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**The role of human rights bodies in climate
litigation**

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Department of Law

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Abstract

Climate litigation is rising to the surface as a valuable instrument to plug the accountability gaps left by international and national climate change law. Human rights arguments are increasingly used as a legal ground for this litigation. Alongside domestic courts, national and international human rights bodies, i.e. national human rights institutions, United Nations human rights mechanisms and regional human rights bodies, emerge as suitable legal venues for climate complaints. The present report aims to shed light on the role that these bodies play and will play in climate litigation. To this end, following an overview of the impacts of climate change and of climate change response measures on the enjoyment of human rights, the report proposes a typology of climate complaints filed with human rights bodies. The report distinguishes between 'pro climate' and 'just transition' complaints, and identifies the main applicants and defendants involved, the types of climate action concerned and the specific human rights that are used as legal grounds for climate complaints. The typology is displayed also by means of illustrative tables. The report highlights then the specific legal hurdles faced by climate complainants before human rights bodies, both procedural ('victim status requirement', 'extraterritorial jurisdiction', and 'exhaustion of domestic remedies'), and substantive (causation, attribution, and due diligence standard). The report offers some explanation on how and to what extent such obstacles can be overcome in the future.

Keywords

Climate change litigation; human rights bodies; state accountability; corporate accountability; just transition

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1. Introduction

The present report aims to shed light on the role that human rights bodies play in climate litigation. The report examines in particular the individual complaints filed with human rights bodies that raise issues of law or facts regarding climate change and climate action.¹ The report considers complaints filed with national and international human rights bodies.

National Human Rights Institutions (NHRIs) are independent institutions charged with the promotion and protection of human rights within respective states. NHRIs are formed in compliance with the Paris Principles endorsed in 1993 by the United Nations (UN) General Assembly.² They take the form of commissions, ombudsmen, consultative commissions, and institutes. NHRIs have played an important role on issues of climate change in all of these different guises.³ NHRIs across the world are seeking to address the human rights impacts of climate change as well as measures to mitigate and adapt to it. They do so in part through data collection, in order to understand the impacts faced by vulnerable groups such as women and indigenous communities, providing policy advice, and investigating the nature of human rights violations.

International human rights bodies include both UN and regional human rights bodies. Over the last decade, the UN 'human rights machinery' has made a remarkable effort to substantiate the link between climate change and human rights.⁴ A variety of 'special procedures' set up by the Human Rights Council have addressed climate change in their reports.⁵ UN human rights treaty monitoring bodies have also addressed the link between climate change and human rights in some of their statements, general comments, and concluding observations.⁶ The

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¹ The Geneva Association defines 'climate litigation' as 'cases brought before administrative, judicial and other investigatory bodies, financial supervisory authorities and ombudsman schemes or in domestic or international courts and organisations, that raise issues of law or facts regarding the science of climate change and climate change mitigation and adaptation efforts'. See: Geneva Association, 'Climate Change Litigation. Insights into the evolving global landscape', 2021, available at <<https://www.genevaassociation.org/research-topics/climate-change-and-emerging-environmental-topics/climate-litigation>>.

² Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.

³ See N Eisen and N Eschke, 'Climate Change and Human Rights: The Contributions of National Human Rights Institutions- A Handbook', German Institute of Human Rights and Center for International Environmental Law, 2020, available at <https://www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf>.

⁴ See the Human Rights Council's resolutions on climate change, starting from Res. 7/23, 'Human rights and climate change', March 2008, and the ensuing studies by the Office of the High Commissioner for Human Rights (OHCHR), starting from the 'Report on the relationship between climate change and human rights', UN Doc. A/HRC/10/61, January 2009.

⁵ See, among the others, the reports of the Special Rapporteur on 'human rights and the environment', e.g., 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/HRC/31/52, February 2016 and 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', UN Doc. A/74/161, July 2019.

⁶ See: Committee on the Elimination of Discrimination Against Women 'General Recommendation N.37 on Disaster risk reduction in the context of climate change', UN Doc. CEDAW/C/GC/37, February 2018; Human Rights Committee, 'General Comment N.36 on the right to life', UN Doc. CCPR/C/GC/36, October 2018; Committee on Economic, Social and Cultural Rights, 'Statement on climate change and the International Covenant on

present report examines the climate change-related individual complaints filed with these UN bodies under the existing procedures.⁷ At the same time, regional human rights bodies promote and protect human rights in different geographic regions around the world. Human rights bodies in the Americas and Europe, in particular the Inter-American Commission on Human Rights and the European Court of Human Rights, have been called upon to decide on individual complaints concerning climate change. These complaints will also be considered in the present report.

Section 2 sets the scene for the investigation by describing the impact that, on the one hand, climate change and, on the other, climate change response measures have on the enjoyment of human rights. Section 3 provides a typology of the climate complaints filed with national and international human rights bodies so far. Section 4 identifies and discusses some specific legal hurdles faced by the applicants before these human rights bodies. Section 5 sets out some concluding observations.

2. Climate change and human rights

2.1. The impacts of climate change on the enjoyment of human rights

The Intergovernmental Panel on Climate Change has described on several occasions the various adverse effects of climate change, such as the changing patterns of extreme weather events, rising sea level, desertification, water shortages, and the spread of tropical and vector-borne diseases.⁸ Such climate-related hazards threaten human society and the life and dignity of individual human beings and affect, directly and indirectly, the full and effective enjoyment of a vast array of human rights across the world.

While many human rights may be negatively affected by climate change, certain rights suffer a more immediate threat. Among others, the rights to life, food and water, health, and a healthy environment are particularly affected by climate change. The right to life, for instance, is increasingly threatened by the rising number and impact of climate-related disaster events. Over the last twenty years, disasters claimed approximately 1.23 million lives, an average of 60,000 per annum, and affected a total of over 4 billion people worldwide.⁹ Food security and water availability are also affected by climate change, and are in turn among the key drivers of

Economic, Social and Cultural Rights', November 2018, available at: <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>; Joint Statement on 'Human Rights and Climate Change' by five UN treaty monitoring bodies, 16 September 2019, available at <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>. The Committee on the Rights of the Child also committed to a new general comment on the subject, see: "The UN Committee on the Rights of the Child commits to a new General Comment on Children's Rights and the Environment with a Special Focus on Climate Change" available at <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27139&LangID=E>.

⁷ The individual communications procedure before the different UN human rights treaty monitoring bodies: <<https://ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm>>, and the communications to the Human Rights' Council special procedures: <<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Communications.aspx>>.

⁸ See in general the latest reports by the IPCC: 'Assessment Report 5', 2014 and the 'Special Report on Global Warming of 1.5° C', 2018, both available at: <www.ipcc.ch>.

⁹ See United Nations Office for Disaster Risk Reduction and Centre for Research on the Epidemiology of Disasters, 'Human Cost of Disasters. An overview of the last 20 years (2000-2019)', 2020, available at <www.undrr.org/media/48008/download>.

increasing global hunger and one of the main leading causes of severe droughts.¹⁰ Climate change's impacts on health vary from expanding the spatial range of disease vectors to changing crop yields and causing direct and indirect effects on mental health.¹¹

In addition, it is openly acknowledged that the impact of climate change is disproportionately borne by vulnerable individuals and communities, which have contributed the least to greenhouse gas emissions and are already in disadvantageous situations. The right of indigenous peoples around the world to continue enjoying the benefits of their own culture is seriously threatened by the impacts of climate change.¹² Populations inhabiting small island developing states also suffer from 'existential risk' due to climate change and sea-level rise in particular; the right to self-determination of these peoples seems to be jeopardized.¹³ Young people and children, who have fewer opportunities to actively participate in the decision-making process, will have to shoulder a heavier burden to tackle the lasting impacts of climate change.¹⁴

The human rights enshrined in national constitutions and various international instruments impose on states negative duties to refrain from adopting policies or carrying out climate-altering activities that significantly impact on human rights, as well as positive duties to adopt and effectively implement legislative and administrative instruments to mitigate and adapt to climate change and to provide redress to victims of climate change impacts. Although human rights protection is normally considered a responsibility for states, corporate actors are also increasingly called on to assume negative and positive human rights obligations concerning climate change. The present report will shed light on the specific rights that have been invoked in the climate complaints before human rights bodies and on the obligations that States are required to meet.

2.2. The impacts of climate change response measures on the enjoyment of human rights

Human rights impacts are not restricted to climate change alone but also include the adverse human rights impacts of climate mitigation and adaptation response measures. These are, for example, instances where renewable energy projects or afforestation projects among others impact upon the rights of indigenous and local communities. These conflicts very often revolve around land on which communities are dependent and where development projects which intended to contribute to climate mitigation or adaptation are being carried out. As Savaresi and Setzer argue, in these 'just transition' conflicts, the communities impacted here are not against climate change mitigation or adaptation action as such, but are concerned rather about the impact that such action has on the enjoyment of their human rights.¹⁵

¹⁰ See FAO, IFAD, UNICEF, WFP and WHO, 'The State of Food Security and Nutrition in the World 2018. Building climate resilience for food security and nutrition', 2018.

