GHGs emitted when the oil that has been produced by the project is used after it has been sold).

##### **(iii) The project’s impact on the global carbon budget and/or the government’s climate change commitments**

Once you have worked out how the projected GHG emissions of the project, it’s important to show what impact these GHG emissions will have on the **global carbon budget**.

- What percentage of the remaining carbon budget will the GHG emissions of the project take up?

It can also strengthen your argument to show what impact these GHG emissions will have on the government’s ability to meet its climate change commitments. For example:

- If the government has committed to reducing its GHG emissions by 50% of 1990 levels by 2030, can it still do this if it approves the project?

- How much more difficult will licensing the project make it to achieve the government’s GHG reduction target?

#### **Practical Tip: Expert Evidence**

Some of the above information may be publicly available and could be found in, for example:

- Governmental policy papers regarding the project. These may estimate the likely output from the project; and
- Consultations, environmental impact assessments and audits that have been published regarding the project. If these considered the climate impact, they may include a projection of GHG emissions.

Some of the information (e.g. projected GHG emissions) may not be available and will require **expert evidence** from someone qualified. Depending on the project concerned, a qualified expert could be a climate scientist or a specialist engineer.

#### *E. The Specific Impact of Climate Change on You (Substantive Challenges)*

If you are arguing that your rights are being impacted by the licensing of a project that will significantly contribute to climate change, you will need to provide evidence the specific loss or damage the you have suffered, are suffering or will likely suffer as a result of climate change needs to be detailed.

- This will be very important in substantive challenges based on human or constitutional rights.
- You may not need to prove individual impact in procedural challenges or in general allegations of unlawfulness in judicial review. The exception is this is where you have to show you are affected by the project to have “standing”. It also may strengthen the argument your government should have considered the climate impact of the project if you can prove that you will personally be impacted by climate change.

Specific loss and damage may include:

- **Property damage** (e.g. extreme weather events such as forest fires, storms and floods that have endangered or destroyed the claimant’s property);
- **Economic loss** (e.g. sea level rises, drought, ocean acidification or loss of biodiversity which has affected the claimant’s way of life/occupation); or
- **Personal injury:** Extreme weather events or temperature changes that have affected the claimant’s health or well-being.

The specific loss and damage your claim is based on needs to be consistent with and supported by the climate science on the impacts of climate change on your country or region.

**Practical Tip: Sources of Evidence**

Useful evidence to demonstrate personal loss, injury and damage include:

- **Witness statements** from yourself and people in your community/group who have been affected by climate change impacts;
- **Photographs, videos and satellite images;**
- **Environmental samples** from the local area demonstrating environmental harm (e.g. ocean acidification);
- **Local scientific, university, NGO/CSO and government reports**, and an expert witness which corroborates the harm claimed by witnesses; and
- **News reports** of extreme weather events in the area.

***F. The Procedure Leading to the Licensing of the Project (Procedural Challenges)***

If you want to make a procedural challenge, you will need evidence of what happened at key stages of the decision-making process which led to the licensing of the project.

- When you have information about what happened in the procedure leading to the licensing of the project, **you can then compare this to what procedure should have been adopted as a matter of law** (see above).

**Key Questions**

Key stages in the licensing process and questions often include:

**(i) The initiation of the process;**

- a. How was the decision-making process initiated?
- b. What public body was responsible for overseeing the process?
- c. Why was the project initiated?

**(ii) Social and environmental impact assessments** that were made before the licensing decision was made:

- a. Where impact assessments made?
- b. At what stage in the decision-making process where the assessments made?
- c. What information was included in the assessments?
- d. What were the results of the assessments?
- e. How did this affect the licensing decision?

**(iii) Expert evidence and consultations** that were made before the licensing decision was made:

- a. Was expert evidence considered? Where consultations made?
- b. At what stage in the decision-making process did the consultations take place?
- c. Who was consulted?
- d. What were the outcomes of the consultations?
- e. How did this affect the decision?

**(iv) Public participation** in the decision-making process:

- a. Did the public have an opportunity to participate in the process?
  - b. At what stage in the decision-making process were the public given opportunities to participate?
  - c. In what way were the public able to participate?
  - d. Was were the views of those who participated?
  - e. How did this affect the outcome of the decision?
- (v) **Policy papers, memos or press releases** that were made by the government during the decision-making process;
- (vi) **Political debates** regarding the licensing decision; and
- (vii) **Final reasons** for the licensing decision.

Some of this information will be publicly available and others may be made available after a [freedom of information request](#).

#### *G. [The Evidence Must Be Linked to the Legal Basis of Your Claim](#)*

This evidence also needs to relate to the **legal basis of your claim**. It is not enough to show that climate change affects you, a project will contribute to climate change or that a procedure has been unfair. The evidence has to support your legal argument that the procedural unfairness related to or the GHG emissions of a project correspond with the breach of a legal obligation. See the sub-section above for examples of what the legal basis of your claim could be.

### **7. *What Procedural Steps do I Need to Take?***

These claims are usually taken in **national administrative or constitutional courts**.

- In some countries, this process is called “**judicial review**” or a “**constitutional petition**”.
- In many Latin American countries, this process is called “**amparo proceedings**”.

The procedure that you have to follow will depend on whether you live in a “**common law country**” or “**civil law country**”. The law in your country will outline a judicial review, constitutional petition or amparo process, so that you can bring a claim to the courts and the court may review the situation and provide a remedy.

#### **Focus Point: Limitation Periods**

A limitation period imposes a time limit within which a claimant may bring a case. The limitation period depends on the precise cause of action and will dictate the amount of time you have to file your case in court. If you do not file your case within the relevant limitation period, you may be prevented from bringing the claim.

Research the law in your country to determine the relevant limitation period for your claim. You will also need to identify when the time starts running for the limitation period. When challenging carbon-emitting projects, the time will usually start running from the date the government made the licensing decision or took the action you are challenging. It may also be possible to apply for the limitation period to be extended.

Generally, you will have to meet the following requirements to bring a constitutional or administrative claim:

(i) **Notify** the public body (i.e. the defendant) that you are going to bring a claim

(ii) **File your case in court within the relevant time period after the harm occurred**  
This could involve giving the court a "claim form"

(iii) **Present the basis of your claim/argument to the court and the defendant**  
This could be called a "statement of claim", "a petition", "complaint" or "particulars of claim"

(iv) **In some countries, you have to apply for permission to bring a public law claim**  
This is a process where your claim is vetted to see if it's credible or has reasonable prospects of success before the defendant has to respond. The defendant can present arguments at this stage

In other countries, the claimant does not have to apply for permission but the defendant can make an application to dismiss the case or apply for summary judgment. The court will then decide whether the case is sufficiently credible or has reasonable prospects of success in order to decide whether to allow it to continue.

(v) **The defendant will provide a "defence" which outlines their arguments**  
They may say your version of events is wrong, argue their actions were not unlawful, or argue you cannot bring your case due to procedural reasons

(vi) **The defendant and you may be asked to exchange evidence you rely on**  
If you are using witnesses, you will usually need to include what they are going to say in a "witness statement" or "affidavit"

(vii) **The court will notify you of a hearing date**

(viii) **At the hearing, you will present your arguments**, including a review of the key evidence already likely filed with the court, **witnesses may give oral evidence and can be questioned by the lawyers.**  
**The court then makes its decision**

(ix) **Once the hearing is over, the losing party may have the right to "appeal" to a higher court**



**Focus Area: Complaints to Regional and International Human Rights Bodies**

If your claim is based on human rights, in some countries there is also the option to bring your case to a **regional or international human rights body** if you have been unsuccessful in national courts.

For more information, see “**Individual Complaints to Regional and International Human Rights Bodies**”.

### *8. What Happens if I Win?*

If you bring a successful claim against the government in human rights, constitutional or public law, you could get one or more of the following “**remedies**”:

As a remedy in challenges against carbon-emitting projects, the court may order the government to do one of the following:

- Redo the licensing process with proper consideration of the climate impacts of the project (this will be common in procedural challenges);
- Stop the implementation of the project;
- Take actions to reduce the amount of GHG emissions that will be emitted as a result of the project; or
- Take actions to offset the GHG emissions that will be produced by the project.

A court order could also make a **quashing order**, which directly cancels the licence and makes it have no legal effect.

**Example: EarthLife Africa Johannesburg v Minister of Environmental Affairs (2017)**

After finding that the licensing of a coal power plant was unlawful due to the EIA’s failure to take into consideration of its climate impact, a court order was made cancelling the licence until a climate impact assessment was made.

It is important to remember **that affected individuals and communities should lead on deciding which remedies are appropriate**, as opposed to NGOs or lawyers. Consider the community impacts of each possible remedy.

If you want more information:

- On remedies, go to our general page on [“What Remedies Are Available?”](#)
- On how to enforce a remedy if the defendant is not cooperating, go to our general page on [“How Can I Enforce a Court Order?”](#)

### *9. The Action4Justice Templates on Climate-Based Infrastructure Challenges*

If you are considering taking legal action to challenge a big carbon-emitting project, we recommend that you download:

- The “[Action4Justice Template on Procedural Climate-Based Infrastructure Challenges](#)”;  
and/or
- The “[Action4Justice Template on Substantive Climate-Based Infrastructure Challenges](#)”.

#### **Key Resource: The Action4Justice Templates**

The Template provides a skeleton for people to follow if they want to bring challenges against big carbon-emitting projects. The Templates have been designed by legal professionals with expertise in climate litigation.

The Templates aim to encourage effective use of the law to bring climate related litigation in appropriate cases by providing:

- An appropriate **format** for drafting a document in which to make a claim (“**the legal complaint**” - paragraphs, font, page numbers, title, headings etc);
- An effective **structure** in which users can place their legal and factual arguments regarding climate change;
- An outline of the **arguments** that could be used when bringing climate litigation; and
- References to **climate science and cases** to help the user build a strong case.

