

# The Increasing Role of Human Rights Bodies in Climate Litigation

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## Introduction

As the impacts of climate change become ever clearer, climate litigation is assuming increasing importance.<sup>1</sup> Climate litigation increased substantially in the years following the adoption of the Paris Agreement, mainly as a tool to plug the accountability gaps left by this treaty.<sup>2</sup> Over recent years, those pursuing climate litigation have started to rely on human rights arguments to make their case. While the overall number of human rights cases remains relatively small, national and international human rights bodies are emerging as an important forum for climate litigation.<sup>3</sup> The use of human rights arguments in climate litigation is primarily based on awareness that climate change can affect the enjoyment of a vast array of human rights. Respect for certain rights — such as the rights to life, food and water, health, and to a healthy environment — is particularly under threat. For instance, the rising frequency and intensity of climate-related disaster events puts the life and health of people around the world at serious risk.<sup>4</sup> The human rights impact of climate change are borne disproportionately by vulnerable and marginalised individuals and groups. At the same time, climate change response measures can also impact negatively on human rights. For example, renewable energy or afforestation projects may endanger the rights of indigenous and local communities.<sup>5</sup>

Along with courts, national and international human rights bodies serve as suitable venues before which to bring human-rights based climate complaints. National Human Rights Institutions (NHRIs) are independent institutions charged with the promotion and protection of human rights. They have been formed in compliance with the Paris Principles endorsed in 1993 by the UN General Assembly<sup>6</sup> and they take the form of commissions, ombudsmen, consultative commissions, and institutes. International human rights bodies include both United Nations (UN) and regional human rights bodies. Some UN human rights mechanisms can perform quasi-judicial functions, receiving complaints by individuals who allege a violation of their human rights, and adopting decisions which contain authoritative recommendations which are addressed to respondent states. Regional human rights systems promote and protect human rights in different parts of the world.

- 1 K Bouwer, J Setzer, (2021) *Climate Litigation as Climate Activism: What Works?*, The British Academy, COP26 Briefings, [https://www.thebritishacademy.ac.uk/documents/2701/Climate-Litigation-as-Climate-Activism-What-Works\\_InBlsWN.pdf](https://www.thebritishacademy.ac.uk/documents/2701/Climate-Litigation-as-Climate-Activism-What-Works_InBlsWN.pdf). Climate litigation is defined as “cases brought before administrative, judicial and other investigatory bodies that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts”, see among the others: UNEP, (2017) *The Status of Climate Change Litigation. A global Review*, <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y>.
- 2 Geneva Association, (2021) *Climate Change Litigation. Insights into the evolving global landscape*, <https://www.genevaassociation.org/research-topics/climate-change-and-emerging-environmental-topics/climate-litigation>. A Savaresi, (2021) ‘Plugging the enforcement gap: The rise and rise of human rights in climate change litigation’, *Questions of International Law*, Zoom-in, <http://www.qil-qdi.org/plugging-the-enforcement-gap-the-rise-and-rise-of-human-rights-in-climate-change-litigation/>.
- 3 Savaresi and Setzer referred to 112 rights-based cases listed in the world-leading climate litigation databases in May 2021, see A Savaresi, J Setzer, (2021) *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, <https://ssrn.com/abstract=3787963>. The databases are managed by the Sabin Centre for Climate Change Law, available at [climatecasechart.com/non-us-case-category/human-rights/](http://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](https://climate-laws.org/cclow/litigation_cases).
- 4 United Nations Office for Disaster Risk Reduction and Centre for Research on the Epidemiology of Disasters, (2020) *Human Cost of Disasters. An overview of the last 20 years (2000-2019)*, [www.undrr.org/media/48008/download](http://www.undrr.org/media/48008/download).
- 5 S Jodoin, A Savaresi, M Wewerinke-Singh, (2021) *Rights-Based Approaches to Climate Decision-Making. Current Opinion in Environmental Sustainability*, <https://ssrn.com/abstract=3888616>; S Lakhapal, A Chhatre, (2018) ‘For the environment, against conservation: conflict between biodiversity and renewable energy in India’, *Reimagining Wilderness: Conservation and Development in India*, Earthscan Routledge.
- 6 Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.