¹¹ See WHO, 'Climate change and health, Fact sheet No. 266', available at www.who.int/mediacentre/factsheets/fs266/en/.

¹² See in general UN, Department of Economic and Social Affairs, Indigenous Peoples and Climate Change, available at: www.un.org/development/desa/indigenouspeoples/climate-change.html and Report of the Special Rapporteur on the rights of indigenous peoples, September 2017, UN Doc. A/HRC/36/46.

¹³ See L.A., R.F. McLean, et al., 'Small islands', in IPCC, Assessment Report 5, 2014, pp. 1613-1654. See also IISD, 'Small Islands, Large Oceans: Voices on the frontlines of Climate Change', March 2021, available at: www.iisd.org/system/files/2021-03/still-one-earth-SIDS.pdf.

¹⁴ See: UNICEF, 'Unless we act now. The impact of climate change on children', 2015, available at: www.unicef.org/media/60111/file.

¹⁵ A Savaresi, J Setzer, 'Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation', 2021, available at <https://ssrn.com/abstract=3787963>.

Conflicts of this kind highlight the need for a rights-based approach to climate mitigation and adaptation.¹⁶ Drawing from energy geography and political ecology, it is possible to conceive these conflicts as being concerned with competing priorities and as having uneven outcomes for the most marginalised.¹⁷ In such instances climate change mitigation and adaptation measures are likely to impact negatively upon the human rights of poor, marginalised, and vulnerable populations' in relation to access to land and natural resources, and the right of Free, Prior, and Informed Consent (FPIC).¹⁸

Communities whose enjoyment of human rights is adversely impacted have invoked the state's negative obligation not to violate human rights and have demanded compliance with human rights obligations by states and corporate actors when they have approached courts and other legal fora.

For example, the UN Committee on the Elimination of Racial Discrimination called upon Norway to suspend a wind project as it was likely to disturb the reindeer and the livelihoods of the Sami people.¹⁹

Another set of cases includes those where rapid plantation and restoration programs are underway in forest areas to create carbon sinks as a mitigation strategy. In Indonesia where the Reducing Emissions from Deforestation and Forest Degradation began with the initial stage of REDD-readiness, The Committee on the Elimination of Racial Discrimination (CERD) under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (UNCERD) through its early warning measures issued two letters to the Indonesian government warning that the regulations adopted for the REDD program do not take into account the rights of indigenous peoples. This is an example of a case where restoration programs need to account for the human rights of vulnerable communities.²⁰

3. A typology of climate complaints before human rights bodies

Human rights-based climate litigation is still limited in terms of the total number of cases. However, it is growing fast, especially since 2015, when the Paris Agreement was adopted. In May 2021, Savaresi and Setzer identified 112 rights-based cases listed in the world's leading climate litigation databases.²¹

¹⁶ Sébastien Jodoin, Annalisa Savaresi, Margaretha Wewerinke-Singh, 'Rights-based approaches to climate decision-making,' *Current Opinion in Environmental Sustainability*, Volume 52, 2021, Pp 45-53.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Business & Human Rights Resource Centre, 'Norway to Build Wind Farm despite UN Calls to Suspend Project over Concerns of Impact on Indigenous Herders' Livelihoods' (2018) available at <<https://www.business-humanrights.org>>

²⁰ Annalisa Savaresi, 'The Human Rights Dimension of REDD' (2012) 21 *Review of European Comparative & International Environmental Law* 102 and Communication of the Committee Adopted Pursuant to the Early Warning and Urgent Action Procedures (13 March 2009), available at <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf> and Communication of the Committee Adopted Pursuant to the Early Warning and Urgent Action Procedures (28 September 2009), available at <http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia28092009.pdf>.

²¹ A Savaresi, J Setzer, *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, (2021), available at <ssrn.com/abstract=3787963>. These numbers refer to 'pro climate' cases as it is explained below. The databases are managed by the Sabin Centre for Climate Change Law, available at

At the international level, 10 climate complaints have been filed so far, 4 with UN human rights bodies and 6 with regional human rights bodies, as illustrated in Table 1 below.²² While there is no data compiled concerning complaints, investigations, and monitoring activities by NHRIs specifically, a report by the Center for International Environmental Law documents their increasing involvement in questions related to climate change. The report asserts that “between January 2012 and February 2020 there were at least twelve submissions from NHRIs to human rights treaty bodies concerning climate change”.²³ The complaints before NHRIs discussed in this report are illustrated in Table 2.

In the present section we map these complaints, by relying on the typology built by Savaresi and Setzer.²⁴ We first distinguish between “pro climate” complaints – where the applicants demand state and corporate actors to adopt/enhance climate action – and “just transition” complaints – where the applicants oppose climate action projects, policies, and legislation because of their alleged negative effect on human rights.²⁵

The typology then takes the following elements into account: the geographical and temporal distribution of the complaints and their outcomes; the type of applicant and defendant; the type of climate action under dispute; and the specific human rights that are used in the complaints. The two illustrative tables place the complaints we discuss within this typology.

Table 1: Climate complaints before international human rights bodies²⁶

<climatecasechart.com/non-us-case-category/human-rights/>, and by the Grantham Research Institute in Climate Change and the Environment, available at <https://climate-laws.org/cclow/litigation_cases>.

²² The 10 climate complaints are the following: *Ioane Teitiota v New Zealand*, UN Human Rights Committee, Communication n. 27278/2016, Views adopted on 7 January 2020, UN Doc. CCPR/C/127/D/2728/2016; *Sacchi et al. v Argentina et al.*, Committee on the Rights of the Child, Communication n.104/2019, Decision adopted on 8 October 2021, UN Doc. CRC/C/88/D/104/2019; *Complaint of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia’s Inaction on Climate Change*, Communication n.3624/2019; *Rights of Indigenous People in Addressing Climate-Forced Displacement v United States*, UN Human Rights Council Special Procedures, January 2020; *Duarte Agostinho et al v Portugal et al*, European Court of Human Rights, February 2020, Appl n. 39371/20; *Klimaseniorinnen v Switzerland*, European Court of Human Rights, November 2020, Appl. n. 53600/20; *Mex M v Austria*, European Court of Human Rights, March 2021, *Greenpeace Nordic Association v Norwegian Ministry of Petroleum and Energy*, European Court of Human Rights, June 2021; *Petition to the Inter-American Commission on Human Rights, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Inuit Petition)*, December 2005; *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada*, April 2013. These complaints can all be found in the two mentioned climate litigation databases. In their paper, Savaresi and Setzer referred to 12 international (human rights-based) cases, however these also include *Armando Ferrão Carvalho v European Parliament* and the *EU Biomass Plaintiffs v European Union*, both filed with the European Court of Justice.

²³ N Eisen and N Eschke, ‘Climate Change and Human Rights: The Contributions of National Human Rights Institutions- A Handbook’, German Institute of Human Rights and Center for International Environmental Law, 2020 available at <www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf>.

²⁴ A Savaresi, J Setzer, Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation, 2021), available at <ssrn.com/abstract=3787963>.

²⁵ Ibid.

²⁶ Acronyms used in the table: ICCPR: International Covenant on Civil and Political Rights; CRC: Convention on the Rights of the Child; ICESCR: International Covenant on Economic, Social, and Cultural Rights; ICERD: International Covenant on the Elimination of Racial Discrimination; GPID: Guiding Principles on Internal Displacement; UNDRIP: UN Declaration on the Rights of Indigenous Peoples; UDHR: Universal Declaration on

Complaint	Human rights body	Pro climate or Just transition	Type of applicant and defendant	Type of climate action	Human rights used as legal basis	Outcome
1. Teitiota v New Zealand	UN Human Rights Committee	Pro climate	Applicant: Individual asylum seeker Defendant: state	International protection for climate change-induced cross-border displaced persons	Right to life (Art. 6 ICCPR)	Rejected (on the merits)
2. Sacchi et al. v Argentina, Brazil, France, Germany and Turkey	UN Committee on the Rights of the Child	Pro climate	Applicant: group of sixteen children Defendant: group of 5 states	Mitigation (adaptation is only marginally touched upon)	Children rights to life, health, culture, and best interest of the child (Arts. 6, 24, 30, 3 CRC).	Rejected (on procedural grounds)
3. Torres Strait Islanders v Australia.	UN Human Rights Committee	Pro climate	Applicant: group of eight indigenous islanders Defendant: State	Mitigation and adaptation	Rights to culture, being free from arbitrary interference with privacy, family and home, life (Arts. 27, 17, 6 ICCPR).	Pending
4. Rights of Indigenous People in Addressing Climate-Forced Displacement	UN Human Rights Council Special Procedures	Pro climate	Applicant: NGO on behalf of indigenous groups Defendant: State	Adaptation	Rights to life, self-determination, culture, food, water, adequate standard of living, health, no discrimination (GPID; UNDRIP;	Pending. (Communication by the UN Special Rapporteurs sent to the US. Reply is pending.)

Human Rights;; CRC: Convention on the Rights of the Child; ECHR: European Convention on Human Rights; ADRDM: American Declaration on the Rights and Duties of Man.