While your complaint needs to be different depending on what country you are taking a legal case, the Template provides useful tips and guidance to get you started if you are thinking about using legal action for climate justice.

**SUB-PAGE 6: LEGAL ACTION AGAINST CORPORATIONS FOR CONTRIBUTING TO CLIMATE CHANGE**

This section of the Guide concerns legal claims against big corporations who have significantly contributed and continue to contribute to climate change.

- These claims often ask for corporations to contribute to the cost of responding to climate impacts, compensation for damage, or for court orders to change or restrict their actions.
- These companies can be called “**Carbon Majors**”.

**Consider the following checklist if you are thinking about taking a claim against a Carbon Major:**

CHECKLIST	YES/NO
1) Is a Carbon Major claim right for me?	
2) Is there an appropriate law for me to base a Carbon Major claim on?	
3) Do I have the right to bring a Carbon Major claim?	
4) Have I identified the right defendant to take a Carbon Major claim against?	
5) Have I gathered enough evidence to take a Carbon Major claim?	
6) Have I identified and followed the procedural steps I need to take in my claim?	
7) If I win, what remedies could I get?	

This section seeks to help you answer these questions. In addition, if you want to take a Carbon Majors claim further, the “[A4J People v Carbon Majors Template](#)” may help you form your legal arguments.

***1. Is a Claim Against a Corporation Right for Me?***

A question to ask yourself when considering bringing a case to court is whether bringing the case is the right decision for you.

- You should continue to ask yourself at each stage of your case’s preparation.

The following table of advantages and disadvantages is designed to help you consider whether a Carbon Majors claim is right for you.

### Advantages of carbon majors claims

- It can be argued that carbon majors claims hold those most responsible for climate change (i.e. corporations with excessive GHG emissions) directly accountable.
- In common law countries, successful cases could create "precedents" which apply to other corporations that have significantly contributed to climate change. This may lead them to a widespread change in an industry.
- They can raise awareness about climate change and a corporation's role therein.
- Even unsuccessful cases can put pressure on corporations and the "liability risk" of cases being brought can change business behaviour.
- There may be alternatives to bring non-judicial complaints against corporations, such as through complaints to OECD National Contact Points.

### Disadvantages of carbon majors claims

- Carbon majors claims are difficult. No cases have yet been successful at national courts.
- If a corporation is based in another country, it can be difficult to establish "jurisdiction" in national courts in your country.
- Justiciability can be a barrier for courts hearing carbon majors claims.
- If corporations are permitted to conduct their business activities by law, it can be difficult to hold them liable ("defence of lawful justification").
- Some corporations can use aggressive tactics to intimidate and retaliate against people that try to hold them accountable (e.g. **SLAPP suits**).
- If all appeal processes are used, claims can take years.

## 2. What Laws Could I Base My Claim on?

If you are bringing a Carbon Majors claim, it will usually be a **"civil claim"**. A civil claim involves arguing a person or corporation acted wrongfully or violated your private rights (e.g. by breaking a contract or acting negligently causing you personal injury or damaging your property).

- If you want to enforce civil law, you will do this in national civil courts.

There are many different areas of civil law. Each area prevents corporations and people from doing certain things and provides consequences when laws are broken. The type of law most relevant to these claims is that of “tort,” “civil responsibility” or “delict”.

- These are concerned with liability for doing something which is wrongful in civil law but not (necessarily) a crime – like carelessly causing a fire which damages your neighbour’s house.

These are a key type of civil claim.

- In “**common law countries**”, torts are defined in judgments over years.
- In “**civil law countries**”, civil responsibility is often defined in a national civil code.

Once you have outlined the facts of your case, look at the areas of law below and see which most closely relates to your situation. Then check your national law to see what the law is in your country.

**Remember:**

Your **legal analysis has to be supported by the evidence you have gathered**. You should consider seeking legal advice. A lawyer should be able to provide advice on the options available to you and advise on your chances of success.

The types of evidence you may need to support your argument will be outlined later in this section.

**A. Civil Responsibility: Private Nuisance**

If your land is affected by climate impacts, a claim in private nuisance could be relevant.

- A private nuisance will be committed where a person or corporation unreasonably and substantially damages or interferes with the use or enjoyment of your land.

**Example: Lluyva v RWE AG**

This is a case brought by a Peruvian farmer in German courts against RWE (a German energy company) for their contribution to climate change.

The farmer is arguing the climate change is causing glaciers near his farm to melt, which will result in flooding of his community. He argues that RWE’s contribution to climate change – and the flood risk – amounts to an unlawful interference with his property.

He is asking the court to order RWE to pay their share of adaptation costs to help protect his community from the floods. A court of appeal in Germany determined his case is sufficiently strong to be admissible. A judgment on the merits of the case is now pending.

To hold a corporation liable in private nuisance, you usually need to show:

(i) The **affected land is your property**

This can include land that you legally own, occupy or use.

(ii) The **land has been damaged** or your **use or enjoyment of the land has been interfered with**

For climate change, this could include:

- Land being harmed by extreme weather events linked to climate change, such flooding or forest fires;
- Land being eroded by sea level rises which have caused coastal erosion; and
- Your use of land (e.g. farming, fishing or hunting) being interfered with by climate impacts (e.g. drought, sea level rises, or ocean acidification killing fish).

(iii) The damage or interference was **caused by the actions of the corporation**

This can be hard to prove. What you need to do to prove **causation** will change in different countries and in different types of claims. This Guide will take you through some steps that could be helpful to prove causation.

First, you will need to outline the **factual causal link or connection** between the GHG emissions of the corporation and the harm you are suffering from. This connection could be shown by, for example, demonstrating that:

- Climate is caused by excess GHG emissions;
- The corporation has historically and/or currently emitted a significant amount of GHG emissions;
- Climate change has caused or contributed to the specific harm that you are suffering from; and
- Therefore, the corporation has contributed to the harm you suffering from.

Second, **this factual causal link above must meet the relevant legal standard of causation.**

- In tort, a **‘but for’ test** is usually used. To satisfy the but for test, you have to show that the harm you have suffered would not have happened if the defendant did not take the action you are complaining about (e.g. but for the Defendant’s bad driving, I would not have been injured). There are difficulties using this test in climate litigation.
  - There are multiple governments and corporations which emit greenhouse gas emissions and contribute to climate change. In almost all cases, a defendant will argue that it was only a small contributor to climate change, and it would occur without their contribution.
  - Climate change is often not the *only* cause of the harm suffered by individuals. On this issue, different types of damage raise different types of causation issues:

- i. **Sea level rises:** This is a constant and predictable consequence of climate change, so the related harm can be easily linked to climate change. The same is also true for changes in long term average temperature; and
  - ii. **Extreme weather events:** Climate change cannot be identified as the *sole cause* of a specific hurricane or heatwave (especially where these have periodically occurred where you live). Rather, the evidence shows that climate change makes certain weather events more intense or likely to happen. If the event is much more likely, it can be argued that climate change is a sufficient contributory factor to make it a legal cause;
- These issues mean it can be difficult to say that *but for* the Defendant’s actions (i.e. greenhouse gas emissions contributing to climate change), the Claimant would not have suffered harm due to a forest fire or heatwave.

#### Focus Area: Alternative Tests of Causation

In some countries, there are **alternative tests of causation** that can be used where there are multiple actors that have **contributed to harm**, rather than causing it on their own:

- Some tests ask whether the Defendant’s actions were the “effective cause” of the harm or whether they “materially contributed to the risk”;
- Under these tests, the Defendant could be held liable for their level of contribution to the climate change and its contribution to the harm suffered by the Claimant (rather than all the harm). In other words, an emitter responsible for a significant, even if small, share of global emissions may be held liable in proportion to that share.
- Also, as the courts have indicated in some of the challenges against governments, such as the Urgenda case, the **doctrine of shared responsibility** may apply so that a defendant cannot escape liability by saying that others are doing the same or worse. This argument could be used in cases against Carbon Majors.

Check if there are any alternative tests of causation used in your country for cases involving multiple causes of harm.

#### (iv) The interference is **unreasonable and substantial**

This is similar to proving a breach of duty in negligence. It can be helpful to highlight:

- The seriousness of the impact of climate change on your property;
- Whether the impact is continuous (e.g. sea level rises) or how often your property is affected by the climate impact (e.g. forest fires, floods etc);
- The interference is not justified as there are sustainable alternatives available to the defendant corporation’s current business practices, and it would be reasonable for the defendant

corporation to avoid the interference by transitioning to renewable energy production (i.e. renewable energy investment instead of burning fossil fuels to produce energy);

- The vulnerability of your property to the relevant climate impact; and
- The defendant corporation’s knowledge about climate change, its causes, impacts and the dangers of their actions.

### B. *Civil Responsibility: Public Nuisance*

Public nuisance is similar to private nuisance except that there is no requirement that your individual property has been damaged.

In public nuisance cases, you have to prove that you are in a **class of people that has been impacted**. The climate change impacts that your claim is based on must affect a group of people who are connected in some way:

- The group could be connected by location, way of life, or age group. Climate change disproportionately impacts certain groups and places more than others;
- You must be part of this group of people; and
- The impact can be on the health, way of life, or well-being of the group (it need not specifically relate to property damage).

In the same way as with private nuisance, you have to prove that:

- The actions of the defendant corporation **caused the harm** your complaint is based on; and
- The harm was **unreasonable and substantial**.

In some countries, you also have to prove that the injury or damage is “special” in some way (i.e. distinct from how the general public may be affected). In absence of this evidence, you will not be able to fulfil the requirement of standing unless you receive prior consent of the attorney general of the jurisdiction in which the claim is being brought. Check the law in your country to see the specific requirements on public nuisance claims.

### C. *Civil Responsibility: Negligence*

An important civil responsibility claim is negligence. A corporation will commit negligence where its actions fall below the **standard of care** they owe you, and this causes harm.

- To bring a claim in negligence, you DO NOT need to show the corporation intended or wanted to cause the injury. It can be enough that they acted recklessly or carelessly.