These are established under the auspices of regional intergovernmental organisations and often include courts, such as the European Court of Human Rights (ECtHR).<sup>7</sup>

The present briefing aims to shed light on the role that human rights bodies currently play in climate litigation. The briefing illustrates the different features of climate complaints brought before national and international human rights bodies so far, developing a typology of such complaints. Drawing on this analysis, the briefing also identifies and summarises some of the principal obstacles that stand in the way of human rights bodies addressing climate change. It concludes with some brief reflections and recommendations on the potential future contribution of these bodies.

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<sup>7</sup> In this briefing, two complaints filed with the European Court of Human Rights and a complaint filed with the Inter-American Commission on Human Rights are discussed. Other regional courts such as the Inter-American Court of Human Rights and the African Court on Humans and Peoples' Rights rather not receive individual climate complaints yet.

## A typology of climate complaints before human rights bodies

The specialised literature has largely focused on ‘pro climate’ human rights-based cases. These are cases in which the applicants use litigation in a bid to ensure that state and corporate actors enhance their climate action. All the climate complaints filed with international human rights bodies so far can be considered ‘pro climate’, as illustrated in tables 1 and 2 below.<sup>8</sup> For instance, in *Sacchi et al*, a group of very young climate activists from around the world requested the UN Committee on the Rights of the Child to recommend that Argentina, Brazil, France, Germany and Turkey take further action on climate change.<sup>9</sup> Yet, human rights arguments can also be used to contest climate projects, policies, and legislation. Where this is the case, we refer to such cases as ‘just transition’ cases.<sup>10</sup> In actions of this kind, applicants do not oppose climate action per se, but they are concerned about the negative impacts of climate projects or policies on the enjoyment of their human rights. For example, the *Kenya National Commission on Human Rights* (see table 3) took cognisance of how the rights of the Sengwer indigenous people were being violated due to their forceful eviction from the forests as a result of an EU-funded conservation program in Kenya. As a result, the Commission decided to undertake a high-level independent fact-finding mission.<sup>11</sup>

Applicants before human rights bodies are normally individuals or group of individuals. Groups of people who are particularly vulnerable to climate change sometimes resort to climate litigation in a bid to bring to light the negative effects they are suffering and to seek redress for their human rights violations. Indigenous peoples are making use of the special protection they enjoy under international law as an entry point for litigation. Following on from an earlier request by the *Inuit people* in 2005,<sup>12</sup> the *Arctic Athabaskan peoples* claimed that Canada was violating their human rights, in particular their rights to enjoy the benefits of their own culture and traditional way of life, by causing rapid Arctic warming and melting through black carbon emissions. Yet, their petition which was filed in 2013 is still pending before the Inter-American Commission on Human Rights.<sup>13</sup> On the one hand, this delay may cast serious doubts about the effectiveness of this specific regional human rights mechanism. On the other hand, the developments in climate litigation over recent years open up further possibilities for a favourable outcome of the petition.

8 10 climate complaints have been filed with international bodies so far (4 with UN human rights bodies and 6 with regional human rights bodies). All the complaints are available in the mentioned databases.

9 For the complaint see: *Sacchi et al. v Argentina et al.*, Committee on the Rights of the Child, 23 September 2019, <http://climatecasechart.com/climate-change-litigation/non-us-case/sacchi-et-al-v-argentina-et-al/>. For the decision see: *Sacchi et al. v Argentina*, Committee on the Rights of the Child, Communication n.104/2019, Decision adopted on 22 September 2021, UN Doc. CRC/C/88/D/104/2019.

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

11 *Interim FactFinding Report by the Kenyan Human Rights Commission* (2018) available at <[https://eeas.europa.eu/sites/default/files/report\\_knchr\\_14\\_june-official\\_0.pdf](https://eeas.europa.eu/sites/default/files/report_knchr_14_june-official_0.pdf)>

12 *Inuit people v the United States* is the earliest climate complaint filed with an international human rights body. In 2005 the Inuit claimed that the United States was violating their human rights by failing to reduce greenhouse gases emissions. The complaint however was rejected by the IACCommHR. *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, <http://climatecasechart.com/climate-change-litigation/non-us-case/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/>.

13 *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, <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/>.