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					UDHR; Art. 6 ICCPR; Art. 11 ICESCR; Arts. 1, 2 ICERD).	
5. Duarte Agostinho et al v Portugal et al	European Court of Human Rights	Pro climate	Applicant: group of six children Defendant: state	Mitigation	Rights to life, private and family life and prohibition of discrimination (Arts. 2, 8, 14 ECHR)	Pending
6. Klimaseniorinnen v Switzerland	European Court of Human Rights	Pro climate	Applicant: an association and a group of four individuals Defendant: state	Mitigation	Rights to life, private and family life, fair trial, effective remedy (Arts. 2, 8, 6, 13 ECHR)	Pending
7. Mex M v Austria.	European Court of Human Rights	Pro climate	Applicant: individual Defendant: state	Mitigation	Rights to private and family life, life, fair trial, effective remedy (Arts. 8, 2, 6, 13 ECHR)	Pending
8. Greenpeace Nordic Association v Norwegian Ministry of Petroleum and Energy	European Court of Human Rights	Pro climate	Applicant: two NGOs and a group of six youth individuals Defendant: state	Mitigation	Rights to life, private and family life, effective remedy, and prohibition of discrimination (Arts. 2, 8, 6, 13, 14 ECHR)	Pending
9. Inuit people v the United States.	Inter-American Commission on Human Rights	Pro climate	Applicant: individual, also on behalf of an indigenous group	Mitigation and adaptation	Rights to culture, property, health, life, physical integrity and security,	Rejected (at a preliminary stage)

			Defendant: state		residence and movement (Arts. 1, 8, 9, 11, 13, 23 ADRDM)	
10. Arctic Athabaskan peoples v Canada.	Inter-American Commission on Human Rights	Pro climate	Applicant: International Organisation and group of four individuals Defendant: state	Mitigation and adaptation	Rights to culture, property, means of subsistence ; health (Arts. 11,13,23 ADRDM)	Pending

Table 2: Discussed climate complaints before national human rights institutions

Complaint	Human rights body	Pro climate or Just transition	Type of applicant and defendant	Type of climate action	Human rights used as legal basis	Outcome
1.Greenpeace Southeast Asia and Philippines Rural Reconstruction Movement	Philippines Commission on Human Rights	Pro Climate	Applicant: NGO and association Defendant: corporate actors	Mitigation	Right to life, right to housing, right to adequate standard of physical and mental health	Inquiry pending
2.High Level Independent Fact Finding Mission to the Embodut Forest	Kenya National Commission on Human Rights	Just Transition	Applicant: independent fact-finding mission Defendant: EU funded Water Project	Adaptation	Right to self-determination of the Sengwer indigenous people	Interim report has been submitted
3.Greenpeace Nordic Association	Norwegian National Human Rights Institutions	Pro Climate	Amicus Curiae Defendant: State	Mitigation	Right to life and the rights of future generations	Amicus curiae brief was submitted but the case before the court was dismissed

3.1. Classic “pro climate” v “just transition” complaints

NHRIs have been the site for several just transition cases. An example of this is the investigation undertaken by the Kenyan NHRI on the violation of the rights of indigenous communities by the European Union funded Water Towers Project.²⁷ The Kenyan Human Rights Commission (KNHRC) as part of its broad mandate to promote constitutionalism, secure the observance of human rights and protect the sovereignty of its people launched a high-level independent fact-finding mission to investigate the forceful evictions and violations of the rights of the Sengwer Indigenous peoples and the death of a resident at Embodut forest.²⁸ These violations were allegedly caused by an EU-funded program as part of European Union support to infrastructure efforts in Kenya to conserve forests and support rehabilitation to protect Kenya’s major watersheds.²⁹ This program was found to have violated the right to self-determination of the indigenous communities as the Kenyan forest service pushed these communities outside of these forests.³⁰ The detailed investigation by the KNHRC revealed that there was a history of exclusion of these communities by the Kenyan Forest Service, inadequate compensation, and forced evictions. It recommended that the Kenyan Forest Service, County governments adopt participatory approaches to managing the forest areas. This is an instance where funding from the EU that had been intended to assist Kenya in its climate change mitigation and adaptation efforts was used for a project that ended up producing negative human rights impacts.³¹ In instances such as this, NHRIs serve as an avenue to investigate the human rights impacts of climate change mitigation or adaptation action. Savaresi and Setzer note how applicants in this type of complaints do not necessarily oppose climate action *per se*, but rather the impacts of climate projects or policies on the enjoyment of their human rights.³² In this connection, NHRIs can facilitate the formulation of a rights-based approach to climate mitigation and adaptation efforts.³³

Conversely, all the climate complaints filed with international human rights bodies so far can be considered as ‘pro climate’. At the moment we are not aware of individual complaints concerning tensions between climate action and the enjoyment of human rights before international human rights bodies.

3.2. Geographical and chronological distribution and outcome

If we consider the place in which the alleged human rights violations occurred as the site of the complaint, the majority of the complaints brought before international human rights bodies were brought in Europe (5), with 4 cases North America; 3 cases Oceania; 1 case Asia; and 1

²⁷ Interim Fact-Finding Report by the High-Level Independent Fact-Finding Mission of the Kenyan Human Rights Commission (2018) available at <https://eeas.europa.eu/sites/default/files/report_knchr-_14_june-official_0.pdf>

²⁸ Part II of the Kenya National Commission on Human Rights Act, 2011.

²⁹ Ibid

³⁰ Interim Fact-Finding Report by the Kenyan Human Rights Commission (2018) available at <https://eeas.europa.eu/sites/default/files/report_knchr-_14_june-official_0.pdf>

³¹ Ibid

³² Ibid.

³³ Sébastien Jodoin, Annalisa Savaresi and Margaretha Wewerinke-Singh, ‘Rights-Based Approaches to Climate Decision-Making’ (2021) 52 *Current Opinion in Environmental Sustainability* 45.

case South America.³⁴ The complaints before international human rights bodies are overall very recent. Only two complaints filed with the Inter-American Commission (the renowned *Inuit People* petition and the *Arctic Athabaskan peoples* petition) were lodged before 2015.

NHRIs tend to be restricted in their activities to the jurisdiction of the nation-state in which they are based. However, the carbon majors inquiry by the Philippines Human Rights Commission has shown that NHRIs can go beyond these jurisdictional boundaries to investigate actors that are not headquartered or otherwise based in the territory of the state where they operate. As with international human rights bodies, NHRIs have been gaining importance as avenues for climate change litigation. It is evident that there has been increasing recourse to them since 2012.³⁵

As for the outcome of such complaints, the vast majority (7) of the complaints before international human rights bodies are still under consideration, while 2 complaints have been rejected.³⁶ There is not a similar figure for complaints before NHRIs.³⁷

3.3. Type of applicant and defendant

Applicants before international human rights bodies are normally groups of individuals. NGOs have limited standing before international human rights bodies. However, in some complaints, they also act as applicants. For example, *Greenpeace Nordic Association* was brought before the European Court of Human Rights in June 2021 by six young Norwegians and two organizations (Greenpeace Nordic and Nature and Youth). The complaint concerned the issuing of oil and gas exploration licenses in the Barents Sea.³⁸

Four out of ten complaints before international human rights bodies have been filed by or on behalf of indigenous groups.³⁹ Indigenous peoples are among the most immediate victims of climate change, and they can make use of the special protection they enjoy under international human rights law as an entry point for climate litigation before international human rights bodies.⁴⁰

Children and youth also act as applicants in human rights-based climate litigation, including before international human rights bodies. The most illustrative examples are the *Sacchi et al* complaint, which has been brought before the UN Committee on the Rights of the Child by a group of very young climate activists from all over the world; and the *Duarte Agostinho et al*

³⁴ The *Sacchi et al* complaint is counted for every continent on the basis of the applicants' countries of origin.

³⁵ N Eisen and N Eschke, 'Climate Change and Human Rights: The Contributions of National Human Rights Institutions- A Handbook', German Institute of Human Rights and Center for International Environmental Law, 2020 available at <www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf>.

³⁶ The Inter-American Commission dismissed the *Inuit petition* at a preliminary stage. The *Teitiota* complaint has been rejected on the merits by the UN Human Rights Committee. The *Rights of Indigenous People in Addressing Climate-Forced Displacement* complaint is not counted here, as the communication mechanism of the Human Rights Council's Special Procedures does not include a proper decision on admissibility and merits. The Special Rapporteurs have sent an official letter to the US on the basis of the communication received.

³⁷ N Eisen and N Eschke, 'Climate Change and Human Rights: The Contributions of National Human Rights Institutions- A Handbook', German Institute of Human Rights and Center for International Environmental Law, 2020 available at <www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf>.

³⁸ See *Greenpeace Nordic Association v Norwegian Ministry of Petroleum and Energy*, Application to the European Court of Human Rights, June 2021.

³⁹ The complaints are the following: *Torres Strait Islanders*; *Rights of Indigenous People in Addressing Climate-Forced Displacement*; and the *Inuit People and Arctic Athabaskan Peoples* petitions.