To hold a corporation liable in negligence for contributing to climate change, you usually have to show that:

- (i) The corporation owes you a **duty of care**.

This means that the corporation must meet a **standard of expected care** towards you. In other words, this means the corporation must act with a degree of caution or care when it's taking actions that could impact you.

When arguing that a corporation owes you a duty of care to take relating to climate change, you may need to show that:

- **Harm is foreseeable:** It may be helpful to highlight that climate change and the climate impact you are complaining about are publicly known, and that the defendant corporation knew about the harm.
- **“Proximity” between the defendant corporation and you:** It may be helpful highlight the **causal link** between the corporation's actions and the harm you are suffering from. This is related to the foreseeability point. The point here is that “proximity” does not necessarily mean geographical proximity but refers to the **degrees of closeness or relationship** (if any) between defendant and claimant. It could be argued that the causal link between a Carbon Major's activities and the harm to an individual creates a sufficiently close relationship, but there is no guarantee this argument will be accepted.
- It is also important to highlight the **gravity of the harm**, your **vulnerability to climate impacts** and the existence of **alternatives** for the defendant's business model.

- (ii) The corporation has **breached its duty of care**.

This means the corporation did not meet the expected standard of care. The breach of duty of care in a Carbon majors claim could be:

- The corporation's failure to substantially reduce its GHG emissions and its continued significant contributions to climate change in spite of knowing about climate change, its causes and the harm it will cause;
- The corporation's continued increase of GHG emissions and investment in fossil fuels in spite of knowing about climate change, its causes and the harm it will cause;
- The corporation's failure to change their operations and transition to renewable energy/green technologies in spite of knowing about climate change, its causes and the harm it will cause; and
- The corporation's engagement in a public relations campaigns of deception and concealment regarding climate change.

**Example: [Rhode Island v Chevron Corp & Others](#)**

A case brought by the state of Rhode Island in the USA against 17 fossil fuel companies for their role in contributing climate impacts in Rhode Island.

They are arguing that the defendants' contributions to climate change have caused damage to Rhode Island residents, infrastructure and property through sea level rises and changes in weather patterns (e.g. heavy rains).

They argue this amounts to **negligence, public nuisance, strict product liability and breach of statutory duty**. They are asking the court to order the defendants to contribute to adaptation costs and change their business operations.

Similar cases have been brought by local governments against Carbon Majors across the USA.

(iii) The corporation's breach of duty **caused the harm** that your claim is based on.

The requirement for causation in negligence is similar to in private nuisance (see above).

***D. [Civil Responsibility: Strict Product Liability](#)***

In some countries, there can be "**strict product liability**" where a business introduces dangerous products (e.g. petroleum or coal) to the market, which create risks for consumers.

- Strict liability means that where design defect or failure to warn is proven, there are **no defences** and the Defendant will be liable.

To prove strict product liability, you usually need to show:

**(i) The defendant corporation designed, produced, promoted or sold a product.**

This will be easy to prove where the product is coal, oil or gas, and the defendant is an energy company.

**(ii) The product is defective or poses a foreseeable risk to the public**

Where the product is coal, oil or gas, it can be helpful to show:

- The link between burning fossil fuels and climate change;
- The severity of the impacts climate change will have;
- The defendant corporation knew about climate change, its causes and impacts; and
- You were not in the same position as the defendant corporation to know about the risks of their product.

- (iii) The **defect was inherent to the product** or the **corporation failed to warn consumers about the risk**

To prove strict product liability for “**design defect**”, the defect must be inherent to the product.

- This means that the product itself (e.g. coal, oil or gas) is the problem, rather than the risk to consumers being created once the product was outside the Defendant’s control (i.e. through the way it’s sold or marketed).

Alternatively, strict product liability could be proven through “**failure to warn**”, where the defendant corporation did nothing to warn the Claimant of the risks their products posed to the climate.

- This can be supported by evidence that Carbon Majors ran campaigns of deception and misinformation regarding climate change (see below).

- (iv) The product **caused the harm** your claim is based on

As with negligence and nuisance, causation must be proven to have a claim for strict product liability.

#### E. Breach of Statutory Duty

In some countries, there are statutes/legislation (i.e. laws passed by government) that can be used to hold Carbon Majors liable for climate harms. Check if there is a statute which:

- Prohibits people or companies from causing **environmental damage**; and
- **Creates a right for individuals to sue** companies in breach.

If there is a suitable statute, look at what you need to do to prove a breach. You will usually rely on the same facts and arguments as other types of civil responsibility claims. For example, you will usually have to prove:

- You have suffered harm; and
- The defendant corporation’s actions caused this harm.

#### F. Human Rights

Usually, human rights claims can only be brought against the State. But in some countries, there are “**due diligence laws**” that allow individuals to take human rights claims directly against businesses when they do not take reasonable steps to prevent human rights abuse in their operations.

- These laws could be used to take claims against Carbon Majors.

#### **Example: [Philippines Commission on Human Rights and Carbon Majors Investigation](#)**

The Climate Change and Human Rights Inquiry in the Philippines is the world's first investigation into corporate responsibility for the climate crisis. It was launched by the Philippines Commission on Human Rights (CHR) after typhoon survivors and civil society groups filed a petition asking the Commission to

investigate the relationship between human rights, climate change and the responsibilities of Carbon Majors. They called for a probe into the possible human rights violations of the 47 biggest fossil fuel and cement companies resulting from climate change.

The CHR's national inquiry has clearly shown that people affected by climate change and whose human rights have been dramatically harmed must have access to remedies, as well as access to justice. It was found that **Carbon Majors and other corporations have responsibilities to protect human rights in the face of the climate emergency.**

The outcome of this landmark inquiry will be released in 2020. You can consult a list of their resources and evidence used [here](#).

In a human rights-based claim against a corporation, you will generally have to show that:

- Climate change is impacting your human rights;
- The defendant corporation is significantly contributing to climate change and, therefore, the impacts on your human rights; and
- The defendant corporation has not taken reasonable steps to prevent the impacts on your human rights. This will be based on similar factors to proving a breach of duty of care.

#### **Examples: Human Rights-Based Climate Cases Against Carbon Majors**

- In France, a complaint has been filed under the “**duty of vigilance**” against Total. It argues that the company failed to assess the threats of new oil projects to human rights. **Find a [summary here](#)** (translation of complaint from French pending).
- In the Netherlands, a case is being brought by a coalition of NGOs and over 17,000 claimants against Royal Dutch Shell for its contributions to climate impacts in the Netherlands. They are arguing their continued contributions to climate change violate their human rights. **The claim form is [here](#).**

Also, even if human rights are not directly enforceable against corporations in your country, human rights principles and standards, such as the **UN Guiding Principles on Business and Human Rights**, could be used to support a case based on tort law or another legal basis. For more information on the human rights responsibilities of businesses, see the “[Action4Justice Business and Human Rights Guide](#)”.

#### *G. [Other Causes of Action](#)*

There may be other laws in your country that could be used to hold Carbon Majors liable for their contributions to climate change.

Also, the law can change. What may not have been possible yesterday, may be possible today. Pay attention to legal changes in your country and new opportunities that could exist to bring climate cases.

**Example: [Smith v Fronterra Co-operative Group Limited & Others](#)**

In New Zealand, a climate change spokesperson of Maori heritage is bringing a claim against big national GHG emitters to hold them liable for their contributions to climate change.

While the court has dismissed the claims that were based on negligence and public nuisance, they allowed a claim to continue to trial that was based on “**a duty cognizable at law to cease contributing to climate change**”. The court accepted that in the age of the climate crisis, **there may be a new special duty emerging** that restrains GHG emitters from contributing to climate change. This will be decided at trial.

#### *H. Defences*

In Carbon Majors claims, corporations could have **defences**. If a corporation has a valid defence, this means that even if you prove the **elements of a cause of action**, you will still not succeed at trial.

- A common defence is that the **Defendant had lawful authority or justification for their actions**. A corporation could argue this where there is legislation that regulates their operations and allows them to emit GHGs, and they have followed these regulations, or that a particular public body is responsible for regulating emissions and its policies have been complied with. This defence is also known as the statutory authority defence, pre-emption or displacement.
- Another defence is “**justiciability**”. It is often argued that a claim of this type is not “justiciable” because the issues raised should be matters of public policy and executive decision, and not the subject of claims between private individuals and corporations. A claim may also be considered non-justiciable were it fails the “**redressability requirement**” (see below).

**Focus Point: Redressability, Justiciability and Jurisdiction**

Where a case is only brought against a small number of corporations, a claim may be considered non-justiciable on the basis that it fails the “**redressability**” requirement. This means that even if the court found in favour of the claimant and ordered the defendants to reduce their GHG emissions or cease operations, the problem of climate change would still occur.

One way to try and overcome this issue has been to add a wide range of carbon majors as defendants to the lawsuit so that the impact of a positive decision would have a larger impact in terms of addressing climate change. However, for a carbon major to be added as a defendant, the court must have jurisdiction over the carbon major (see below).

### **3. Who Can Bring a Claim?**

Civil claims are based on your private rights rather than broader public interests. To bring a civil claim based on tort or a similar law, you will therefore generally need to be **affected by the harm** that your claim is based on.

- If you are not affected by the harm, you will not have an argument that, for example, a corporation has breached its duty of care towards you.

**Example: [Lluyva v RWE AG](#)**

The claim in this case is being brought by a Peruvian farmer whose lands are directly affected by the risk of floods linked to climate change.

Some jurisdictions permit multiple affected individuals to be represented collectively by a claimant.

- These actions may be called a “group”, “collective” or “class” action.

**Focus Area: Claims Brought by Government Bodies**

In some countries, government bodies are able to bring cases against businesses on behalf of individuals or for general harms that are happening in their areas.

In the US, there has been a wave of cases brought against Carbon Majors by local, city and state governments seeking accountability for climate change impacts in their local area.