Children and young people are also suffering dramatic impacts of climate change.<sup>14</sup> It is therefore not surprising that they are applicants in an increasing number of leading cases, such as *Sacchi et al* before the UN Human Rights Committee (HRCComm), and *Duarte Agostinho et al* before the ECtHR. In the latter case, as illustrated in table 2, six very young Portuguese individuals claimed that Portugal and other 32 respondent states are violating the rights to life and private life which are enshrined in the European Convention on Human Rights due to their high contribution to global greenhouse gases emissions.<sup>15</sup>

Environmental and social NGOs are also playing a growing role both as legal advisors and applicants themselves. For instance, Greenpeace Nordic, together with another local environmental organisation and six individual applicants, filed a complaint with the ECtHR on 15 June 2021 alleging that the expansion of oil and gas extraction in the Arctic Sea by Norway is violating the rights to life and private and family life of the individuals concerned.<sup>16</sup>

States are the only defendants before international human rights bodies. Normally the complaint is made against the state of territorial jurisdiction, namely the state where the rights violation occurs. However, in some cases a group of different states can be summoned together. This was the situation in *Sacchi et al* and *Duarte Agostinho et al*, as illustrated in tables 1 and 2. The *Carbon Majors inquiry* by the Philippines NHRI is a unique case to date because here corporations were the defendants rather than states (see table 3).<sup>17</sup> The ‘carbon majors’ included the fifty investor-owned oil, coal, and gas companies whose contribution to global greenhouse gases was identified based on the study conducted by the Climate Accountability Institute.<sup>18</sup>

In general, climate litigation before human rights bodies seeks to tackle inadequate mitigation action by the defendants. The applicants request these bodies to recommend that the respondents reduce greenhouse gas emissions in order to cease or prevent human rights violations. In some complaints, the applicants spell out the emissions reduction targets that they think the respondents should achieve in order to ‘do their part’. For example, the *Torres Strait Islanders* complaint suggests that Australia should “reduce its emissions by at least 65% below 2005 levels by 2030 and going net-zero before 2050.”<sup>19</sup> Complaints sometimes target a specific climate-altering activity, such as oil exploration licenses in the Arctic, as in the previously mentioned *Greenpeace Nordic Association* complaint.

14 A Barford, A Mugeere, R Proefke, B Stocking, (2021) *Young people and climate change*, The British Academy, COP26 Briefings, <https://www.thebritishacademy.ac.uk/documents/3285/Young-people-and-climate-change.pdf>.

15 *Duarte Agostinho et al v Portugal et al*, European Court of Human Rights, February 2020, Appl n. 39371/20, <http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/>.

16 *Greenpeace Nordic Association v Norwegian Ministry of Petroleum and Energy*, European Court of Human Rights, June 2021, [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210615\\_HR-2020-846-J\\_application.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210615_HR-2020-846-J_application.pdf).

17 *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](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).

18 N Eisen and N Eschke, (2021) ‘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*, available at [https://www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights\\_final.pdf](https://www.ciel.org/wp-content/uploads/2020/12/Climate-Change-and-Human-Rights_final.pdf).

19 *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, <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/>.

Overall, few human rights-based cases have dealt with adaptation so far.<sup>20</sup> Among those that have, the *Torres Strait Islanders* sought to force Australia to allocate resources for emergency measures such as seawalls and to invest in long-term adaptation measures to ensure the islands can continue to be habitable despite sea level rise.<sup>21</sup> Finally, in some complaints, climate change action is only indirectly involved. For instance, *Teitiota* (see table 1) concerns an alleged violation of the *non-refoulement* obligation arising from the right to life. This obligation gives rise to a duty not to send an individual to a country where his/her right to life might be put at serious risk.<sup>22</sup> The applicant in this case was escaping Kiribati, his country of origin, due to the life-threatening effects of sea-level rise induced by climate change. In his complaint before the HRC, Mr Teitiota challenged the decision by New Zealand's judicial authorities refusing his demand for refugee status. Although the claim was rejected on the merits, much of the specialised literature has hailed the decision by the HRC as 'ground-breaking'. The reason for this lies in the fact that the HRC was open to the possibility of including the adverse effects of climate change as among the factors able to trigger international protection obligations.<sup>23</sup>

The three following tables illustrate the climate complaints that have been discussed in this section and highlight how such complaints fit in the typology.