⁴⁰ See *infra* Section 3.5 on the use of the right to culture in climate litigation.

complaint, in which 6 Portuguese young people claimed that Portugal and other 32 respondent states were violating their rights enshrined in the European Convention on Human Rights.⁴¹

Climate change is intensifying internal and cross-border displacement of people, hence complaints are likely to be increasingly brought by displaced persons, migrants, and asylum seekers. *Ioane Teitiota v New Zealand* is the first illustrative example of how climate change-induced displacement can form the basis for an action before an international human rights body.⁴² The complaint concerns the alleged violation of the *non-refoulement* obligation arising from the right to life enshrined in Art. 6 of the International Covenant on Civil and Political Rights, i.e., the duty not to send an individual to a country where his/her right to life might be put at serious risk.

States are the only possible defendants before international human rights bodies. It is interesting that there are two complaints that have been addressed to multiple respondent states. The *Sacchi et al* complaint is addressed to Argentina, Brazil, France, Germany, and Turkey, while the *Duarte Agostinho et al* complaint is addressed to 33 State Parties to the European Convention on Human Rights. Multi-state complaints of this kind pose additional challenges, mainly concerning extraterritorial jurisdiction, which will be discussed in more detail in the next section.

In relation to NHRIs, we see complaints being filed by indigenous communities and NGOs. However, we also find that NHRIs sometimes take the initiative to report on the human rights aspects of climate change as part of their organizational mandate of promoting and protecting human rights. An example of this is the national report submitted by Bangladesh's NHRI which highlights the role that climate change will have in adversely impacting human rights in view of the specific vulnerabilities that Bangladesh struggles with.⁴³ The carbon majors inquiry is a unique case in which corporations were defendants in an investigation brought by the Philippines NHRI.⁴⁴ It is extraordinary as a quasi-judicial body like the Philippines NHRI investigated how corporations were responsible for human rights violations of the citizens of the Philippines caused by climate change. The carbon majors included the forty-seven investor-owned oil, coal, and gas companies head quartered across the globe whose contribution to global greenhouse gases was identified based on the study conducted by the climate accountability institute.⁴⁵

3.4. Type of climate action

The complaints filed before NHRIs have ranged from mitigation, adaptation, questions of corporate accountability to cases involving just transition concerns.

⁴¹ *Sacchi et al. v Argentina et al.*, Committee on the Rights of the Child, 23 September 2019; *Duarte Agostinho et al v Portugal et al*, European Court of Human Rights, February 2020, Appl n. 39371/20.

⁴² *Ioane Teitiota v New Zealand*, UN Human Rights Committee, Communication n. 27278/2016, Views adopted on 7 January 2020, UN Doc. CCPR/C/127/D/2728/2016.

⁴³ National Report Submitted by Bangladesh to the Human Rights Council A/HRC/WG.6/4/BGD/1 available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/168/33/PDF/G0816833.pdf?OpenElement>>

⁴⁴ Petition submitted by Greenpeace South East Asia and Philippine Rural Reconstruction Movement to the Commission on Human Rights of the Philippines available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf> .

⁴⁵ N Eisen and N Eschke, 'Climate Change and Human Rights: The Contributions of National Human Rights Institutions- A Handbook' (Published by German Institute of Human Rights and Center for International Environmental Law, 2020) available at <https://www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf>

By contrast, the vast majority of the complaints filed with international human rights bodies specifically target the inadequate mitigation action of respondent States. The applicants request the international human rights bodies to find that this violates their human rights. They also request the bodies to recommend or require that the respondents enhance their climate mitigation action. In some complaints, the applicants identify the emissions reduction targets that the respondent States should achieve to 'do their part'.

For example, the *Torres Strait Islanders* complaint argues that Australia should "reduce its emissions by at least 65% below 2005 levels by 2030 and achieve net-zero before 2050".⁴⁶ Along with positing emissions reduction targets, complaints may urge the respondent States to cease the extraction, export and import, and financing of fossil fuels, as the *Duarte Agostinho et al* application to the European Court of Human Rights.⁴⁷ The *Sacchi et al* complaint also mentions the fact that the five respondent States are failing to "use all available legal, diplomatic, and economic tools to ensure that the major emitters are also decarbonizing at a rate and scale necessary to achieve the collective goals".⁴⁸ A complaint can also address a single specific climate-altering activity, such as oil exploration and extraction projects. The *Greenpeace Nordic Association* complaint specifically addresses, as already mentioned, oil exploration licenses in the Arctic.

Overall, few human rights-based cases have dealt with adaptation so far.⁴⁹ Among the complaints filed with international human rights bodies, the *Torres Strait Islanders* and the *Rights of indigenous people in addressing climate-forced displacement* complaints are the only ones that link the alleged human rights violations with the inadequate adaptation action of the respondents. The applicants in the *Torres Strait Islanders* have asked the UN Human Rights Committee to recommend that Australia "commit at least \$20 million for emergency measures such as seawalls, as requested by local authorities – and sustained investment in long-term adaptation measures to ensure the islands can continue to be inhabited".⁵⁰

In the future, climate litigation could be used to fill the accountability gap on loss and damage,⁵¹ thereby requiring a respondent state (or corporate actor) to provide adequate compensation for climate harm that has already occurred.⁵² Developments in the science of 'extreme weather event attribution' may facilitate this type of climate litigation.⁵³ While tort law would seem the

⁴⁶ See Client Earth, Press Release on Torres Strait FAQ, available at: <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/>.

⁴⁷ See *Duarte Agostinho et al v Portugal et al*, Application to the ECtHR, para 9.

⁴⁸ *Sacchi et al*, complaint, para 18.

⁴⁹ A Savaresi, J Setzer, Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation, 2021), available at <ssrn.com/abstract=3787963>.

⁵⁰ See Client Earth, Press Release on Torres Strait FAQ. In this respect, the communication already obtained a first 'key win', as in February 2020 Australia announced to be willing to allocate \$25 million for CCA and DRR measures (in particular seawalls construction) in the islands, see: Client Earth, "Torres Strait Islanders win key ask after climate complaint", press release 19 February 2020 <www.clientearth.org/latest/latest-updates/news/torres-strait-islanders-win-key-ask-after-climate-complaint/>.

⁵¹ Loss and damage is introduced and defined in Art. 8 of the Paris Agreement. See Paris Agreement, adopted 12 December 2015 and entered into force 4 November 2016, United Nations Treaty Series, 54113.

⁵² See P Toussaint, "Loss and Damage and Climate Litigation: The Case for Greater Interlinkage", RECIEL, 2020.

⁵³ See F Otto (2019), "Attribution of extreme weather events: how does climate change affect weather?", Weather, 74: 325-326, F Otto, R James, M Allen, "The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts", Environmental Change Institute, available at <unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf>. See also the website of World Weather Attribution at <www.worldweatherattribution.org/about/>.

most suitable legal tool for use in this situation, it remains to be seen if human rights arguments and international human rights bodies, in particular, can play a role in this regard.

The only climate complaint decided on the merits before international human rights bodies thus far does not directly concern mitigation, adaptation, or loss and damage. Instead, *Teitiota* concerns the alleged violation of the *non-refoulement* obligation arising from the right to life enshrined in Art. 6 of the International Covenant on Civil and Political Rights, i.e., the duty not to send an individual to a country where his/her right to life might be put at serious risk.⁵⁴ New Zealand's judicial authorities rejected a demand for refugee status by Mr Teitiota, a Kiribati citizen who complained about the life-threatening effects of sea-level rise in his country of origin. Having exhausted domestic remedies, Mr Teitiota filed a complaint with the HRC. The Human Rights Committee considered the individual complaint admissible, as the living conditions in Kiribati "do not concern a hypothetical future harm, but a real predicament".⁵⁵ However, it then dismissed the communication on the merits. The Committee found that Mr Teitiota had not sufficiently substantiated the claim that he faced a "real risk" to his life if sent back to Kiribati.⁵⁶

Although Mr Teitiota's claim was rejected, much of the literature hailed the Decision by the HRC as 'ground-breaking'.⁵⁷ The reason for this lies in the significant opening of the Human Rights Committee to the possibility of including the adverse effects of climate change within the factors able to trigger the *non-refoulement* obligations arising from the rights to life and not to be subject of torture or to cruel, inhuman, or degrading treatments enshrined in the International Covenant on Civil and Political Rights. Following this, one can reasonably expect that complaints before international human rights bodies will increasingly tackle this issue. Yet, the relationship between international protection schemes and climate change response strategies is controversial. Resettlement away from countries that are suffering from egregious loss and damage due to climate change can itself be considered a response strategy. In this sense, complaints like *Teitiota* might foreshadow the relocation of entire communities and populations. However, some particularly vulnerable countries, like small island developing States, would firmly reject this assertion, arguing on the contrary that 'adaptation by resettlement' would harm their self-determination, national dignity, and the right of the inhabitants to enjoy their own culture.⁵⁸

⁵⁴ The principle of *non-refoulement* is first of all derived from the 1951 Convention Relating to the Status of Refugees. Then, some international human rights bodies have expanded the *non-refoulement* obligations to offer a 'complementary protection' also to individuals who do not qualify as refugees but who have been forcibly displaced by their homes and are at risk of life deprivation, torture and other degrading treatment if returned back.