If you don’t have the right or resources to bring a case but a sympathetic local government body might, an idea could be to lobby the local government to take the case on your behalf.

**4. Who Is the Claim Brought Against?**

This type of legal case is generally brought against big corporations who have significantly contributed and continue to contribute to climate change.

- These cases are typically brought against **fossil fuel companies** (oil, coal and gas companies) who are responsible for a large proportion of global greenhouse gas emissions.
- However, claims could also be brought against other big GHG emitters (e.g. big beef and dairy companies) or the industries that support them (e.g. investors).

**Key Resource: [The Carbon Majors Report](#)**

The Carbon Majors Report highlights 100 corporations that are cumulatively responsible for 71% of global GHG emissions. The vast majority of these corporations are involved in the fossil fuel industry.

**Key Resource: [Union of Concerned Scientists Studies](#)**

The Union of Concerned Scientists led two studies which built upon The Carbon Majors Report. These studies found that carbon and methane emissions traced to the 90 largest carbon producers contributed approximately 57% of the observed rise in carbon dioxide in the atmosphere. These emissions were also found to contribute to approximately 50% of the rise in global average temperature, and roughly 30% of global sea level rise since 1880.

Another factor that will influence who you can bring a claim against is “**jurisdiction**”. Jurisdiction relates to whether a court has the power to hear a case.

- To bring a case, the court must have jurisdiction over the defendant corporation.

To establish jurisdiction, you will generally need to prove that the defendant company is **domiciled** in the country where you are bringing the case. This often includes countries where:

- The corporation is registered/incorporated in the country of the court;
- The corporation has its headquarters or principal place of business in the country of the court; or
- The actions/harm you are complaining of happened in the country of the court.

This issue is discussed in more detail in Action4Justice’s “**Business and Human Rights Guide**”.

#### **Focus Point: Claims Against Investors and Insurers**

It may also be possible to bring a climate case against businesses which have assisted, facilitated or are connected to the activities of Carbon Majors. This could include banks and investors which provide Carbon Majors with finance.

- For more information, see the Action4Justice “[Business and Human Rights Guide](#)”.

However, as these claims are more indirect and removed from the cause of the harm a claim will be based on, they will likely be more difficult (e.g. it will be harder to prove causation and duty of care).

### **5. What Evidence do I Need to Bring a Claim?**

In civil law actions, it’s the claimant who has the “**burden of proof**”. This means the person bringing a civil claim needs to prove their case.

One of the first things you need to do then to bring a successful claim is gather evidence that will be accepted in court. You need to have a set of facts that describes what happened and evidence that supports your “**version of events**” (i.e. what you are saying happened).

When you’re bringing a Carbon Majors claim, you will need evidence to support 3 things:

#### **A. The Occurrence, Causes and Impacts of Climate Change**

You will need to provide evidence that global temperatures are rising, this is caused by man-made GHG emissions and the warming of the Earth will have serious impacts (see the introduction for an overview).

Useful and publicly available sources of evidence were outlined in “**Climate Litigation**”.

When presenting evidence on climate impacts, you should focus on the particular climate impact that affects you and your community.

- For example, if your claim is based on sea level rises affecting your coastal town, place emphasis on the relationship between climate change and sea level rises in your area.

### *B. The Defendant Corporation's Emissions and their Contribution to Climate Change*

The defendant corporation's business activity needs to be connected to the causes and impacts of climate change. In other words, the extent to which the defendant has contributed (and will likely continue to contribute) to climate change has to be demonstrated and proven.

For past GHG emissions, this can be done by:

- Detailing the operations of the defendant which create greenhouse gas emissions (e.g. the exploration, drilling, extraction, production and combustion of fossil fuels) and connecting these (in general terms) to the causes of climate change;
- Calculating the overall greenhouse gas emissions that can be attributed to the operations of the defendant; and
- Calculating the percentage of overall global greenhouse gas emissions that the defendant is responsible for.

#### **Key Resource:** [Carbon Majors Report](#)

The Carbon Majors Report calculates the amount of GHG emissions of the 100 corporations who have emitted the most GHG emissions since 1988. It concludes that these Carbon Majors have been responsible for 71% of global GHG emissions in that period.

The report continues to calculate the level of responsibility (by %) each of the Carbon Majors has for global GHG emissions in that period.

This is a vital evidence if you want to prove the level of responsibility a Carbon Major has for the occurrence of climate change.

It will also strengthen your argument to provide evidence of continued investment in fossil fuel resources can provide useful evidence that the defendant intends to continue contributing to climate change.

### *C. The Defendant Corporation's Knowledge of Climate Change*

It may also be necessary to prove the defendant had knowledge (or should have known) of the impacts of climate change and the fact they were contributing to them.

#### **Practical Tip: Sources of Evidence**

This could be proven with the following evidence:



- Internal memos of fossil fuel companies;
- Internal scientific reports commissioned by fossil fuel companies;
- External policy documents of fossil fuel companies;
- Attendance of fossil fuel companies at climate conferences; and
- General awareness of climate change once scientific and political consensus had publicly been reached.

Depending on the company, evidence of knowledge exists and is publicly available from as far back as the 1950s. **You do not need to prove that the company had “actual knowledge.” Rather, since the 1950s, fossil fuel companies have had “constructive knowledge” as they are part of the industry groups.** This means a fossil fuel company is presumed in law to have known about climate change, as they would have this knowledge had they made appropriate inquiries and exercised reasonable care. Once the defendant corporation’s knowledge of its contribution to climate change is established, it can strengthen your arguments to show that although they have had the opportunity to change their operations and transition to renewable energy and green technologies, they have failed to and/or chosen not to do so.

- This is useful for demonstrating the unreasonableness of their actions.

#### Focus Point: Climate Denial and Deception

In some cases, there is evidence that Carbon Majors have not just known about climate change but have failed to disclose information regarding climate change and campaigned to deceive the public and prevent action to combat climate change.

An excellent resource is “[Smoke and Fumes](#)”, a report by the Center of International Environmental Law which provides a comprehensive evidentiary basis of climate deception by certain Carbon Majors.

#### *D. Personal Loss, Injury and Damage*

The specific loss or damage the you have suffered, are suffering or will likely suffer as a result of climate change needs to be detailed. This may include:

- **Property damage** (e.g. extreme weather events such as forest fires, storms and floods that have endangered or destroyed the claimant’s property);
- **Economic loss** (e.g. sea level rises, drought, ocean acidification or loss of biodiversity which has affected the claimant’s way of life/occupation); or
- **Personal injury:** Extreme weather events or temperature changes that have affected the claimant’s health or well-being.

The specific loss and damage your claim is based on needs to be consistent with and supported by the climate science on the impacts of climate change on your country or region.

#### **Practical Tip: Sources of Evidence**

Useful evidence to demonstrate personal loss, injury and damage include:

- **Witness statements** from yourself and people in your community/group who have been affected by climate change impacts;
- **Photographs, videos and satellite images;**
- **Environmental samples** from the local area demonstrating environmental harm (e.g. ocean acidification);
- **Local scientific, university, NGO/CSO and government reports**, which corroborate the harm claimed by witnesses;
- **Expert witnesses.** These are people with specialist knowledge in an area relevant to your case that could support what you are claiming (e.g. climate scientists); and
- **News reports** of extreme weather events in the area.

#### *E. The Evidence Must Be Linked to the Legal Basis of Your Claim*

This evidence also needs to relate to the **legal basis of your claim**. It is not enough to show that climate change affects you and a Carbon Major has contributed to this. The evidence has to support your legal argument that the actions of a Carbon Major corresponds with the breach of a legal obligation. See the sub-section above for examples of what the legal basis of your claim could be.

#### **6. What Procedural Steps do I Need to Take?**

When you have collected your evidence and conducted your legal analysis, you should then be able to start the court claim.

- The procedure that you have to follow will depend on whether your country is a “**common law country**” or a “**civil law country**”, the type of claim, the court you choose, and on the procedural rules of that court.

#### **Focus Point: Limitation Periods**

A limitation period imposes a time limit within which a claimant may bring a case. The limitation period depends on the precise cause of action and will dictate the amount of time you have to file your case in court. If you do not file your case within the relevant limitation period, you may be prevented from bringing the claim.

Research the law in your country to determine the relevant limitation period for your claim. You will also need to identify when the time starts running for the limitation period. Time may start running from one of the following:

- The date the harm occurred (e.g. when a forest fire occurred); or
- The date you learned about the harm.

In Carbon Major cases, it can be argued that there is “**continuing harm**” because the threat of climate change and the corporation’s contributions are ongoing. In some systems, the time limit will not begin to run where the harm is continuing.

It may also be possible to apply for the limitation period to be extended.

Here are some **general points of procedure** that you may have to follow to pursue a civil claim:

(i) Consider whether to notify the defendant corporation that you are going to bring a claim.

In some cases, it may be unwise to do this if there's a risk the defendant will destroy important evidence and/or remove assets from the country in question.



(ii) File your case in court within the relevant time period after the harm occurred

This could involve giving the court a "claim form".



(iii) Present the basis of your claim/argument to the court and the defendant

This could be called a "statement of claim", "a petition", "complaint" or "particulars of claim"



(iv) The defendant will provide a "defence" which outlines their arguments

They may say your version of events is wrong, argue their actions were not unlawful, or argue you cannot bring your case due to procedural reasons



(v) Interim applications

Consider whether to apply to the court to freeze the defendant's assets, force the defendant to disclose key documents/evidence in their possession, or apply for permission to use expert witnesses. Sometimes these need to be made immediately when you file your case.



(vi) There may be "interim hearings" on relating to interim applications, specific legal or evidential issues before trial.

For example, the defendant may apply for your case to be dismissed before trial. This could lead to a "mini trial" to see if your case has some chance of success.