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20 A Savaresi, J Setzer, (2021) *Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation*, <https://ssrn.com/abstract=3787963>; 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.

21 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/](http://www.clientearth.org/latest/latest-updates/news/torres-strait-islanders-win-key-ask-after-climate-complaint/).

22 *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.

23 Among the others, E. Sommaro, (2021) '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, <http://www.qil-qdi.org/when-climate-change-and-human-rights-meet-a-brief-comment-to-the-un-human-rights-committees-teitiota-decision/>.

**Table 1: Climate complaints before UN human rights bodies discussed in this report**<sup>24</sup>

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
<b>1. Teitiota v New Zealand</b>	UN Human Rights Committee	Pro climate	Applicant: individual asylum seeker; Defendant: state	International protection for climate change-related displacement of persons	Right to life (Art. 6 ICCPR)	Rejected (on the merits)
<b>2. Sacchi et al. v Argentina, Brazil, France, Germany and Turkey</b>	UN Committee on the Rights of the Child	Pro climate	Applicant: group of sixteen children Defendant: group of five states	Mitigation	Children rights to life, health, culture, and best interest of the child (Arts. 6, 24, 30, 3 CRC)	Rejected (on procedural grounds)
<b>3. Torres Strait Islanders v Australia.</b>	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

<sup>24</sup> 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 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.

**Table 2: Climate complaints before regional human rights bodies discussed in this report<sup>25</sup>**

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
<b>1. Duarte Agostinho et al v Portugal et al</b>	European Court of Human Rights	Pro climate	Applicant: group of six children Defendant: group of 33 states	Mitigation	Rights to life, private and family life and prohibition of discrimination (Arts. 2, 8, 14 ECHR)	Pending
<b>2. Greenpeace Nordic Association v Norwegian Ministry of Petroleum and Energy</b>	European Court of Human Rights	Pro climate	Applicant: two NGOs and a group of six young 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
<b>3. Arctic Athabaskan peoples v Canada.</b>	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

<sup>25</sup> 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 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.

**Table 3: Climate complaints before national human rights institutions discussed in this report**

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
<b>1. Greenpeace Southeast Asia and Philippines Rural Reconstruction Movement (Carbon Majors inquiry)</b>	Philippines Commission on Human Rights	Pro Climate	Applicant: NGO and other association  Defendant: corporate actors	Mitigation	Right to life, right to housing, right to adequate standard of physical and mental health	Inquiry pending
<b>2. High Level Independent Fact Finding Mission to the Embodut Forest</b>	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

## Legal hurdles to climate complaints before human rights bodies

Existing literature has considered the specific hurdles faced by applicants seeking relief from climate change-related human rights violations at the national and international levels.<sup>26</sup> Drawing on this, the following section identifies and briefly analyses some of these hurdles, distinguishing between procedural and substantive constraints.

### i) Procedural hurdles

The first legal hurdles to litigating climate change before human rights bodies arise at the admissibility stage. The climate complainant is obliged to meet some specific procedural requirements in order for their action to be declared admissible. The applicant must have legal standing before the body. In this context, this means that the applicant must fulfill the so-called 'victim status requirement'. The existence of a direct link between the applicant on the hand, and the respondent's act or omission on the other, has to be established. In other words, an applicant has to prove that they are 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*). Although scientific evidence suggests that climate-related risk is dramatically increasing, it still remains very difficult in most situations to establish that this risk has affected or will affect a particular individual or group of individuals.

The establishment of jurisdiction can constitute a second procedural hurdle to climate litigation especially when the alleged human rights violations are linked to transboundary climate harm.<sup>27</sup> For instance, in *Duarte Agostinho et al*, Portuguese residents brought their claim against Portugal and 32 other States. The applicants claimed that, as a result of their contributions to climate change, the 32 respondent states were in effect exercising significant control over the interests of the applicants. Thus, in the particular circumstances of the case, the applicants should be viewed as being subject to the extraterritorial jurisdiction of such states.<sup>28</sup> The vexed issue of extraterritoriality has also come to the fore in the *Carbon Majors inquiry* undertaken by the Philippines National Human Rights Commission. In the amicus curiae brief they submitted to this inquiry, Savaresi, Cismas and Hartmann argued that, in line with the protective and the territorial principle, at times a state can exercise legislative and corresponding adjudicative jurisdiction over conduct taking place beyond national borders.<sup>29</sup> Together these two principles enable the exercise of extraterritorial jurisdiction.<sup>30</sup> This argument was indeed espoused by

26 Among the others, A Savaresi, (2021) 'Human Rights and the Impacts of Climate Change: Revisiting the Assumptions', 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.