⁵⁵ UN Human Rights Committee, *Ioane Teitiota v New Zealand*, Communication n. 27278/2016, Views adopted on 7 January 2020, UN Doc. CCPR/C/127/D/2728/2016, para 8.5.

⁵⁶ *Ibid.*, para 9.4.

⁵⁷ See by way of example: B Behlert, 'A Significant Opening. On the HRC's Groundbreaking First Ruling in the Case of a "Climate refugee"' Voelkerrechtsblog (30 January 2020) <<https://voelkerrechtsblog.org/articles/a-significant-opening/>>.

⁵⁸ See for instance the Submissions under Res 7/23 of the UN Human Rights Council regarding the relationship between human rights and the impacts of climate change by the Maldives (September 2008) and the Republic of Marshall Island (December 2008) available at, respectively: <www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf> and <www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Republic_of_the_Marshall_Islands.doc>. See also: M. Wewerinke-Singh, "State Responsibility, Climate change and Human Rights under International Law", Hart Publishing, 2019, pp. 110-112.

3.5. Which human rights?

A survey of complaints filed before NHRIs reveals that the rights to life, self-determination, and a healthy environment are among those most frequently invoked in relation to climate change.⁵⁹ For example, in the *carbon majors* inquiry, the complainants argued that the carbon majors had violated their right to life, adequate housing, self-determination, food, water, sanitation, and the highest attainable standard of physical and mental health.⁶⁰ In the investigation by the Kenyan NHRI, the applicants alleged a violation of the right to self-determination of the Sengwer peoples and their right to live in on their traditional lands.⁶¹

In a recent Amicus Curiae briefing submitted in the case concerning oil and gas extraction from the Barents Sea, the Norwegian NHRI provided its interpretation of the “right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained”, as protected by the Norwegian Constitution. The submission provided an expansive interpretation of this article, to encompass the rights of future generations and solidarity between generations.⁶²

The right to life has been used in *Teitiota*, as the legal basis to assert the state duty of *non-refoulement*. The right to life has been also used in *Sacchi*, with specific reference to the life of the child, as arising from Art. 6 of the Convention on the Rights of the Child.

The right to private and family life has been used in climate complaints before international human rights bodies. Articles 2 and 8 of the European Convention on Human Rights on the rights to life, and private and family life, respectively, constitute the legal bases for the consolidated ‘environmental jurisprudence’ of the European Court of Human Rights.⁶³ It comes as little surprise that these same rights have been used in the recent climate complaints. All four pending complaints before the Court are based on Articles 2 and 8.

Some of the climate complaints also make reference to rights to a fair trial and an effective remedy. For instance, in the *Klimaseniorinnen*, the applicants claim a violation of Articles 6 and 13 of the European Convention on Human Rights. They argued that the Swiss domestic courts dismissed their claims arbitrarily, wrongly denying them standing rights.⁶⁴

Economic, social, and cultural rights could, in theory, be used in relation to environmental protection and climate change specifically. Respect for these rights is seriously endangered by the adverse effects of climate change and, if compared to the right to life, they also entail a more collective dimension. Yet, these rights suffer from limited ‘justiciability’ at the international

⁵⁹ N Eisen and N Eschke, ‘Climate Change and Human Rights: The Contributions of National Human Rights Institutions- A Handbook’ (Published by German Institute of Human Rights and Center for International Environmental Law, 2020) available at <https://www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf>

⁶⁰ Carbon Majors Petition available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf>.

⁶¹ Interim Fact-Finding Report by the Kenyan Human Rights Commission (2018) available at <https://eeas.europa.eu/sites/default/files/report_knchr-_14_june-official_0.pdf>

⁶² Written Submission by the Norwegian National Human Rights Institution on Case No. 20-051052SIV HRET available at <<https://www.klimasøksmål.no/wp-content/uploads/2020/11/Amicus-Curiae-from-the-Norwegian-National-Human-Rights-Institution.pdf>>

⁶³ See: Council of Europe, “Manual on Human Rights and the Environment”, 2012. See also: D. J. Harris, M. O’Boyle, “Law of the European Convention on Human Rights”, *Oxford University Press*, 2014.

⁶⁴ *Klimaseniorinnen v Switzerland*, European Court of Human Rights, November 2020, Appl. n. 53600/20, Section f.

level.⁶⁵ So far, *the rights of indigenous people in addressing climate-forced displacement* has been the only international climate complaint to rely explicitly on the International Covenant on Economic, Social and Cultural Rights. The complaint focuses in particular on the rights to self-determination, subsistence, food, water and sanitation, and health.⁶⁶

The right to culture, as enshrined in the International Covenant on Civil and Political Rights at Art. 27, has also been used by the *Torres Strait Islanders* before the Human Rights Committee. The right to culture has become another important access point for climate complaints before international human rights bodies with a specific connection to indigenous peoples. The right is particularly developed in the Inter-American system, where it served as the legal basis, together with the right to (communal) property, for the consolidation of the jurisprudence concerning the protection of indigenous groups, their lands, and the natural resources they dispose of.⁶⁷

As described above, some climate complaints have been launched by or on behalf of children. In *Sacchi et al* the applicants have invoked the rights of the child to life, health, and culture – this latter right only concerning the indigenous applicants – as well as on the ‘best interest of the child’ principle, all enshrined in the Convention on the Rights of the Child.

In *Duarte Agostinho et al*, the young applicants argued that the material interferences with their rights “are greater than in relation to older generations. This is not only because they will live longer, but also because the impacts of climate change will worsen over time”. The applicants conclude: “there is no objective and reasonable justification for shifting the burden of climate change onto younger generations by adopting inadequate mitigation measures”.⁶⁸ The *Greenpeace Nordic Association* complaint also invokes the ‘indirect and disproportionate discrimination’ that both young and indigenous applicants suffer due to the licensing decision.⁶⁹

4. Specific legal hurdles to climate complaints before human rights bodies

The literature has considered the specific hurdles faced by applicants seeking relief from climate change-related human rights violations at the national and international levels.⁷⁰ In

⁶⁵ See United Nations Office of the High Commissioner on Human Rights, ‘Key concepts on ESCRs – Can economic, social and cultural rights be litigated at courts?’, available at: <www.ohchr.or/en/issues/escr/pages/canescrbelitigatedatcourts.aspx>. See also: F Coomans, ‘The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights’, *Human Rights Law Review* 11, 2011.

⁶⁶ *Rights of Indigenous People in Addressing Climate-Forced Displacement v United States*, UN Human Rights Council Special Procedures, January 2020, pp. 39-48.

⁶⁷ See: J. Anaya, *Indigenous Peoples in International Law*, Oxford University Press, 2004, and G. Pentassuglia, “Towards a Jurisprudential Articulation of Indigenous Land Rights”, *European Journal of International Law* 22, 2011.

⁶⁸ *Duarte Agostinho et al v Portugal et al*, European Court of Human Rights, February 2020; Appl n. 39371/20, para 31.

⁶⁹ *Greenpeace Nordic Association v Norwegian Ministry of Petroleum and Energy*, European Court of Human Rights, June 2021 Section f.

⁷⁰ See among the others: A Savaresi and J Hartmann, ‘Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry’ in J Lin and D Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020); A Savaresi, ‘Human Rights and the Impacts of Climate Change: Revisiting the Assumptions’ (2021) 11 *Oñati Socio-Legal Series* 231; C Bakker ‘Climate Complaints before UN Human Rights Bodies: Overcoming The Obstacles’, paper presented at the Workshop ‘Climate Change Litigation and Human Rights Arguments’ held at the Sant’Anna School of Advanced Studies in Pisa on 6-7 May 2021, forthcoming, in file with authors.

this section we identify and discuss some of these hurdles, distinguishing between procedural and substantive ones.

4.1. Procedural hurdles

The first legal hurdle to litigating climate change before human rights bodies come at the admissibility stage when the action has to meet some specific procedural requirements to be declared admissible in order to be heard. In the first place, the applicant must have legal standing before the relevant body. Accordingly, the applicant must fulfill the so-called 'victim status requirement', and the jurisdiction requirement. In addition to this, as a general rule available domestic remedies have to be exhausted before bringing the complaint to an international human rights body. Although the nature of these requirements can change from one human rights system to another, these procedural hurdles are common to all.

4.1.1. The victim status requirement

For a complaint to be declared admissible before a human rights body, a direct link between the applicant and the respondent State's act or omission has to be identified. The applicant has to prove the 'victim's status', i.e., that he/she is personally and directly affected by the behavior of the respondent. It follows that the complaint cannot challenge a law or a practice on behalf of the 'public interest' (so-called *actio popularis*). As in most national courts, this type of legal action is not allowed before human rights bodies.⁷¹

This requirement constitutes the first important obstacle to climate complaints. In particular, when reference is made to the risk of harm due to climate change, although scientific evidence suggests that risk is dramatically increasing, it is difficult if not impossible to determine whether and to what extent this risk will affect or has affected a particular individual or group of individuals.⁷²

A few human rights-based climate cases were declared inadmissible for lack of standing due to the alleged public interest nature of the claim. *Klimaseniorinnen* is an illustrative example, and was brought before the European Court of Human Rights precisely because Swiss judicial bodies dismissed the case due to the lack of standing of the applicants, providing a very narrow interpretation of the victim requirement:

The prerequisite for victim status is fulfilled if a sufficiently direct connection exists between the applicant and the disadvantage which has occurred or is impending and which brought about the alleged violation. Persons pursuing a public interest are excluded by this criterion. In principle, an *actio popularis*, i.e., an application in the name of an indeterminate number of third parties against a law as such or against a government policy, is not possible...In the present case, the applicants are pursuing public interests which cannot provide the basis for victim status.⁷³

⁷¹ See: Human Rights Treaty Bodies. Individual Communications, available at: <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whocan>.