(vii) The defendant and you may be asked to exchange evidence you rely on

If you are using witnesses, you will usually need to include what they are going to say in a "witness statement"



(viii) The court will notify you of a trial date



(ix) At trial, you will present your arguments, the judge will ask questions, witnesses will give oral evidence and can be questioned by the lawyers. The court then makes its decision



(x) Once the trial is over, the losing party may have the right to "appeal" to a higher court

## 7. What Happens if I Win?

If you bring a successful civil claim against a corporation, you could get one or more of the following “remedies”:

- A **declaratory judgment** stating that the defendant corporation is in breach of a legal duty;
- **Compensation or damages** to be paid by the defendant corporation to you. This could be reparation for harm you have suffered because of climate impacts or compensation for the costs of climate adaptation which you have to take to protect yourself from climate impacts. The amount of any such order will likely be limited to a sum proportionate to the defendant corporation’s responsibility for climate change (i.e. the % of global GHG emissions they have been responsible for);
- A court order demanding that the defendant corporation does something (e.g. reduces its greenhouse gas emissions and transitions to renewable energy); or
- A court order demanding that the Defendant stops doing something (e.g. stops a new project).

### Practical Tip: Less Can Be More

Depending on your legal system, it can be a smart idea not to ask for too much by way of remedy. If a judge considered you are asking them to make a complex court order or devise regulations governing the amount of GHG emissions a Carbon Major is permitted to make, they may be more likely to consider a case **non-justiciable**.

It is important to remember **that affected individuals and communities should lead on deciding which remedies are appropriate**, as opposed to NGOs or lawyers. Consider the community impacts of each possible remedy.

If you want more information:

- On remedies, go to our general page on [“What Remedies Are Available?”](#)
- On how to enforce a remedy if the defendant is not cooperating, go to our general page on [“How Can I Enforce a Court Order?”](#)

## 8. The Action4Justice People vs Carbon Majors Template

If you are considering taking a Carbon Major claim, we recommend that you download the “Action4Justice People vs Carbon Majors Template”.

### Key Resource: [The Action4Justice People v Carbon Majors Template](#)

The Template provides a skeleton for people to follow if they want to bring claims against Carbon Majors for their contributions to climate change. The Templates have been designed by legal professionals with expertise in climate litigation.

The Templates aim to encourage effective use of the law to bring climate related litigation in appropriate cases by providing:

- An appropriate **format** for drafting a document in which to make a claim (**“the legal complaint”** - paragraphs, font, page numbers, title, headings etc);
- An effective **structure** in which users can place their legal and factual arguments regarding climate change;
- An outline of the **arguments** that could be used when bringing climate litigation; and
- References to **climate science and cases** to help the user build a strong case.

While your complaint needs to be different depending on what country you are taking a legal case, the Template provides useful tips and guidance to get you started if you are thinking about using legal action for climate justice.

## SUB-PAGE 7: INVESTOR AND OTHER FINANCIAL CLAIMS

This Guide has so far focused on claims by people directly affected by climate change, or organisations who represent them, and claims against contributors to climate change, such as governments or corporations who may be able to reduce emissions or their impact. But in addition to physical harm, climate change has a huge effect on businesses and companies, as well as on individuals. As a result, there are opportunities for businesses, investors and shareholders to pursue climate litigation due to the financial harm it will cause.

Although this form of climate litigation may not seem to directly benefit the people generally, it could have a very strong indirect effect in changing corporate behaviour towards a lower carbon economy and reducing emissions. This is because companies do not want to be put out of business by climate change or the need to transition to a low carbon economy, and company management, investment advisers or others in the financial sector do not want to be liable for the adverse financial consequences of climate change on companies.

### *1. What Are the Financial Risks?*

Climate change risks to companies are numerous and various. They are often classified into three broad types:

#### *a. Physical or Operational Risks*

This means the physical risks posed to a company by the effects of climate change. For example, a factory that risks being repeatedly flooded will not be profitable and an agricultural business in an area stricken by drought will likewise not survive.

#### *b. Transition Risks*

These are based on the prediction that globally; countries and corporations will take actions necessary to comply with the Paris Agreement and be part of a transition to a low carbon economy. Carbon intensive industries may no longer be profitable or viable. This may happen because the increasing regulatory costs of high carbon industry will be too high, or because renewable energy is cheaper to produce. Or it may mean that the climate risk associated with such industries are too great for them to continue.

This has happened already happened with much of the global coal industry. Their shares may fall in value, and their assets be “stranded” (this means that the oil and coal reserves of corporations won’t be able to be taken out of the ground and be used for commercial activity). The risk of stranded assets is sometimes described as a distinct and fourth category degree of risk known as “**carbon asset risk**”.

### *c. [Liability Risks](#)*

Companies who do not report or account correctly for climate change risk may be liable for penalties or lawsuits, and in addition the activities of major carbon intensive companies may render them directly liable for their contribution to climate change.

**Key Resources:** [Task Force on Climate Related Financial Disclosures](#)

This provides detailed guidance on the types of risk faced by companies in different business and industry sectors.

[Carbon Tracker](#) also publishes research to assist in assessing the financial impact of climate change on carbon intensive companies.

These factors give rise to a number of types of potential legal liability.

## *2. [Claims by Shareholders against Companies and/or Management](#)*

Often carbon intensive projects and operations are undertaken by businesses due to a failure to appreciate the risks, or for political or other reasons, even though they may be unwise and/or unprofitable.

Under many national systems of law, the companies' management owe a duty to shareholders to act appropriately. Sometimes environmental organisations or concerned citizens buy shares in companies to bring action against it to prevent it undertaking projects or ventures which are risky in climate change terms.

### *A. [What is the legal basis for this type of claim?](#)*

The legal basis for this type of claim arises from the basic principles of **company law**, and the relationship between the shareholders of the company, who collectively own it, and the management in the form of directors and managers.

The directors and managers owe duties to manage the company prudently for the benefit of the shareholders (these are often called "**fiduciary duties**"). Although they have discretion in what exact actions they take and they have to act in the interests of the shareholders as a whole, rather than just groups of individual shareholders, a breach of this duty may render them legally liable.

### *B. [Who can bring a claim?](#)*

In general, shareholders may bring this type of action. Quite often environmental activists buy small numbers of shares in a company, not because they agree with the way it's run or want to share in its profits but because they want a platform to voice their views and even take legal action.



In some countries, small groups of minority shareholders cannot bring this type of action. However, in other countries, it may be possible to take a “**derivative**” action where the company’s management is acting against the interests of the shareholders as a whole.

**Example:** [Von Colditz v Exxon](#)

Shareholders of Exxon sued on behalf of the company to recover moneys and assets allegedly wasted by Exxon management. The claim alleged that the Exxon management provided misleading information to investors and regulators on the degree of climate risk to the company, and were in breach of their duty as directors.

*C. [What evidence is needed for this type of claim?](#)*

There are three matters that need to be shown:

- i) That the company faced climate-related financial risks that were **material and foreseeable**.

Not every minor risk will count. Risks include not only those in the immediate future but also those in the longer term.

- ii) That the company’s board of management or directors were in **breach of duty**. Normally a company considering climate risks must do so by:
  - **Identifying the risks;**
  - **Assessing the risks and the scale of them;** and
  - **Managing the risks.**

If the company does not even consider whether such risks exist at all, it is unlikely to have complied with its duties, unless it is in one of the relatively rare industry sectors where climate change is not a risk. If the board of directors did not act prudently and with loyalty to the shareholders (for example preferring its own short-term interests in terms of bonuses or executive pay to the interests of the shareholders) it may be in breach. Usually national legislation sets out directors’ duties in this regard.

Sometimes this question can be considered from public documents such as annual reports of companies. In other instances, it may be necessary to seek information about the way the company was managed. Most of the largest carbon intensive companies are public companies, which are subject to higher obligations in relation to conduct and disclosure, than private companies.

- iii) the claimant must show **actual loss and damage** caused by the breach of duty. This is usually a reduction in share value.

#### *D. [What remedies may be available?](#)*

One possible remedy in these cases is **compensation** or **damages for financial loss** caused by the breach of duty. However, shareholders may be able to require a company to take specific action or refraining from action, such as investing in a financially risky carbon intensive plant, project or other company.

**Example: [Client Earth v ENEA](#)**

The Claimant, an environmental law organisation, purchased some shares in the defendant company and sued it in Poland, alleging warned that its ongoing actions in relation to a proposed coal plant risked breaching board members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders. The Polish court found the plans to be invalid.

Companies also have a general duty under relevant national law to prepare accurate accounts including assessment of risks and provide accurate information to regulators and shareholders. A failure to assess or report on these risks accurately may render the company liable to legal claims from shareholders who have been misled, or to enforcement actions/fines by regulators. Indeed, some companies have been accused of deliberately misstating climate risks in their reports or press releases.

**Example: [Ramirez v Exxonmobil](#):**

The claimants purchased shares in Exxonmobil in 2016. The complaint alleged that Exxon's public statements at that time were materially false and misleading because they failed to disclose that internally generated reports concerning climate change recognized (a) the environmental risks caused by global warming and climate change, and (b) that due to risk associated with climate change Exxon would not be able to extract existing hydrocarbon reserves it claimed to have. The claim also alleged that Exxon's form 10-K, which was required by law to make disclosures to the Securities Exchange Commission were also false. The claim failed as a matter of fact as the court found that the statements were not misleading.

**Key Resources: The Commonwealth Climate and Law Initiative** has published reports into Directors' duties [here](#) and [here](#). These provide a detailed guide to the duties of directors, trustees and others in common law jurisdictions in the UK, Australia, Canada and South Africa. These duties arise both under common law (duties of care and fiduciary duties) and under companies legislation. CIEL has published a [guide](#), which gives similar guidance on the law in the US.

### **3. *Other Claims for Failure to Report***

If company reports or information given publicly fail adequately to disclose climate risks, this may put companies in breach of their obligations under national laws regulating companies and their reports and accounts, and a complaint to the relevant authority may result in court proceedings and/or regulatory sanction.