27 In human rights law, the term jurisdiction refers to the scope of application of international human rights treaties and determines the individuals towards whom a state party holds obligations. See among others M. Milanovic, (2011) *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press.

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

29 A Savaresi, I Cismas and J Hartmann, (2017) *Amicus Curiae Brief: Human Rights and Climate Change* (Asia Pacific Forum of National Human Rights Institutions & the Global Alliance of National Human Rights Institutions) [http://www.asiapacificforum.net/media/resource\\_file/APF\\_Paper\\_Amicus\\_Brief\\_HR\\_Climate\\_Change.pdf](http://www.asiapacificforum.net/media/resource_file/APF_Paper_Amicus_Brief_HR_Climate_Change.pdf).

30 A Savaresi and J Hartmann, (2020) '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.

the Commission.<sup>31</sup> Extraterritorial jurisdiction can be asserted by human rights bodies in some exceptional cases as these examples show.

Thirdly and finally, before filing a complaint with an international human rights body, the applicant must have exhausted available effective remedies at the local level. However, some climate complaints were brought directly before international human rights bodies, without previous engagement with domestic proceedings. In a recent Decision, the Committee on the Rights of the Child found the *Sacchi et al* complaint inadmissible for its failure to exhaust domestic remedies. The Committee noted, in particular, that the applicants did not make any concrete attempt to engage with national bodies and to initiate domestic proceedings.<sup>32</sup>

## ii) Substantive hurdles

If a climate complaint is declared admissible, other legal hurdles will still have to be confronted at the merits stage. Establishing causation and attribution is considered to be a typical obstacle in climate litigation.<sup>33</sup>

The causation problem 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. Often a twofold link must be established. First, greenhouse gases emissions caused climate change and second, the adverse effects of climate change caused an interference with the human rights at stake. In addition, complaints may refer 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.”<sup>34</sup>

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. Even the largest emitter might argue that a human rights interference cannot be directly attributed to it, due to the presence of multiple emitters and the diffuse causes of climate change.

It is particularly difficult to attribute responsibility to corporations for human rights harm. Recent advances in attribution science, such as those relied on by the Climate Accountability Institute in the *Carbon Majors inquiry*, can help in determining the contribution made by companies to climate change. Scientific evidence relating to attribution becomes an essential component for holding corporations accountable 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.”<sup>35</sup>

If the various legal hurdles highlighted are overcome, the human rights bodies can then focus on whether or not the respondents are ‘doing enough’ to address climate change and if their actions or omissions constitute a violation of the human rights of the applicants.

31 A Savaresi and J Hartmann, (2020) “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.

32 See *Sacchi et al. v Argentina*, Committee on the Rights of the Child, Communication n.104/2019, Decision adopted on 22 September 2021.

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

34 See *Teitiota*, para 8.5.

35 *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](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).

Concerning mitigation complaints, this question revolves around the very complex ‘fair share’ issue.<sup>36</sup> Put succinctly, while the Paris Agreement establishes 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”, it does not set establish a specific reduction obligation for each country to meet within a given timeframe. Despite attempts to find objective pegs on which to hang emissions reduction targets at a country-by country level, this remains a very complex matter.<sup>37</sup>

When it comes to adaptation, it is very difficult to evaluate and monitor progress at the country level. Possible parameters for human rights bodies mainly focus on whether or not the state is fulfilling 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. The applicants’ claims on adaptation, however, primarily concern the lack of adequate adaptation measures targeted on a specific area or vulnerable group, such as in the mentioned *Torres Strait Islanders* complaint. The human rights body will thus have to consider whether or not the respondent is ‘doing enough’ on a case-by-case basis.