⁷² See C Bakker 'Climate Complaints before UN Human Rights Bodies: Overcoming The Obstacles'.

⁷³ See 'Unofficial translation of the juridical relevant part of the order the KlimaSeniorinnen received the 26 of April 2017 by the Federal Department of the Environment, Transport, Energy and Communications', para 2.1, available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170426_No.-A-29922017_order-1.pdf. See also Case T-330/18, *Armando Carvalho and Others v The EU Parliament and Council ('The Peoples' Climate Case')*, 8 May 2019.

In *Teitiota* the Human Rights Committee granted standing to the applicant and declared the complaint admissible. However, it rejected his claims on the merits, finding that the risk that the living conditions in Kiribati posed for Mr Teitiota was not personal to him and his family but was shared by all the other inhabitants. In this way, the Committee in effect decided that the applicant did not meet the ‘victim requirement’.⁷⁴ Overall, putting additional emphasis on how the impacts of climate change (or climate change response measures/action) personally affect the applicants appears to be key to overcome this first legal hurdle. Applicants should provide evidence of how they suffered from these impacts or how they face a direct and immediate risk as a result of it.⁷⁵ For instance, in *Sacchi et al* the applicants have emphasised the impacts and risks concretely faced by each young applicant.⁷⁶

4.1.2. Jurisdiction

Jurisdiction can constitute a second key procedural hurdle for complaints where the alleged human rights violations are linked to transboundary climate harms. *Duarte Agostinho et al* is an illustrative example of climate complaint addressing transboundary harm before an international human rights body. In the complaint, Portuguese residents claim against 32 respondent States other than Portugal. These claims are based on the extraterritorial jurisdiction of the respondents. The applicants claim that through their contributions to climate change the respondent states are in effect exercising significant control over the interests of the applicants and that the capability of Portugal alone, as territorial state, to confront climate change and protect those interests is limited. Accordingly, in the particular circumstances of the case, the applicants would fall within the jurisdiction of all 33 respondent states.⁷⁷

In recent decades international human rights bodies have developed an extraterritorial scope of application of human rights treaties.⁷⁸ The consolidated approach to extraterritoriality, however, applies to situations in which a given state has “effective control” over either the territory of another State or over individuals placed within the territory of another State. To properly address the challenge of climate change, human rights bodies would have to extend further the concept of extraterritoriality. Recently, in its Advisory Opinion on ‘human rights and the environment’, the Inter-American Court of Human Rights put forward a progressive interpretation of the concept based on a ‘cause-effect relationship’. The Court observed that:

when transboundary harm occurs which affects rights under the American Convention, it is understood that the persons whose rights have been violated are under the jurisdiction of the

⁷⁴ See C Bakker ‘Climate Complaints before UN Human Rights Bodies: Overcoming the Obstacles’, p.16.

⁷⁵ Ibid., see also, specifically on the *Teitiota* complaint: E. Sommaro, ‘When Climate Change and Human Rights Meet: A Brief Comment to the UN Human Rights Committee’s *Teitiota* Decision’, *Questions of International Law*, Zoom-in 77, 2021.

⁷⁶ See *Sacchi et al. v Argentina et al*, communication to the Committee on the rights of the child, available at: <<http://climatecasechart.com/climate-change-litigation/non-us-case/sacchi-et-al-v-argentina-et-al/>>.

⁷⁷ See *Duarte Agostinho et al v Portugal et al*, European Court of Human Rights, February 2020, Appl n. 39371/20, paras 14–26.

⁷⁸ See M. Milanovic, ‘Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy’, *Oxford University Press*, 2011. See also J. Knox, ‘Diagonal Environmental Rights’, in M. Gibney, S. Skogly, *Universal Human rights and extraterritorial obligations*, University of Pennsylvania Press, 2010; J. E. Viñuales, ‘A Human Rights Approach to Extraterritorial Environmental Protection? An assessment’, in N. Bhuta (ed.), *The frontiers of Human Rights Extraterritoriality and its Challenges*, Oxford University Press, 2016; A Savaresi, J Hartmann, ‘Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry’ in J Lin, D Kysar (eds), *Climate Change Litigation in the Asia Pacific*, CUP, 2020.

state of origin if there is a causal link between the event that originated in its territory and the human rights of people outside its territory.⁷⁹

This is because it is the State of origin that is “in a position to prevent transboundary harm”. It follows that a State is bound to *prevent* extraterritorial harm that “*could* affect the human rights of people outside their territory”.

The extraterritoriality issue has come to the fore also in the carbon majors’ inquiry undertaken by the Philippines National Human Rights Commission. In an amicus curiae brief submitted by Annalisa Savaresi, Ioana Cismas and Jacques Hartmann they argued that in line with the protective and the territorial principle, a state has the power to inquire into human rights violations of people within its territory.⁸⁰ Together these two principles provide a framework enabling extraterritorial jurisdiction in the context of climate change.⁸¹ This argument was adopted by the Commission as it undertook its inquiry across the Philippines, New York and London.

4.1.3. Exhaustion of domestic remedies

Before filing a complaint with an international human rights body, the applicant must have exhausted available effective remedies at the local level. The general rule on exhaustion of domestic remedies is explicitly included in all human rights treaties. The treaties themselves provide for an exception to this general rule when the available domestic remedies are unreasonably time-consuming or not effective.⁸²

Some climate complaints were brought directly before international human rights bodies, without previously exhausting domestic remedies. *Torres Strait Islanders* and *Sacchi et al* were filed directly before UN human rights bodies. Similarly, the applicants in *Duarte Agostinho et al* did not previously exhaust available domestic remedies.

A distinction can be made between those complaints that target multiple respondent States and those that target only one. In cases such as *Sacchi et al* and *Duarte Agostinho et al* the applicants argued that none of the remedies available at the national level would have been effective as their complaints were directed to several different States. More specifically, *Sacchi et al* mentioned the fact that in the relevant domestic legal systems, foreign states enjoy jurisdictional immunity for sovereign acts. This means that the applicants would have to bring their case against each of the five respondent states separately, and this would have been too costly and time-consuming. The Committee on the Rights of the Child, however, was not

⁷⁹ Inter-American Court of Human Rights, Advisory Opinion on “Human Rights and the Environment”, para 101.

⁸⁰ Annalisa Savaresi, Ioana Cismas and Jacques Hartmann, ‘Amicus Curiae Brief: Human Rights and Climate Change’ (Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions 2017) <http://www.asiapacificforum.net/media/resource_file/APF_Paper_Amicus_Brief_HR_Climate_Change.pdf>

⁸¹ A Savaresi and J Hartmann, “Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry” in J Lin and D Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020).

⁸² See Optional Protocol to the United Nations Convention on the Rights of the Child on a Communications Procedure (A/RES/66/138, 19 December 2011), Art. 7 (e): domestic remedies do not need to be exhausted, “where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief”. The Optional Protocol to the ICCPR provides only one exception: ‘where the application of the remedies is unreasonably prolonged.’ However, this has been broadened by the interpretative jurisprudence of the Human Rights Committee, according to which the “applicants need only pursue domestic remedies which offer a ‘reasonable prospect of redress’”. See ICCPR, Art 41 (c) and Optional Protocol to the ICCPR, Art. 5 (b) and *Patiño v Panama*, HRC, Communication No. 437/1990, UN Doc CCPR/C/52/D/437/1990 (21 October 1994) para 5.2.

persuaded by the applicants' arguments. It noted in particular that the applicants did not make any concrete attempt to engage with national bodies and to initiate domestic proceedings. The Committee found the communication inadmissible for failure to exhaust domestic remedies.⁸³

Claiming an exception to the rule seems equally difficult for complaints that are brought against one State on the basis of territorial jurisdiction. This might constitute a serious obstacle for the *Torres Strait Islanders*. Even in this case the applicants have alleged that effective remedies at the local level are not available, because, among other things, "few Australian statutory provisions directly mention climate change issues".⁸⁴ However, the decision on the *Sacchi* complaint makes very clear that the applicants have to give convincing reasons on why they were not able to pursue domestic remedies, "other than generally expressing doubts about the prospects of success of any remedy".⁸⁵

4.2. Substantive hurdles

If the climate complaint is declared admissible, other legal hurdles will have to be faced at the merits stage. Establishing causation and attribution about the alleged human rights impairment is considered to be an important obstacle to climate litigation. Albeit closely intertwined, objective causation and subjective attribution can be dealt with as separate questions. It is only once these two questions are addressed, that the human rights body can finally consider whether or not the act or omission of the respondents amounts to a violation of the human rights of the applicant.