**Example: The English Financial Reporting Council**

The Council has duties to ensure that reports of English companies comply with the regulatory requirements for such reports. They have [guidelines](#) on reporting on climate related risk. A complaint to the authorities is not a legal claim in a court, but is a type of legal intervention that may be effective.

Check if there is a similar body in your country.

*A. [What is the legal basis for this type of claim?](#)*

The basis for this type of claim is the obligation under national law for companies to provide accounts and reports which are **true and accurate**. For example, in England the position is governed by the **Companies Act** and in the United States by **Securities legislation**. The requirements now often include a specific duty to report on environmental performance and/or environmental impact/risks. Even a generic requirement to report on material risks often requires a report/disclosure of risks emanating from climate change. A company that has breached these obligations may have broken the law.

*B. [Who can bring a claim?](#)*

Usually, these types of obligation are enforced and policed by **national regulatory authorities**. In England, this is the Financial Conduct Authority/financial Reporting Council. In the United States, it is the Securities Exchange Commission.

These bodies may bring proceedings themselves, but frequently they will only do so if there is a complaint by a citizen of the relevant state. **Anyone may make a complaint** whether or not they are a shareholder of the company. Although this is not a formal court claim, it means that the national regulatory authority has to consider the matter.

*C. [What evidence is needed for this type of claim?](#)*

There are two main requirements for this type of complaint.

- i) That the company faced climate-related risks that were **material and foreseeable**. Not every minor risk will count. Guidelines for assessing and disclosing climate-related risks can be found on the website for the [Task Force for Climate-Related Financial Disclosures](#); and
- ii) That reports made by companies under their legal obligations are **not accurate** in this respect.

*D. [What remedies may be available?](#)*

Remedies may include a declaration that the company was in breach, a requirement that the information is corrected, or possibly a fine for the company.

**Example: ClientEarth Complaint to the Financial Report Council (UK)**

Client Earth made a complaint to the FRC in 2018 in relation to Lancashire Holdings, an insurance Company, alleging failure to deal adequate with climate risks in its Annual Report. The claim was based

on a breach of the **European Transparency Directive**. Similar claims have been made based on obligations in the **Companies Act**, including under section 172 which refers to the impact of the company’s operations on “the community and the environment”.

#### 4. *Claims Against Investment Managers and Pension Funds*

Many shares in corporations are held not by individuals but by investment funds, pension funds and others who manage assets, including shares in companies, for the beneficiaries or members of the funds. These are often individuals who have pension plans, or investors who want their investments to be managed by others.

A failure by investment managers or pension fund managers to appreciate the financial risks inherent in climate change, and the related risks of investing in carbon intensive industries, may put them in breach of their duties to the beneficiaries of the fund or people who they advise.

##### A. *What is the legal basis for this type of claim?*

Trustees are under a duty similar to company directors to acts as “**fiduciaries**,” which in simple terms means to act prudently in the interests of the people who are to benefit from the pension fund.

National laws vary but typically the duty can be broken down into the duties that a prudent trustee must fulfil including the:

- (1) Duty to diversify the assets of a particular fund so the majority of the wealth is not concentrated into one particular investment. A trustee must diversify assets unless there are circumstances that justify retention of a concentration of assets, or if the duty has been waived (“**duty to diversify**”);
- (2) Duty to manage the fund solely in the interest of the beneficiaries. The trustee must act in good faith and cannot act in a way that would create a conflict of interest with their beneficiaries (i.e. they must not gain any direct or indirect personal profit from their role) (“**duty of loyalty**”);
- (3) Duty to act impartially and fairly in the administration of the fund. This includes a duty to act impartially between beneficiaries of different funds (“**duty of impartiality**”);
- (4) Duty of the trustee to familiarise themselves with the trust on appointment and to investigate complaints or any problems relating to a fund or its assets (“**duty of inquiry**”);
- (5) Duty to monitor all investment decisions. This includes a duty to monitor risk within the portfolio of investments (“**duty to monitor**”); and
- (6) Duty to observe the terms of the fund and to prudently administer the fund in accordance with the agreed terms, taking into account all relevant facts and circumstances (“**duty to act in accordance with the plan documents**”).

Each of the above duties is relevant to assessing whether and how fully a trustee has complied with his or her overarching **duty of prudence**. A failure to identify, assess and manage climate related risk to the pension fund investments may constitute a breach of this duty.

Trustees are under a **duty also to consider the interests of all the potential beneficiaries**. So, an investment policy which discriminates against certain categories of beneficiary may also put trustees in breach. For example, it has been suggested that young people are potentially affected more by investment in carbon intensive assets.

One question which sometimes arises in this type of case is whether the Trustees' duty is limited to maximising financial gain on their investments, or whether they can take into account environmental or social concerns in their investment policy. This will often be a contested issue in court, but even from an economic perspective, it may be that an argument can still be made that Trustees have breached their duty on the basis of the financial risks associated with climate change (see above).

*B. [Who can bring a claim?](#)*

This type of claim would normally be brought by someone who has a pension plan against the trustees of their pension fund. Many companies have pension funds specific to them for the benefit of their employees. In addition, many people have individual pension plans whereby money put into their pensions is invested by an independent asset manager.

*C. [What evidence is needed for this type of claim?](#)*

The evidence needed is similar to that described above in relation to claims against company management. An initial step is ascertaining to what extent the Trustees took climate-related risks into account at all. The Trustees will normally provide information to beneficiaries on the policy on investment.

Expert assistance may be required to assess the extent to which there may be a breach as the rules on pension investments and the calculation of financial consequences of various risks are both complex.

*D. [What remedies may be available?](#)*

If a breach is proved, it may be possible to require the Trustees to rectify this and amend their investments/investment policy.

In addition, if any beneficiaries such as pensioners have suffered loss they may be entitled to compensation. This is a complex question as often the extent of any loss may not be known and/or the loss may not be suffered until sometime in the future.

**Example: [McVeigh v Retail Employees Superannuation Trust](#)**

An Australian pension fund member filed suit against the Retail Employees Superannuation Trust (REST) alleging that the fund violated the Corporations Act 2001 by failing to provide information related to climate change business risks and any plans to address those risks. The complaint alleged that the pension fund Trustees owed “fiduciary” duties to the members who were beneficiaries of the fund to guard against financial risks associated with carbon intensive investments. These duties were alleged to be owed under national legislation dealing both with companies (including REST) and with duties of pension fund trustees.

In 2020, REST agreed its trustees have a duty to manage the financial risks of climate change. The case was settled out of court.

**Key Resources:** The [Commonwealth Climate and law Initiative](#) and [CIEL guides](#) referred to above are also useful for this type of claim.

### **5. Other types of Financial Claim**

There is a general principle that professional advisers in the financial sector **owe a duty to act reasonably and carefully in giving their advice to those who may rely on it**. The extent of this duty varies from country to country. If the duty is breached and, in reliance on poor advice, someone suffers financial loss, they may be entitled to compensation. This leads the possibility of claims against various types of participants in the financial sector who give advice or publish information which may be relied upon.

These potentially include the following:

- **Credit Rating Agencies.** These assess the creditworthiness of major corporations. A failure to take into account climate-related risks may lead to an overoptimistic rating of a company. For more information, see this [CIEL Study on CRAs and Climate Change](#);
- **Auditors.** These are independent accountants who have to consider the company’s accounts and certify that they appear to be a true and fair reflection of the company’s financial position. Auditors negligently failed to identify and report on climate-related risks may be liable to the company itself and/or to shareholders in it; and
- **Investment advisers.** The same principles apply to a wide class of advisers who may give investment advice based on their opinion of the value of future prospects of a company. A failure to factor in climate -related risks may make this advice negligent.

### **6. Consumer Claims**

It may also be possible for consumers to bring legal action or make complaints where companies give misleading information about a climate-related aspect of their business or products. For example:

- A common issue is misleading descriptions of the “greenest” or environmental friendliness of a product or service. This is often known as “green washing”. A company that falsely states information in this regard may be liable for breach of advertising codes or regulations.
- A company may also be liable to a fine and/or compensation to consumers who bought the product in reliance on the claims.
- A company may also be liable for a fine or another consequence if it involves a breach of relevant safety or environmental legislation.

For example, Volkswagen, the German car manufacturer, has faced liabilities of billions of dollars in fines and compensation as a result of the installation of a concealed “defeat” device which ensured that the car underreported emissions during tests. Although this was primarily concerned with NOx emissions and not climate change related emissions, the same principles could apply in a climate context.

**Example: [OECD Complaint against BP](#)**

An example of such a claim related to climate change is **Client Earth’s recent complaint against BP for breaching the OECD guidelines**. This alleges a BP advertising campaign in relation to its low carbon activities was misleading.

### **7. What Can You Do?**

Often a credible threat of legal action will achieve results without the need to take actual legal action. Steps that you can take include the following.

- If you are a member of a pension scheme, you could write to the managers or trustees seeking information about the extent to which they take climate change risks into account in their investment policy. Depending on the answer, legal action may be possible;
- Reporting suspected instances of inadequate reporting or disclosure of a company’s climate change policies, or of the climate consequences of its activities, to the relevant regulatory authorities;
- Buying a small number of shares in a company with a view either to raising questions for the management or, possibly, taking action if they appear to have breached their duties to shareholders; or
- Considering whether advertising or marketing of a company’s product or services is misleading or inaccurate, and if so, reporting to relevant authorities.

## SUB-PAGE 8: ARE THERE ALTERNATIVES TO GOING TO NATIONAL COURTS?

There are alternatives to going to national courts if you want to challenge governments and corporations about their policies and actions on climate change. This section of the Guide will give you an introduction on some of these alternatives and give you tips on how to use them.

### **1. Individual Complaints to Regional Human Rights Courts and Commissions**

Regional human rights courts and commissions can **enforce regional human rights treaties** when available domestic mechanisms (courts or other) have failed to protect your human rights.

- Individual complaints to regional human rights bodies are like bringing human rights or constitutional claims before national courts (they are **legal complaints**).
- This means that **the guidance provided on issues of law, evidence and procedure in the previous sections is relevant** to these complaints.