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36 G Liston, (2020) ‘Enhancing the Efficacy of Climate Change Litigation: How to Resolve the “Fair Share Question” in the Context of International Human Rights Law’, 9 *Cambridge Journal of International Law* 241.

37 D Van Berkel, (2020) ‘How scientists can help lawyers on climate action’, *Nature*, <https://doi.org/10.1038/d41586-020-01150-w>.

## Recommendations and future prospects

Climate litigation is becoming an important tool to address the accountability gaps left by the Paris Agreement. Human rights bodies, both national and international, can constitute suitable venues to bring climate complaints based on human rights arguments. The role of these bodies in climate litigation is expected to increase as the impacts of climate change become heavier, with immediate and serious repercussions for the enjoyment of human rights.<sup>38</sup>

This Briefing has set out a typology of these complaints and highlighted the main legal hurdles they face. These legal hurdles are likely to be progressively overcome. In particular, human rights bodies can increasingly rely on climate science to establish causation and attribution.<sup>39</sup> In addition, human rights bodies themselves seem willing to play a greater regulatory role in relation to climate change. For instance, the ECtHR decided to use the priority procedure for climate complaints arrived at its docket.<sup>40</sup>

Derived from this study, the recommendations for prospective litigants are as follows:

- a. To take an expansive view of what constitutes climate litigation to further consider the opportunity to file complaints with human rights bodies.
- b. To harness human rights bodies' ability to offer a wide range of remedies. As compared to domestic courts, human rights bodies offer different remedies in terms of fact-finding investigations, inquiry reports and authoritative decisions at the international level.
- c. To rely on the latest developments in climate science to overcome the hurdles of causation and attribution. Human rights bodies tend to be less formalistic than proper courts in using scientific outputs in their decisions.
- d. To leverage these avenues to push the boundaries of environmental and human rights law and jurisprudence to further address climate considerations.

However, the increased role of human rights bodies in climate litigation does not come without problems. At the internal level, NHRIs can suffer from lack of independence and accountability in terms of their relations with governments and civil society.<sup>41</sup> As for international human rights bodies, their functions, in the end, rest on the consent of state parties to international human rights treaties. States would rather confront climate change by means of international negotiation and cooperation than through litigation. A sudden and unbalanced expansion of the role of these bodies could potentially push states to disregard their decisions and even withdraw from human rights treaties.

38 See in general 'IPCC, (2021): Summary for Policymakers'. In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf).

39 Q Schiermeier, (2021) 'The Science that Supports Climate Lawsuits', *Nature* 597, <https://doi.org/10.1038/d41586-020-01150-w>. See also: A Holzhausen, R Luporini (Eds), (2021) *The Role of Science in Climate Change Litigation: International Workshop Report*, [www.biicl.org/publications/the-role-of-science-in-climate-change-litigation-international-workshop](http://www.biicl.org/publications/the-role-of-science-in-climate-change-litigation-international-workshop) and [www.santannapisa.it/en/event/role-science-climate-change-litigation](http://www.santannapisa.it/en/event/role-science-climate-change-litigation).

40 ECtHR, *Duarte Agostinho et al v Portugal et al*, Communiquée, 30 November 2020, [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201130\\_3937120\\_na.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201130_3937120_na.pdf); ECtHR, *Klimaseniorinnen v Switzerland*, Communication of the Application to the Respondent Government, 25 March 2021, [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325\\_No.-A-29922017\\_na.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_No.-A-29922017_na.pdf).

41 See A Smith, (2006) 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?', *Human Rights Quarterly*, Vol. 28, No. 4.

Yet, as recent calls to action by health journals and lawyers show,<sup>42</sup> there is not much time left to confront the climate emergency. Human rights bodies should use their authority to push for climate action.

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42 L Atwoli et al. (2021) 'Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health', *The New England Journal of Medicine*, DOI: 10.1056/NEJMe2113200; World Lawyers' Pledge on Climate Action (2021), [https://lawyersclimatepledge.org/wp-content/uploads/2021/08/Lawyers-Climate-Pledge\\_English.pdf](https://lawyersclimatepledge.org/wp-content/uploads/2021/08/Lawyers-Climate-Pledge_English.pdf).

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