4.2.1. Causation

Put succinctly, the causation question is concerned with whether a causal link can be established between the act or omission under review and the specific human rights impairment allegedly suffered by the applicant.⁸⁶

Establishing this causal link is particularly difficult in complaints concerning mitigation, where a twofold link must be established: greenhouse gases emissions cause climate change; the adverse effects of climate change cause an interference with the human rights at stake. In *Sacchi et al*, for instance, the applicants assert that: "climate science...establishes a causal chain that links each harm to climate change. The same chain links climate change to emissions resulting, in substantial part, from Respondents' climate policies".⁸⁷

In the Carbon Majors Inquiry too the difficulty in establishing causation was one where there was a need to prove that carbon emissions by the so-called carbon majors caused climate change which in turn impacted the human rights of the citizens of the Philippines. In the complaint it was argued 'by directly or indirectly contributing to current or future adverse human

⁸³ See Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019, CRC/C/88/D/104/2019, 8 October 2021.

⁸⁴ See M. Cullen, 'Eaten by the sea: human rights claims for the impacts of climate change upon remote subnational communities', p.184.

⁸⁵ Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019, para 10.18.

⁸⁶ See O Quirico, 'Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation' (2018) 2 *Netherlands International Law Review* 185.

⁸⁷ See *Sacchi et al*, Petitioners' Reply to the Admissibility Objections of Brazil, France and Germany (20 May 2020, para 14.

rights impacts through the extraction and sale of fossil fuels and activities undermining climate action'. Scientific studies here proved to be important in establishing the causal link between emissions by the so-called carbon majors and the impacts on the climate as well as its link to particular extreme weather events.⁸⁸

In complaints like *Sacchi et al*, difficulties for the applicants may come from the fact that the impacts of climate change affect communities and society at large. It will thus be up to the applicants to prove how they are specifically and distinctly affected. In addition, this type of complaint refers to a mix of past and prospective interference with human rights. It will thus be up to the human rights body to consider how and to what extent these prospective interferences “do not concern a hypothetical future harm, but a real predicament”.⁸⁹

Arguably, the precautionary principle should guide the attitude of human rights bodies in deciding on such aspects of the complaints. According to the precautionary principle, lack of scientific certainty is not a reason to postpone action to avoid potentially serious or irreversible harm to the environment.⁹⁰ The precautionary principle plays a key role in international environmental law, and it is also enshrined in the UN Framework Convention on Climate Change.⁹¹ Applying the customary international norms on interpretation as codified in Art. 31 of the 1969 Vienna Convention on the Law of Treaties, the precautionary principle could be granted a greater function in international human rights law and human rights-based climate complaints specifically.⁹²

By applying the precautionary principle to human rights complaints, the applicants should have the burden of causality-proof significantly eased. If the applicants are demanding protection against risk rather than compensation for past harm, rigid adherence to classical causal thinking should be abandoned in favor of a modern ‘probabilistic approach to causation’, not least because absolute causality is impossible to prove in such situations.⁹³

International human rights bodies have already referred to the precautionary principle on some occasions, in particular in Europe where this principle is more deeply rooted. In the *Tatar v Romania* case concerning the extraction of precious metals from mines, the European Court of Human Rights, explicitly based their legal arguments on the precautionary principle, ruling that even in the absence of scientific certainty, the existence of a serious and substantial risk to health and well-being of the applicants imposes a positive obligation on the State to adopt adequate measures to protect their right to private and family life ex Art. 8 of the European Convention on Human Rights.⁹⁴ The application of the precautionary principle to human rights protection has also been dealt with extensively by the Inter-American Court of Human Rights in the previously mentioned Advisory Opinion. The Court affirmed that in the context of the

⁸⁸ Carbon Majors Petition available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf>.

⁸⁹ See *Teitiota*, para 8.5.

⁹⁰ See Rio Declaration on Environment and Development, 1992, A/CONF.151/26 (Vol.1), Principle 15. See also M Schröder, Precautionary Approach/Principle, Max Planck Encyclopedia of International Law, 2014.

⁹¹ See UN Framework Convention on Climate Change, adopted 9 May 1992 and entered into force 21 March 1994, UN Treaty Series, 1771, 107, Art. 3.3.

⁹² See also A. Savaresi, ‘Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages’ in S. Duyck, S. Jodoin, A. Johl (eds.), *Routledge Handbook of Human Rights and Climate Governance*, Routledge 2018.

⁹³ See: M Wewerinke-Singh, ‘Remedies for Human Rights Violations Caused by Climate Change’ (2019) 9 Climate Law 232. See also L A Omuko, ‘Applying the Precautionary Principle to Address the “Proof Problem” in Climate Change Litigation’ (2016) 21 *Til- burg L Rev* 52.

⁹⁴ European Court of Human Rights, *Tatar v Romania*, App. no. 67021/01, Judgment of 27.01.2009, para 109.

protection of the rights to life and personal integrity “States must act in keeping with the precautionary principle. Therefore, even in the absence of scientific certainty, they must take ‘effective’ measures to prevent severe or irreversible damage”.⁹⁵

Establishing causation seems less difficult in adaptation complaints. In this type of complaint, it is not necessary to establish whether and to what extent climate change and the ensuing adverse effects are caused by greenhouse gases emissions. Once it is established that the adverse effects of climate change interfere with the enjoyment of human rights and that adaptation measures are suitable to prevent or reduce these effects, States are bound to take action of this kind, regardless of the causes of climate change.⁹⁶

Establishing this type of causal link is not relevant for complaints concerning international protection, such as *Teitiota*. In these complaints, attention has to be paid to establishing whether the living conditions in the State of origin would not allow the individual applicant to live a life with dignity. Yet, the legal reasoning of the human rights bodies facing this type of complaint can be very relevant for future cases. In *Teitiota* for instance, the Human Rights Committee acknowledged that the adverse effects of climate change can threaten the life of Kiribati residents. This will be relevant for future complaints addressing the causality link at hand.

4.2.2. Attribution

The attribution problem involves establishing the extent to which the interference with human rights can be attributed to a given respondent state or corporate actor. This can be difficult mainly because individuals suffer at the same time from the effects of emissions taken cumulatively, and not only from those released by the respondents. Certainly, the contribution of a given respondent to global emissions can differ significantly. Yet, even the largest emitter might argue that a human rights interference cannot be directly attributed to it, due to the dispersed causes of climate change.

France, for instance, which can be considered a large emitter, argued this in its defence to the *Sacchi et al* complaint. In particular, France claimed that the emissions driving climate change are not “a localized ‘pollution’ directly attributable to a given country”.⁹⁷ In their Reply, the applicants argue that emissions are local in their origins and global in their impacts; the harmful effects of France’s emissions are felt by individuals around the world, hence France has a duty to take appropriate measures to prevent or reduce such harms. The applicants ground their arguments on the principle of shared responsibility: “where several states are responsible for the same internationally wrongful act, the responsibility of each state may be invoked in relation to that act”.⁹⁸ In particular, they argue that each state should be responsible for mitigating its own contribution to climate change within a framework of shared responsibility.⁹⁹

It is to be noted that in complaints concerning the failure of the territorial State to adopt adaptation measures, subjective attribution is not a complex issue to solve, as it is evident that

⁹⁵ Inter-American Court of Human Rights, Advisory Opinion on “Human Rights and the Environment”, para 180.

⁹⁶ See R Luporini, ‘Human Rights-based Litigation to Advance Climate Change Adaptation: Realities and Prospects’, paper presented at the Workshop ‘Climate Change Litigation and Human Rights Arguments’ held at the Sant’Anna School of Advanced Studies in Pisa on 6-7 May 2021, forthcoming, in file with author.

⁹⁷ See *Sacchi et al*, Petitioners’ Reply to the Admissibility Objections of Brazil, France and Germany (20 May 2020), para 24.

⁹⁸ *Ibid.*, para 32, referring to Art. 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission.

⁹⁹ *Ibid.*, para35.

the responsibility to take such action lies principally with the territorial state. Yet, if the respondent State is a developing country, it could be argued that its responsibility is to be shared with developed countries as a group, as the UN climate regime establishes a sort of 'implementation conditionality', i.e., the implementation of some actions by developing country Parties, including taking adaptation measures, is conditioned to the international support granted by developed countries in terms of funding and technology transfer.¹⁰⁰

Finally, it is particularly difficult to attribute responsibility to private entities and corporations for human rights harm. Recent advances in attribution science such as that made by the Climate Accountability Institute in the context of the carbon majors' inquiry help in determining the contribution made by companies to climate change. To then be able to hold them accountable to human rights harms.

Savaresi and Hartmann address the challenge of holding corporations accountable in their paper by relying on the framework established by the UN guiding principles on business and human rights. The guiding principles provide that corporations are required to respect human rights and international courts are thus required to establish the responsibility of corporations for human rights harms.¹⁰¹ The petition filed in the carbon majors inquiry speaks to attribution and responsibility to corporations for the violation of the human rights of Filipinos as "by directly or indirectly contributing to current or future adverse human rights impacts through the extraction and sale of fossil fuels and activities undermining climate action."¹⁰²

4.2.3. *Due diligence standard*

If the previous legal hurdles are overcome, the human rights bodies can focus on whether or not the respondent is 'doing enough' to address climate change and if its actions or omissions constitute a violation of the human rights of the applicants.