#### A. When Could a Complaint to a Regional Human Rights Court or Commission Be Right for Me?

Bringing a claim to a regional or international court could be helpful in the following cases:

- You have tried and failed to bring a public claim in national courts (up to the highest level);
- The national courts in your country are ineffective;
- The judgment from a national court hasn't been enforced or followed by the government; or
- You want to take a case against another country's government.

#### B. When Could I Bring a Complaint to a Regional Human Rights Court or Commission?

You may have the option of bringing an "individual complaint" (i.e. a case) to a regional or international human rights body if:

- (i) Your case is being brought **against the government**

For this reason, complaints to regional human rights courts or commissions are **most relevant to mitigation claims, adaptation claims or challenges to government licensed projects**.

- (ii) Your case is based on **human rights law**

These complaints are only relevant to claims where you are arguing that a human right that is protected in the relevant international human rights treaty has been violated. For this reason, it's important you check what rights are protected in the relevant treaty.



(iii) Your country has **signed and ratified** a regional human rights treaty which gives a regional human rights court or commission **jurisdiction** to hear human rights complaints regarding your country.

For example:

- If in Europe, you could go to the [European Court of Human Rights](#) which enforces the **European Convention on Human Rights**;
- If in the Americas, you could go to the [Inter-American Commission on Human Rights](#) or the [Inter-American Court of Human Rights](#) to enforce your rights under the **American Convention on Human Rights**.
- If in Africa, you could go to the [African Commission on Human and Peoples' Rights](#) or the [African Court of Human and Peoples' Rights](#) to enforce your rights under the **African Charter on Human and Peoples' Rights**.
- If in West Africa, you could enforce the same rights before the [ECOWAS Community Court of Justice](#).

These bodies can launch investigations into your case, facilitate negotiations between you and the government, declare that your government has violated your human rights, and order the government to give you a remedy and change its laws or policies.

#### **Example: Climate Litigation Before the Inter-American Court of Human Rights**

In 2017, the IACtHR handed down an [advisory opinion](#) on the environment and human rights. The advisory opinion made it clear that:

- The right to a healthy environment is an enforceable right;
- States have obligations to prevent significant environmental damage that impacts human rights;
- These obligations could apply to climate change.

This advisory opinion could pave the way for climate change-related claims to be brought before the IACtHR.

(iv) Your claim is considered **admissible** by the regional human rights court or commission

For your claim to be admissible, you generally have to show:

- That you are a “**victim**” of your government’s actions or omissions (i.e. that your health has been negatively impacted by their actions or omissions). This is similar to proving “**standing**” in national courts.
- That you have **evidence** to back up your claim.

- That you have first tried to bring your claim before national courts – this is often referred to as the “**exhaustion of local remedies**”
  - The exception to this rule is the ECOWAS Community Court of Justice.

## **2. Using United Nations Human Rights Bodies**

There are a number of ways UN human rights bodies can be used as ways to advocate for climate justice. Sometimes these can be instead of going to court or they can be used to support litigation.

- None of these processes are legally binding, but they can put pressure on your government to act on climate change.

### **A. Individual Complaints to UN Human Rights Treaty Bodies**

There may be the possibility to enforce your state’s human rights obligations through individual complaints before UN human rights treaty bodies.

#### **[video]**

While these aren’t courts, they have individual complaints mechanisms which hear individual complaints like a court.

#### **Example: Sacchi and others v Argentina, Brazil, France, Germany and Turkey**

A group of children and youth have brought a mitigation claim to the Committee on the Rights of the Child. They argue that, as children, they are particularly vulnerable to the short and long-term impacts of climate change.

By not taking adequate action to reduce their GHG emissions, they are arguing that several governments are violating their rights to life, health and cultural life, as well as not acting in the best interests of the child.

To access these bodies, your country must:

- (i) Be a party to the relevant international human rights treaty

**AND**

- (iii) Have accepted the competence of the treaty body to receive complaints against the state; this may be in the optional protocol to the treaty

### Key Resource: OHCHR Website

Here you can find information on:

- What countries have signed and ratified different human rights treaties
- The different treaty bodies that exist
- Guides for how to submit a complaint
- Past cases and examples

#### B. *Submitting Shadow Reports to UN Treaty Bodies and other UN Human Rights Bodies*

UN Treaty Bodies have a role in monitoring the human rights compliance of countries under UN human rights treaties.

As part of this role, UN Treaty Bodies issue **concluding observations** every few years about each country's human rights record.

- Concluding observations are general assessments of countries' compliance with specific UN human rights treaties. They identify failings and achievements of countries and make recommendations on how to improve their human rights record.

The concluding observations are based on:

- The country's own reporting of its human rights record;
- **Shadow reports of civil society organisations;** and
- Questioning of countries by the UN Treaty Body.

Following targeted interventions by organisations, a number of UN Treaty Bodies have adopted concluding observations that have recommended countries to take **mitigation measures and adaptation measures** to combat climate change.

#### **Example: UN Committee on Economic, Social and Cultural Rights Concluding Observations for Norway**

In its 2020 concluding observations, CESCR expressed its concern regarding Norway's licensing of oil/gas exploration in the Arctic and Barents Sea because of their impact on global warming. The CESCR recommended that the government reconsiders its licensing decision and make human rights the primary consideration of its natural resource exploitation and export policies.

While this is not legally binding, it is supportive of the case being brought by Greenpeace Nordic and Nature and Youth which is challenging the government's decision to issue oil exploration licenses in the Arctic on the basis of the constitutional right to a healthy environment.

If your country is due to report to a relevant UN Treaty Body and want to put climate change on the agenda, the resources below can help.

Key Resource: [CIEL's Guides on Leveraging UN Human Rights Treaty Bodies for Climate Campaigning](#)

1. **Background Note: Opportunities Offered by the Reporting Procedure of UN Human Rights Treaty Bodies:** This briefing note provides a short overview of the reporting procedure of UN Treaty Bodies and describes the different stages of the process and opportunities for civil society to provide input.
2. **Guidance Note: Preparation of a Parallel Report to a UN Human Rights Treaty Body on the Topic of Climate Change and Human Rights:** This provides guidance on the drafting of a parallel report to UN Treaty Bodies to influence their review of the State's compliance with its treaty obligations. It explains how to identify the key climate issues for the relevant State and to highlight the linkages between national climate (in)action and the State's human rights obligations.

A similar process also exists at the **UN Human Rights Council** regarding its **Universal Periodic Review** process. Find out more information [here](#).

### *C. [Complaints to UN Special Rapporteurs](#)*

UN Special Rapporteurs are independent experts which focus on specific human rights issues. As part of their mandate, they can receive complaints from individuals.

- This is not a legal process and the outcome is not binding on countries but can be used to put pressure on your country to take more climate action.

Example: [Complaint to UN Special Rapporteurs re Climate-Forced Displacement of Indigenous Peoples](#)

In 2020, 5 coastal Native American tribes submitted a complaint to several UN Special Rapporteurs claiming that the US government had violated its human rights obligations by failing to address climate displacement.

### *3. [Complaints to Corporate Accountability Mechanisms](#)*

Submitting complaints to **non-judicial corporate accountability and regulatory mechanisms** can be an alternative way to hold corporations accountable for their contributions to climate change.

More information on corporate accountability mechanisms can be found in the "**Action4Justice Business and Human Rights Guide**". There are pages dedicated to:

- **Internal corporate grievance mechanisms:** While these will generally not be effective for fossil fuel companies, as you are challenging the core of their business activities, it could be effective for investors.
- **International Corporate Accountability Mechanisms:** There are a variety of industry specific and general complaints procedures which can be used to hold corporations accountable for human rights abuses.

**Example: [Dutch NGOs vs. ING Bank](#)**

In 2017, Dutch NGOs filed a complaint against ING Bank at the Dutch OECD National Contact Point for failing to sufficiently commit to the targets set in the Paris Climate Agreement.

In its final statement, the Dutch NCP concluded that the OECD Guidelines for Multinational Enterprises demand that ING Bank sets concrete climate goals e.g. refraining from financing new coal-fired power plants

**Example: [Market Forces v SMBC](#)**

The complaints allege that Japanese banks financing Vietnamese coal projects are in breach of OECD guidelines because they failed to provide environmental and social impact assessments and consequently failed to urge project sponsors to assess and prevent or minimize environmental damage

#### ***4. Complaints under the Complaints Mechanisms for International Financial Institutions (“IFIs”)***

Often infrastructure or development projects, which are said to contribute to excessive emissions, are financed by international Financial Institutions such as the World Bank. These have their own codes of practice for assessing projects for sustainability, environmental and climate change implications, and if the relevant principles have not been observed, a complaint may be made with the object of getting the IFI to withdraw funding or for appropriate changes to be made to the project

**Example: [The World Bank Grievance Redress Service](#)**

This allows communities affected by a World Bank funded project to complaint if it has affected or will affect them

**Example:** In October 2017 the Philippine Movement for Climate Justice [filed a complaint](#) to the IFC’s independent accountability mechanism, the Compliance Advisor Ombudsman (CAO), accusing it of contributing to the crisis of global climate change by financing coal plants. The allegation was that the recipients of finance failed to meet the IFC’s social and environmental [performance standards](#). These mandate social and environmental impact assessments for certain projects. The complaint letter is [here](#). In October 2019 the CAO decided to investigate the complaint.

Most IFIs including the African Development Bank (AfDB), Asian Development Bank (DB) and Inter-American Development Bank (IDB) have performance standards of this type.

## 5. Complaints to National Human Rights Institutions

NHRIs are independent institutions which have responsibility for the protection, monitoring and promotion of human rights in a country.

### Key Resources:

For more details on such organisations, please see: <https://www.asiapacificforum.net/support/what-are-nhris/fact-sheet-7-complaint-handling/>.