Concerning mitigation complaints, this question revolves around the very complex 'fair share' issue.¹⁰³ The State parties to the Paris Agreement agreed on the common objective of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit...[it]...to 1.5°C".¹⁰⁴ The Agreement however does not establish the specific obligation of result for each country to meet a given emissions reduction target in a certain timeframe. The Paris Agreement's 'bottom-up approach' largely relies on 'obligations of means'.¹⁰⁵ These entail that each State party has to put in place its best efforts to meet the

¹⁰⁰ See in particular UN Framework Convention on Climate Change, Art. 4.7 and Paris Agreement, Art. 7.13.

¹⁰¹ A Savaresi and J Hartmann, 'Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry' in J Lin and D Kysar (eds) *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020).

¹⁰² Carbon Majors Petition available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150512_Case-No.-CHR-NI-2016-0001_petition.pdf>.

¹⁰³ See G Liston, 'Enhancing the Efficacy of Climate Change Litigation: How to Resolve the 'Fair Share Question' in the Context of International Human Rights Law' (2020) 9 Cambridge J Intl L 241.

¹⁰⁴ Paris Agreement, Art. 1 (a).

¹⁰⁵ See: D. Bodansky, 'The Paris Climate Change Agreement: A new hope?', *American Journal of International Law*, 288, 2016; D. Bodansky, 'The Legal Character of the Paris Agreement', *Review of European, Comparative & International Environmental Law*, 25, 2016; A. Savaresi, 'The Paris Agreement: Reflections on an International Law Odyssey', *ESIL Annual Conference Paper Series*, 13, 2016; A. Savaresi, 'The Paris Agreement: A New Beginning?', *Journal of Energy & Natural Resources Law*, 34, 2016.

temperature goal set by the Paris Agreement. These efforts are communicated by the State parties employing “nationally determined contributions”.¹⁰⁶

It is thus for the ‘best available science’ to determine whether or not the State parties are ‘doing their part’ in tackling the climate challenge. In the first place, the scientific reports produced by the Intergovernmental Panel on Climate Change, which are endorsed by the State parties, identify the extent and timeframes of emissions reduction that are needed to fulfil the overall objective of the treaties. These reports however do not establish emissions reduction targets per each country, but only collective targets for developed and developing country groups.¹⁰⁷ To fill this gap, in some complaints before international human rights bodies, reliance was placed not only on the Intergovernmental Panel on Climate Change’s reports but also on the scientific outputs of other important institutions, such as Climate Analytics and the Climate Action Tracker Consortium.¹⁰⁸ For example, in both *Sacchi et al* and *Duarte Agostinho et al* complaints the applicants base their arguments on ‘fair share’ drawing on the approach and estimates elaborated by these institutions.¹⁰⁹ Despite attempts to find objectives pegs on which to hang country targets, this remains a very complex matter, especially because climate science itself cannot but be characterized by uncertainty. Still, such uncertainty should not prevent the pursuit of accountability and justice.

Concerning adaptation complaints, it is very difficult to establish whether the respondent State is ‘doing enough’. The Paris Agreement establishes a “global goal on adaptation”.¹¹⁰ The goal is not quantitative.¹¹¹ Thus, by contrast to the mitigation context, there is not even a common benchmark. In addition, it is very difficult to evaluate and monitor progress in adaptation at the country level. Possible parameters for human rights bodies to evaluate the national adaptation efforts of a given respondent state mainly focus on ‘procedural adaptation’, i.e., whether or not the state is engaging in adaptation communication, fulfilling other relevant procedures established by the Paris Agreement, whether it has national strategies and plans in place, and legal and administrative tools to adequately implement such frameworks. When the complaint

¹⁰⁶ Paris Agreement, Art. 3.

¹⁰⁷ IPCC reports are based on hundreds of peer-reviewed scientific papers. The IPCC provides regular summaries of the state of the knowledge, by analysing hundreds of reviewed papers, which presents results and discuss scientific issues linked to climate change, applying the scientific method. States Parties to the UNFCCC endorse the IPCC reports through a three-level process: approval; adoption; and acceptance. See Appendix A to the Principles Governing IPCC Work: Procedures for the Preparation, Review, Acceptance, Adoption, Approval and Publication of IPCC Reports, adopted at the Fifteenth Session (San Jose, 15-18 April 1999) and amended at various following sessions <www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles-appendix-a-final.pdf>.

¹⁰⁸ Climate Analytics is a non-profit organization based in Berlin, which was created in 2008 to bring cutting edge science and policy analysis on climate change, see the website: <https://climateanalytics.org>. Climate Action Tracker (CAT) originates from the collaboration between Climate Analytics and New Climate Institute, and has been providing its independent analysis to policymakers since 2009. See the website at <<https://climateactiontracker.org/countries/eu/>>.

¹⁰⁹ See: *Sacchi et al*, paras 214–229, and footnote 184 specifically, and *Duarte et al*, Annex to the Application to the ECtHR, para 31.

¹¹⁰ Paris Agreement, Art. 7.

¹¹¹ During the negotiations on the Paris Agreement, the African Group submitted a proposal for a quantitative goal, introducing a proper methodological approach for the quantification of adaptation needs and costs. See ‘Submission by Swaziland on behalf of the African Group on Adaptation in the 2015 Agreement’, 2013. adaptation is inherently a political process, involving qualitative actions, see: S Eriksen, AJ Nightingale, and H Eakin, ‘Reframing Adaptation: The Political Nature of Climate Change Adaptation’, (2015) 35 *Global Environmental Change*, 523–33 and AJ Nightingale, S Eriksen, M Taylor, T Forsyth, M Pelling, A Newsham, E Boyd, et al. ‘Beyond Technical Fixes: Climate Solutions and the Great Derangement’, (2020) 12 *Climate and Development*, 343–52.

concerns the lack of adequate adaptation measures targeted on a specific area or vulnerable group, the human rights body will have to consider the situation on a case-by-case basis.¹¹²

An illustrative example comes from the *Torres Strait Islanders* complaint, in which the applicants allege that Australia has not adopted adequate adaptation measures directed to the protection of the life of islander native groups against the adverse effects of climate change. The applicants thus requested the Committee to require the State to allocate more adequate funding for adaptation on the islands.¹¹³

Finally, future complaints may also look at the growing gap in the provision of funding and technology that is required to support adaptation capacity in the global south, and may also examine how funding and technology are being used.¹¹⁴ Under international law, states have a general duty to cooperate in good faith. This duty is confirmed and specified in the UN climate regime as well as in international human rights law. Climate complaints could address both the inaction by developed States in providing funding and technology and the misuse of this funding by developing states.¹¹⁵

5. Conclusions

The human rights impacts of climate change are many and diverse. Increasingly the human rights framework is being used by individuals and civil society actors to address questions of climate change. This report aims to highlight the role played by human rights bodies thus far and to navigate the challenges they encounter. We have provided an overview of the nature of human rights claims being brought before international and national human rights bodies. On the basis of our analysis, we have provided a typology of complaints to highlight the role played by these institutions. The typology examines the 'pro climate' and 'just transition' complaints, the nature of the applicants and defendants, the type of climate action involved, and the kinds of human rights violations being experienced. This typology is not exhaustive but provides a framework to navigate the increasing number and complexity of complaints being filed before human rights bodies at the national and international level.

The report then examines the procedural and substantive hurdles experienced by those filing these complaints and the human rights bodies addressing them. The major hurdles identified are those related to the fulfilment of the 'victim status' and of the jurisdiction requirements and the exhaustion of domestic remedies (procedurally) and to the establishment of causation and attribution, and the identification of the due diligence standard to apply (substantially). If these hurdles are overcome, human rights bodies have the potential to act as an important

¹¹² See R Luporini, 'Human Rights-based Litigation to Advance Climate Change Adaptation: Realities and Prospects'.

¹¹³ See Client Earth, Press Release on Torres Strait FAQ, available at: <<http://climatecasechart.com/climate-change-litigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/>> and Client Earth, "Torres Strait Islanders win key ask after climate complaint", press release 19 February 2020 <www.clientearth.org/latest/latest-updates/news/torres-strait-islanders-win-key-ask-after-climate-complaint/>.

¹¹⁴ See UNEP, Adaptation Gap Report 2020, available at: <<https://www.unep.org/resources/adaptation-gap-report-2020>>.

¹¹⁵ See C Rodríguez-Garavito, 'Human Rights: The Global South's Route to Climate Litigation' (2020) 114 AJIL Unbound 40; JAuz, 'Global South climate litigation versus climate justice: duty of international cooperation as a remedy?' (2020) 28 *Völkerrechtsblog*, available at <www.voelkerrechtsblog.org/articles/global-south-climate-litigation-versus-climate-justice-duty-of-international-cooperation-as-a-remedy/>, and R Luporini, 'Human Rights-based Litigation to Advance Climate Change Adaptation: Realities and Prospects'.

mechanism to hold states and companies accountable for the human rights violations caused both by climate change and by actions adopted to mitigate or adapt to it.