A list of the names of the NHRIs in different countries can be found at: [https://www.ohchr.org/Documents/Countries/NHRI/Chart\\_Status\\_NIs.pdf](https://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf)

NHRIs do not make legally binding judgments like a court but can launch inquiries into human rights issues.

- The publicity from NHRI complaints and inquiries can raise awareness and put pressure on governments and corporations to change their actions.

### Example: [Philippines Commission on Human Rights and Carbon Majors Investigation](#)

The Climate Change and Human Rights Inquiry in the Philippines is the world's first investigation into corporate responsibility for the climate crisis. It was launched by the Philippines Commission on Human Rights (CHR) after typhoon survivors and civil society groups filed a petition asking the Commission to investigate the relationship between human rights, climate change and the responsibilities of Carbon Majors. They called for a probe into the possible human rights violations of the 47 biggest fossil fuel and cement companies resulting from climate change.

The CHR's national inquiry has clearly shown that people affected by climate change and whose human rights have been dramatically harmed must have access to remedies, as well as access to justice. It was found that **Carbon Majors and other corporations have responsibilities to protect human rights in the face of the climate emergency.**

The outcome of this landmark inquiry will be released in 2020. You can consult a list of their resources and evidence used [here](#).

Some NHRIs can also hear individual complaints to NHRIs. Although NHRI complaints do not lead directly to binding judgements, in some countries the NHRI can then refer or take the case to a court for determination which may then result in an enforceable order for remedy.

## 6. Campaigns and Actions

Going to court or “litigation” is only one way of seeking climate justice. Another vital tool is campaigning.

A campaign is a co-ordinated range of activities dedicated to achieving a common goal. An effective campaign can:

- **Put pressure on businesses** to change their operations and be more environmentally responsible by harming their reputation in the eyes of the public;
- **Put pressure on government** to do more to prevent climate change; and
- **Give a voice to communities** to speak out the impact climate change is having on them.

Campaigning doesn't have to be done instead of bringing a legal claim. A strategic campaign can support and raise awareness about a legal case. For example, a campaign could:

- **Get the attention of organisations** and lawyers that could help you take legal action; and
- **Get people to pay attention** to climate change; and
- Get people to pay attention or **fund** the legal case you are bringing.

**Key Resource:** [A People's Guide on Holding Your Government Accountable for Climate Change](#)

Greenpeace International, a partner of A4J, has created an excellent guide on how to bring a human rights-based climate change case against the government. The guide also goes into detail on how to develop a campaign strategy to complement a climate case.

One type of campaign that can be effective in getting corporations to change their policies on climate change is **shareholder actions**. These are campaigns driven by shareholders within fossil fuel companies, investors, banks and insurers which pressure corporations to act on climate change.

**Example:** [Climate Change Resolution at Barclays' Banks Upcoming AGM](#)

Over 140 investors are tabled a resolution at a Barclays Bank's AGM asking Barclays to phase out fossil fuel financing.

For more information, see "[Alternatives to PIL: Campaigning](#)".

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## SUB-PAGE 9: WHERE CAN I GET MORE INFORMATION & SUPPORT?

This guide has given you an introduction into climate litigation and what options you can have when it comes to using legal action for climate justice.

Having **information and support is key** if you want to take climate litigation.

- If after reading this guide you are thinking about taking legal action, the organisations and resources outlined below could help you.

### *1. What Organisations Could Help Me?*

#### *A. International NGOs and Organisations*

The following are a non-exhaustive list of examples of NGOs that work on climate change issues:

#### Centro Mexicano de Derecho Ambiental (CEMDA)

- An organisation based in Mexico that specializes in using legal action to address a range of environmental issues, including climate change.

#### Center for Environmental Rights

- An organisation based on South Africa that uses legal action across a wide range of environmental issues.

#### Center for International Environmental Law

- CIEL is an organisation that specializes in using the power of law to protect the environment, promote human rights, and ensure a just and sustainable society.
- It has a team of attorneys, policy experts, and support staff who provide legal counsel and advocacy, policy research, and capacity building on climate change issues. They are assisting other organisations in a range of climate litigation cases.
- They also have informative resources on their website to assist people bringing climate litigation.

#### ClientEarth

- An organisation that specializes in using legal action to address environmental issues, such as climate change. They frequently use strategic litigation to challenge energy projects, government environmental policies and corporate malfeasance.
- They also have a useful library of resources on a range of environmental issues and legal strategies



### EarthLife

- An organisation with offices in South Africa and Namibia that campaigns and uses legal action to secure environmental justice.

### ELAW

- A global alliance of lawyers, scientists and other advocates who work to promote a sustainable environment, including by supporting legal action in different countries.
- They have comprehensive databases on environmental cases and legal research.

### EarthRights International

- EarthRights International is an environmental organisation that specialises in using legal action to hold businesses accountable for human rights and environmental abuse.
- They take legal action against businesses.
- They provide training and advice.
- They campaign for corporate accountability.

### Friends of the Earth

- An environmental organisation with offices all over the world. They frequently take climate litigation cases and assist others who are taking cases.

### Greenpeace

- Greenpeace is a network of 26 independent national/regional organizations operating in 55+ countries who bring the campaigning, community organising, communications, and legal muscle in order to toxify the presence of fossil fuel interests in society by tackling the industry's social license head-on.
- Currently, almost 20 national offices are participating in climate justice campaigns.

### Iniciativa Climatica de Mexico

- An organisation that coordinates and supports campaigns and legal actions to secure climate justice in Mexico. They have a range of resources and initiatives design to build capacity for climate litigation and campaigns in Mexico.

### [InterAmerican Association for Environmental Defense \(AIDA\)](#)

- AIDA has a team of lawyers across Latin America who use legal action to protect the environment and communities who rely on it.

### [International Bar Association](#)

- The IBA has a number of committees, including regional forums, and legal resources such as publications on climate change and climate justice.

### [Sabin Center for Climate Change Law, Columbia Law School](#)

- The Sabin Center for Climate Change Law develops legal techniques to fight climate change, trains law students and lawyers in their use, and provides the public with up-to-date resources on key topics in climate law and regulation.

### **Union of Concerned Scientists**

- An organisation composed of scientists and experts who research and advocate on climate issues. They often support legal actions by providing expertise on climate science.

#### *B. [Local Organisations and Law Firms](#)*

The most important source of support you can often get is from lawyers and organisations who work in your country or local community.

Check to see if any of the following groups could help you:

- Local **civil society** organisations
- Local **environmental and climate justice movements**
- **Community groups**
- **Pro-bono lawyers** in your country who offer free legal advice
- **Law centres** in your community or a nearby city

The international organisations listed above may be able to help you find support locally.

## **2. *Where Can I Find More Information?***

The following key resources were identified in the guide. Refer to these if you are thinking about legal action and they are relevant to your case.

- **[Carbon Majors Report](#)**: Report calculates the level of responsibility major polluters have for the current climate crisis.

- [CIEL Guides on Leveraging United Nations Human Rights Treaty Bodies for Climate Change](#): Guides on how to file shadow reports to UN Treaty Bodies to put climate change on their agenda when considering countries' human rights records.
- [CIEL Smoke and Fumes Report](#): Report into the climate deception efforts of certain fossil fuel companies.
- [Climate Action Tracker](#): Analysis of the adequacy of countries' actions and commitments on climate change.
- [Climate Change Laws of the World Database](#): Database on climate litigation cases and climate change laws in different countries.
- [Climate Liability News](#): Website with updates on recent climate litigation cases.
- [Greenpeace Guide on Human Rights-Based Climate Litigation](#): Comprehensive guide on how to take human rights-based climate litigation against governments.
- [ELAW Primer on Climate Litigation](#): A 3-page overview on climate litigation.
- [IPCC Assessment Reports](#): Foundational climate science on which climate litigation is frequently based on.
- [Law and Climate Change Toolkit](#): Database of countries' climate change laws and policies.
- [New Model Statute For Citizens to Challenge Governments Failing To Act on Climate Change \(IBA 2020\)](#): The Model Statute provides a number of rationales, precedents/authoritative decisions and articles that would support litigation for the reduction of greenhouse gases.
- [OHCHR Study on the Relationship between Human Rights and Climate Change](#): Overview of the human rights impacts of climate change.
- [Achieving Justice and Human Rights in an Era of Climate Disruption](#): Report produced by the President's Task Force on Climate Justice and Human Rights.
- [Sabin Center Climate Litigation Database](#): Comprehensive database on climate litigation.
- [UNEP Emissions Gap Report](#): Annual reports on the adequacy of global climate change policies.
- [WHO Quantitative risk assessment of the effects of climate change on selected causes of death, 2030s and 2050s](#): Comprehensive study on the projected health impacts of climate change.

#### Key Resource: The Action4Justice Climate Litigation Templates

Finally, we recommend that you consult the relevant **Action4Justice Climate Litigation Template** if you are considering bringing a climate case:

- The [Action4Justice Mitigation Claims Template](#);
- The [Action4Justice Template for Procedural Challenges against Carbon-Emitting Projects](#);
- The [Action4Justice Template for Substantive Challenges against Carbon-Emitting Projects](#); and
- The [Action4Justice People v Carbon Majors Template](#).

The Templates provide a skeleton for people to follow for certain climate litigation cases. The Templates have been designed by legal professionals with expertise in climate litigation.

The Templates aim to encourage effective use of the law to bring climate related litigation in appropriate cases by providing:

- An appropriate **format** for drafting a document in which to make a claim (“**the legal complaint**” - paragraphs, font, page numbers, title, headings etc);
- An effective **structure** in which users can place their legal and factual arguments regarding climate change;
- An outline of the **arguments** that could be used when bringing climate litigation; and
- References to **climate science and cases** to help the user build a strong case.

While your complaint needs to be different depending on what country you are taking a legal case, the Template provides useful tips and guidance to get you started if you are thinking about using legal action for climate justice.

### *3. Do You Work on Climate Change Issues?*

If you are an organisation or a law firm who works on climate change issues and would like your name/resources to be used on the A4J Climate Change Guide, [contact us](#).